ORAL ARGUMENT WAS HELD ON OCTOBER 25, 2021

United States Court of Appeals for the District of Columbia Circuit

No. 20-7054

UNITED MINE WORKERS OF AMERICA 1974 PENSION PLAN, *et al.,*

Plaintiffs-Appellees,

v.

ENERGY WEST MINING COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia in No. 1:18-cv-01905-CJN, Honorable Carl J. Nichols, U.S. District Judge.

BRIEF OF AMICI CURIAE ACTUARIAL FIRMS, NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS, AND MULTIEMPLOYER PENSION PLANS IN SUPPORT OF APPELLEES' PETITION FOR REHEARING *EN BANC*

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties

Except for the *amici curiae* listed in the below Rule 26.1 Corporate Disclosure Statement, all parties, intervenors, and *amici* are listed in Appellant's Opening Brief.

(B) Rulings Under Review

Reference to the ruling at issue appears in Appellant's Opening Brief.

(C) Related Cases

This case has not previously been before this Court or any other court. There are no related cases pending before this Court or any other court.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, The Segal Group, Inc., Milliman, Inc., Horizon Actuarial Services, LLC, Cheiron, Inc., United Actuarial Services, Inc., National Coordinating Committee for Multiemployer Plans, Sheet Metal Workers' National Pension Fund, National Retirement Fund, LIUNA National (Industrial) Pension Fund, New York State Teamsters Conference Pension and Retirement Fund, and SEIU National Industry Pension Fund, disclose that they have no parent corporation and no publicly held corporation owns 10% or more of any of their stock.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae Segal Group, Milliman, Horizon Actuarial Services, Cheiron, and United Actuarial Services, collectively provide actuarial services to the majority of the more than 1,100 multiemployer defined benefit plans nationwide – including the plans listed in the Rule 26.1 Statement. *Amicus Curiae* National Coordinating Committee for Multiemployer Plans is the leading non-partisan organization dedicated to advocacy for and protection of multiemployer plans.

Amici Curiae have a substantial interest in the panel's decision regarding the discount rates that can be used when calculating the liability of withdrawing employers. The discount rate is a critical component of liability calculations, affecting billions of dollars of payments, which Congress designed to ensure the solvency of pension plans. The panel's decision limits the previously accepted range of reasonable discount rates utilized by *Amici Curiae*. The decision misinterprets the governing statute and improperly interferes with well-established actuarial standards, which direct actuaries to consider the purpose for which the calculation is made.[1]

[1] No party or their counsel authored this brief in whole or in part, and no person other than *Amici Curiae* contributed money to preparing or submitting the brief. Appellees consent to the filing of the brief; Appellant does not.

INTRODUCTION

A multiemployer pension plan receives contributions from employers and uses those contributions and investment returns to pay retirement benefits earned by employee-participants. Employers contributing to the plan on an ongoing basis are responsible for any shortfall between the value of plan assets and benefits owed to participants.

In response to concerns that employers could have "incentives to flee the plan" and leave the remaining employers "holding the bag" when ongoing efforts to fund a multiemployer plan are falling short, Congress passed the Multiemployer Pension Plan Amendments Act ("MPPAA"), which "requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan," representing "the employer's proportionate share of the plan's 'unfunded vested benefits.'" *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984). In exchange for this payment of "withdrawal liability," the employer eliminates future risk or responsibility for funding the ongoing pension plan.

