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## Does the Imposition of Pension Plan Withdrawal Liability on an Employer Constitute a Taking of Property Without Due Process?

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## *Does the imposition of pension plan withdrawal liability on an employer constitute a taking of property without due process?*

by Jay E. Grenig

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**Concrete Pipe and Products of California, Inc.**  
v.  
**Construction Laborers Pension Trust for Southern  
California**  
(Docket No. 91-904)

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*Argument Date: December 1, 1992*

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### ISSUE

In this case the Supreme Court is asked to determine whether application of provisions of the Multiemployer Pension Plan Amendments Act, imposing withdrawal liability on an employer who allegedly never had employees vested in the plan and whose collective bargaining agreements specifically limited liability to contributions made, violates the Fifth Amendment. The Court is also asked to determine whether the presumptions in 29 U.S.C. § 1401, creating a presumption in favor of determinations by plan trustees, violate the due process rights of an employer.

### FACTS

Concrete Pipe and Products of California, Inc. (CP&P) manufactures and sells concrete pipe in California. CP&P was created in 1976 when it purchased certain assets of Cen-Vi-Ro, including a production facility in Shafter, California. After purchasing the assets, CP&P made contributions in accordance with various collective bargaining agreements, including one negotiated in 1978, to the Construction Laborers Pension Trust for Southern California (CLPT) for covered employees at its Shafter facility.

CLPT is a multiemployer pension trust fund established in 1962. Employers and employees are equally represented by trustees in the administration of CLPT.

In 1979 CP&P closed the Shafter facility, claiming it intended to relocate to a different community. By August 1979, only two full-time workers remained at the Shafter facility, neither of whom was covered by a contract requiring contributions to CLPT.

In September 1980, Congress enacted the Multiemployer Pension Plan Amendments Act (MPPAA). Under the MPPAA, plan trustees may assess liability on an employer withdrawing from the plan based on the employer's propor-

tionate share of the plan's unfunded vested liabilities. 29 U.S.C. § 1401(a)(3) provides a presumption that a trustee's determination is correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

In April 1981, the Laborers Union gave notice of its intention to terminate the 1978 union contract with CP&P and requested negotiations for a successor contract covering the Shafter facility. By November 30, 1981, the negotiations with the Laborers reached an impasse, and CP&P notified the Laborers Union that it was withdrawing recognition. CLPT asserts that this event terminated CP&P's obligation to contribute, triggering a complete withdrawal. CP&P maintains that the August 1979 cessation of covered operations at the Shafter facility before the enactment of the MPPAA was the withdrawal.

Sometime after November 1981, CP&P concluded that it needed to use the Shafter facility to produce concrete pipe for two new contracts it had won. CP&P produced new pipe at the Shafter facility, and it did not make contributions to CLPT. After the two contracts were completed, the facility was shut down.

CLPT claims that the production of pipe at the Shafter facility after November 1981 establishes that the 1979 closure was not permanent within the meaning of 29 U.S.C. § 1383(a)(2). In January 1982, CLPT issued its withdrawal liability demand in the amount of \$268,168.81.

The dispute over CP&P's withdrawal liability was submitted to arbitration in bifurcated hearings in 1987 and 1988. The 1987 arbitration determined that CP&P's actions in 1981 constituted a cessation of CP&P's "obligation to contribute" to the CLPT pension plan, producing a complete withdrawal by CP&P from CLPT and subjecting CP&P to withdrawal liability under the MPPAA. The arbitrator rejected CP&P's argument that it had withdrawn from the plan prior to the effective date of the MPPAA, holding that December 15, 1981, was the date of withdrawal. In his 1988 decision, the arbitrator, applying 29 U.S.C. § 1401(a)(3)(B), found that the withdrawal liability of CP&P was \$190,465.57.

The U.S. District Court for the Central District of California affirmed the arbitrator's decision in its entirety. CP&P appealed and the U.S. Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion.

### BACKGROUND AND SIGNIFICANCE

A multiemployer pension plan is the product of collective bargaining between employers and a union. Typically, an

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employer agrees to make a designated contribution to the pension plan for each hour of employee time. Under federal labor law, trustees of a multiemployer plan are taken one-half from union representatives and one-half from employer representatives.

A 1978 study by the Pension Benefit Guaranty Corporation (PBGC) found that, once an employer in a multiemployer plan suspected the plan was in financial trouble, there was an incentive for the employer to withdraw from the plan to avoid higher contribution levels. A trickle of employers dropping out would soon lead to a torrent, leaving a multiemployer plan in a hopeless financial position and potentially saddling the federal insurance system with significant liabilities.

