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I Can Get it For You Wholesale: Discount Rates and Withdrawal Liability

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It is common for multiemployer pension plans to use different discount rates for purposes of determining a plan's minimum funding requirements and for valuing liabilities for withdrawal liability. For these plans, two recent district court decisions[1] impose an unwarranted and improper hurdle—an undefined presumption of unreasonableness—that the plan must overcome in order to collect assessments of withdrawal liability. While the *New York Times* case settled prior to a ruling on the merits by the Second Circuit, the *Sofco* case is fully briefed and waiting for a decision from the Sixth Circuit. If left unreversed, the district court's ruling has the potential to dramatically increase the cost to multiemployer

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plans of enforcing withdrawal liability assessments. This article addresses how withdrawal liability is calculated; the statutory language placing the burden of overturning any actuarial assumptions squarely on the withdrawing employer; why discount rates for funding differ from discount rates used to calculate withdrawal liability; how the district courts in *New York Times* and *Sofco* got it wrong; and the detrimental consequences to multiemployer plans if *Sofco* is not overturned.

WITHDRAWAL LIABILITY GENERALLY

By enacting the Employee Retirement Income Security Act of 1974, as amended (ERISA),[2] Congress sought to ensure that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it."[3] To further that goal, Congress amended ERISA by enacting the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA),[4] which imposed "withdrawal liability" on employers that cease contributing to underfunded multiemployer defined benefit pension plans.[5] Withdrawal liability requires that, when an employer withdraws from an underfunded plan, the employer must pay its allocable share of the plan's vested pension benefits that current plan assets do not cover.[6] This withdrawal liability reflects the withdrawing employer's *pro rata* share of the difference between the present value of the pension benefits the employers promised their employees and the value of the plan's assets, which generally consist of contributions made by the employers, plus or minus investment gains or losses, benefit payments, and administrative expenses.[7]

Although there are multiple ways to allocate such liability to a withdrawing employer, they all begin from the same starting point: a plan first determines the total value of its vested benefits. Using a variety of actuarial assumptions, such as mortality rates, retirement rates, and anticipated rates of retirement, the plan estimates the expected stream of payments of vested benefits. The plan then applies a discount rate to reduce that stream of payments to a present value. From this present value of vested benefits, the plan then subtracts the value of its assets. The difference between these two numbers is the plan's "unfunded vested benefits" or "UVBs."[8] Next, the plan calculates the proportionate share of the UVBs allocable to the withdrawing employer. Although several methodologies may be used to determine an employer's proportionate share, most are based on the employer's share of the total contributions to the plan over prior years.[9]

Unique to withdrawal liability, MPPAA also added a series of procedures and requirements for withdrawal liability assessments and for employer challenges to those assessments. Initially, an employer seeking to challenge a plan's assessment must file a "request for review" with the plan sponsor, typically the Board of Trustees.[10] If the employer is dissatisfied with the result of the review, the employer must then file a demand for arbitration.[11] Either party may then seek to challenge the arbitration award in court.[12] Each of these steps has specific deadlines, and failure to follow any of them will permanently foreclose an employer's right to challenge the assessment.[13] Notwithstanding the pendency of an employer's challenge to a withdrawal liability assessment, the employer is required to make its periodic withdrawal liability payments in accordance with the assessment.[14] In the event an employer ultimately prevails in its challenge, it is entitled to a refund of any overpayments, with interest.[15]

CHALLENGES TO ACTUARIAL ASSUMPTIONS USED TO CALCULATE WITHDRAWAL LIABILITY

The actuarial assumptions used to calculate withdrawal liability can have an enormous impact on the valuation of the plan's future benefit obligations and, therefore, the amount a withdrawing employer is required to pay. Because of this, withdrawing employers often seek to challenge a plan's assessment by attacking the assumptions used to calculate the plan's UVBs. Historically, this has been a high hurdle.

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) . . .[16]

This language unambiguously requires the party contesting the plan's determination to prove that the actuary's assumptions were unreasonable. As explained by the Supreme Court 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 professional standards:

> 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 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.
>
> . . . . The employer merely has a burden to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that *falls outside the range of reasonable actuarial practice.*[17]

The actuarial standards applicable to the selection of a reasonable discount rate for withdrawal liability and the valuation of pension liabilities in general are codified in Actuarial Standard of Practice (ASOPs) Nos. 4 and 27.[18]

DISCOUNT RATE FOR FUNDING PURPOSES VS. DISCOUNT RATE USED FOR WITHDRAWAL LIABILITY

Of all the actuarial assumptions that go into a withdrawal liability assessment, the one that typically has the greatest impact is the discount rate. For this reason, particularly in recent years, employers have

focused on attacking the discount rates used for withdrawal liability purposes when they differ from the discount rate used for minimum funding purposes. Specifically, these employers take the position that the discount rate is the discount rate, and it is unfair, unlawful, and unreasonable to apply one discount rate for funding purposes, which affects those employers that have not withdrawn and continue to fund the plan, and a different one for purposes of assessing withdrawal liability, which only affects the employers that have withdrawn from the plan. These employers contend that the use of a lower discount rate, which produces a higher liability, for withdrawn employers is punitive and discriminatory. This argument is, however, premised on a series of misunderstandings and false assumptions.

