Nos. 06-3362, 06-3397, 06-4040

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

---

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND; JACK STEWART,

Plaintiffs-Appellees/Cross-Appellants,

*v.*

EL PASO CGP CO., *et al.*,

Defendants-Appellants/Cross-Appellees.

---

On Appeal from the United States District Court
for the Northern District of Illinois
No. 04 C 7872 (Coar, J.)

---

# BRIEF FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL ASSOCIATION OF MANUFACTURERS SUPPORTING DEFENDANTS-APPELLANTS

---


William J. Kilberg, P.C.
Paul Blankenstein
William M. Jay
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

*Attorneys for Amici Curiae*

*(Additional counsel listed on inside cover)*

OF COUNSEL:

Stephen A. Bokat
Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Jan S. Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-3000

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

1. The full name of the parties that undersigned counsel represent in the case is:

   *Amici curiae* Chamber of Commerce of the United States of America and National Association of Manufacturers.

2. The only law firm whose partners or associates have appeared for the parties in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the parties in this court is:

   Gibson, Dunn & Crutcher LLP.

3. *Amici curiae* have no parent corporation, and no publicly held company owns 10% or more of either *amicus*'s stock.

## TABLE OF CONTENTS

**Page**

INTEREST OF THE *AMICI CURIAE* ..... 1

STATEMENT ..... 2

A. ANR's Bankruptcy And The Fund's Claim Against ANR ..... 2

B. The Fund's Claim Against The El Paso Defendants ..... 3

C. The District Court's Decision ..... 5

SUMMARY OF ARGUMENT ..... 7

ARGUMENT ..... 10

I. MPPAA's Notice Provisions Must Be Construed To Provide Constitutionally Adequate Notice ..... 10

A. Due Process Precludes Imposing Liability Without Adequate Notice ..... 12

B. Construed To Avoid Due-Process Concerns, MPPAA Requires Express Notice Before Imposing Liability On A Former Controlled-Group Member ..... 14

II. The District Court's Interpretation Of MPPAA's Notice Provision Offends Due Process ..... 23

A. The Fund Did Not Inform The El Paso Defendants In 2002 That It Had Filed A Proof Of Claim Against ANR ..... 24

B. The Proof Of Claim Against ANR Was Not Adequate Notice To The El Paso Defendants Under MPPAA ..... 25

C. The Proof Of Claim Against ANR Was Not Constitutionally Adequate Notice To The El Paso Defendants ..... 26

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*,
522 U.S. 192 (1997) ... 22

*Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*,
85 F.3d 1282 (7th Cir. 1996) ... 16, 17

*Central States, Southeast & Southwest Areas Pension Fund v. Slotky*,
956 F.2d 1369 (7th Cir. 1992) ... 18, 19, 20, 21, 27

*Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*,
508 U.S. 602 (1993) ... 15, 21

*Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*,
485 U.S. 568 (1988) ... 11

*Fogel v. Zell*,
221 F.3d 955 (7th Cir. 2000) ... 12, 13, 14

*Folger Adam Securities v. DeMatteis/MacGregor, JV*,
209 F.3d 252 (3d Cir. 2000) ... 14

*Hopi Tribe v. Navajo Tribe*,
46 F.3d 908 (9th Cir. 1995) ... 14, 24

*Mennonite Board of Missions v. Adams*,
462 U.S. 791 (1983) ... 13, 25

*Mullane v. Central Hanover Bank & Trust Co.*,
339 U.S. 306 (1950) ... 12, 13, 25

*Rheem Manufacturing Co. v. Central States, Southeast & Southwest Areas Pension Fund*,
63 F.3d 703 (8th Cir. 1995) ... 16

*Trustees v. Central Transport, Inc.*,
888 F.2d 1161 (7th Cir. 1989) ... 9

*Tulsa Professional Collection Services v. Pope*,
485 U.S. 478 (1988) ... 13, 20, 21, 22, 25

## TABLE OF AUTHORITIES (continued)

**Page(s)**

**Statutes**

29 U.S.C. § 1301(b)(1) .......... 16

29 U.S.C. § 1369(b) .......... 17

29 U.S.C. § 1382 .......... 15

29 U.S.C. § 1392(c) .......... 8, 17, 18

29 U.S.C. § 1398(1)(A) .......... 17

29 U.S.C. § 1399(a) .......... 22

29 U.S.C. § 1399(b) .......... 8

29 U.S.C. § 1399(b)(1) .......... 6, 15

29 U.S.C. § 1399(b)(1)(A) .......... 18

29 U.S.C. § 1399(b)(1)(B) .......... 26

29 U.S.C. § 1399(b)(2)(A) .......... 4, 16

29 U.S.C. § 1399(c)(2) .......... 4, 16, 18

29 U.S.C. § 1401(a)(1) .......... 4, 16, 18

29 U.S.C. § 1401(a)(1)(A) .......... 6, 18

29 U.S.C. § 1401(a)(1)(B) .......... 4

**Regulations**

29 C.F.R. § 4001.2 .......... 16

29 C.F.R. § 4001.3(a)(1) .......... 16

29 C.F.R. § 4001.3(a)(2) .......... 16

Treas. Reg. § 1.414(c)-2(b)(1)(ii) .......... 28

Treas. Reg. § 1.414(c)-2(b)(2) .......... 16

Treas. Reg. § 1.414(c)-2(b)(2)(i)(A) .......... 28

## INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. Its underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Both the Chamber and the NAM represent companies that sell, spin off, merge, or otherwise transfer interests in business units that participate in multiemployer pension plans. In conducting these transactions, members of the Chamber and the NAM need workable rules specifying when they can be liable for the subsequent withdrawals from these plans of their former business units that go into bankruptcy. This case presents the questions whether a company can be held responsible for its former business unit's