In response to the study, Congress enacted the MPPAA in 1980 in order to reduce the economic incentive of employers to withdraw from multiemployer plans. Under the MPPAA, plan trustees assess a liability on an employer withdrawing from the plan based on the employer's proportionate share of the plan's unfunded vested liabilities. Unfunded vested liabilities are calculated by subtracting plan assets from the present value of vested retirement benefits of plan participants.

In *Connolly v. PBGC*, 475 U.S. 211 (1986), the Supreme Court upheld the facial constitutionality of the MPPAA, rejecting contentions that the MPPAA denies substantive due process and results in unconstitutional takings in violation of the Fifth Amendment. However, a concurring opinion in *Connolly* recognized that the actual application of the MPPAA may violate the Fifth Amendment rights of some employers. Now, the Court is being asked to determine whether the actual application of the MPPAA to CP&P violated CP&P's Fifth Amendment rights.

Five of six U.S. courts of appeals that have considered the matter have upheld the constitutionality of the presumptions in Section 1401. The Third Circuit's decision that the presumptions in Section 1401 are unconstitutional was affirmed by an equally divided Supreme Court in *PBGC v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987). The Court is now being asked to determine whether the application of the presumptions in Section 1401 violated the due process rights of CP&P.

## ARGUMENTS

***For Concrete Pipe and Products of California, Inc.*** (Counsel of Record, James M. Nelson; Diepenbrock, Wulff, Plant & Hannegan, 300 Capitol Mall, STE 1700, PO Box 3034, Sacramento, CA 95812-3034; telephone (916) 444-3910):

1. The MPPAA as applied to CP&P is arbitrary and irrational and violates the substantive due process rights of CP&P.
2. The MPPAA withdrawal liability provisions constitute a taking without just compensation in violation of the Fifth Amendment as applied to CP&P.
3. The effect of MPPAA as applied to CP&P is that the CLPT is empowered by operation of law to seize assets

constituting 46 percent of CP&P's book value net worth for the purpose of funding a level of pension benefits to employees of other employers, which was never promised by CP&P.

4. The dispute resolution mechanisms of 29 U.S.C. § 1401 deprived CP&P of an impartial decision-maker because the presumptions favor the plan trustees who have both structural and actual bias.

***For Construction Laborers Pension Trust for Southern California*** (Counsel of Record, John S. Miller, Jr.; Cox, Castle & Nicholson, 2049 Century Park East, STE 2800, Los Angeles, CA 90067; telephone (310) 277-4222):

1. The application of the MPPAA to CP&P is not a denial of substantive due process or an unconstitutional taking of property in violation of the Fifth Amendment.
2. The statutory presumptions of the MPPAA do not violate the Due Process Clause, as they are burdens of proof appropriately allocated and adjudicated by impartial decision makers.

## AMICUS BRIEFS

***In Support of Concrete Pipe and Products of California, Inc.***

American Trucking Associations, Inc. (Counsel of Record, Daniel R. Barney, ATA Litigation Center, 2200 Mill Road, Alexandria, VA 22314-4677; telephone (703) 838-1865).

Midwest Motor Express, Inc., the MPPAA Solvency Coalition, and the National Tank Truck Carriers, Inc. (Counsel of Record, Alan J. Thiemann; Taylor Thiemann & Aitken, 908 King Street, STE 300, Alexandria, VA 22314; telephone (703) 836-9400).

***In Support of Construction Laborers Pension Trust for Southern California***

Pension Benefit Guaranty Corporation (Counsel of Record, Carol Connor Flowe, Pension Benefit Guaranty Corporation, 2020 K Street, NW, Washington, DC 20006; telephone (202) 778-8820).

American Academy of Actuaries (Counsel of Record, Lauren M. Bloom, American Academy of Actuaries, 1720 Eye Street, NW, Washington, DC 20006; telephone (202) 223-8196).

National Coordinating Committee for Multiemployer Plans (Counsel of Record, David R. Levin; Feder & Associates, 1350 Connecticut Avenue, NW, STE 600, Washington, DC 20036; telephone (202) 955-8305).

Teamsters Pension Trust Fund of Philadelphia and Vicinity, the Dairy Industry-Union Pension Fund of Philadelphia and Vicinity (Counsel of Record, James D. Crawford; Schnader, Harrison, Segal & Lewis, 1600 Market Street, STE 3600, Philadelphia, PA 19103; telephone (215) 751-2288).

American Federation of Labor and Congress of Industrial Organizations (Counsel of Record, Laurence Gold, 815 16th Street, NW, Washington, DC 20006; telephone (202) 637-5390).