The economic rationale for using a more conservative (*i.e.*, lower) discount rate for withdrawal liability purposes rather than the discount rate used for funding purposes is compelling. Indeed, it boils down to one simple question: who bears the risk?

Investment return is driven by risk. The riskier the investment, the greater the expected return that will be demanded by an investor to take that risk. The truth of this statement can be demonstrated by a riddle: Which is more valuable: $1,000 worth of government bonds that will pay interest at a guaranteed rate of one percent per year or $1,000 worth of stock for which the expected rate of return is 7.5 percent? The answer, of course, is that they are both worth the same—$1,000—notwithstanding the differences in the expected rate of return. The government bond is risk-free, while the shares of stock are not. Although the shares of stock have the potential to beat their expected rate of return, they are also subject to the risk that they will underperform, and even lose value. In exchange for taking the risk of loss, an investor would be foolish to make the riskier investment unless the investor was likely to get paid for it: this is known as the "risk premium." Indeed, the degree of risk an investor is willing to take is known as "risk tolerance." In short, the greater an investor's risk tolerance, the riskier the investment the investor is willing to make and, in turn, the greater the expected reward.

The key, therefore, to evaluating the reasonableness of any actuarial assumption is the purpose for which that assumption is used. Thus, the calculation of a plan's liabilities in the context of withdrawal liability is distinct from the calculation of a plan's liabilities for determining required minimum funding contributions. Multiemployer plans are required to maintain a funding standard account reflecting specified charges and credits.[19] These charges and credits are applied annually, and include such things as administrative expenses, the cost of benefits being earned under the plan's 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, and so on, and employer contributions.[20] 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 (the Code) imposes additional funding requirements on plans and, potentially, nondeductible excises taxes payable by the contributing employers.[21] 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 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. In effect, it is buying an annuity from the plan and the remaining employers, since they now bear all the risk in providing the benefits attributable to the withdrawing employer.

Put in investment terms, the contributing employers now shoulder all the risk. The withdrawn employers, on the other hand, have settled their liabilities once and for all and have defeased themselves of all risk. For this reason, it is only fair that the employers bearing all of the risk—including the risk formerly borne by the withdrawn employers—have the benefit of the risk premium in the form of a higher discount rate. Because the withdrawn employers no longer bear any risk, it is unfair for them to demand the benefit of a risk premium.

For these reasons, perhaps half or more actuaries acknowledge the shifting of risk engendered by an employer's withdrawal by adopting disparate discount rates. In determining a plan's minimum funding requirements, actuaries will typically select a discount rate based upon the anticipated return of a plan's actual mix of assets. Although actuaries may build some conservatism into this rate, generally speaking, the chances of equaling or exceeding the rate are approximately the same as the chances of failing to earn the expected rate or of even losing money.

For withdrawal liability purposes, in recognition of the shifting of risk, actuaries will often take risk off the table with regard to the withdrawing employer by using either a risk-free discount rate or an intermediate rate, somewhere between the risk-free rate and the plan's expected rate of return.

The relevant actuarial standards explicitly recognize and, indeed, encourage this practice:

> 3.9 Selecting a Discount Rate—A discount rate is used to calculate the present value of expected future plan payments. . . . *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:
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> 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.
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> 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.
>
> c. Market-Consistent Measurements—An actuary making a market-consistent measurement may use a discount rate implicit in the price at which benefits that are expected to be paid in the future would trade in an open market between a knowledgeable seller and a knowledgeable buyer. In some instances, that discount rate may be approximated by market yields for a hypothetical bond portfolio whose cash flows reasonably match the pattern of benefits expected to be paid in the future. The type and quality of bonds in the hypothetical portfolio may depend on the particular type of market-consistent measurement.
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> The present value of expected future pension payments may be calculated from the perspective of different parties, recognizing that *different parties may have different measurement purposes*. For example, the present value of expected future payments could be calculated from the perspective of an outside creditor or the entity responsible for funding the plan.[22]

