ORIGINAL

In the

Supreme Court of the United States

NACHMAN CORPORATION, Petitioner, --vs-- PENSION BENEFIT GUARANTEE CORPORATION, et al., Respondents.	NUMBER: 78-1557

Washington, D. C.
January 7, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

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NACHMAN CORPORATION, :

Petitioner, :

v. : No. 78-1557

PENSION BENEFIT GUARANTEE
CORPORATION, ET AL., :

Respondents. :

- :

Washington, D. C.,

Monday, January 7, 1980.

The above-entitled matter came on for oral argument at 1:10 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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HENRY ROSE, ESQ., General Counsel, 2020 K Street, N. W., Washington, D. C. 20006; on behalf of the Respondent

APPEARANCES (continued):

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1557, Nachman Corporation v. Pension Benefit Guaranty Corporation.

Mr. Gettleman, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT W. GETTLEMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GETTLEMAN: Mr. Chief Justice, and may it please the Court: I am Robert Gettleman and I am the attorney for the petitioner, Nachman Corporation.

This case presents one of the first opportunities for this Court to examine the Employee Retirement Income Security Act of 1974, known by its acronym ERISA, and the first occasion directly involving interpretation of specific exceptions to that statute.

Significantly, it involves the operation of ERISA at its initial stages. The Nachman Corporation was an employer whoch terminated a pension plan in December of 1975, and which under the terms of that plan was not required to continue to fund any more payments under the terminated plan.

Prior to ERISA, Nachman was governed by the Internal Revenue Code and the common law of contracts, and those laws allowed an employer to do just what Nachman

did, terminate a plan and under its terms not be liable for further contributions. The issue in the case is whether ERISA prior to 1976 changed the rules to require an employer such as Nachman to continue to fund the plan. The case requires an examination both of the terms of ERISA itself and of the various provisions of the plan. And first I would like to just briefly describe ERISA.

That statute was enacted in September of 1974 as an attempt by Congress to cure many of the problems which were plaguing private pensions in this country at that time. Among those problems was the issue involved when a plan terminated with insufficient funds to pay all the benefits under the plan.

In Titles I and II of ERISA, and it was a four-title Act, the statute prescribes for the first time that a plan must provide a certain minimum level of benefits and that these benefits have to be what was defined in the Act as non-forfeitable benefits. That means unconditional and legally enforcible benefits. It also provided that the employer must undertake to fund those benefits.

In Title IV of the Act, ERISA established a termination insurance program to be operated by the Pension Benefit Guaranty Corporation, the respondent in this case today.

QUESTION: Do you equate that statutory language

legally enforcable to mean legally collectable?

MR. GETTLEMAN: Under the facts of this case, I think that they are synonymous because the rights under the particular plan that Nachman had with its employees were not enforcable or collectable because of the various provisions of the plan which made -- which precluded further employer liability, which allocated benefits on termination in a particular type of order, and benefits that are at issue in this litigation, Mr. Chief Justice, are those benefits which were not funded. There were benefits which were funded under the Nachman plan and to that extent we are not in litigation. We are only talking about the unfunded benefits. They were neither collectable nor enforcable nor unconditional and they did not meet the statutory term of non-forfeitable or the statutory definition of that term.

And it is important to remember that the PBGC guarantees under Title IV only non-forfeitable benefits under the terms of a plan. And it is also important to recognize, as this Court has done, that Congress when it enacted ERISA paid great attention to the types of problems which would be created by the new requirements of this statute. It did not make the entire statute effective immediately but provided grace periods during which certain provisions would be phased on before

compliance was required. Among those provisions was the minimum benefit provisions of Titles I and II and the non-forfeitability requirement of Titles I and II. Those provisions did not take effect until plan years beginning in January 1976.