To calculate withdrawal liability, actuaries must exercise professional judgment and select a discount rate to determine the present value of future benefits. The Supreme Court held that, with respect to discount rate assumptions, there is a "range of reasonable actuarial practice," *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 635 (1993), and, for decades,

courts upheld several leading "schools of thought among actuaries with respect to the selection of interest rate assumptions." *Combs v. Classic Coal Corp.*, No. CIV. A. 84-1562 TPJ, 1990 WL 66583, at *3 n.5 (D.D.C. Apr. 6, 1990), *aff'd*, 931 F.2d 96 (D.C. Cir. 1991). These include: (i) "the same interest rate assumption . . . used . . . for determining ongoing funding requirements;" (ii) "interest rates promulgated by the PBGC [Pension Benefit Guaranty Corporation] for use in determining liabilities under terminated single employer plans;" and (iii) a "'blended interest' or 'Segal' method, [which] effectively compromises between the funding assumption and the PBGC approaches" often by blending results using the other two rates, according to a weighted formula based on the plan funding level. *Id.* The latter two approaches – which the panel's decision calls into question – account for the change in risk that is shifted to a plan when an employer withdraws, because, unlike an employer continuing to participate in the plan, the plan cannot look to the withdrawing employer when actual plan experience falls short of what is assumed at the time of employer withdrawal.

Although the obligation of ongoing employers to make annual contributions funding the plan is based on actuarial assumptions about the future, those employers and participants take on risk and are ultimately liable for contributing all of the funds needed to pay pension benefits. In contrast, a withdrawing employer's liability to the plan and obligation to fund future benefit payments becomes fixed as of the date

the employer withdraws from the plan. The use of PBGC rates in calculating withdrawal liability takes into account that, by withdrawing from the plan, the employer shifts to other employers more risk associated with future plan experience falling short of assumed experience. Accordingly, use of PBGC rates in calculating withdrawal liability to reflect shifting of risk can reflect an actuary's "best estimate" of anticipated plan experience *with respect to the withdrawing employer*, because that employer will no longer be a party to the risk taken to earn future investment returns.

Notwithstanding the Supreme Court directive to "judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability," *Concrete Pipe*, 508 U.S. at 635, the panel's decision declares that "the merits of the actuary's theory" and "how widespread the . . . practice is among the profession" are both irrelevant. *See* Panel Opinion ("Op.") at 15 & n.8. The panel reaches this result by construing the statutory requirement that assumptions represent "the actuary's best estimate of anticipated experience under the plan," 29 U.S.C. §1393(a)(1), as requiring the actuary to take into account "the plan's anticipated investment returns" but prohibiting the actuary from taking into account the change in risk with respect to the withdrawing employer. *See* Op. at 14. Given that an actuary is "a person whose job is to calculate risk," *Actuary*,

Cambridge Business English Dictionary,[2] it is inconceivable that Congress intended "the actuary's best estimate of anticipated experience" to preclude consideration of the plan accepting all risk with respect to the withdrawing employer.

The panel's decision addresses issues of exceptional importance as, if allowed to stand, it will imperil the financial security of multiemployer pension plans that provide the principal form of retirement income to 12 million American workers and retirees. The decision provides an incentive for employers to withdraw from plans by giving withdrawing employers the benefit of the plan's risk profile – including anticipated investment returns – without having to take any associated risk. The decision also adopts vague and amorphous standards that will encourage future litigation, create more uncertainty, and make efforts to collect withdrawal liability more expensive. These consequences are directly contrary to the purpose of the statute to ensure that workers promised pension benefits will actually receive them.

[2] https://dictionary.cambridge.org/dictionary/english/actuary.

ARGUMENT

I. The Panel's Decision Misinterprets and Misapplies the Statute and Improperly Interferes with Actuarial Discretion.

A. The Panel's Creation of a Second Substantive Test for Actuarial Assumptions Creates a Circuit Split and Contravenes Supreme Court Precedent.

MPPAA requires that withdrawal liability calculations be based on "actuarial assumptions and methods which, in the aggregate, are ***reasonable*** (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the ***actuary's best estimate of anticipated experience*** under the plan." 29 U.S.C. §1393(a)(1) (emphasis added). The statute provides that calculations of withdrawal liability are "presumed correct," and authorizes withdrawing employers to challenge calculations by demonstrating that "actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations")." 29 U.S.C. §1401(a)(3)(B).