withdrawal liability without proper notice, and whether the opportunity to challenge that liability can be forfeited based on a boilerplate proof of claim filed in bankruptcy court that does not meet the statutory notice requirements. If the district court's decision is affirmed, the *amici*'s members face a very real possibility that multiemployer pension plans will seek to use the same tactics against them.

## STATEMENT

### A. ANR's Bankruptcy And The Fund's Claim Against ANR

ANR Advance Transportation Company, Inc. ("ANR") was contractually obligated to contribute to the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund ("the Fund"), a multiemployer pension plan. The appellants in this case, El Paso CGP Company and several of its affiliates ("the El Paso Defendants"), had indirectly owned one of the companies that, in November 1995, were merged to form ANR. Following the merger, the El Paso Defendants owned only 50% of ANR's parent company.[1] Appellants' Appendix (App.) 3-5.

Several years later, ANR went bankrupt and ceased contributing to the Fund. In June 1999, the Fund filed a claim against ANR in the bankruptcy court, asserting that ANR was obliged to pay "withdrawal liability" under the Multiemployer Pension Plan

---

1 The parent, ANR Advance Holdings, was also a defendant below, but defaulted. Its liability is not relevant to this appeal.

Amendments Act of 1980 ("MPPAA"). App. 114. When an employer completely "withdraws" from a multiemployer pension plan by permanently ceasing to have an obligation to contribute to the plan, or by ceasing all covered operations under the plan, MPPAA authorizes the plan to assess "withdrawal liability" that generally reflects the withdrawing employer's share of the plan's unfunded vested liabilities. Here, the Fund assessed ANR's withdrawal liability at approximately $1.74 million. App. 114. The proof of claim filed in the ANR bankruptcy proceedings did not contain any reference to the El Paso Defendants, to any company other than ANR, or to the merger that had created ANR. *See* App. 114. The Fund did not provide the El Paso Defendants with a copy of the proof of claim, directly or indirectly, and the El Paso Defendants did not even learn of its existence until sometime between September 1, 2001, and January 1, 2002, when one of their officers happened to be perusing the claims register in the ANR bankruptcy. App. 272.

### B. The Fund's Claim Against The El Paso Defendants

In November 2004, more than five years after filing the proof of claim in ANR's bankruptcy, the Fund first notified the El Paso Defendants by letter that it held them responsible for ANR's withdrawal liability. App. 63-66. The Fund asserted that "a withdrawn employer and all trades or businesses under common control with it are liable for the withdrawn employer's proportionate share" of withdrawal liability, but did

not specify any basis for asserting that the El Paso Defendants and ANR were "under common control" when ANR withdrew from the Fund. App. 63.

The El Paso Defendants received the demand letter on November 20, 2004, and timely asked the Fund to review its determination. *See* App. 287 (¶¶ 55-56); 29 U.S.C. § 1399(b)(2)(A) (employer may seek review within 90 days of receipt of notice). When the Fund did not do so within 120 days, the El Paso Defendants timely sought to arbitrate the dispute. *See* App. 294 (¶ 34); 29 U.S.C. § 1401(a)(1), (a)(1)(B) (an employer may request arbitration within 60 days after the 120-day time period expires). During this time the El Paso Defendants made interim payments to the Fund against the assessed liability, without conceding the obligation to pay.[2] App. 288-89 (¶¶ 58-65).

Meanwhile, on December 6, 2004 (sixteen days after the El Paso Defendants received the demand letter), the Fund filed this action in the district court to collect the withdrawal liability. App. 1. The complaint conceded that in the normal course "no member of [the El Paso Defendants] would be liable for withdrawal liability incurred by [ANR], after the merger" that formed ANR, because that merger removed the El Paso Defendants from ANR's controlled group. App. 5 (¶ 21). But the complaint asserted, for the first time anywhere, that "a principal purpose of the [1995] merger . . . was to

---

[2] Under MPPAA, an employer challenging a plan's withdrawal-liability demand generally must make payments to the plan while it pursues the challenge. 29 U.S.C. § 1399(c)(2).

evade or avoid withdrawal liability," and therefore that the merger transaction should be treated as a nullity and the El Paso Defendants should be reinstated as part of ANR's controlled group. App. 6 (¶¶ 28-29).

### C. The District Court's Decision

On cross-motions for summary judgment, the district court held for the Fund. In the court's view, the El Paso Defendants were completely barred from offering any challenge to the Fund's assertion of withdrawal liability because they had not immediately sought to arbitrate the question of their *own* liability when they learned that the Fund had filed a proof of claim in the ANR bankruptcy.