QUESTION: Mr. Gettleman, is it your position that after January 1, 1976, an employer and a union could not negotiate a plan in which disclaimed personal liability on the part of the employer --

MR. GETTLEMAN: Basically, yes. Basically, yes. The Internal Revenue Service has dealt with types of limitation clauses which might be permissible even after 1976. There is no question that the type of clauses in the Nachman plan would not have been permitted after 1976.

QUESTION: But how about a specific disclaimer of liability on the part of the employer as opposed to the plan?

MR. GETTLEMAN: No, that would not have been, that would not have been allowed.

QUESTION: You say after January 1, 1976, that is not permissible?

MR. GETTLEMAN: That is not permitted, that's right. The General Motors Plan -- they are an amicus on behalf of the respondent -- and some other plans apparently have limited liability to the assets of the plan or to

the PBGC guarantee, which means basically that all of the protections of Title IV are incorporated by reference into the plan. But the type of limitation clause or disclaimer clause that we had would not have been permitted, which was basically a general disclaimer. We are obligated to pay a certain amount into the plan and after that we have no further liability. That is no longer allowed.

This case arises because the non-forfeitability requirements were effected in 1976, but the termination insurance program went into effect upon enactment in 1974. The difference between those two dates really raises the issues which are presented in this case.

I would like just briefly to discuss the plan. I have already discussed it somewhat, but I would like to go back a bit and discuss the type of plan we have here before the Court.

It was established in 1960 for certain employees of Nachman's North Chicago plant as a part of the collective bargaining agreement between Nachman and United Auto Workers which represented those employees. United Auto Workers is an intervening party in this case. It was part of a package of wages and non-wage compensation bargained collectively between the parties to this plan. It was what was known as a combined benefit plan and it provided various normal retirement benefits, that is

benefits that would be payable upon the reaching of normal retirement age, in this case 65, as well as certain early benefits and disability benefits.

It required the employer to make contributions annually into the plan based upon an actuarial table which contemplated that if the plan remained in existence thirty years and if that level of benefits was maintained, all benefits in the plan would be fully funded, and the reason that all benefits in this type of plan were not fully funded immediately is because the contributions were based on hours worked. Contributions based upon current service were paid currently; contributions based upon services rendered before the establishment of the plan were based upon a thirty-year amortization schedule. This is still permissible under ERISA.

Unfortunately, however, Nachman was compelled to close its plant for economic reasons in 1975, after only fifteen years, and therefore terminated the plan. It did so lawfully. There is no question or contest that it did anything improper in terminating the plan. It obeyed the terms of the plan which governed the rights of the parties upon termination. One of them is a term I mentioned in response to Mr. Justice Rehnquist's question and that is it was a normal type of what was called a disclaimer clause, but it said more than just we disclaim

any further liability.

Article V of the plan told the employees that they could not look any further than the assets in the plan at the time it terminated to get their benefits.

QUESTION: Well, those two are the same, to say we disclaim any personal liability and to say you couldn't look any further than the assets in the plan. There is no difference between those two.

MR. GETTLEMAN: I think it goes a little further than just saying that, than just saying we disclaim any more liability. It says to the employee, your benefits will be paid from the assets, and part of the issue and part of the Seventh Circuit's dissertation on the definition of non-forfeitable contained in the statute was that these were not claims that could be asserted against the plan. We say that that clause says both that you cannot assert a claim against the employer or the plan, but there are other provisions in the plan, Mr. Justice Rehnquist, which govern the rights of the parties upon termination.

Article IX of the plan provides that it was allowed to be amended to comply with changes in the law but that no such amendment would affect the level of contributions required of the employer under the terms of the plan. This was obviously for the benefit of both the

employer and the employees, and it protected the integrity of the bargain between those parties.

Article X of the plan governed termination and allowed either side to terminate upon 60 days' notice but not during the term of a collective bargaining agreement, again an effort to protect the integrity of the collective bargaining agreement and the collective bargaining process.

