RECORD NOS.

18-1140(L); 18-1408

In The
United States Court of Appeals
For The Second Circuit

THE NEW YORK TIMES COMPANY,

Plaintiff-Appellant/Cross-Appellee,

v.

NEWSPAPER AND MAIL DELIVERERS'-PUBLISHERS' PENSION FUND,

Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT FOR THE SOUTHERN DISTRICT OF NEW YORK
Nos. 1:17-cv-6178 & -6290 – Judge Robert W. Sweet

BRIEF OF *AMICUS CURIAE* NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF NEWSPAPER AND MAIL DELIVERES' -PUBLISHERS' PENSION FUND

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure and Local Rule 29.1(b), the National Coordinating Committee for Multiemployer Plans ("NCCMP") certifies that it has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly-held company has a 10% or greater ownership interest in the NCCMP.

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I. STATEMENT OF IDENTITY AND INTEREST[1]

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax exempt organization, and is the only national organization devoted exclusively to protecting the interests of multiemployer plans and the more than ten million American workers to whom they provide pension, health and other benefits. For more than thirty years, the NCCMP has advocated on behalf of these plans in Congress, in the courts, and in the regulatory process to help develop sound employee benefits legislation, regulations, and policy.

Hundreds of multiemployer plans and related organizations, including unions, employers, and employer associations, with a nationwide participant base, are affiliated with the NCCMP. Affiliated plans are active in every segment of the multiemployer plan universe, including the airline, building and construction, entertainment, food production, distribution and retail sales, health care, hospitality, mining, maritime, industrial fabrication, service, textile, and trucking industries.

Congress has recognized that the continued well-being and security of employees, retirees, and their dependents are directly impacted by multiemployer

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[1] No party's counsel authored the brief, in whole or in part. No party nor party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the NCCMP itself and its members, contributed money that was intended to fund preparing or submitting the brief.

All parties have consented to the filing of this *amicus curiae* brief by the NCCMP.

plans and that interference with the maintenance and growth of such plans is contrary to the national public interest. *See* 29 U.S.C. §§ 1001a(a), (c) *as added by* the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364 ("MPPAA").

Because of the broad range of experience of the NCCMP's constituent organizations, the NCCMP believes it is uniquely qualified to state the position of the trustees of multiemployer plans and to offer special insight into the impact this case will have on the efficient administration of these plans.

The instant case is of special importance to the NCCMP because it represents a rejection of the statutory deference Congress afforded to the decisions by multiemployer pension plans and their professionals in making withdrawal liability assessments and to the decisions by arbitrators in reviewing those assessments.

The court below placed the burden on the pension plan to prove that the actuarial assumptions used in its assessment were correct rather than on the employer seeking to challenge the assessment as Congress had intended. The court below also substituted its own judgment for that of the arbitrator in clear violation of federal law. Finally, if left standing, the court's decision substantially increases the burden on multiemployer pension plans in enforcing employers' statutory withdrawal liability. The ability to collect withdrawal liability protects these plans, their participants and beneficiaries, and the multiemployer pension insurance system.

II. INTRODUCTION

Although the district court below ruled on several questions, this *amicus curiae* brief addresses the following issues:

1. Whether the district court erred by failing to require that the New York Times Company ("New York Times" or "Employer") meet its statutory burden to prove by a preponderance of the evidence that the actuarial assumptions selected by the Newspaper and Mail Deliverers' Publishers' Pension Fund's ("Fund") actuary for the Fund's withdrawal liability assessment were, in the aggregate, unreasonable in its challenge to that assessment?

2. Whether the district court erred by substituting its own judgment for that of the arbitrator and failing to require that the New York Times meet its statutory burden to prove by a clear preponderance of the evidence that the arbitrator's findings of fact regarding the actuary's assumptions were incorrect?

The district court, while ostensibly applying the appropriate standards, misapplied those standards in a manner contrary to law. ERISA imposes a statutory presumption that the assumptions of a plan actuary used to determine an employer's withdrawal liability are correct. In order to overcome that presumption, an employer must prove, by a preponderance of the evidence, that those assumption are, in the aggregate, unreasonable. Here, despite the Employer's failure to present any evidence that the actuary's assumptions were unreasonable, the court nevertheless relied upon its own misunderstanding of basic actuarial principles to replace the actuary's assumptions with its own.