The statute only permits challenges to the reasonableness of the assumptions in the aggregate. Unsurprisingly, it has been understood for decades that "the best estimate test is procedural, as opposed to substantive, in nature" and is designed to determine "whether assumptions truly came from the plan actuary." *Vinson & Elkins v. Comm'r*, 7 F.3d 1235, 1238 (5th Cir. 1993). "The statute refers to the *actuary's* best estimate, not that of a court" and "a second substantive test would

render the reasonableness test superfluous." *Id*. The district court followed *Vinson & Elkins* (and similar cases from other Circuits), in upholding the actuary's calculations because they "represented his own best estimate, free from undue interference by interested parties." JA274-75. The panel reversed, concluding that the "Best Estimate Requirement . . . lay[s] down both a procedural rule that the assumptions be made by the actuary and a substantive rule that the assumptions reflect the characteristics of the plan," and "[i]f the actuary is not basing the assumptions on the plan's characteristics, the assumptions will not be reasonable." Op. at 10, 16. The panel's construction of the statute as imposing a second substantive test is directly contrary to that of the Fifth Circuit.[3] The panel's assertion that there is no conflict because the substantive test advocated for in *Vinson & Elkins* is different than the substantive test advocated here is unpersuasive. The Fifth Circuit was clear that it rejected existence of any "second substantive test" as a matter of statutory interpretation; not merely rejecting the specific proposed substantive test before it.

Finally, by holding that any time assumptions fail this second substantive test, assumptions also automatically fail the reasonableness test, regardless of "the merits of the actuary's theory" and "how widespread the . . . practice is among the

[3] The Fifth Circuit's decision addressed identical language the Internal Revenue Code. *See* Op. at 12.

profession," Op. at 15 & n.8, the panel's opinion contravenes Supreme Court precedent. *See Concrete Pipe*, 508 U.S. at 635 (holding that reasonableness must be judged "by reference to what the actuarial profession considers to be within the scope of professional acceptability"). The outcome in this case is particularly troubling given that "Energy West's own expert conceded that [the actuary's] assumptions [using PBGC rate] were reasonable in light of industry standards." JA268.

B. Even if a Second Substantive Tests Exists, the Panel's Interpretation of "Anticipated Experience Under the Plan" Is Erroneous.

Even if the "best estimate of anticipated experience under the plan" requirement did impose a second substantive test, the panel erred in holding that it requires an actuary to focus exclusively on "the plan's anticipated investment returns." Op. at 14. The statute says "anticipated experience" not "anticipated investment returns." By focusing on only one aspect of the plan's anticipated experience – assumed investment returns – the panel's decision arbitrarily confines actuarial discretion.

As described above, the panel's decision ignores that a plan's anticipated experience with respect to a withdrawing employer is materially different than it is with respect to ongoing contributing employers. Another court aptly explained:

> Funding is an ongoing process, subject to adjustment for an employer that is remaining in the plan. . . . [A] participating employer may be required to make additional contributions to make up for any shortfall. Withdrawal liability, however, is calculated once, as of the time of

> withdrawal. Should the unexpected occur after that employer's departure, the burden may unfairly fall on other plan employers (or ultimately the taxpayer, through PBGC).

Manhattan Ford Lincoln, Inc. v. UAW Loc. 259 Pension Fund, 331 F. Supp. 3d 365, 393 (D.N.J. 2018). Accordingly, the *Manhattan Ford Lincoln* court appropriately concluded "[t]he 'best estimate of anticipated experience under the plan,' . . . may reflect factors other than the Plan's commitment to some future investment portfolio." *Id*. at 402.