Thus, the actuarial guidance acknowledges that the selection of discount rates can vary with the purpose of the calculation, that is, determining funding obligations or settling liabilities. Indeed, it explicitly directs the actuary to consider the purpose in selecting the rate. 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 purpose of withdrawal liability), an actuary may "use a discount rate implicit in annuity prices or other defeasance or settlement options."[23] There is absolutely *no* suggestion that the choice for one purpose forecloses the choice for the other. To the contrary, the explicit declarative that "the purpose of the measurement [is] a primary factor in selecting a discount rate" demonstrates that precisely the opposite is true.[24]

The Pension Benefit Guaranty Corporation (PBGC) requires the use of specified discount rates for valuing plan liabilities in cases of mass withdrawal (the PBGC rate). The PBGC rate is derived by determining the implicit interest rates priced into the cost of commercially available single-premium annuities. It is considered a "risk-free" rate because, in buying an annuity, the buyer absolves itself from any future responsibility for funding the annuity and passes all the risk on to the annuity issuer. It is also considered to be a "market consistent measurement" because it is based on the actual market price for annuities that provide a stream of payments which precisely match the obligations of the pension plan.[25]

As noted above, actuaries use a range of discount rates for valuing plan liabilities for withdrawal liability purposes. Some actuaries use the funding rate, while others use a defeasance or settlement rate—most typically the PBGC rate. Still others use an intermediate rate—something that is in between the risk-free rate and the funding rate. The most common intermediate rate is known as the Segal Blend, which is a hybrid of a plan's anticipated earnings and a risk-free settlement or defeasance rate. The concept that there is a range of reasonable assumptions is also built into the actuarial standards:

> 3.6.2 Range of Reasonable Assumptions—The actuary should recognize the uncertain nature of the items for which assumptions are selected and, as a result, may consider several different assumptions reasonable for a given measurement. The actuary should also recognize that *different actuaries will apply different professional judgment and may choose different reasonable assumptions. As a result, a range of reasonable assumptions may develop both for an individual actuary and across actuarial practice.*[26]

Notwithstanding the clear language contained in the relevant actuarial guidance, two recent court decisions have led to a flurry of challenges by withdrawing employers related to the use of disparate discount rates for funding and withdrawal liability purposes. To date, there have been four district court decisions specifically addressing this issue. Two of the decisions, *New York Times* and *Sofco*, which we contend were wrongly decided for the reasons outlined below,

rejected the use of disparate discount rates for funding and withdrawal liability purposes. Two other cases, *United Mine Workers of America 1974 Pension Plan v. Energy West Mining Company*[27] and *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*[28] reached the opposite result.[29] In the latter two cases, after proper application of the appropriate statutory burdens and examination of the relevant actuarial standards of practice, the courts upheld the arbitrators' decisions that the respective employers had failed to meet their burdens of proof.

HOW *NEW YORK TIMES* AND *SOFCO* GOT IT WRONG

The relevant facts underlying the *New York Times* and *Sofco* cases are nearly identical. Both cases involve participating employers that withdrew from the multiemployer pension plans to which they were obligated to contribute. In calculating the withdrawing employer's liability, the plans' actuaries utilized the Segal Blend method for purposes of determining the discount rates used to calculate the present value of the plan's UVBs. As stated above, the Segal Blend is an intermediate rate that uses both the market interest rates published by the PBGC—which are essentially "risk free" rates—and the plan's minimum funding investment return rate. While the employers made various challenges to their withdrawal liability calculations, a principle argument was that it was unreasonable as a matter of law to use different rates for purposes of determining a plan's minimum funding requirements and for valuing liabilities for withdrawal liability.[30] In both *New York Times* and *Sofco*, the arbitrators who heard the cases were experts in the complex field of withdrawal liability and affirmed the plans' assessments and calculations against the employers. The employers then appealed the arbitrators' decisions to the appropriate district courts, and the plans filed counterclaims to enforce the decisions.

In clear contravention of the actuarial standards highlighted above, the district courts in *New York Times* and *Sofco* overturned the arbitrators' decisions and found that the plans' use of disparate rates for minimum funding requirements and valuing liabilities for withdrawal liability was unreasonable. While ostensibly applying the appropriate standards, in their decisions the district courts misapplied those standards in a manner contrary to law. Specifically, the district courts: (1) placed the burden on the pension plans to prove that the actuarial assumptions used in their assessments were correct rather than on the withdrawing employer seeking to challenge the assessment as Congress had intended; and (2) substituted their own judgment for that of the arbitrator in clear violation of federal law. While *New York*

Times settled prior to a ruling on the merits by the Second Circuit, *Sofco* is, as of this writing, fully briefed, although oral argument has not yet been set.

