ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MILWAUKEE BREWERY WORKERS' PENSION PLAN, Petitioner v. JOS. SCHLITZ BREWING COMPANY AND STROH BREWERY COMPANY

CASE NO: No. 93-768

PLACE: Washington, D.C.

DATE: Monday, December 5, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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MILWAUKEE BREWERY WORKERS' :

PENSION PLAN, :

Petitioner :

v. : No. 93-768

JOS. SCHLITZ BREWING COMPANY :

AND STROH BREWERY COMPANY :

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Washington, D.C.

Monday, December 5, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MICHAEL G. BRUTON, ESQ., Chicago, Illinois; on behalf of the Petitioner.

RICHARD K. WILLARD, ESQ., Washington, D.C.; on behalf of the Respondents.

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PROCEEDINGS

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 93-768, the Milwaukee Brewery Workers' Pension Plan v. Joseph Schlitz Brewing Company.

Mr. Bruton.

ORAL ARGUMENT OF MICHAEL G. BRUTON

ON BEHALF OF THE PETITIONER

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

In 1981, the Joseph Schlitz Brewing Company closed its Milwaukee plant and completely withdrew from the Milwaukee Brewery Workers' Pension Plan, a defined benefit, multiemployer plan in which Schlitz' employees had participated since the plan's inception in 1954.

In the late 1970's and early 1980's, the brewing industry in Milwaukee was considered a declining industry. The number of hours that plan participants were currently working were diminishing. At the same time, the average age of plan participants, as well as their length of service, was increasing. As a result, this plan, like many other multiemployer plans at that time, experienced significant underfunding problems.

As of December 31st, 1980, which was the last day for this plan in the year prior to the year in which

Schlitz withdrew, this plan had unfunded but vested liabilities in excess of $111 million. That amount represented the difference, as of that day, between the fair cash market value of the plan's assets, approximately $51 million, and the present cash value of the plan's liability to pay for vested benefits at some future date, as of that date, approximately 162 million.

It's significant to note that in 1980, in reducing the future liabilities for present cash -- for the vested benefits to present cash value, this plan used a discount rate of 7 percent.

After carefully studying the problems that multiemployer plans faced in the area of underfunding, and the application of ERISA to the multiemployer plans, Congress passed the Multiemployer Pension Plan Amendments Act of 1980, or MPPAA.

Perhaps the most significant portion of MPPAA is the requirement that a withdrawing employer continue to make payments to a multiemployer plan in an effort to fully fund a portion of the unfunded vested liabilities which are attributed to that employer.

Simply stated, the question in this case is, how much was Schlitz required to pay to this plan?

QUESTION: Well, isn't the question even more simply stated as the question of how much interest?

MR. BRUTON: I think the question, Your Honor, is, in total how much was Schlitz required to pay? The important component of the amount that Schlitz was required to pay is the interest on the unfunded but vested benefits that were allocated to it.

QUESTION: And that's the point on which the courts of appeals disagree, is it not?

MR. BRUTON: That is correct. It's important -- the answer to the question lies in the proper application of section 4219(c)(1)(a) of MPPAA. That provision can be found at page 4 of the blue brief of the petitioner.

In that section, Congress very carefully and with great detail instructed that a presumed or hypothetical payment schedule should be created in order to determine the number of level annual payments that a withdrawing employer should be required to make.

In this case, of the $111 million in unfunded liabilities as of December 31st, 1980, Schlitz was allocated $23.3 million, but Schlitz has not paid $23.3 million. Despite never missing a payment and never being late with a payment, Schlitz has paid 28 -- approximately $28.5 million.

The plan submits that when section 4219(c)(1)(a) is properly applied, that the plan -- that Schlitz should have paid approximately $31.1 million. That $2.6 million difference depends on how the first payment in this presumed schedule, which must be established under 4219, is treated. The plan submits that when properly constructed, the payment schedule is contained in the blue brief of petitioners at page 28 and 29.

QUESTION: May I ask you a question about that schedule?

Assume a case in which the annual payment that it has to make is 100 percent of the unfunded liability. One payment would do it, and the payment would be due in August of the year, and it's made in August of the year. They paid up to that time by the regular payment. Would you say they also had to pay a year's interest on that?

MR. BRUTON: Justice Stevens, I believe that the interpretation of the proper application of the prepayment provision would provide the answer to that question. The prepayment --

QUESTION: And what is the answer to the question?

MR. BRUTON: The answer -- the plan submits that the answer is that interest would have accrued from --

QUESTION: In other words, your answer is yes?

MR. BRUTON: Yes, Your Honor.

QUESTION: And the reason -- and even though the payment is made in full, there's been no arrearage, it's all done in one simple payment, nevertheless you'd charge them 1 year's interest and treat that as the amount of the unfunded liability.

MR. BRUTON: I think in the instance in which the first payment actually occurred, or payment in full actually occurred prior to the first day of the plan year after withdrawal, that interest would be charged only for the period from the last day of the plan year, the day on which the amount of the unfunded vested liabilities are fixed, and the day that the full actual payment is made.

QUESTION: In other words, January 1st to August under the hypothetical.

MR. BRUTON: Under your example, that's correct, Justice Stevens.

QUESTION: Yes. Yes.

MR. BRUTON: And in order -- that would be done in order to fully fund the amount of the --

QUESTION: Even though, if there had been no withdrawal, say, as, you know, they just had gradually had lesser participation, they had stayed in the plan, paid that amount, that discharged their liabilities and everybody could go home, they'd still -- you have to add on the interest because they're withdrawing.