An actuary's consideration, as part of the analysis of anticipated plan experience, of the change in plan risk with respect to withdrawing employers is also supported by decades of actuarial practice. Actuarial standards provide that "[t]he actuary should take into account *the purpose of the measurement* as a primary factor in selecting a discount rate," and expressly distinguish assumptions for the purpose of measuring contribution requirements from assumptions for purposes of "[d]efeasance or [s]ettlement," ASOP 27 §3.9 (emphasis added), which, as the arbitrator in this case correctly concluded, includes withdrawal liability. *See* Op. at 7-8. In the case of defeasance or settlement, ASOP 27 explicitly authorizes "use [of] a discount rate implicit in annuity prices," ASOP 27 §3.9(b) – what PBGC rates, used by the actuary in this case, approximate. *See* Op. at 7. The panel concluded that this fundamental actuarial issue was of no consequence: "[w]e express no opinion on the Pension Plan's argument that withdrawal liability is an occasion

where benefits are properly measured on a 'defeasance or settlement basis.'" Op. at 14-15 n.7.

While the panel is correct that "MPPAA, not ASOP 27, is the law," by refusing to consider that "anticipated experience under the plan" may vary depending on the purpose of the measurement and simply assuming that the only possible such experience was "the plan's anticipated investment returns," Op. at 14-15, the panel erred in interpreting MPPAA. Anticipated experience under a multiemployer plan is not the same with respect to withdrawing employers as with respect to ongoing contributing employers who, unlike a withdrawing employer, take investment risk and remain obligated to make additional contributions to make up for future shortfalls in plan funding. There is a price to removing risk and the statute assigns the actuary the job of valuing that risk as part of the plan's "anticipated experience."

II. The Decision Will Have Significant Negative Consequences for Multiemployer Pension Plans.

The panel's decision will have significant negative consequences for multiemployer plans. "The Act's withdrawal liability provisions were enacted because Congress determined that the existing regulatory framework . . . contributed to the financial distress of such plans by creating incentives for employer withdrawals and eventual plan terminations." *Washington Star Co. v. Int'l Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1504 (D.C. Cir.

1984). The panel's decision creates a similar incentive to withdraw by requiring plans to give withdrawing employers the benefit of anticipated investment returns, without withdrawing employers having to take any associated risk. *See Bassett Const. Co. v. Trs. of the Centennial State Carpenters Pension Tr. Fund*, No. 83–F–980, 1985 WL 1270583, at *6 (D. Colo. Feb. 25, 1985) ("[The withdrawing employer] does not bear the burden of future actuarial losses and in turn is not entitled to benefit from actuarial gains occurring subsequent to its withdrawal."). Notably, PBGC rates used by the actuary in this case reflect what it would cost a withdrawing employer to settle pension obligations without any future risk. In other words, the panel's decision requires multiemployer plans (and remaining employers) to subsidize withdrawing employers.

Additionally, by providing that withdrawal liability calculations be "presumed correct," 29 U.S.C. §1401(a)(3)(B), Congress intended to "discourage litigation," and "ensure the enforc[e]ability . . . of employer liability." *Keith Fulton & Sons, Inc. v. New Eng. Teamsters & Trucking Indus. Pension Fund, Inc.*, 762 F.2d 1137, 1143 (1st Cir. 1985). "Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan." *Concrete Pipe*, 508 U.S. at 635 n.20 (quoting S. 1076, 96th Cong., 2d Sess., 20–21). The panel's decision undermines these goals in at least two significant ways. *First*, the panel's

decision functionally erases the employer's "burden to show" the assumptions "would not have been acceptable to a reasonable actuary," *Concrete Pipe*, 508 U.S. at 635, by holding that assumptions can be unreasonable even where the employer's own expert concedes the "assumptions were reasonable in light of industry standards." JA268. *Second*, the panel's decision adopts vague and amorphous standards, which will invite unnecessary litigation, create more uncertainty, and make efforts to collect withdrawal liability more expensive. *See, e.g.*, *Baze v. Rees*, 553 U.S. 35, 70 (2008) (Alito, J., concurring) (explaining that a "vague and malleable standard would open the gates for a flood of litigation"). For example, the panel decision announces that discount rates for withdrawal liability and minimum funding must be "similar," Op. at 18, but offers no meaningful guidance on how to evaluate when a difference between discount rates is too great to be "similar."

CONCLUSION

The petition for rehearing *en banc* should be granted.

Dated: August 10, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: August 10, 2022

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