What the Courts in New York Times *and* Sofco *Got Right*

In both *New York Times* and *Sofco*, the employers made the same argument: that in *Concrete Pipe,* the Supreme Court had ruled as a matter of law that use of disparate rates for funding and withdrawal liability purposes is *per se* unreasonable based upon the similar statutory language applicable to the selection of actuarial assumptions for funding and withdrawal liability purposes. Both the *New York Times* and *Sofco* courts rejected this argument.

Employers that make this argument rely on the following language from the *Concrete Pipe* decision:

> The use of the same language to describe the actuarial assumptions and methods to be used in these different contexts tends to check the actuary's discretion in each of them. "Using different assumptions [for different purposes] could very well be attacked as presumptively unreasonable both in arbitration and on judicial review.
>
> > "[This] view that the trustees are required to act in a reasonably consistent manner greatly limits their discretion, because the use of assumptions overly favorable to the fund in one context will tend to have offsetting unfavorable consequences in other contexts. For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of [29 U.S.C.] § 1082."[31]

No court, however, has ever found it *per se* unreasonable to use disparate actuarial assumptions for funding and withdrawal liability purposes, including the district courts in *Sofco* and *New York Times*.[32] While overturning arbitration decisions upholding the use of disparate assumptions, both district courts expressly recognized that neither statute nor case law supports the argument that actuarial assumptions for funding and withdrawal liability must be identical.[33]

In fact, in *Concrete Pipe* itself, the Supreme Court *upheld* an arbitration award in which the arbitrator had rejected the employer's

challenge to the plan actuary's use of the Segal Blend.[34] Thus, any claim that *Concrete Pipe* held that the use of disparate discount rates for minimum funding and withdrawal liability purposes is *per se* unreasonable is incorrect. Furthermore, even if such an inference could be drawn from that decision, the fact that the Court's ruling upheld an arbitration decision in which the arbitrator rejected a challenge to the use of the Segal Blend would render such an inference the textbook definition of *obiter dictum*.[35] Furthermore, as explained in *Energy West,* any such inference is directly contradicted by the Supreme Court's own language:

> But the very next sentence in the Supreme Court's opinion dispels any notion that the two rates must be the same as a matter of law: "This point is not significantly blunted by the fact that the assumptions used by the Plan in its other calculations may be supplemented by several actuarial assumptions unique to withdrawal liability."[36]

What the Supreme Court did hold in *Concrete Pipe*, is that 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.[37]

Additionally, subsequent to the Supreme Court's decision in *Concrete Pipe,* the standards applicable to actuarial assumptions used for minimum funding purposes was modified, so that the two standards are no longer the same.[38] Previously, both of the standards required only that the actuarial standards be reasonable "in the aggregate." Now, the standard applicable to the actuarial assumptions used for minimum funding purposes must be individually reasonable. As the court stated in *Manhattan Ford*:

> The minimum funding Section, then, requires actuarial assumptions and methods each of which is reasonable. The withdrawal liability Section differs in requiring that actuarial assumptions and methods be found reasonable in the aggregate. The former standard is tighter, more granular; it invites item-by-item comparison in a way the latter does not. Requiring that all assumptions, taken in the aggregate, be reasonable would seem to grant the actuary (and the Arbitrator) more latitude to craft a solution that is reasonable and fair overall, in light of the Plan's experience and expectations.[39]

Thus, with regard to evaluating the appropriateness of the discount rates selected by a plan's actuary for minimum funding and withdrawal liability purposes, not only are these discount rates being used

to predict different things, the standards for evaluating those assumptions are now different.

Failure to Apply the Appropriate Statutory Burden

Where the *New York Times* and *Sofco* courts went astray was in their misapplication of the statutory burdens. Both courts substituted their own actuarial judgments in place of the plans' actuaries and required that the plans use the discount rate assumption used to value its liabilities for statutory minimum funding purposes instead of the Segal Blend. These mistakes appear to have arisen from the district courts' misinterpretations of the statutory requirement that withdrawal liability assessments 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 . . .[40]

As explained in multiple court decisions, this "best estimate" requirement is not a substantive standard. Rather, it is:

> *procedural only, and does not place a second substantive hurdle* in the path of actuarial assumptions. Rather, it is "principally designed to insure that the chosen assumptions actually represent the actuary's own judgment rather than the dictates of plan administrators or sponsors."[41]

In other words, the "best estimate" requirement is meant to ensure that an actuary was not improperly influenced by third parties. By elevating the "best estimate" requirement into a substantive standard, the district courts in *New York Times* and *Sofco* managed to both eliminate all the statutory presumptions and allocations of the burden of proof and directly violate precedent.