QUESTION: Mr. Gettleman, could I ask you a question while you are going through the plan here because it may bear on what you are saying. Supposing the termination occurred a year later, in January of 1977, and at that time I would suppose there would still be the same provisions in the trust agreement to the pension plan and it would still be unfunded, some of the benefits would not be funded. Would the insurance coverage apply then?

MR. GETTLEMAN: To answer the question directly, yes, but the plan would have been amended in 1976.

QUESTION: The statute would have required it?

MR. GETTLEMAN: Yes, because at that time all plans were required to provide a non-forfeiture benefit. These types of provisions would have been amended out and plans all over the country employed many lawyers amending these provisions during that period of time.

QUESTION: And they would have been amended out whether the collective bargaining agreement provided for

such amendment or not, wouldn't they, simply by force of Congress' action?

MR. GETTLEMAN: That's right. At that time the congressional direction overrode the contract between the parties, but not until that time, and our plan terminated before that time and that is really the point of this whole case. Our plan and obviously some others terminated prior to 1976.

There is just one other provision of the plan that I would like to mention briefly and that is that when the plan terminated, an allocation schedule was set up in Article X which divided the assets according to six categories of employees, basically the oldest first, those getting benefits at the time of termination, those eligible to receive normal retirement benefits, and on down.

When a category was reached for which there were insufficient assets, the assets were distributed pro rata to that category and there were no further rights to receive any other benefits under the plan. I think it is important to emphasize that this was a legal, lawful tax qualified IRS approved pension plan at the time it terminated. It met all of the provisions of the governing law.

QUESTION: So you would be making your same argument between two plans if one is terminated the day before the deadline and one is terminated the day after,

but things are just different?

MR. GETTLEMAN: That's right, and that is exactly what Congress intended. That is precisely what Congress intended.

QUESTION: Even though the relative burden on the company is exactly the same?

MR. GETTLEMAN: But the company had the opportunity to adjust to the new requirements.

QUESTION: You only had a day.

MR. GETTLEMAN: No, no. Your Honor, this is a 16-month period between enactment and the effective date of these requirements and during that time our collective bargaining agreement expired and we were allowed to terminate the plan. It is important to keep in mind that our plan was terminated practically at the earliest date we could have because on September 2, 1974, when ERISA was enacted, we were right in the middle of a three-year collective bargaining agreement which expired in October of 1975.

QUESTION: And when did this plan expire, during the grace period?

MR. GETTLEMAN: Yes.

QUESTION: So you are still saying there is a difference between the day before the grace period is over and the day after?

MR. GETTLEMAN: Yes. We could have picked November 1st. We picked the last day of the grace period for administrative convenience and to make our lives easier, I suppose. But it was in 1975 and that was the operative fact.

I think it is also important to emphasize once again that this was a collectively bargained plan. The employees were represented by a major union in this country and certainly had no right or no reason to expect anything other than what the plan provided. They certainly had no reason to expect prior to ERISA that the employer would be liable to continue to fund this plan after termination. That is what they bargained for, that is what they got.

When the plan terminated, which was not a particularly happy event for anybody because the plant closed down, when the plant terminated there were approximately $575,000 which had been contributed by Nachman over the fifteen years. This sum was enough to pay everybody who was receiving benefits and everybody who had worked for Nachman ten years who was over the age of 60. Below that category, however, there is no question that there were insufficient assets to pay the remaining benefits. And again, there is no question that had this plan survived that other day, it would have been required to provide a truly non-forfeitable benefit, but it is just as clear

that prior to 1976 it was not required to provide a non-forfeitable benefit. And since the Pension Benefit Guaranty Corporation insures only non-forfeitable benefits and the employer is liable to the PBGC to reimburse them for any benefits so insured and actually paid by them, the issue then is whether these benefits were non-forfeitable under the terms of the Nachman plan.

The District Court held that they were not, that they were forfeitable and properly forfeited. The Court of Appeals disagreed, and this Court granted certiorari limited to the interpretive issue. We also raised a constitutional question but the grant of certiorari was limited only to the interpretive issue.