The court took it as undisputed—and dispositive—that the El Paso Defendants (or their predecessors) were *at one time* members of the ANR controlled group. Whether the El Paso Defendants had successfully severed their ties before ANR incurred the withdrawal liability, or whether the transaction that severed those ties should be set aside as an attempt to "evade or avoid" withdrawal liability, did not concern the court. In the court's view, those questions were "for the arbitrator to determine." Appellant's Short Appendix (SA) 34.

The court held, however, that it was too late for the El Paso Defendants to present their case to an arbitrator. Under MPPAA, the time for seeking reconsideration and then arbitration generally runs from the date on which a multiemployer plan "notif[ies] [a withdrawing] employer of . . . the amount of the liability, and . . . the schedule for li-

ability payments, and . . . demand[s] payment in accordance with the schedule." 29 U.S.C. § 1399(b)(1); *see id.* § 1401(a)(1)(A). The district court held that the El Paso Defendants had received the requisite notification of an obligation to pay withdrawal liability by January 1, 2002, when they learned that the Fund had filed a proof of claim in the ANR bankruptcy. SA 36, 38. The court relied on Seventh Circuit cases holding that a proof of claim filed in a bankruptcy proceeding can satisfy MPPAA's requirement of a notice of withdrawal liability and express demand for payment. *See* SA 36. And the district court concluded that anyone who receives a demand from a multiemployer plan must immediately invoke the MPPAA dispute-resolution procedure—and make interim payments of withdrawal liability—in order to contest liability. SA 37.

Although the El Paso Defendants protested that the proof of claim against ANR was not sufficient to show that the Fund was asserting withdrawal liability against *them*, the district court dismissed that argument on the ground that the El Paso Defendants "ha[d] already admitted receipt of the proof of claim." SA 37. And although the district court agreed that "the only means by which [the Fund] was able to assess liability upon [the El Paso Defendants] . . . is by declaring the . . . 1995 merger an evade or avoid transaction," SA 40, and although the El Paso Defendants pointed out that the Fund had never notified them of any such declaration at any time before filing suit, the court thought that the evade-or-avoid allegation *in the complaint*—filed in December 2004,

nearly three years after the date the district court said the El Paso Defendants had the requisite notice—was sufficient to meet that requirement. SA 32.

The court then briefly discussed and dismissed the El Paso Defendants' due-process argument on the ground that MPPAA has been held to be *facially* valid, and that the defendants were not entitled to contest membership in ANR's controlled group. SA 40-41.

**SUMMARY OF ARGUMENT**

The district court held that the El Paso Defendants had an obligation to seek arbitration at a time when they had no reason to believe that the Fund was asserting a withdrawal-liability claim against them, and that it was too late for them to seek arbitration when the Fund finally advised them of that claim and the evade-or-avoid allegation that concededly was "the only basis" for the claim. That decision simply cannot stand.

Under MPPAA, when an employer withdraws from a multiemployer plan, all members of the employer's controlled group are jointly and severally responsible for the resulting withdrawal liability. The statute also recognizes that membership in a controlled group is not eternal and that members may sever their ties to the group. For example, if an employer that is contractually obligated to contribute to a multiemployer plan starts out as a wholly owned subsidiary of another company, but then is spun off as an independent, stand-alone entity, the former parent will no longer be part of the employer's controlled group, and will not be liable if—sometime later—the spun-off company withdraws from the plan.

MPPAA respects the validity of such transactions, unless "a principal purpose of [the] transaction is to evade or avoid [withdrawal] liability," in which case "liability shall be determined and collected . . . without regard to such transaction." 29 U.S.C. § 1392(c). Since determinations of withdrawal liability are made in the first instance by the plan, *see id.* § 1399(b), a *former* member of the controlled group—like the El Paso Defendants—has no reason to believe that it has any continuing exposure to withdrawal liability unless the plan notifies the former member of a finding that it exited the controlled group through a sham transaction—that is, a transaction that had a principal purpose to evade or avoid withdrawal liability.

Here, the first notice provided by the Fund to the El Paso Defendants demanding the payment of withdrawal liability was a letter received November 20, 2004. The El Paso Defendants acted accordingly, and timely sought arbitration of the Fund's claim that they were responsible for ANR's withdrawal liability.

The district court did not dispute that the El Paso Defendants' request for arbitration was timely if measured from the receipt of the demand letter. Instead, misapplying relevant decisions of this Court, the district court held that the El Paso Defendants' statutory obligation to seek arbitration was triggered when they learned, by early 2002, that the Fund had filed a proof of claim in the ANR bankruptcy. But there is nothing about the act of filing a proof of claim against ANR that should have reasonably alerted the El Paso Defendants that the Fund was seeking to impose withdrawal liability on

*them*, let alone that the Fund had secretly made the necessary finding that the 1995 merger was done to evade or avoid withdrawal liability. Filing a proof of claim against a bankrupt employer is what multiemployer plans do in the normal course. And there was nothing special about the proof of claim here that would even have hinted that the Fund had broadened its withdrawal-liability demand to include *former* controlled group members like the El Paso Defendants. Indeed, the Fund's proof of claim would have been no different if the Fund had never pursued (and never intended to pursue) withdrawal liability against the El Paso Defendants.