In *New York Times*, although the employer at least produced an expert, it adduced *no evidence* that the actuary's assumptions were unreasonable. As stated by the arbitrator: "[t]he Times's expert did not opine whether the 6.5-percent effective discount rate resulting from the use of the Segal Blend was or was not a reasonable number."[42] 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 acknowledgement that she had used the Segal Blend as her "best estimate" when[43] 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].

Thus, the only support for the employer's assertion that the actuarial assumptions were unreasonable in the aggregate was the actuary's use of a higher discount rate (7.5 percent) in valuing the plan's liabilities for contributions required to fund the plan rather than the composite 6.5 percent rate she used in valuing the plan's liabilities for withdrawal liability purposes.

In *Sofco*, the lack of evidence purporting to show that the actuary's assumptions were unreasonable is even more glaring. Indeed, as in *New York Times,* the employer adduced no evidence of any kind to challenge any of the plan's actuarial assumptions. Unlike in *New York Times,* however, it did not even produce any expert testimony. Although the district court in *Sofco* does not fully explain the basis for its decision, its reliance on *New York Times* suggests that it based its decision upon the same misconceptions.

In both cases, the courts assumed that the discount rate used for determining the present value of the plan's liabilities for funding purposes and the discount rate used in determining plan liabilities for withdrawal liability purposes are necessarily measuring the same thing: the plan's anticipated rate of earnings. Based on this false premise, the district courts concluded the requirement that the "actuarial assumptions and methods …, in combination, offer the actuary's best estimate of anticipated experience under the plan" means that the interest rate assumption used to calculate withdrawal liability must offer the actuary's best estimate of the anticipated long-term rate of return on the plan's mix of assets. In doing so, the courts directly contradicted their own (correct) holdings which found that funding and withdrawal liability discount rates need not be identical as a matter of law. The courts in effect created their own presumption that any

discount rate for withdrawal liability different from the funding rate is presumed to be unreasonable, and imposed on the plans the burden of overcoming that presumption.

As explained above, the discount rates used for these two purposes do not measure the same thing. Although the discount rate used for minimum funding purposes is typically based on the plan's expected rate of return based upon its mix of assets, the discount rate used for withdrawal liability purposes might measure something quite different. In its simplest terms, that rate might be risk-adjusted, reflecting, in whole or in part, the withdrawn employers' settlement of its liabilities and defeasance of risk. This is, of course, explicitly permitted under the relevant actuarial standards.

Thus, the courts' misconstruction of the appropriate standard is directly contrary to the unambiguous statutory language and the Supreme Court's holding in *Concrete Pipe*. As explained above, ERISA explicitly places the burden of proof on the party challenging the actuarial assumptions to "*show by a preponderance of evidence* that the *assumptions were unreasonable in the aggregate*."[44] The statute contains no language that qualifies the standard of proof or shifts that burden based on whether the plan uses different assumptions for minimum funding and withdrawal liability. Further, the notion that an actuary must somehow "reconcile" the disparity among these assumptions ignores the express directive of the actuarial standards, which acknowledge that determining funding obligations and settling liabilities are two distinct purposes of measurement.

Misapplication of the Standard of Review

As with their decisions regarding the allocation of the burden of proof, the district courts in *New York Times* and *Sofco* also misapplied the appropriate standard for review of the arbitrators' decisions. 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.[45]

In substituting their judgment for that of the arbitrators, the district courts failed to comply with this statutory standard.

In *New York Times*, the district court determined that its review of the arbitrator's decision to reject the employer's challenge to the

discount rate assumption was a mixed issue of fact and law subject to the "clear error" standard. As explicitly recognized by the Supreme Court in *Concrete Pipe*, the question of 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.[46] Thus, while an arbitrator's purported failure to apply a correct standard in evaluating a matter of fact might itself be a mixed question, the underlying factual determination remains just that—a factual determination subject to full statutory deference. This principle has been recognized by several courts when evaluating similar challenges to a withdrawal liability assessment.[47]

The level of deference afforded to findings of fact by arbitrators has been construed as follows:

> The arbitrator was required to assess the facts of this case in light of the rebuttable presumption in favor of the [] Fund, and the district court, in turn, was required to review the arbitrator's findings of fact for clear error. We must also review the arbitrator's findings of fact for clear error, which means that we will only disturb the arbitrator's findings if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake has been committed.[48]

In explaining the reasons for this level of deference, the same court stated:

> Furthermore, deference to the findings of the arbitrator is proper because the arbitrators chosen to resolve the complicated issue of withdrawal liability often have relevant expertise in the field of pension law which can contribute significantly to the accuracy of a decision.[49]

The result in *New York Times* and *Sofco* demonstrate the wisdom of this statement.