As I mentioned, a term is defined in the statute itself as unconditional and legally enforcable against the plan. Our position really is very simple. We contend that a benefit which was conditioned upon the sufficiency of assets at termination was by definition conditional and therefore for that reason alone not non-forfeitable. We also claim that under the provisions of the plan which I have described, the rights at issue in this case could not be enforced against either the plan or the employer. To be unforfeitable, a benefit must be both unconditional and legally enforcable. We are neither. If we were not just one of those, we would be forfeitable and therefore not

insured by the PBGC and therefore the employer would not be liable to the PBGC.

The respondents in this case would rather look instead to the statutory definition to PBGC's own definition contained in a regulation promulgated about a year after ERISA was enacted, in September 1975. Thie definition provides in effect that a benefit becomes nonforfeitable when the employee satisfies all the conditions imposed upon him. It makes no mention whatever, however, of the statutory requirement that the benefit be unconditional and legally enforcable. We claim that that definition is invalid because it contradicts the statutory definition. We claim it is invalid because it is unnecessary because Congress provided its own definition of this term in very clear and unambiguous language.

And even more important, we claim that their definition and in fact their whole position in this case is improper and would result in the immediate imposition of liability on Nachman Corporation and employers like Nachman Corporation on the date of enactment of ERSA in September 1974. I think that it is very clear that, although Congress certainly intended to prohibit types of limitation of clauses we had, they just as clearly intended to provide prospective, effective dates and not to impose immediate and retroactive liability. Yet the Court

of Appeals in its opinion concedes that its ruling does result in a retroactive effect on Nachman Corporation.

This Court has, although not dealt with ERISA directly as in this case, it has compared ERISA to certain other situations which resulted in retroactive changes to pension plans. The first such case was City of Los Angeles v. Manhart, at 435 U.S., in which Justice Stevens, writing for a unanimous Court, found that although a Title VII violation had occurred by compelling women to pay more into a pension plan than men because they lived longer, that a retroactive remedy was inappropriate in that case for several reasons. One of those reasons was the drastic effect that retroactively imposed rules or remedies would have on pension plans, because pension plans were for the future, they look to the future. They make contributions and obligations based upon future expectations. To impose retroactively a burden or a remedy on them had drastic effects, and I quote from page 721 of that opinion -- after going through that, Justice Stevens wrote: "Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." And at that point the opinion cites to ERISA as an example of an instance where Congress did not want retroactive application to a pension plan. And I quote again:

"In 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans. The bill" -- citing ERISA -- "The bill paid careful attention to the problem of retroactivity and set a wide variety of effective dates for the different provisions and cites to the exact sections of ERISA which we rely upon in this case, namely that sections which are in 29 U.S.C., section 1061 and 1086, those are the sections that provide the 1976 effective dates."

QUESTION: Mr. Gettleman, do you suppose when I wrote that footnote I contemplated the issue that is before us now?

MR. GETTLEMAN: No, Your Honor, but you recognize the congressional intent that we rely upon in this case. That was Title VII.

QUESTION: That wasn't the proposition, that there are staggered dates in ERISA, of course there are a lot of other staggered dates in ERISA.

MR. GETTLEMAN: That's right, but that is precisely the point. Congress didn't make the act effective immediately. They didn't make the more burdensome provisions of that act --

QUESTION: They did make one thing effective immediately, Mr. Gettleman, and that is the insurance program.

MR. GETTLEMAN: Yes.

QUESTION: What does that insure during the period prior to the date of your termination of the plan?

MR. GETTLEMAN: It insures by definition the same thing it insures after that date, non-forfeitable benefits under the terms of the plan.

QUESTION: Is the purpose just to insure against the possibility that the money contributed to the fund will have been dissipated or stolen by the trustees?