MR. BRUTON: I think that Congress has essentially said, we are going to, for sake of convenience and ease of calculation, eliminate --

QUESTION: But one isn't any easier to calculate than the other. I mean, your schedule is no -- wouldn't be any harder to calculate if you just didn't put the interest in in the first payment. You'd have the same --

MR. BRUTON: I agree that the -- the ease of calculation, if you use either accrual of interest from the date that the amount is fixed, the date of -- the last day of the plan year before the withdrawal, or the first date that the presumed payment is made, that those two schedules are equally easy to calculate.

QUESTION: Mr. Bruton, may I ask if ease of calculation is the reason why you are not urging, as Central States is, the Easterbrook position as a fallback? That is, using the date of withdrawal as the critical date?

MR. BRUTON: We carefully looked at the statute, and we could find no support in the statute for Judge Easterbrook's position that in some way a portion of the interest during that period could be charged to the withdrawing employer. The statute says that the payment should be amortized. In fact, in the section that's at issue in this case, the word "interest" does not appear. The statute does not limit or qualify the term, "amortize."

QUESTION: So the choices as you see it are only the two on which the Fourth Circuit and the Third Circuit divided?

MR. BRUTON: That is correct, Justice Ginsburg. We view the statute as giving no alternative. Congress could have provided logically, rationally, reasonably to begin interest from the date of withdrawal, or until the date of the first actual payment. There are many alternative scenarios that Congress could have constructed in order to approach the equity that they were attempting to achieve.

However, the one that Congress selected is the scenario in which the amount of the unfunded liabilities are calculated as of the last day of the plan year prior to withdrawal.

QUESTION: Even if the withdrawal occurred on that -- in fact occurred on that very last day, so that the employer had made all the contributions for that year?

MR. BRUTON: That is correct, Justice Ginsburg. In fact, if it occurred on the last day, using the timetable in this case as an example, if the withdrawal in this case had occurred on December 31st, 1980, the calculation of the amount of unfunded vested liabilities would have been as of December 31st, 1979. The employer would have been making contributions for that entire year.

Those contributions may or may not have reduced the unfunded vested liabilities from the level that they existed a year earlier. Congress, in order to eliminate the need to continually recalculate that amount, essentially said we will not consider for that year of withdrawal any additions to or subtractions from the unfunded vested liabilities.

In other words, Congress considered the contributions for that year, the actual contributions that were being made, as a wash, and for purposes of making the calculation easy to determine, and to prevent plans from incurring enormous actuarial expenses each time a withdrawing employer decided to withdraw, a simple method of just designating the end of the plan year prior to withdrawal was adopted.

QUESTION: Before we get too far away from Justice Stevens' question, I want to make sure I understand the answer.

If Schlitz had paid the full amount of the demand in 1981 -- that is to say, before the first payment was due -- what interest component would Schlitz have been liable for? Suppose it paid it the day after the demand -- when was the demand, sometime in August?

MR. BRUTON: Correct.

It is our position that interest accrues from the date that the amount was fixed, the end of the prior plan year -- in this case it would be December 31st of 1980. If Schlitz had paid the full amount due as of August 31st, 1981, the amount of interest that they would have had to pay in addition to the $23.3 million, would be interest which accrued from the December 31st, 1980 date to the August 31, 1981 date.

QUESTION: I don't see how that doesn't undercut your position that the interest has to be included as if the payment isn't made until January 1, '82.

MR. BRUTON: Congress provided that an employer --

QUESTION: I'd say that's perfectly sensible from a financial standpoint, but it seems to me to undercut your theory in this case.

MR. BRUTON: It does not, because the prepayment provision is entirely separate from the provision that is utilized to calculate the number of long-term payments, so to speak.

QUESTION: But why is it that interest is not charged if there's a full discharge at once, but it is not if the full payment is made, say, on the first payment date?

MR. BRUTON: Interest would accrue up until that first payment date. At that point, there would be one full year of interest.

QUESTION: Yes, but isn't the -- all right, isn't that if the calculation is made on the assumption in effect on your theory that the debt becomes due on December 31 of the previous year, and that the first payment is made on January 1 of the year following the withdrawal, so isn't there always going to be 1 year's accrued interest whenever you make the first payment, even if you prepay it? Aren't you liable for 1 year's accrued interest?

MR. BRUTON: The scenario, as I understood the hypothetical question, was that the $23.3 million would be the amount tendered at the first full payment, and it would be our position that that would be insufficient, because by that point in time, at least a portion of the first year's worth of interest will have accrued.

QUESTION: Yes, but I thought the payment schedule -- I mean, first there's a calculation as to the unfunded liability. Then there's a calculation -- as I understand it, based on these conventions of December 31 of one year, January 1 of the next following one, there is a calculation of the first payment due, and the first payment due is made on the conventional assumption that a year is going to -- a full year is going to elapse.

So therefore, isn't the question, on your theory, not whether 8 months of interest would have accrued if X dollars was due on -- it was due 8 months before, but rather, isn't the accrued liability plus a year's interest due whenever you make the first payment, whether you make it at the last possible date, or whether you make it at the first possible date?

MR. BRUTON: The prepayment provision, which is set forth at page 25 of the red brief of the respondent, specifically says what must be prepaid in order to comply with this statute, and it is somewhat counterintuitive. The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments.

QUESTION: And doesn't that annual withdrawal liability payment include on this conventional calculation basis a year of interest?

MR. BRUTON: It does.

QUESTION: Okay. So then why is your answer to Justice Kennedy that he only has to pay 8 months of interest?

MR. BRUTON: The statute goes on to say that they should also pay accrued interest, if any.

QUESTION: Yes, but I thought your answer -- I thought your interpretation of that provision was that accrued interest there refers to interest which accrued on any payments as to which the employer was delinquent.