The district court improperly relied on the general rule that notice to one member of the controlled group is notice to all members of that group.[3] Here, the threshold question is whether the El Paso Defendants were members of the controlled group at the time of ANR's withdrawal. The complaint concedes that the 1995 merger transaction removed the El Paso Defendants from the ANR controlled group. Since the 1995 transaction is presumptively valid absent an evade-or-avoid determination by the Fund, the proof of claim could not constitute the necessary notice because it did not contain that determination, either expressly or by any reasonable implication.

The district court held, however, that the Fund had satisfied its obligations to make that determination and to so notify the El Paso Defendants by alleging *in the complaint*—

[3] *See, e.g.*, *Trustees v. Cent. Transp., Inc.*, 888 F.2d 1161, 1163-64 (7th Cir. 1989).

filed in December 2004—that the 1995 transaction was invalid. Yet the district court also held that by December 2004 the El Paso Defendants had already long since forfeited their right to seek arbitration. These two irreconcilable conclusions badly misread the relevant provisions of MPPAA and seriously offend basic principles of due process. Nothing in the statute obliges the federal courts to let a multiemployer pension plan lie in wait, concealing determinations that could impose millions of dollars in withdrawal liability on innocent parties, only to spring the trap once the time has expired to challenge the plan's self-interested determination. MPPAA cedes extraordinary authority to multiemployer plans, but both due process and the statute itself require as a safeguard that those plans provide appropriate notice to the targets of their withdrawal-liability claims. The routine proof of claim filed against ANR did not provide the El Paso Defendants with the requisite notice.

## ARGUMENT

### I. MPPAA's Notice Provisions Must Be Construed To Provide Constitutionally Adequate Notice

This case is far from the run-of-the-mill withdrawal-liability litigation in which the only defendant is the withdrawing employer and the only contested issue is the amount to be paid. Here, there is no dispute that ANR has withdrawn as a contributing employer, and the Fund's claim against ANR for withdrawal liability was made in the bankruptcy proceeding. Although the statute defines an "employer" to include all companies under common control, in this case none of the El Paso Defendants met the

statutory definition at the relevant time—when ANR withdrew. The Fund has admitted as much. *See* App. 5 (¶ 21).

Rather, this is a case in which the plan seeks to disregard both the legally separate existence of the defendant companies and the statutory definition of common control, and to impose withdrawal liability by undoing the transaction that moved the El Paso Defendants out of the ANR controlled group. Moreover, the Fund asserted—and the district court agreed—that the El Paso Defendants cannot even defend that transaction as legitimate because that defense can be presented only in arbitration, and the defendants have missed their opportunity to do even that.

The district court's entire decision is thus founded on the notion that the proof of claim filed in the ANR bankruptcy was a sufficient notice and demand under MPPAA to start the El Paso Defendants' clock running. As detailed below, MPPAA cannot be interpreted in that fashion without causing a serious due-process problem, which demonstrates that the district court's construction must be rejected. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Section A discusses the due-process backdrop against which the notice provision must be interpreted; Section B explains why, in light of these due-process considerations, MPPAA requires more exacting notice when a plan attempts to impose liability outside the controlled group by setting aside a transaction on evade-or-avoid grounds.

### A. Due Process Precludes Imposing Liability Without Adequate Notice

A long line of decisions from the Supreme Court and this Court confirms that due process requires proper notice before a party may be coerced by law to make payments to another party—a deprivation of property. Neither ambiguous nor general notice will suffice; the person facing liability must be specifically and actually informed of that fact. As this Court has explained, "Fair or adequate notice has two basic elements: content and delivery." *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000). In "settings in which a person's legal right is extinguished if he fails to respond"—precisely what the Fund and the district court asserted happened in this case—the notice that triggers the obligation to respond (here, the demand to pay withdrawal liability) must satisfy both of these due-process elements. *Id.*

1. In a series of cases beginning with *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Supreme Court has established that in any "proceeding . . . in which [citizens] may be deprived of property rights[,] . . . notice and hearing must measure up to the standards of due process." *Id.* at 313. An "elementary and fundamental requirement of due process," the Court elaborated, is that the required notice cannot be a "mere gesture," but rather "must be of such nature as reasonably to convey the required information" to "those affected." *Id.* at 314, 315. In *Mullane*, the beneficiaries of a trust challenged the practice of providing notice by publication when the trust account was being settled, thereby cutting off claims against the trustee bank. Holding

that there is no substitute for actual notice to parties whose identities and addresses are known, the Court concluded that the trustee must personally inform the trust beneficiaries whose contact information it had on file. *See id.* at 318.

Applying the *Mullane* standard, the Supreme Court has made clear that the party providing the notice has a duty of reasonable diligence: he must undertake reasonable efforts to learn the identities of those to whom notice is due. As the Court explained in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are *reasonably ascertainable*." *Id.* at 800 (second emphasis added); *see, e.g.*, *Tulsa Prof'l Collection Servs. v. Pope*, 485 U.S. 478, 490 (1988) (due process requires notice to "known or *reasonably ascertainable* creditors" of an estate before winding up probate (emphasis added)).