Similarly, ERISA requires that an arbitrator's factual determinations be upheld unless the contesting employer proves by a clear preponderance of the evidence that the arbitrator's findings of fact were incorrect. In this case, although the arbitrator upheld the assumptions used by the Fund's actuary, the court nevertheless substituted its own judgment for that of the arbitrator, notwithstanding the New York Times' failure to adduce any evidence that those assumptions were unreasonable. These rulings by the district court are contrary to the plain language of ERISA, the clear expression of Congressional intent, and controlling case law.

III. ARGUMENT

A. The District Court Erred by Failing to Require That the Employer Meet its Statutory Burden to Prove by a Preponderance of the Evidence That the Actuarial Assumptions Selected by the Fund's Actuary for its Withdrawal Liability Assessment Were, in the Aggregate, Unreasonable in the Employer's Challenge to That Assessment.

The standard of review in any arbitration challenging the "actuarial assumptions" used by a plan actuary in an assessment of withdrawal liability is provided in ERISA as follows:

> (B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless ***a party contesting the determination shows by a preponderance of evidence*** that—
>
> > (i) the actuarial assumptions and methods used in the determination were, ***in the aggregate***, ***unreasonable*** (taking into account the experience of the plan and reasonable expectations) . . . .

ERISA Section 4221(a)(3)(B)(i), 29 U.S.C. § 1401(a)(3)(B)(i) (emphasis added). This language unambiguously requires the New York Times, as the party contesting the Fund's determination, to prove that the actuary's assumptions were unreasonable. The Supreme Court has explicated this language as follows:

> Section 1401(a)(3)(B) speaks instead of the aggregate reasonableness of the assumptions and methods employed by the actuary in calculating the dollar liability figure. Because a "method" is not "accurate" or probably "true" within some range, "reasonable" must be understood here to refer to some different kind of judgment [from the factual determinations made by the plan sponsor], one that it would make sense to apply to a review of methodology as well as of assumptions. Since the methodology is a subject of technical judgment within a recognized professional discipline, it would make sense to judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation. Accordingly, ***an employer's burden to overcome the presumption in question (by proof by a preponderance that the actuarial assumptions and methods were in the aggregate unreasonable) is simply a burden to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary.*** In practical terms it is ***a burden to show something about standard actuarial practice***, not about the accuracy of a predictive calculation, even though consonance with professional standards in making the calculation might justify confidence that its results are sound.

Concrete Pipe & Products of California, *Inc. v. Constr. Laborers Pension Trust for Southern California*, 508 U.S. 602, 634-35 (1993). The district court, however, misapplied the statutory burden and substituted its own actuarial judgment for that of the Fund's actuary.

The New York Times adduced *no evidence* that the actuary's assumptions were unreasonable. As stated by the arbitrator:

> The Times's expert, Darren French, did not opine whether the 6.5% effective rate resulting from the use of the Segal Blend was or was not a reasonable number.

The New York Times Co. Appendix A1 ("NYT App. A1"), p. A.36. In fact, the *only* "evidence" relied upon by the district court was the following:

> Egan's [the Plan actuary's] testimony before the Arbitrator was that a 7.5% percent assumption was her "best estimate of how the Pension Fund's assets . . . will on average perform over the long term." Arb. Tr. 568:3-8 [NYT App. A2, p. A.188]; see Arb. Tr. 600:3-15 [NYT App. A2, p. A.196] (observing that the Segal Blend was "lower" than Egan's best estimate of anticipated plan experience in the long term). ***If 7.5% was the Fund actuary's "best estimate," it strains reason to see how the Segal Blend, a 6.5% rate derived by blending that 7.5% "best estimate" assumption with lower, no-risk PBGC bond rates, can be accepted as the anticipated plan experience.*** This is especially [true] when the blend includes interest rates for assets not included in the Fund's portfolio. The Segal Blend's applicability is further undermined by Egan's acknowledgment that she had used the Segal Blend as her "best estimate" when calculating [withdrawal] liability "regardless of the particular pension plan's actual portfolio of assets." Arb. Tr. 585:10-586:5 [NYT App. A2, p. A.192].