We're not talking about delinquency payments. We're talking about the interest, which is never called interest in the statute, which is implied by the concept of amortization, so it seems to me that, given your answers both to the so-called if any objection, and your construction of the statute based on this conventional scheme, that the first payment, whenever it is made, even if it is prepaid at the first possible moment, should include a year's -- a year of interest.

MR. BRUTON: Yes, Justice Souter and, in fact, while it is not --

QUESTION: Is that your answer now?

MR. BRUTON: It is.

QUESTION: Okay.

MR. BRUTON: And in fact, while it is not an issue in this case, I think that taken to its logical extension, the entire amount, that some total of all of the required payments in this presumed schedule, in our case $31.1 million, is the amount that would be due if there was a prepayment at any time, and there --

QUESTION: And you get that conclusion out of the word "amortize" in this section, and it's puzzling to me how an amortization of a single payment for the full amount of principal due would contemplate interest being paid on that amount if you pay it promptly.

MR. BRUTON: The purpose for the amortization is to fully fund this amount which was calculated.

QUESTION: If you paid it in full on the date due, it would fully fund.

MR. BRUTON: If it was --

QUESTION: If they'd made the payments up to August, as currently, then they make the full payment of the unfunded vested liability in one single payment, that would fully fund it.

MR. BRUTON: If the amount that was being funded was calculated as of the date that the first payment was made, I agree it would fully fund --

QUESTION: It was calculated as of the January date, but the employer has made payments from January to August under the old schedule.

MR. BRUTON: And Congress has said --

QUESTION: And the presumption is that when he withdraws, the amount calculated as of the first of the year will remain the correct amount, without further fiddling with the figures.

MR. BRUTON: Congress has said that --

QUESTION: You're saying that the word "amortize" means it's that amount plus the year's interest.

MR. BRUTON: Correct. The unlimited use of the term, "amortize," unqualified by any other --

QUESTION: Normally, when you amortize a single payment, do you toss interest on top of it? Have you ever -- can you give me an example of that ever having been done?

MR. BRUTON: Well, if the payment is made on the same day the debt arises, there would be no interest. If the payment --

QUESTION: And incidentally -- and that's your -- you stick with your answer to me on that point? I wanted to make sure that you hadn't changed your answer to me. Assume full payment the day of the demand, and this is before the first day that payment is due. No interest due at all, or accrued interest, or a year's interest? There are three choices.

MR. BRUTON: Your Honor, I believe that the prepayment provision would require full payment of the total amount --

QUESTION: The 23.3?

MR. BRUTON: The 31.1 -- 31.1. The sum total of all the required payments under this hypothetical presumed schedule that was created --

QUESTION: All right, so then, a full year's interest must be paid.

MR. BRUTON: Correct.

QUESTION: No matter if it's paid on the date of demand, and even if that date of demand is before the first required payment under the statute?

MR. BRUTON: Correct.

QUESTION: So that's a different answer than you gave me the first time.

MR. BRUTON: I apologize if I initially was confused. The prepayment provision --

QUESTION: I had thought you conceded in your brief that no interest would be due under that -- under that hypothetical. Perhaps I'm incorrect.

MR. BRUTON: I believe that the prepayment provision is one that could take briefing and argument and debate and discussion in another case. It is a complex provision. It is one that is not at issue in this case because there was no prepayment.

However, if you carefully read what Congress permitted in the prepayment provision, it is that the employer is entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments -- annual withdrawal liability payments.

That provision, while it has not been interpreted by this Court, can be interpreted to mean that in order to prepay you must pay the full sum total of all of the payments in this schedule which is created by 4219.

QUESTION: Because annual is calculated on the assumption that the debt begins to run on the date that the amount of the debt is calculated, and that no payment is made until a full year has elapsed, so therefore the annual payment implies, by definition, a year of interest.

MR. BRUTON: That is correct.

And in addition, if you step back for a moment and put this in the context of MPPAA, in which this Court has already recognized the purpose was to protect the plan participants and their beneficiaries as well as the employers who continued to contribute to the plan, a scenario could be constructed, a prepayment scenario, using some of the figures in this case, for example, wherein an employer, in times of decreasing return on market investments -- let's say, for example, the market was returning approximately 3 percent rather than the 7 percent interest rate which was used in this case, an employer would have an incentive to prepay if it did not have to pay the full amount of the annual withdrawal liability payments.

QUESTION: Isn't the assumption that the actuaries used realistic interest rates? They couldn't use a 7 percent rate for one year when the interest is really 3 percent.

MR. BRUTON: That is correct, Justice Stevens.

However, these payments extend over a 20-year period.

QUESTION: No, but a prepayment, in all our hypotheticals we're assuming that you fix the unfunded liability as of December 31, 1980, and in my hypothesis the company decides to pay it in full on January 1st of the following year. You're saying you have to pay the full amount, plus a year's interest --

MR. BRUTON: That is correct, Your Honor.

QUESTION: -- in order to make the fund whole, but that more than makes the fund whole, the plan whole.

MR. BRUTON: There are -- there will be instances, there is no question that there will be instances in which, on a purely actuarial analysis the withdrawing employer will pay something more than is necessary to make the plan whole. However --

QUESTION: This is such a case, isn't it, because they made contributions through August, and then they paid interest from August on?

MR. BRUTON: Not necessarily, Justice Stevens. We don't know, because it was never determined in the court below or in the arbitration proceeding, precisely what happened to the underfunding of this plan.

QUESTION: Yes, but that's always true. I mean, scenarios can go one way or the other. My problem with the case is, for every one you think of one way, you can think of a counterbalancing one the other way.