2. Not only must actual notice be provided to an entity known to be interested in the proceedings, but that notice must be "reasonably calculated" to inform the recipient that his interests are at risk. *Mullane*, 339 U.S. at 314. As this Court has put the point, "If the notice is unclear, the fact that it was received will not make it adequate." *Fogel*, 221 F.3d at 962. If a party's interests are entitled to the protection of actual notice, the notice must actually inform that party of what is at stake in the proceeding. Partial or

incomplete notification will not suffice. *See, e.g.*, *Folger Adam Sec. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 265 (3d Cir. 2000) (notice of a bankruptcy auction did not adequately inform a creditor that it could waive contract defenses by not participating in the auction), *cited in Fogel*, 221 F.3d at 963.

Assertions of successor or vicarious liability require even more precision in the content of the required notice because of the real risk that the recipient will not perceive that its own interests are at stake if the notice mentions only a third party. Thus, for example, in *Fogel* this Court pointedly noted that adequacy of the notice was "not a problem here, because the notice did identify Madison [the bankrupt] as successor to Interpace [the party that owed money to the recipient of notice]." 221 F.3d at 963. By contrast, in *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir. 1995), the Ninth Circuit held that a letter bearing a "salutation to a third party" was not constitutionally adequate notice because, under the circumstances, it was possible that "the recipient would misapprehend the letter's import, mistakenly assume the letter was misaddressed or otherwise fail to be meaningfully informed by it in a timely manner." *Id.* at 919.

### B. Construed To Avoid Due-Process Concerns, MPPAA Requires Express Notice Before Imposing Liability On A Former Controlled-Group Member

MPPAA's withdrawal-liability provisions unquestionably implicate these due-process principles. As the Supreme Court has explained, imposing withdrawal liability on an employer is using state action to deprive the employer of a "protected interest,"

and the employer is entitled to "procedural fairness under the Due Process Clause." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617, 626 (1993). An assessment of withdrawal liability may require a single employer to pay many millions of dollars. MPPAA must therefore be construed with the Due Process Clause in mind, and any construction that would cause the statute to run afoul of due process must be avoided. Thus, in *Concrete Pipe*, the Supreme Court relied on the Due Process Clause's guarantee of an impartial adjudicator and rejected an interpretation of MPPAA that would have given a heavy presumption in favor of a multiemployer plan's self-interested determination that its claim for withdrawal liability was correct. *See id.* at 628-29.

1. When an employer withdraws, MPPAA's procedure for adjudicating withdrawal liability is relatively simple. The plan "(1) determine[s] the amount of the employer's withdrawal liability"; "(2) notif[ies] the employer of the amount of the withdrawal liability"; and "(3) collect[s] the amount of the withdrawal liability from the employer." 29 U.S.C. § 1382.

The statute prescribes the content of the "notice" to be provided to the withdrawing employer. The plan must state the amount of the asserted liability, specify a schedule of payments, and explicitly demand that the employer begin payment. *Id.* § 1399(b)(1).

The date on which "the employer receives the notice" specified by the statute is the basis for all subsequent deadlines. First, the notice generally triggers the employer's

obligation to make interim payments notwithstanding any dispute over liability. *Id.* § 1399(c)(2). Second, the notice also starts the time within which to dispute liability. The employer has 90 days from the date of the demand to ask the plan to reconsider. *Id.* § 1399(b)(2)(A). If the parties continue to disagree, they may seek arbitration within a short time period. *Id.* § 1401(a)(1).

2. The statute also prescribes how far the obligation to pay withdrawal liability will extend through the corporate structure. This Court has held that "the party 'who is signatory to a contract creating the obligation to contribute is the "employer" for purposes of establishing withdrawal liability.'" *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 85 F.3d 1282, 1287 (7th Cir. 1996) (quoting *Rheem Mfg. Co. v. Cent. States, Se. & Sw. Areas Pension Fund*, 63 F.3d 703, 707 (8th Cir. 1995)).

MPPAA defines a few circumstances in which the obligation may run beyond the company that had the contribution obligation. An "employer" is defined to include all "trades or businesses . . . which are under common control," and "all such trades and businesses shall be treated as a single employer." 29 U.S.C. § 1301(b)(1); 29 C.F.R. § 4001.3(a)(2); *see id.* § 4001.2 (definition of "employer"). The definition of "common control" is found in the Treasury Regulations, *see* 29 C.F.R. § 4001.3(a)(1); generally, a parent must own 80% of a subsidiary for the two to be under common control, *see* Treas. Reg. § 1.414(c)-2(b)(2). If two companies meet this definition of common control and form a single employer, then they are jointly "liable to the plan" when one withdraws.