The arbitrator in *New York Times* determined that the employer had presented no evidence that the plan's actuary's use of the Segal Blend was unreasonable.[50] Instead, the employer's 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.[51] The district court, however, failed to accord any discernable deference to the arbitrator's factual determinations regarding the appropriate discount rate. Instead, the district court merely substituted its own judgment for that of the arbitrator.

Even more disturbing, in *Sofco*, the employer did not even attempt to present any evidence at all regarding the discount rate assumption. Rather, citing to *New York Times*, it made the same legal argument expressly rejected by the district court in that case—that the use of disparate interest rates was unlawful. Nevertheless, without citing to any evidence in the record, the district court in *Sofco* relied upon *New York Times* to reverse the arbitrator's decision. In this sense, *Sofco* is on all fours with the erroneous decision in *New York Times*. In both cases, the employer presented no evidence that the use disparate discount rates was unreasonable. In both cases, the employer's sole argument was that the use of disparate discount rates was unlawful and unreasonable as a matter of law. In both cases, the district court correctly *rejected* the employer's argument. Nevertheless, in both cases, the district court ignored the evidence and the statutory presumptions, concluded that the use of disparate rates was unlawful, and itself selected the discount rate the plan was required to use.

The basis for the *New York Times'* court's erroneous decision may best be encapsulated in the following quote:

> [i]n sum, the actuary's testimony,[52] 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."[53]

The arbitrators in *New York Times* and *Sofco* specifically found that the employers presented no evidence that the discount rate used by the plan's actuary was unreasonable. Based on this finding, the arbitrators concluded that the employers had not met their burden. Indeed, the plans should have prevailed even if they presented *no evidence at all* of the reasonableness of the actuarial assumptions. Nevertheless, the district courts relied on their own misunderstanding of actuarial principles to not only shift the burden of proof to the plans and to reject the plans' affirmative evidence supporting the reasonableness of their discount rate assumption but also to substitute their own judgment for that of the arbitrators. This is clearly a misapplication of the appropriate standard.

THE COSTLY BURDEN THESE CASES THREATEN TO IMPOSE ON MULTIEMPLOYER PLANS

The use of different discount rates to determine a plan's minimum funding requirements and value liabilities for withdrawal liability purposes is common. As testified in *New York Times,* more than 30 percent of plans use the Segal Blend to value their unfunded vested benefits for withdrawal liability purposes.[54] Still, other plans use other rates, including the PBGC's risk-free discount rates applicable to pension plan terminations.[55] For these plans using disparate discount rates, the *New York Times* and *Sofco* decisions have perpetuated an unwarranted and improper hurdle—an undefined presumption of unreasonableness—that the plan must overcome in order to collect assessments of withdrawal liability. As explained above, *New York Times* settled prior to a ruling by the Second Circuit. *Sofco*, however, is currently pending before Sixth Circuit. If left unreversed, this 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 by the Sixth Circuit:

> The series of presumptions prescribed by the Multiemployer Act were intended by Congress 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*."
>
> In an attempt to circumvent these problems, Congress granted the presumption in favor of the trustees' calculation of withdrawal liability. The burden of proof is on the employer. In meeting this burden, the test is not which withdrawal determination is the most reasonable but rather whether the challenged determination is unreasonable or clearly erroneous.[56]

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 parts 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.[57] 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.[58]

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[59] to collect contributions from a contributing employer, the Sixth Circuit stated:

> The passage of § 515 arose from Congress's concern that "simple collection actions brought by plan trustees [had] been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions, and steps [were required] to simplify delinquency collection." [*Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 87 (1982)] (internal quotation marks omitted). As the Seventh Circuit explained:
>
>> [Multi-employer] plans rely on documents to determine the income they can expect to receive, which governs their determination of levels of benefits. . . . Once they promise a level of benefits to employees, they must pay even if the contributions they expected to receive do not materialize. . . . Costs of tracking down reneging employers and litigating also come out of money available to pay benefits. The more complex the litigation, the more the plan must spend. Litigation involving conversations between employers and local union officials—conversations to which plans are not privy—may be especially costly, and hold out especially great prospects of coming away empty-handed.
>
> [*Cent. States, Se. & Sw. Areas Pension Fund v. Gerber Truck Serv., Inc.,* 870 F.2d 1148, 1151 (7th Cir. 1989) (*en banc*).]. Thus, governing law restricts the defenses employers may raise to suits brought to collect delinquent contributions to ERISA funds.[60]

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, reversable only on clear error. 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 courts' decisions are both contrary to the plain language of ERISA, the clear expression of Congressional intent, and the controlling case law.