But where it doesn't seem to counterbalance is just the point that's being raised, that if in fact your interpretation of the statute is correct, then wouldn't employers normally have to pay more than their fair share, while if the other person's interpretation is correct, the most, it seems to me, that the fund could ever lose, is 60 days' worth of interest plus whatever time calculated. Do you see why I arrive at that?

MR. BRUTON: I think that I --

QUESTION: I mean, is it right?

MR. BRUTON: I don't believe that that is correct. I believe that the amount that the employer -- excuse me, the plan, will typically lose if Schlitz' interpretation is correct is the amount of interest on one full year on the unfunded liabilities --

QUESTION: I didn't see one full year, because it seemed to me the way this works is, $23 million is what would be necessary to make the plan whole as of, let's call it day zero, and then the statute says, how many payments of $4 million, because that's their normal payment -- say how many payments of $4 million will it take to raise that $23 million if the first payment was made on day 366 --

MR. BRUTON: That is correct.

QUESTION: -- right, and what you don't know is, do they mean, including the interest for that year or not.

MR. BRUTON: That is correct.

QUESTION: Front-loaded or back-loaded. Now, if you assume, as you'd want to, that it's back-loaded, then the money that's coming in is as if they paid not a penny from day zero, but in reality the employer will always be making his monthly payments throughout the year, until the minute he withdraws, and as of the minute he withdraws, there's then, if the plan wants it, it can get as much as they want 60 days later.

So I didn't say, see how in reality the plan could lose more than that 60-day period, plus whatever time is needed to calculate this big calculation. That's how I reach that conclusion.

MR. BRUTON: The amount that's fixed as of day zero, however, is not impacted by what occurs between day zero and day 365. It is neither reduced nor increased. We are attempting to fund at the end of day 5,000 or 6,000 the amount that was calculated at day zero.

If we exclude interest from day zero to day 365 on that amount, because the amount is not affected by what occurred in the first 365, positively or negatively, then there will be a deficiency in attempting to --

QUESTION: No, there won't be if the employer is making a monthly payment during that whole period. If he pays his regular monthly payment there's no problem. The fund's getting the money.

MR. BRUTON: That regular monthly payment, however, did not relate to, in any way, the $23.3 million that was calculated as of day zero. Those regular payments may or may not have changed the actual amount of the unfunded liability.

QUESTION: Since they may or may not have, shouldn't we assume that they will be sufficient to keep the plan where it was left?

MR. BRUTON: No, because Congress said, we want to amortize the amount calculated as of day zero, and that is the goal and the purpose of this whole schedule, to fully amortize that amount.

QUESTION: Where does it say, as of day zero? I see the word amortize, but I don't see as of day zero.

MR. BRUTON: It is not included in the section 4219(c)(1)(a). However, the common and ordinary meaning of the term, "amortize" -- Schlitz has conceded that interest payments are included in the schedule. Schlitz says you'd have to treat the first payment --

QUESTION: Amortize says spread out, but it doesn't say, starting when.

MR. BRUTON: It contemplates that in each payment there will be both an interest component and a component attributed to reduce the amount of the unfunded benefits.

It also contemplates that at the end of this payment schedule there will be complete and full funding of the amount being amortized, and since that amount is $23.3 million as of day zero, in order to fully and completely fund it, there must be interest accruing as of day zero, and what occurs between day zero and day 365, Congress has said we will disregard, whether it be favorable to the plan or unfavorable to the plan, we will simply disregard.

Our goal here is to allocate a portion of the unfunded vested benefits to Schlitz as of day zero and make sure that Schlitz makes enough payments to fully fund it, and because that amount was reduced by the 7 percent discount rate, the interest rate must also be 7 percent from day zero.

I'd like to reserve whatever remaining time I have.

QUESTION: Very well, Mr. Bruton.

MR. BRUTON: Thank you.

QUESTION: Mr. Willard, we'll hear from you.

ORAL ARGUMENT OF RICHARD K. WILLARD

ON BEHALF OF THE RESPONDENTS

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

Schlitz' position is that the obligation to pay does not arise until after the plan calculates the amount of the withdrawal liability and transmits a demand for payment, so that if Schlitz were to pay the full amount of the principal in this case, the allocated share of the unfunded vested benefits, within the demand period, then it would pay no interest.

QUESTION: Mr. Willard, did the Pension Benefit Board adopt a position on the proper rule to be applied in this situation?

MR. WILLARD: Your Honor, they did in an amicus brief filed in the Third Circuit in the Huber case, which agreed with our position. They did not express a position in this Court, and the Solicitor General's brief filed at the petition stage pointed out that that expressed the views of the Solicitor General but not the Pension Benefit Guaranty Corporation.

QUESTION: And the corporate view supported your interpretation, I gather.

MR. WILLARD: That is correct, Justice O'Connor.

I'd like to explain why the plain language of the statute supports our view that if full payment were made within the initial demand period there would be no interest.

We point out -- we quote on pages 10 and 11 of our red brief the language of section 1381 and section 1382. Section 1381 defines the term, the withdrawal liability, and it has a definition in there, it has several stages, and it's very clear that that definition does not include any component for interest.

Section 1382, which we also quote at page 11 of our brief, said, this is the amount, the withdrawal liability which the plan assesses and collects from the withdrawing employer.

Section 1399(b), which is also quoted and referred to in our brief, pages 21 and 22, provides that the demand notice that's sent out by the plan when there's a withdrawal includes two things, the amount of the liability -- that's determined in the statute -- and the schedule for liability payments, so there's a distinction drawn in the statute between the demand for liability and the schedule of payments, and in fact, that is what happened in this case.