The New York Times Co. v. Newspaper & Mail Deliverers'-Publishers' Pension Fund, 303 F. Supp. 3d 236, 255 (S.D.N.Y. 2018). Thus, the *only* support for the

New York Times' assertion that the actuarial assumptions were unreasonable in the aggregate was that the actuary used a higher discount rate—7.5%—in valuing the Fund's liabilities for contributions required to fund the Fund rather than the 6.5% rate she used in valuing the Fund's liabilities for withdrawal liability purposes.

Furthermore, the district court rejected the evidence submitted by the Fund to support the reasonableness of the Fund's actuary's assumptions, which included:

- "Egan's acknowledgment that she had used the Segal Blend as her "best estimate" when calculating withdraw liability . . . ." *Ibid;*
- The further testimony of the Fund's actuary that the use of the Segal Blend was justified because the use of disparate rates appropriately reflected the "risk premium" properly attributed to the employers that continued to shoulder the burden of funding the Fund on an ongoing basis. NYT App. A1, p. A.36;
- The testimony of the Fund's actuarial expert, Dr. Ethan Kra, that the interest rate used by the Fund was reasonable. *New York Times*, 303 F. Supp. 3d at 255;
- The additional testimony of Dr. Kra that the range of reasonableness accepted in the actuarial profession for discount rates applicable for withdrawal liability was from 3% to 7%. NYT App. A1, p. A.35.

- The testimony of both the Fund's actuary and Dr. Kra that the use of different discount rates for funding and withdrawal liability purposes was directly supported by the governing actuarial standards. Fund App, pp. FA.26-FA.27, FA.53.

As the Supreme Court stated in *Concrete Pipe*, any consideration of the reasonableness of the assumptions used by an actuary in valuing a plan's liabilities must be determined by reference to the actuarial standards of practice. *Concrete Pipe*, 508 U.S. at 635. The governing actuarial standards applicable to this dispute, and to the valuation of pension liabilities in general, are codified in Actuarial Standard of Practice ("ASOP") No. 27 (2007).[2] NYT App. A1, p. A.36.

Here, the district court's fundamental error was its anecdotal presumption that the interest rate used for funding purposes and the discount rate used in measuring the present value of a plan's liabilities for withdrawal liability purposes are necessarily measuring the same thing. The egregiousness of the district court's error, and its misunderstanding of basic actuarial principles, is demonstrated by reviewing the purposes of the different measurements and the governing standards.

The calculation of a plan's unfunded vested benefits in the context of withdrawal liability is distinct from the calculation of a plan's liabilities for

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[2] http://www.actuarialstandardsboard.org/wp-content/uploads/2014/07/asop027_109.pdf.

determining minimum funding. Pursuant to Internal Revenue Code ("IRC") Sections 412 and 431, 26 U.S.C. §§ 412 and 431, multiemployer plans are required to maintain a funding standard account reflecting specified charges and credits. These charges and credits are applied annually, and include such things as administrative expenses, the cost of benefits being earned under the actuarial cost method, amortization charges for previously-earned benefits, experience gains and losses reflecting the variances between the actuarial predictions and the plan's actual experience on such matters as investment performance, mortality, retirement rates, *etc.*, and employer contributions. IRC Section 431(a), (b)(2), (3), 26 U.S.C. § 431(a), (b)(2), (3). Depending on a plan's experience, the amount of the employer contributions required to satisfy the statutory funding requirements vary from year-to-year. If the contributions payable by the contributing employers are insufficient to satisfy the applicable minimum funding standard for any plan year, the Internal Revenue Code imposes nondeductible excises tax payable by the contributing employers. *See* IRC Sections 275(a)(6), 4971(a)(2), (b), 26 U.S.C. §§ 275(a)(6), 4971(a)(2), (b). Thus, contributing employers bear the ongoing risk of bad experience and of ensuring that a plan continues to satisfy the statutory minimum funding standards.

Withdrawal liability is fundamentally different. By withdrawing from a plan, an employer settles up its liability to the plan once-and-for-all and relieves itself (*i.e.*, defeases itself) from all responsibility under the statutory funding standards, along with the ongoing uncertainties attendant to satisfying those standards.