NOTES

1. *New York Times Co. v. Newspaper & Mail Deliverers'- Publishers' Pension Fund,* 303 F. Supp. 3d 236, 254 (S.D.N.Y. 2018); *Sofco Erectors, Inc. v. Trustees of Ohio, Operating Engineers, Pension Fund,* No. 2:19-CV-2238, 2020 WL 2541970, slip. op. at *8–9 (S.D. Ohio May 19, 2020).

2. 29 U.S.C. §§ 1001 *et seq.*

3. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 720 (1984) (citing to *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980)).

4. 29 U.S.C. §§ 1381 *et* seq.

5. ERISA §§ 4201(a), 4203(a), 4205(a), 29 U.S.C. §§ 1381(a), 1383(a), 1385(a).

6. ERISA § 4201(a); 29 U.S.C. § 1381(a).

7. *See R.A. Gray & Co.*, 467 U.S. at 725.

8. ERISA § 4211(b)-(d); 29 U.S.C. § 1391(b)-(d).

9. *See* ERISA § 4211; 29 U.S.C. § 1391.

10. ERISA § 4219(b)(2)(A), 29 U.S.C. § 1399(b)(2)(A).

11. ERISA § 4221(a)(1), 29 U.S.C. § 1401(a)(1).

12. ERISA § 4221(b)(2), 29 U.S.C. § 1401(b)(2).

13. ERISA § 4221(b)(1), 29 U.S.C. § 1401(b)(1).

14. ERISA § 4221(d), 29 U.S.C. § 1401(d).

15. *Id.,* 29 C.F.R. § 4219.31(d).

16. ERISA § 4221(a)(3)(B)(i), 29 U.S.C. § 1401(a)(3)(B)(i) (emphasis added).

17. *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for Southern California,* 508 U.S. 602, 634–35 (1993). *See Board of Trustees, Michigan Food and Commercial Workers v. Eberhard Foods,* 831 F.2d 1258, 1263 (6th Cir. 1987) ("the employer is only entitled to complain if he proves that the actuarial assumptions applied by the trustees in the aggregate are unreasonable.").

18. *http://www.actuarialstandardsboard.org/wp-content/uploads/2014/02/asop027_172.pdf*; *see also*, *http://www.actuarialstandardsboard.org/wp-content/uploads/2020/07/asop027_197.pdf*.

19. IRC §§ 412 and 431, 26 U.S.C. §§ 412 and 431.

20. IRC §§ 431(a), (b)(2), (3), 26 U.S.C. § 431(a), (b)(2), (3).

21. *See* IRC §§ 275(a)(6), 432(a), (b)(2), (e), 4971(a)(2), (b), (g), 26 U.S.C. §§ 275(a)(6), 432(a), (b)(2), (e), 4971(a)(2), (b), (g).

22. ASOP 27, § 3.9 (emphasis added).

23. *Id.*

24. *Id.*

25. *See* ASOP 27, § 3.9(c).

26. ASOP 27, § 3.6.2 (emphasis added).

27. *(Slip op.),* C.A. No. 1:18-cv-01905 (CJN), (D. DC May 22, 2020).

28. 331 F. Supp. 3d 365 (D.N.J. 2018).

29. Of these three cases, only *Energy West* is on appeal. *United Mine Workers of America 1974 Pension Plan v. Energy West Mining Company,* No. 20-07054 (D.C. Cir. Filed Jun 24, 2020). Although appeals were initiated in the other two cases, they were either withdrawn or settled. *Manhattan Ford Lincoln Inc v. UAW Local 259 Pension Fund*, No. 2:17-cv-05076-KM-MAH (3d Cir. Oct. 9, 2018), ECF No. 32; *New York Times Company v. Newspaper and Mail Deliverers'-Publishers' Pension Fund*, No. 18-01140 (2d Cir. Oct. 16, 2019), ECF 127, No. 18-1408, ECF 101.

30. In *New York Times*, the applicable PBGC rates for calculating the Segal Blend were 5.50% for the first 20 years and 5.02% thereafter, and the discount rate used for minimum funding was 7.5%, yielding an effective discount rate of approximately 6.5%. In *Sofco*, the applicable PBGC rates for purposes of calculating the Segal Blend were 2.44% for the first 20 years and 2.74% thereafter and the discount rate for minimum funding was 7.25%.

31. *Concrete Pipe, supra* n.17 at 632–33, quoting from *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.,* 787 F. 2d, 128 at 146–47 (Seitz, J., dissenting in part). *Affirmed* by an equally divided court, 481 U. S. 735 (1987).