The demand letter sent by the plan to Schlitz, which appears at page 153 of the Joint Appendix, includes a number. It includes the wrong number -- it's $41 million. Later it was reduced to $23.3 million, but it includes a number, and that number is the principal amount of the allocated share of unfunded vested benefits. That's the amount they demanded that Schlitz pay.

It didn't include any interest, and in the hearing before the arbitrator, which is also cited in our brief, the plan's expert witness agreed that this amount did not include any interest.

And so we have a situation where, under the statute, and as the demand letter was sent in this case, a demand was made for the payment of a principal sum, no interest, and our position is that if Schlitz had paid that principal sum, it would have paid no interest at all, and therefore, that is the point at which the liability arises, and if Schlitz chose to pay over time thereafter, interest would begin to accrue at the point that the liability arises.

The position of the petitioners in this case would be a little bit as if you were buying a house and interest began to run not from the date title was transferred, but from the date the appraisal was done, which may have been some months earlier. Normally interest accrues --

QUESTION: Well, except that the -- I mean, the counterargument there is that the entire set of calculations is being done on a set of conventional assumptions, and one conventional assumption is that the date -- that the debt, rather, comes into existence on the date it's amount is calculated, so that if literally you paid at any time after that date, the December 31 date, some interest would have run.

MR. WILLARD: Well, that is the position that the plaintiff has taken, although it's a little unclear how much interest they claim would arise and how it would be calculated, but --

QUESTION: Well, is it unclear after the argument? I mean, I thought it was clear after the argument that at least a year's interest --

MR. WILLARD: Right.

QUESTION: -- is going to be added on. I thought that was their position.

MR. WILLARD: I believe his position was 8 years of interest would be added on. In other words, if you prepaid you'd have to pay all the interest that would have accrued during the entire schedule. Page 13 of their reply brief I believe that's the position they take, and I thought that's what he was saying here today.

The prepaying provision, though, section 1399(c)(4), refers to accrued interest, if any, and that appears at page 7a in bold face in the appendix to our brief. It says that you shall be entitled to prepay plus accrued interest, if any, and under their interpretation of the statute, there would always be accrued interest, because interest would run --

QUESTION: Under their interpretation, as I understand it, the word, "interest" preceding "if any" would refer to interest on delinquent payments, because their argument is that interest -- the interest that is implied by the concept of amortization is, in fact, never expressly referred to in the statute, and that when the statute does speak of interest, it's referring to interest on delinquency, so I'd like to know your response to that, but isn't -- to begin with, isn't their view, at least internally, consistent?

MR. WILLARD: There's one problem with their view, Justice Souter, and that is that the subsection (6), which appears at page 9a of the appendix to our brief, refers to the interest that's used in calculating the amortization schedule as an exception to the normal interest accrual rule.

It says, "Except as provided in paragraph (1)(A)(ii)," which is where it talks about constructing the amortization schedule, "interest under this subsection shall be charged at rates based on prevailing market rates," which refers then to the delinquent interest, so the statute itself in (6) appears to create two categories of interest, interest that's charged at prevailing market rates, which is the default interest, and interest which is calculated as it is under paragraph (1)(A)(ii), which refers to the construction of the amortization schedule.

So while the statute is admittedly a bit opaque, it does appear to view interest as being involved in both concepts, the amortization schedule as well as the payment of delayed -- payment of interest on delayed obligations.

QUESTION: Before you get off the prepaid interest statute, it does seem to me that you can explain the "if any" consistently with the position that Schlitz takes, save and except that it is entitled to all of the accrued interest.

It seems to me that the "if any" could mean that, assume that Schlitz in the third year, if it's making yearly payments, decides it's going to pay everything, and it makes a timely payment, and then if it prepays all the balance, it would pay no interest, and that could explain the word "if any," it seems to me.

MR. WILLARD: Justice Kennedy, that was the explanation that the Third Circuit in Huber gave to the "if any" language. That assumes that if they paid off the balance on one day and then turned around and made a principal payment --

QUESTION: Yes.

MR. WILLARD: -- on the same day, that that would be treated as two separate payments, but normally, at any point after the amortization schedule begins, there would be some accrued interest at that point, and so if you were to prepay at any point after the amortization schedule starts, there would be some amount of accrued interest.

It's interesting, the legislative history discloses when that "if any" term appeared. The original version of this statute, as drafted by PBGC, provided that interest accrued from the date of withdrawal until paid at market rates, a very simple, maybe sensible solution, but one that Congress got rid of.

Instead, they took out all references to interest accruing on timely paid obligations and added in the words "if any" after the reference to interest in this section, and so it suggests that Congress recognized, when they took out the reference to interest accruing from the date of withdrawal, which means interest would always accrue to some extent, if there is a 60-day demand for payment, to indicate that they contemplated that if timely payment was made immediately after withdrawal, there wouldn't be interest, that interest would only accrue if you paid over time and not in a lump sum at once.

QUESTION: I agree that that lump sum thing cuts in your favor. I'm not certain, though, that it's determinative, and if your position is right, then how long does it take funds normally to make the calculations of the underfunding? Is there a normal -- does it take a day, or a month, or 6 months, or when do they normally come up with the figures of last year's plan?

MR. WILLARD: The record shows in this case that the valuations were generally done about the middle of the year, May, June, July.

QUESTION: All right. Then if that's typical, and if your interpretation is correct, and the 60-day period is there, there would be then be typically 8 months of interest lost to the funds, which means that typically in a statute designed to make funds whole, you would have 8 months too little money, 8 months' worth of interest. That seems to me an odd interpretation of a statute where the Pension Benefit Guaranty Corporation told the Third Circuit it was totally unclear.