The governing actuarial standards explicitly recognize the fundamental importance of the purpose of a measurement in the selection of actuarial assumptions. In describing the types of economic assumptions that may be applicable to a valuation of a pension plan's liabilities, the governing ASOP states as follows:

> Identifying Types of Economic Assumptions—The types of economic assumptions used to measure obligations under a defined benefit pension plan may include the following:
>
> a. inflation;
> b. ***investment return*** (sometimes referred to as the valuation interest rate);
> c. ***discount rate***;
> d. compensation scale; and
> e. other economic factors (*e.g.*, Social Security, cost-of-living adjustments, growth of individual account balances, and variable conversion factors).

ASOP 27 (2007), Sec. 3.2 (emphasis added). By distinguishing between a plan's assumed investment return and a discount rate, the standard plainly rejects the suggestion that all discount rates used by a pension plan are presumed to be the same as its rate of assumed earnings used for funding purposes. This point—that one measurement or assumption may not be appropriate for different purposes—is made even sharper in the very next section of the ASOP. That section lists the factors to consider in determining "which types of economic assumptions to use for a specific measurement and when selecting those economic assumptions that will be used" and identifies as the first factor "the purpose and nature of the measurement." ASOP 27 (2007), Sec. 3.3.

The ASOP further clarifies the importance of considering the purpose of the measurement in selecting economic assumptions, as follows:

> Selecting an Investment Return Assumption and a Discount Rate—The investment return assumption reflects anticipated returns on the plan's current and future assets. The discount rate is used to determine the present value of expected future plan payments. Generally, the appropriate discount rate is the same as the investment return assumption. ***But for some purposes***, such as SFAS No. 87 [used for valuing pension liabilities for employer balance sheet purposes] or unfunded plan valuations, ***the discount rate may be selected independently of the plan's investment return assumption*, *if any. In such cases*, *the discount rate reflects anticipated returns on a hypothetical asset portfolio*, *rather than on the plan's expected investments.***

ASOP 27 (2007), Sec. 3.6 (emphasis added). In fact, that is exactly what happened in this case. The Fund's actuary elected to use a hybrid methodology to value the Fund's liabilities for purposes of withdrawal liability—a hybrid between the Fund's actual portfolio and a "hypothetical," risk-free portfolio. Furthermore, the Fund's actuary specifically testified that her decision to use the Segal Blend was based upon these controlling actuarial standards. *E.*g., Fund's Appendix, p. FA.26.

The appropriateness of this methodology is further confirmed in the revised actuarial standards that became effective in 2014. Those revised standards provide, in relevant part, as follows:

> Selecting a Discount Rate—A discount rate is used to calculate the present value of expected future plan payments. A discount rate may be a single rate or a series of rates, such as a yield curve. ***The actuary should consider the purpose of the measurement as a primary factor in selecting a discount rate.*** Some examples of measurement purposes are as follows:
>
> > a. Contribution Budgeting—An actuary evaluating the sufficiency of a plan's contribution policy may choose among several discount rates. The actuary may use a discount rate that reflects the anticipated investment return from the pension fund. Alternatively, the actuary may use a discount rate appropriate for defeasance, settlement or market-consistent measurements.
> >
> > b. Defeasance or Settlement—An actuary measuring a plan's present value of benefits on a defeasance or settlement basis may use a discount rate implicit in annuity prices or other defeasance or settlement options.

ASOP 27 (2014), Sec. 3.9.[3] Thus, in valuing a plan's liabilities for purposes of determining the appropriate level of employer contributions, "[t]he actuary may use a discount rate that reflects the anticipated investment return from the pension fund." On the other hand, in valuing a plan's liabilities for purposes of settling or defeasing an employer's liability to a plan (which describes the operation of withdrawal liability), an actuary may "use a discount rate implicit in annuity prices or other defeasance or settlement options." *Ibid.*

Furthermore, the appropriateness of using different discount rates for different purposes is demonstrated by referring to the Fund's Actuarial Valuation Report

[3] http://www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop027_172.pdf.

itself. In addition to the discount rates used for minimum funding purposes and for withdrawal liability, the Fund uses yet another rate for determining "current liability," as required under the Internal Revenue Code for purposes of determining the maximum amount employers are allowed to contribute. NYT App. A2, p. A.301; *see* IRC Section 431(c)(6), 26 U.S.C. § 431(c)(6). That rate, 4.61%, was substantially lower than the effective 6.5% used by the Fund for valuing benefits for withdrawal liability purposes, and its use for that purpose would have dramatically increased the New York Times' withdrawal liability.