Separate companies that do *not* meet the specified definition of common control do not qualify as the same employer, however. MPPAA does not displace the usual rule of "respect for corporate form," nor does it create a "standard for disregarding corporate form [that is] lower . . . than in a typical contract dispute." *Cent. Transp.*, 85 F.3d at 1288. For example, when a corporate family divides by spinning off as a separate, stand-alone entity the subsidiary that is contractually obligated to a multiemployer plan, the other members of that corporate family are no longer members of the controlled group of the contributing "employer." MPPAA recognizes that these corporate transactions are entirely permissible and do not themselves result in withdrawal liability. *See* 29 U.S.C. § 1398(1)(A); *id.* § 1369(b) (specifying the effect of certain types of reorganizations).

3. MPPAA creates one narrow exception to this rule. Companies cannot engage in transactions purely to hide from withdrawal liability. Accordingly, the statute provides that "[i]f a principal purpose of any transaction is to evade or avoid liability under [MPPAA], [the statute] shall be applied (and liability shall be determined and collected) without regard to such transaction." *Id.* § 1392(c).

This provision becomes important when a controlled-group relationship is severed, leaving behind a contributing employer and another company that is no longer part of that employer's controlled group. A finding that the transaction severing the relationship had "a principal purpose . . . to evade or avoid liability" will undo the transaction

and bring the second company back into the definition of "employer" from whom withdrawal liability can be collected. *Id.*

The text of MPPAA and this Court's cases make clear that if a plan seeks to place a company back in the controlled group by making an evade-or-avoid finding, that company is entitled to actual notice of the finding, of the demand for liability against it, and of the opportunity to seek arbitration to challenge that finding and demand. Arbitration under MPPAA is designed to resolve "dispute[s] between an employer and . . . a multiemployer plan concerning a determination made under" the statute. *Id.* § 1401(a)(1). Evade-or-avoid liability is one such "determination." And arbitration cannot commence until after the employer is notified of the demand for payment. *See id.* § 1401(a)(1)(A). Therefore, before a former controlled-group member can be expected to contest the evade-or-avoid determination, it must first be informed of the demand for payment—including the evade-or-avoid determination.

Moreover, an employer generally must begin paying soon after receipt of a demand for withdrawal liability, and for that reason the demand must include the schedule of payments that the employer is to meet. *Id.* § 1399(b)(1)(A), (c)(2). This Court has eased the latter requirement in the bankruptcy context, noting that insisting on a schedule would be "otiose, because the bankruptcy court would inevitably establish its own, supervening schedule for payment of all debts of the bankrupt." *Cent. States, Se. & Sw. Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1375 (7th Cir. 1992). But when notice to the

bankrupt is supposed to serve as notice to other companies, and to trigger those other companies' obligations under the statute, that notice must comply with the statutory requirement that it include a schedule of payments. *See id.* (noting that "[t]here must be adequate notice to [Slotky]" even though "notice to Stevens [the bankrupt] is notice to Slotky"). Significantly, in *Slotky*, notice to the non-bankrupt members of the controlled group was deemed adequate because the plan had attached a schedule of payments to the notice and demand sent to the bankrupt. *Id.*

4. The conclusion that a plan must provide actual notice to the subject of an evade-or-avoid finding is confirmed by fundamental due-process considerations. When an employer that participates in a multiemployer plan spins off an independent company that does not participate, the spun-off company has no withdrawal-liability exposure. A claim against the employer will not reach the spun-off company, which is entitled to the benefit of its separate corporate existence. Thus, even if the spun-off company learns of a claim against the employer for withdrawal liability, it has no reason to believe that it has any interest in the adjudication of that claim—*unless* the plan first finds that the spin-off transaction was to "evade or avoid" withdrawal liability and so notifies the spun-off entity. Accordingly, in this context, the *sine qua non* of fair notice is that the employer be informed that the plan has made an "evade or avoid" determination.

As this Court colorfully put the matter in *Slotky*:

> On the theory . . . that only the arbitrator can determine who is an employer, and given the plan's position . . . that notice to one member of a

> controlled group is notice to all, the plan could have sued the Easter Bunny and when the Bunny complained that he was not a trade or business under common control with the [withdrawing employer] could have replied that the Bunny had waived the argument by failing to demand arbitration within the statutory deadline. For of course [the withdrawing employer], never suspecting that the Easter Bunny might be a trade or business under common control with it, would not have forwarded the notice to the Bunny.

956 F.2d at 1372-73. Significantly, this Court recognized that due-process concerns would come to the fore when knowledge of a withdrawal-liability claim against the bankrupt former employer is imputed to another entity that is no longer a member of the controlled group, because imputing knowledge starts the clock running under MPPAA and may deprive the former controlled group member of any chance to contest withdrawal liability. *See id.* at 1375 (discussing *Tulsa Prof'l Collection Servs.*, 485 U.S. at 491).

The Supreme Court's due-process analysis asks two relevant questions: First, as a practical matter, where should the burden of providing notice be placed? *Tulsa Prof'l Collection Servs.*, 485 U.S. at 490. Second, what will be the relative costs of requiring actual notice versus permitting some lesser form of notice? *Id.* at 488-89. Both inquiries confirm that a multiemployer plan demanding that a former member of a controlled group pay withdrawal liability based on an evade-or-avoid finding must provide the target of the demand with actual notice of the finding.