MR. WILLARD: Well, I think we should look at the facts of our case to try to illustrate that. It really depends on when the withdrawal occurs during the plan year. If it begins at the very beginning --

QUESTION: That's why I'm speaking typically.

MR. WILLARD: That's right. If it occurs at the beginning of the plan year, then there would be a longer gap while waiting for the valuation. The valuation has to be done by statute every year anyway, and so the statute, by keying onto this, produces an efficiency, because if the valuation is already done, then it's a very simple matter to get the assessment made.

Here in this case the valuation date was December 31st, 1980. Schlitz withdrew in August of 1981. In fact, they only made 5 months of contributions during that plan year, because they were struck on May 31st and ceased operations thereafter.

But for 5 months of the year they were making contributions, and the contributions were required by statute to include an amount to amortize the unfunded liability, to bring down the $23 million liability to a lower number and, in fact, here, they did.

Pages 201 to 206 of the Joint Appendix show that the normal cost of this plan was only a little over $1 million a year, and yet the actual contributions projected for the year were $9 million, so almost 90 percent of the contributions that were being made were going to pay interest on or to reduce the unfunded liabilities. Only a little over 10 percent were actually normal cost. So during that 5-month period, Schlitz made a considerable contribution to reduce the amount of the liability.

Then there is the gap. The demand -- the withdrawal was -- notice was given in August, the demand letter was sent on September 29th, the actual first payment was due and paid by November 1st. That's not 60 days, because the statute says, up to 60 days. The plan can demand payment in less than 60 days, if it chooses to do so, and it did so here.

Demand was made September 29th for payment by November 1st, which is only a little over a month.

QUESTION: How soon can they do the calculation if they really want to do it as quickly as possible?

MR. WILLARD: If the valuation is done, then it should just be a matter of a few days. The tricky part of it is coming up with actuarial valuation. That report, once it's done, sets the amount of unfunded liabilities, and then the only issue is allocating out among the employers.

QUESTION: Is it correct that that calculation is made every year regardless of whether anybody withdraws or not?

MR. WILLARD: That is correct, Justice Stevens, it is.

QUESTION: And that's part of the routine accounting in front.

MR. WILLARD: That is part of the routine accounting, and I should note also that the allocation here, and in fact this whole issue, is a dispute among employers.

This is a dispute -- the real parties at interest on the other side are Miller and Pabst, because if the more Schlitz pays as a withdrawal liability, the less they have to pay, and vice versa, so this is not a dispute between beneficiaries and employers. Instead, it's a dispute among employers for how the funding is going to be allocated.

QUESTION: You're not suggesting that the petitioner, here, is not a legitimate litigant?

MR. WILLARD: No, Mr. Chief Justice, I'm not. I'm simply pointing out that the real interest here is the interest of the remaining employers, because if Schlitz contributes less, then the remaining employers have to contribute more to make up unfunded liability. In other words, the statutory scheme --

QUESTION: Well, maybe they have their own theories about how that should be looked at.

MR. WILLARD: I understand, Mr. Chief Justice.

QUESTION: Mr. Willard, but on your theory there would always be some gap period. It may be short, but there'll always be some gap period.

MR. WILLARD: That is correct, Justice Ginsburg, there will always be some gap, in this case a few months only, whereas under the petitioner's view, they would always assess 12 months' interest, even though the gap is much shorter.

QUESTION: But if there is a gap -- either way you move, there's going to be one side or the other disadvantaged, so why don't we fall back on the beneficial purpose of this whole plan, this whole scheme?

MR. WILLARD: Well, first of all, if the statute is silent on the issue of charging interest of this withdrawal here, period, then we believe that the courts do not have the authority on their own to impose that liability. In other words, if Congress forgot to take care of this problem, or if there is a gap in the statutory scheme, then that should -- that problem should be solved by Congress and not the courts.

In our view, the statutory language makes it -- does not provide for the assessment of this interest, and the legislative history makes it clear that this was not a simply oversight but was a deliberate choice that Congress made in the process of drafting the statute.

QUESTION: You're stressing the difference between ambiguity and simply making no provision, is that it? You said, there's no room for construction?

MR. WILLARD: That is correct, Justice Ginsburg, and our position is, there's not room -- this is not an ambiguous statute that could be read to allow the imposition of interest. There simply is nothing here that provides for it.

It's clear under the statute that the liability arises, and the amount of the liability, when it arises, is the principal amount, not the principal amount plus a year of interest, and so we don't think there's room here for the Court to find the imposition of interest, and the legislative history makes it clear it is a deliberate choice.

There is the reference to whether or not the liability is front-loaded or back-loaded. Well, at one point the liability was back-loaded. The first markup of the bill provided that the presumed payments -- the payments were presumed to be made as if they occurred at the end of the year in which made, and that allowed for the payment of 1 year of interest in the first year's payments of interest.

Then, for some unexplained reason, by the time it was passed on the floor, that was changed. The presumed payment occurred at the beginning of the year in which the payments were made. So the statute, while it was originally back-loaded, turned into a front-loaded statute between the first markup and the time the bill passed on the floor of the House.

Why? We don't know for sure. We do know that a number of changes were being made to reduce the amount of withdrawal liability during the legislative process because of complaints by employers that this was too onerous, and we also know that at least one witness testified, and we cited this at page 39 of our brief, that the interest charges under the original bill would have been excessive.

So while Congress didn't say, this is why we made the change, we know they were making changes. They said they were making a number of changes in order to reduce the amount of liability imposed on employers, and they took a statute where the interest was back-loaded and turned it into one that was front-loaded.