By misunderstanding the governing actuarial standards and erroneously assuming that the interest rate used for minimum funding purposes and the discount rate used for withdrawal liability purposes were intended to measure the same thing, the district court created its own presumption and imposed on the Fund the burden of overcoming that presumption. This is directly contrary to the unambiguous statutory language.

B. The District Court Erred by Substituting its Own Judgment for That of the Arbitrator and by Failing to Require That The New York Times Meet its Statutory Burden to Prove by a Clear Preponderance of the Evidence That the Arbitrator's Findings of Fact Regarding the Actuary's Assumptions Were Incorrect.

As with its decision regarding the allocation of the burden of proof, the district court also misapplied the appropriate standard for review of the arbitrator's decision. The relevant provision of ERISA states as follows:

> Presumption respecting finding of fact by arbitrator — In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

ERISA Section 4221(c), 29 U.S.C. § 1401(c). In substituting its judgment for that of the arbitrator, the district court failed to comply with this statutorily mandated standard.

The district court determined that its review of the arbitrator's decision to reject the New York Time's challenge to the discount rate assumption was a mixed issue of fact and law, subject to a "clear error" standard. *New York Times*, 303 F. Supp. 3d at 255. As explained above, however, and as explicitly stated by the Supreme Court, the question whether a plan's actuarial assumptions for withdrawal liability purposes are "in the aggregate, unreasonable" is factual in nature and must be evaluated with reference to prevailing standards. *See*, p. 5, *infra*. Thus, while an arbitrator's purported failure to apply a correct standard in evaluating a matter of fact may itself be a mixed question, the underlying factual determination remains just that—a factual determination.

Here, the arbitrator determined that the New York Times had presented *no evidence* that the Fund's actuary's use of the Segal Blend was unreasonable. NYT App. A1, p. A.36. Instead, the New York Times' argument consisted solely of testimony that any use of disparate discount rates was *per se* unreasonable as a matter of law—an argument explicitly (and correctly) rejected by both the arbitrator and the district court. *New York Times*, 303 F. Supp. 3d at 255; NYT App. A1, p. A.36.

The court, however, failed to accord any discernible deference to the arbitrator's factual determinations regarding the appropriate discount rate in this case. Instead, the court merely substituted its own judgment for that of the arbitrator. As stated by the court:

> [i]n sum, the actuary's testimony, combined with the untethered composition of the Segal Blend and paucity of analysis by the Arbitrator, create "a definite and firm conviction that a mistake has been made" in accepting the Segal Blend; as such, this Court will "set the findings aside even though there is evidence supporting them that, by itself, would be considered substantial." Accordingly, the Arbitrator's decision that the Segal Blend was the appropriate rate to calculate the Times' partial withdrawal is reversed. In the absence of additional evidence sufficient to support a different rate, the Times' liability should be recalculated using the 7.5% assumption testified to as the "best estimate."

New York Times, 303 F. Supp. 3d at 256 (citations omitted).

The arbitrator, however, found that the New York Times presented *no evidence* that the discount rate used by the Fund's actuary was unreasonable. Based upon this finding, the arbitrator could only conclude that the New York Times had failed to meet its burden. Indeed, the Fund should rightly have prevailed even if it had presented *no evidence at all* of the reasonableness of the actuarial assumptions. Nevertheless, the district court relied on its own misunderstanding of actuarial principles to not only shift the burden of proof to the Fund, but to reject the Fund's affirmative evidence supporting the reasonableness of its discount rate assumption. This is clearly a misapplication of appropriate standard.

C. The District Court's Decision Imposes Impermissible Burdens on Multiemployer Plans Contrary to the Plain Language of ERISA, Congress' Clear Expression of Intent, and Controlling Case Law.

The use of different discount rates for purposes of determining a plan's minimum funding requirements and for valuing liabilities for withdrawal liability purposes is common. As testified on the record below, more than 30% of plans use the Segal Blend for valuing their unfunded vested benefits for withdrawal liability purposes. NYT App. A1, p. A.34. Still other plans use other rates, including the PBGC's risk-free discount rates applicable to pension plan terminations. *See*, *e.g.*, NYT App. A1, p. A.36. For these plans using disparate discount rates, the district court's decision has created a new hurdle—an undefined presumption of unreasonableness— that the plan must overcome in order to collect assessments of withdrawal liability. If left unreversed, this portion of the district court's ruling has the potential to dramatically increase the costs to multiemployer pension plans of enforcing withdrawal liability assessments.