First, the only party guaranteed to know about an evade-or-avoid finding is the plan that makes it in the first instance. And practical reality supports giving the plan the re-

sponsibility to notify those affected by its finding. As the Supreme Court pointed out in *Concrete Pipe*, a multiemployer plan has several powerful incentives to "act in a biased fashion" and favor its own interests when making determinations under MPPAA. 508 U.S. at 617. When the decisionmaker faces such a strong possibility of bias, the "practical need for actual notice" becomes much stronger: the self-interested decisionmaker has little "inclination to call attention to the potential expiration" of an employer's time to seek review of the evade-or-avoid finding. *Tulsa Prof'l Collection Servs.*, 485 U.S. at 489 (because executors often have a personal interest in the estate they administer, due process requires the executor to give the estate's ascertainable creditors actual notice, not just publication notice, of the deadline to submit claims).

Unlike in *Slotky*, there is no practical alternative to giving *former* controlled group members actual notice. This Court held in *Slotky* that notice of a withdrawal-liability claim to a withdrawing employer suffices to give notice to companies that are currently in its controlled group. But relying on the withdrawing employer to provide immediate notice to entities outside its controlled group—with the MPPAA clock running all the while—is another matter entirely. Whereas the identity of those *in* the controlled group is readily ascertainable to an employer based on the statutory and regulatory definition, those outside the controlled group, who "ha[ve] absolutely no reason to believe that they might be deemed members of a controlled group," may range from recent former parent companies to the Easter Bunny. *Slotky*, 956 F.2d at 1373; *see id.* at 1375. Rather

than require a withdrawing employer—whose "unfortunate position . . . as a bankrupt [may] make[] it less than interested in the details of its liability," *id.*—to forward the demand to former controlled-group members in time to file challenges within 90 days, it makes far more sense for the plan to identify the entities that would be affected by the "evade or avoid" determination.

Second, "[a]ctual notice need not be inefficient or burdensome," as in many cases it requires no more than a postage stamp. *Tulsa Prof'l Collection Servs.*, 485 U.S. at 489-90. Multiemployer plans have at their disposal all the tools they need to ascertain who is (and who was) in a debtor's controlled group and what transactions should be investigated. They are statutorily entitled to demand documents and information that will help make those determinations. 29 U.S.C. § 1399(a). And while the target of a withdrawal-liability demand has only 90 days to respond, a plan has a statutorily *unlimited* period in which to calculate withdrawal liability and demand payment. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 202 (1997). The cost to the plan of identifying the targets of its "evade or avoid" findings is relatively low, while the cost to the target of missing the 90-day deadline can be bankrupting. And as a matter of course, plans maintain awareness of the membership of their contributing employers' controlled groups, so that they can assess whether one company's withdrawal is complete or partial.

Thus, the most sensible construction—and the constitutionally required construction—of MPPAA's notice provision requires that when a multiemployer plan makes an "evade or avoid" finding, it must provide actual notice of that finding to the affected companies before MPPAA's time limits begin to run.

## II. The District Court's Interpretation Of MPPAA's Notice Provision Offends Due Process

The district court in this case misinterpreted MPPAA's notice provision and failed to give due weight to the underlying due-process principles. The court concluded that the El Paso Defendants received adequate notice because by January 1, 2002, they learned that the Fund had filed a proof of claim for withdrawal liability in the ANR bankruptcy. SA 36. That conclusion is legally unsupportable.

Properly construed in light of the requirements of due process, the notice provision of § 1399 required the Fund to inform the El Paso Defendants that it had made an evade-or-avoid determination, which (if upheld) would set aside the transaction by which the El Paso Defendants left the controlled group. Without such a determination, knowledge of that proof of claim did absolutely nothing to inform the El Paso Defendants, or any other entity outside ANR's controlled group, that they must immediately invoke MPPAA's dispute-resolution provisions, or else be liable. Mere knowledge of the proof of claim's existence certainly cannot justify time-barring the El Paso Defen-

dants from obtaining the neutral adjudication of the evade-or-avoid issue that due process guarantees them.

### A. The Fund Did Not Inform The El Paso Defendants In 2002 That It Had Filed A Proof Of Claim Against ANR

As an initial matter, the district court improperly turned passive voice into active voice and surmised that "[i]t is undisputed that *Plaintiff notified [the El Paso] Defendants* of the amount of liability via a proof of claim Defendants admit receiving" no later than January 1, 2002. SA 36 (emphasis added). That supposition is completely unsupported by the record—even by the Fund's own Rule 56.1 statement.