So while there are a number of other aspects of the legislative history that we think support our reading of this statute, we think it's clear that as to this one feature, the accrual of interest, it is that interest would not accrue until the point that the amortization schedule began.

QUESTION: Mr. Willard, can I ask you a question about your understanding of what it is in the statute that imposes any interest obligation at all?

The reason I ask is that this is kind of a strange amortization. Instead of taking an amount and then figuring out how long -- many years it would take to pay it off, you take an amount and then you first figure the amount of the annual payment, which is more or less a substitute for your annual contributions, I guess, based on --

Why couldn't it have reasonably been argued that if they are a substitute for contributions that would have been made to pay off this liability, they should bear no interest at all? What is it in the statute that forecloses that argument?

MR. WILLARD: Well, I understand, Justice Stevens, and initially I thought maybe there wasn't any provision for statutory interest. After we look at it, though, there is this reference to, in the section accruing at market rates, that says, "except as provided in paragraph (1)(A)(ii)."

This is quoted at page 9a of the red brief, and we -- and that is the paragraph in which there's a reference to constructing the amortization schedule, and so our view is that Congress, while they may have camouflaged what they were doing so that it wouldn't be apparent they were charging interest --

QUESTION: I'm sorry, I lost -- what you quoted --

MR. WILLARD: Yes, sir.

QUESTION: -- to me was where?

MR. WILLARD: Paragraph -- page 9a in the appendix to our brief, bold face. This is the provision about interest being charged at market rates. It says, "Except as provided in paragraph (1)(A)(ii), interest shall be charged at market rates."

Paragraph (1)(A)(ii), if we look back to page 4a, is the statement that the determination of the amortization period shall be based on the assumptions which includes the interest rate assumption.

QUESTION: I see. Thank you.

MR. WILLARD: So it's hidden in there, and I don't know why. I think maybe Congress was sensitive to all the complaints they got about interest and decided to hide what they were doing, but that's the choice they made.

I'd like also to follow up a little further on the question Justice Ginsburg asked about whether our interpretation means that the plan is short-changed. I mean, I think we can see that both interpretations are not precise. One may lend itself to overpayment, one to underpayment, but there are a number of other features of the statutory scheme that protect plans and go against the withdrawing employer, that should more than outweigh the loss of a few months' interest.

Actuarial projections generally are imprecise and are normally supposed to be conservative. That is, actuaries are supposed to overestimate the liabilities, not underestimate them, and here, for example, as pointed out at page 174 of the Joint Appendix, this plan was earning in the year of the valuation over 15 percent of its investments, and yet they assumed they would only be able to earn 7 percent as the actuarial rate of return.

Now, that's perfectly proper for an actuary to do. They're supposed to be conservative. But if, in fact, the plan earned more than 7 percent on its investments, then they wouldn't need nearly as much money as they projected, and Schlitz would have overpaid.

QUESTION: Well, they wouldn't in these fat years, but whatever rule we come up with is going to be a rule for the lean years, too. You're saying they had a lot of good luck, but I mean, we can't construe the statute on the assumption that even conservative actuaries are always going to produce that much luck for them.

MR. WILLARD: I understand, Justice Souter, but what I'm pointing out is, actuaries generally try to err on the conservative side, so it's not a situation where it's equally likely to be wrong one way than another. Actuaries are supposed to and, generally, try to be conservative to provide a cushion there, so there is a cushion that's provided.

Also, the annual payment formula here is skewed to require employers in a declining industry like this to pay more money after they withdraw than they did before, so that the annual contribution from Schlitz actually went up after it withdrew and no longer had employees participating in the plan.

And then finally, the plan is revalued every year, and the assumptions are adjusted, so that if the plan is having a streak of bad luck, the actuarial assumptions are adjusted, the funding levels are changed, and the remaining employers make up the difference.

QUESTION: In your legislative history, I had this slight question. It seems awfully much to me as if it's -- every argument I see a counterargument. It seems very, very ambiguous, and they seem mostly to wash.

The thing I wondered, though, is why would Congress have brought in this notion of this second year if it hadn't had a back-loaded amortization in mind? What they're trying to do is, they take the $23 million, and they ask the question, how many payments at $4 million each at an interest rate of 4 percent will be necessary to raise the $4 million?

That question has the same answer whether you calculate it as of the date of year zero, or as the date of year 1, if, in fact, it's front-loaded, so why would they have brought in this notion of the second year, unless they meant it to be back-loaded?

MR. WILLARD: Well, I think it's fairly clear they didn't because it was originally back-loaded and they changed it to front-loaded. Now --

QUESTION: Did they?

MR. WILLARD: -- it may have --

QUESTION: Is there strong evidence they changed it to front-loaded? I mean, I noticed you have a House report there which you don't quote --

MR. WILLARD: Right.

QUESTION: -- but you characterize.

MR. WILLARD: Right. Well, we cite to the text of the bill as it was marked up, and we actually reproduce it in Appendix A to our brief, and so if we look at page -- and it may take me just a moment to find this --

QUESTION: Well, just tell --

MR. WILLARD: -- but I will --

QUESTION: I can look it up later.

MR. WILLARD: It is -- we cite in this appendix both the original PBGC bill, then we include in here in italics in brackets the language of the first markup, and then we include the language in bold face as finally enacted, and the -- here we go, here. The --

QUESTION: What page are you on?

MR. WILLARD: Page 3a of the appendix to the red brief, and in the very middle of it, two i's -- this would be -- italicized paragraph in the very middle of the page.

It says, the period of years necessary to amortize the liability in level annual payments, determined under paragraph (B) as if each payment were made at the end of the year when due. That's back-loaded.