32. *Slip op.* at 18–19; *see New York Times, supra* n.1 at 254; *see also Energy West, supra* n.29, *slip op.* at 15–16; *Manhattan Ford, supra* n.29 at 386.

33. *Id.*

34. *See In re Concrete Pipe,* Arbitration Decision, reprinted at Brief for Defendants' Appellees-Cross-Appellants, *Newspaper and Mail Delivers'—Publishers Pension Fund, et al., New York Times*, Case No. 18-1140 (2nd Cir.), p. Add.91–Add.94, ECF 57-4, pp. 27–30.

35. "Latin 'something said in passing.' A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *Black's Law Dictionary* (11th ed. 2019).

36. *Energy West, supra* n.29, *slip op.* at 15, quoting *Concrete Pipe, supra* n.17 at 633; *see Manhattan Ford, supra* n.29 at 387.

37. *Concrete Pipe, supra* n.17 at 635.

38. § 201 of the Pension Protection Act of 2006, Pub. L. 109-280, 120 State. 780, *amending* ERISA § 304(c)(3)(a), 29 U.S.C. § 1084(c)(3)(a), and 26 U.S.C. § 431(c)(3)(a).

39. *Manhattan Ford,* 331 F. Supp 3d at 386–87.

40. ERISA § 4213(a)(1), 29 U.S.C. § 1393(a)(1) (emphasis added).

41. *Rhoades, McKee & Boer v. United States,* 43 F.3rd 1071, 1075 (6th Cir. 1995) citing *Vinson & Elkins v. Comm'r of Internal Revenue,* 7 F.3d 1235, 1238 (5th Cir.1993);

Wachtell, Lipton, Rosen & Katz v. Comm'r of Internal Revenue, 26 F.3d 291, 296 (2d Cir.1994). *See e.g., Citrus Valley Estates, Inc. v. Comm'r.,* 49 F.3d 1410, 1415 (9th Cir. 1995); *Huber v. Casablanca Indus., Inc.,* 916 F.2d 85, 93 (3d Cir. 1990); *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.,* Civ. A. No. 1:18-cv-01905, 2020 BL 192243 (D.D.C. May 22, 2020).

42. The New York Times Co. Appendix A1 (NYT App. A1), p. A.36.

43. *New York Times*, *supra* n.1 at 255.

44. ERISA § 4213(a)(1), 29 U.S.C. § 1393(a)(1) (emphasis added).

45. ERISA § 4221(c), 29 U.S.C. § 1401(c).

46. *Concrete Pipe, supra* n.17.

47. *Eberhard Foods, supra* n.17 at 1262. *See Concrete Pipe, supra* n.17 at 635; *Manhattan Ford*, *supra* n.29 at 379–80.

48. *Sherwin-Williams*, 158 F.3d at 393, citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 570 (1985).

49. *Sherwin-Williams, supra* n.48.

50. NYT App. A1, p. A.36.

51. *New York Times*, *supra* n.1 at 255; NYT App. Al, p. A. 36.

52. The *New York Times'* court's belief that the actuary had testified that the use of the Segal Blend was *not* her best estimate was also erroneous and is flatly contradicted by the record. Deposition of Rosana Egan, *New York Times,* Appendix Vol. II, p. A.192 (2nd Cir. Case No. 18-1140), ECF No. 38, p. 92.

53. *New York Times, supra* n.1 at 256 (citations omitted, emphasis added).

54. NYT App. A1, p. A.34.

55. *See, e.g., Energy West, supra* n.29, *slip op*. at 4.

56. *Eberhard, supra* n.17 at 1260–61, quoting fromH.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 1, 86, reprinted in 1980 U.S. Code Cong. & Admin. News 2918, 2954 (citations omitted, emphasis added); *see Concrete Pipe, supra* n.17 at 628 (relying on the same legislative history).

57. *See Findlay Truck Line, Inc. v. Cent. States, Se. & Sw. Areas Pension Fund,* 726 F.3d 738, 742 (6th Cir. 2013); *T.I.M.E.-DC, Inc. v. Mgmt.-Labor Welfare & Pension Funds of Local 1730 Longshoremen's Ass*ociation, 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).").

58. *Concrete Pipe, supra* n.17 at 628, *quoting* H. R. Rep. *supra* n.56.

59. § 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.

60. *Operating Engineers Local 324 Health Care Plan v. G&W Constr. Co.,* 783 F.3d 1045, 1051–52 (6th Cir. 2015) (emphasis added); *see also Benson v. Brower's Moving & Storage, Inc.,* 907 F.2d 310, 314 (2d Cir. 1990).

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