The record demonstrates that the Fund asserted only that the El Paso Defendants *knew* of the proof of claim—*not* that the Fund had sent the proof of claim to the El Paso Defendants. *See* App. 285-86, ¶¶ 45-46; App. 275. The distinction is significant because sending the proof of claim directly to the El Paso Defendants—even though it contained no mention of any claim against the El Paso Defendants themselves—might have created a very weak inference that the Fund could be asserting a claim against them as well as ANR. Although doing so would not have satisfied the content aspect of due process because of the inherent ambiguity in sending out an unadorned proof of claim,[4] the Fund did not take even that minimal step, or otherwise notify the El Paso Defendants of

[4] *Cf., e.g.*, *Hopi Tribe*, 46 F.3d at 919 (notice is not constitutionally adequate if it creates a likelihood that "the recipient would . . . mistakenly assume the letter was misaddressed").

its claim until—in the Fund's view—it was too late for the El Paso Defendants to seek arbitration. Thus, the district court's statement that the El Paso Defendants were "recipient[s] of a notice and demand" by January 1, 2002, SA 37, is simply wrong.

In fact, the Fund directly notified the El Paso Defendants of its claim only in November 2004. Thus, through reasonable diligence, the Fund was able to identify the El Paso Defendants as former members of ANR's controlled group, develop a basis for asserting a claim against them, and provide them with actual notice of that claim, all apparently within the limitations period. At that time, but no sooner, the El Paso Defendants received adequate notice and became obligated to act to protect their interests (which they did). *See, e.g.*, *Tulsa Prof'l Collection Servs.*, 485 U.S. at 491; *Mennonite*, 462 U.S. at 798; *Mullane*, 339 U.S. at 317.

### B. The Proof Of Claim Against ANR Was Not Adequate Notice To The El Paso Defendants Under MPPAA

Even more significant, of course, is that the proof of claim makes absolutely no mention of any entity other than ANR, and makes no mention of expanding the circle of potentially liable companies to those outside ANR's controlled group. There is certainly no reference to any "evade or avoid" determination. *See* App. 114. Indeed, on the district court's theory of the case, the Fund was not even required to make that determina-

tion for another *five and a half years*. *See* SA 32; App. 114 (proof of claim filed June 3, 1999); App. 1 (complaint filed Dec. 7, 2004).[5]

Finally, and most tellingly, the proof of claim did not provide the form of notice that is most central to the MPPAA framework, *i.e.*, a demand for immediate payment by the El Paso Defendants, or any other current or former controlled group member. *See* 29 U.S.C. § 1399(b)(1)(B) (the required notice shall "demand payment"); *supra* pp. 18-19 (explaining that the demand for payment is an essential portion of the notice when the recipient is not in bankruptcy). While the proof of claim may have been sufficient to start the clock as to the bankrupt (who could not make interim payments in any event), it plainly did not satisfy MPPAA's notice requirement as to anyone else.

### C. The Proof Of Claim Against ANR Was Not Constitutionally Adequate Notice To The El Paso Defendants

Nor can the district court's time-bar analysis be sustained on the theory that ANR should have informed the El Paso Defendants that they were subject to a claim for withdrawal liability, or that notice to ANR was constructive notice to the El Paso Defendants. The El Paso Defendants were not members of ANR's controlled group, a term

[5] Even treating the demand letter as substantially compliant with the notice requirements, reversal is still required, because measured from receipt of the letter the El Paso Defendants' demand for arbitration was timely.

defined in law, and ANR had no reason to notify them of any of its dealings with the Fund. *Compare Slotky*, 956 F.2d at 1375.

The district court's suggestion that the El Paso Defendants had "a reasonable suspicion that they might be deemed a member of the controlled group," SA 40, is completely unfounded. The Fund never served notice that it would seek to return them to the control group until 2004. The district court's approach appears to contemplate that *any* business entity that might at one time have had some ownership interest in a contributing employer is on perpetual notice that a plan may assert withdrawal liability against it, and must initiate arbitration even before it receives a demand containing the necessary evade-or-avoid determination. That proposition is not consistent with either MPPAA or due process.

Due process customarily requires that a plan provide actual notice when it seeks to impose withdrawal liability. *See supra* Section I.B. As a limited exception, a company that has some reason under MPPAA to be on inquiry notice of potential withdrawal liability need not receive actual notice. This Court held in *Slotky* that "[t]here is nothing unreasonable about requiring the notified firm [rather than the plan] to notify the other members of the controlled group," because the notified firm presumptively understands MPPAA and its definition of who is in the controlled group. 956 F.2d at 1375. Thus, a company that knows it is a controlling owner of a contributing employer may be on inquiry notice of withdrawal-liability claims against its subsidiary. *See id.* But to

be in a controlled group, a parent generally must own 80% of the contributing employer. *See* Treas. Reg. § 1.414(c)-2(b)(1)(ii), (b)(2)(i)(A). The El Paso Defendants did not meet that definition when ANR withdrew. App. 5.

As informed by due-process principles, MPPAA required the Fund to provide actual notice, specifying the basis for demanding payment, to any target that was outside ANR's controlled group at the time of withdrawal. The Fund gave no such notice until late 2004.

## CONCLUSION

For these and other reasons, the judgment of the district court should be reversed.

Dated: February 22, 2007

Respectfully submitted,

____________________________

William J. Kilberg, P.C.
Paul Blankenstein
William M. Jay
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
Tel: (202) 955-8500
Fax: (202) 467-0539

*Attorneys for Amici Curiae*

OF COUNSEL:

Stephen A. Bokat
Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Jan S. Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF
MANUFACTURERS
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 637-3000