In crafting the statutory presumptions in favor of multiemployer plans, Congress specifically anticipated—and rejected—such a result. As stated in the Report of the House Committee on Education and Labor on the bill that eventually added the withdrawal liability provisions to ERISA:

> These rules are necessary in order to ensure the enforceability of employer liability. ***In the absence of these presumptions***, employers could effectively nullify their obligation by refusing to pay and ***forcing the plan sponsor to prove every element involved in making an actuarial determination.***

Concrete Pipe, 508 U.S. at 628, *quoting*, H. R. Rep. 96-869, pt. 1, p. 86.

That Congress intended for multiemployer plans to not have to surmount unnecessary hurdles in working to ensure their continued ability to provide benefits to their participants and beneficiaries is also manifest in other areas of the law. For example, Congress also required employers to make their withdrawal liability payments even while they are actively disputing their liability for those payments. *See T.I.M.E.-DC*, *Inc. v. Mgmt.-Labor Welfare & Pension Funds of Local 1730 Longshoremen's Association*, 756 F.2d 939, 946 (2d Cir. 1985) ("The most significant aspect of the notice scheme is that no matter what disputes arise between the old plan sponsor and the employer over the amount of liability, the employer is obligated to pay the withdrawal liability demanded as soon as the plan sponsor has provided notice of the payment schedule under [ERISA Section 4219(b)(1), 29 U.S.C.] § 1399(b)(1).") As stated in the legislative history:

> The committee believes it is extremely important that a withdrawn employer begin making the annual payments even though the period of years for which payments must continue will be based on the actual liability allocated to the employer.

Concrete Pipe, 508 U.S. at 628, *quoting*, H. R. Rep. 96-869, pt. 1, p. 86.

This same Congressional intent is also manifest in another part of the law added at the same time as the withdrawal liability provisions. In concluding that ordinary contract defenses may not be raised in an action by a multiemployer plan under Section 515 of ERISA[4] to collect contributions from a contributing employer, this Court stated as follows:

> [The] stated purpose [of ERISA Section 515, 29 U.S.C. § 1145] was to "permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. 186." 126 Cong.Rec. 23,039 (1980) (remarks by Representative Thompson). This new provision was essential to the viability of employee benefit plans. The high costs associated with employer delinquency ***detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans.*** Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. *Id.* Simply put, benefit plans must be able to rely on the contribution promises of employers because plans must pay out to beneficiaries whether or not employers live up to their obligations. For this reason, ***Congress placed employee benefit plans in a position superior to the original promisee***, analogous to a holder in due course.

Benson v. Brower's Moving & Storage, Inc., 907 F.2d 310, 314 (2d Cir. 1990) (emphasis added, some citations omitted).

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[4] Section 515 of ERISA, 29 U.S.C. § 1145, was added to the law as part of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, which also added the withdrawal liability provisions. ERISA §§ 4201-4225, 4301, 29 U.S.C. §§ 1381-1405, 1451,

Under the plain language of ERISA and the Supreme Court's explication of that language in *Concrete Pipe*, an employer has an affirmative duty to adduce sufficient evidence to prove that the actuarial assumptions used in a withdrawal liability assessment are unreasonable in the aggregate in order to successfully challenge those assumptions. Furthermore, an arbitrator's finding upholding those assumptions is entitled to deference. By adding what amounts to a presumption of unreasonableness to a plan actuary's assumptions based upon nothing more than the actuary's decision to apply different discount rates for different purposes, the district court's decision is both contrary to the plain language of ERISA, the clear expression of Congressional intent, and the controlling case law.

IV. CONCLUSION

The decision of the district court to substitute its own judgment for that of the Fund's actuary and the reviewing arbitrator in the selection of the appropriate discount rate should be reversed.

Respectfully submitted,

/s/ Paul A. Green

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2018, I caused this Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

/s/ Paul A. Green
Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains [*4,573*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: November 7, 2018

/s/ Paul A. Green
Counsel for Amicus Curiae