That's the language of the marked-up bill in the subcommittee of the House Education and Labor Committee. Now, that very language got changed.

We flip over to the bold face on page 4a, and it says that -- calculated as if the first payment were made on the first day of the plan year -- this is the first paragraph at the top of the page, in the middle of it -- as if made on the first day of the plan year following the plan year in which the withdrawal occurs and as if each subsequent payment were made on the first day of the subsequent plan year.

So it's --

QUESTION: Where was that change made?

MR. WILLARD: That change was made after the initial markup --

QUESTION: In the -- in a subcommittee?

MR. WILLARD: In the subcommittee.

QUESTION: In a subcommittee.

MR. WILLARD: Before the full committee report.

QUESTION: Before the full committee report.

MR. WILLARD: So it was after the subcommittee --

QUESTION: So we can assume that --

MR. WILLARD: -- before the full committee.

QUESTION: Who had this idea in mind?

MR. WILLARD: Well --

QUESTION: How many members were on that subcommittee?

MR. WILLARD: I don't know, Justice Scalia. We know --

QUESTION: What, as many as 10?

MR. WILLARD: Right. Right, could easily be more, but I'm not talking about what they had in mind, Justice Scalia. I'm talking about what they did.

QUESTION: But what they did is not change to the first day of the year when due. They changed it to the first day of the plan year.

MR. WILLARD: That's right.

QUESTION: And so that's totally consistent of their thinking of this sum as if the sum had been due a year before.

MR. WILLARD: But at that time --

QUESTION: Particularly if there's no evidence they intended any change by it.

MR. WILLARD: But at that time, the actuarial valuation date was not a year before.

QUESTION: It wasn't?

MR. WILLARD: It was not. In other words, there were -- this gets more -- this -- Justice Breyer, this -- the legislative history of this is complicated, but once it is sorted through, the picture it paints is fairly clear.

The actuarial valuation date at that point was -- there were alternatives, depending on whether you use the presumptive method, in which case it was the end of the year in which withdrawal occurred, or all other methods it was the beginning of the year in which withdrawal occurred, and so for them to have required there to be 1 year of interest in addition to the interest of the year in which the payment was made would have required 2 years of interest, but that would not necessarily have taken you back to the valuation day, which might have been 1 year, a year-and-a-half, 2 years, who knows?

In other words, never, throughout the drafting of this statute, did Congress tie the accrual of interest to the valuation date. It might have coincided with it at one point or another by chance. It doesn't coincide with it now, but there's nothing in the statute, nothing in the legislative history, that suggests Congress thought interest should accrue from the valuation date, any more there's any -- than -- than interest would accrue from the date the appraisal is done on your home.

Congress has always indicated that the interest accrual is keyed to the payment schedule, and when they changed it from a back-loaded to a front-loaded payment schedule.

QUESTION: You mean, the subcommittees of Congress thought. Yes.

MR. WILLARD: Yes, Justice Scalia, the people who were drafting that.

QUESTION: And if each subcommittee changed it, it thought.

MR. WILLARD: That is correct, Justice Scalia. The various people who changed it as it went along, and they may have even been staffers, but whoever they were, they did it, and that's what happened, and so we have a statute here that does not provide for the accrual of interest prior to the time the amortization schedule begins, that does not tie it in any way to the valuation date, and on that basis, we conclude the Court has no choice but to affirm the decision of the court of appeals.

QUESTION: Mr. Willard, do you know why Judge Easterbrook thought the case that created the split really didn't, because at the end of his opinion he says that he thought it doubtful that Huber actually held the employer must pay interest from the valuation date.

MR. WILLARD: As I recall in Huber, Justice Ginsburg, the withdrawal occurred at the outset of the plan year, and so it was a little hard to tell whether the court in Huber meant that interest should accrue from the date of withdrawal or from the end of the prior plan year, since they were so close together in time, and in fact one later district court case which we cite, which was affirmed by the Third Circuit without opinion, seemed to have thought that it was accruing from the withdrawal date and not from the end of the prior plan year.

I have to agree those opinions are somewhat murky, and so I can understand why Judge Easterbrook may have been confused.

Also, I would point out that in none of these cases up till now has interest really been the principal issue in the case. Even in the court of appeals here, other issues predominated, and so it may be that other courts have not had an opportunity to consider this interest rate accrual issue in quite as much detail as we have in briefing it for the Court today, or the Court has in studying it.

QUESTION: Thank you, Mr. Willard.

Mr. Bruton, you have 1 minute remaining.

REBUTTAL ARGUMENT OF MICHAEL G. BRUTON

ON BEHALF OF THE PETITIONER

MR. BRUTON: Thank you.

The PBGC told the Third Circuit that they could not determine what Congress intended. Clearly, if there is any ambiguity, or room for doubt, when the amount that is trying to be amortized is considered and when the purpose for MPPAA is applied to protect plan beneficiaries and the participants and remaining contributing employers, the plan's interpretation is the only one that makes sense.

QUESTION: Why does the PBC -- how do they explain their position, if they say they can't find the answer in the statute?

MR. BRUTON: Justice Stevens, they don't. They simply say, if it's not there, Congress must not have intended it, and we simply say, by using the word "amortize," Schlitz conceded that's sufficient to trigger interest on all the other payments, why isn't it sufficient for the first?

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruton --

MR. BRUTON: Thank you.

CHIEF JUSTICE REHNQUIST: -- the case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

MILWAUKEE BREWERY WORKERS' PENSION PLAN, Petitioner v. JOS. SCHLITZ BREWING COMPANY AND STROH BREWERY COMPANY

CASE NO.:93-768

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)