MR. GETTLEMAN: No, most funds, you must assume -- and I think it is true -- are operated honestly and the reason that there was insufficient funding was because of this past service liability, the contributions for the years before the establishment of a plan were substantial.

QUESTION: You are not talking about the risk of dissipation of funds or maybe poor investments. What did the insurance program insure?

MR. GETTLEMAN: Okay. During that period of time, we know from an affidavit filed in the District Court by the PBGC itself that there were -- I am trying to get the exact number -- 136 plans which terminated during the grace period which had insufficient assets upon termination. Forty-three percent of those plans had non-forfeitable benefits, even though they weren't required to at that time they provided them. They did not have the limitation

clauses which we had in our plan and which the remaining 57 percent had in their plans.

There is $20 million worth of benefits insured under that program during the grace period. We think it was a significant role that the PBGC played during the grace period. After the grace period, all plans were required to provide non-forfeitable benefits and all plans and all benefits which were non-forfeitable as they were required to be were therefore insured.

The PBGC during the grace period also had to set premiums. It was a brand new agency. It had to get established and set its housekeeping regulations. So when you put Title IV and Titles I and II together, it demonstrates a cohesive scheme to get this program rolling to give people time to adjust, not to impose retroactive liability, not to impose immediate and substantial liability on employers which had never bargained for and never expected to and perhaps could not pay that type of price.

QUESTION: Let me ask one other question, if I may, on the plans that were terminated during the interval before the date here and after the enactment of the act. You say about half of them or whatever the figure was had non-forfeitable benefits.

MR. GETTLEMAN: Yes.

QUESTION: Did they also have provisions in them that the employer was liable for the full amount of the benefits --

MR. GETTLEMAN: They did not limit the employer's liability.

QUESTION: Then if that were true, I still don't see why you needed insurance, because --

MR. GETTLEMAN: Becu se they terminated with insufficient assets. Those plans terminated --

QUESTION: If they terminated, wouldn't there be liability on the part of the employer?

MR. GETTLEMAN: There would but the employer, one, could be insolvent; two, there was a 30 percent limitation --

QUESTION: The risk being insured against was the insolvency of employers whose plans would terminate when there would be an obligation to pay the full amount of the benefits?

MR. GETTLEMAN: More than just that, Your Honor. The termination insurance program provides an easily accessible uncostly efficient administrative scheme to pay pension benefits to the average employee of a plan. If a plan were to terminate and the employer for one reason or another denied liability or didn't have the money or wanted to stall, they could go to the PBGC and get their

pension benefit, and it was up to the PBGC to go after the employer under the statutory subjugation. That is the case today. That is the case today, because even though the plan must provide a non-forfeited benefit it still needs to fully fund the plan on a current basis. And even today an employer can go out of business -- not go out of business -- an employer could terminate a plan if he has a right to do so, and if he goes out of business and is insolvent, the employees go to the PBGC. Even if he is not, the employees can go to the PBGC.

QUESTION: Let me ask you one other -- maybe I -- I don't mean to be unfair, but there is reference in the legislative history to the termination of the Studebaker plan in South Bend, I think.

MR. GETTLEMAN: Yes.

QUESTION: I think there is some evidence of intent that that situation should have been covered. Would you agree that your reading of the statute would cover that plan?

MR. GETTLEMAN: I have never read the Studebaker plan. It occurred in 1963, I believe, and a large number of --

QUESTION: That was a case of insolvency of the employer, I think.

MR. GETTLEMAN: I don't believe so. I believe

it had a limitation -- I believe that plan had a limitation clause similar to ours and the legislature said to both employers and employees or at least employees unions, because we have to assume that they were represented by the unions as well, we are not going to let you limit liability to the employer any more. But they didn't say we are not going to let you do that upon enactment. They said we are not going to let you do that after 1976.

QUESTION: Well, why are unions so critical in your analysis? I mean, couldn't a private individual, simply an employee who was not represented by a union have a contract for a pension plan that would be affected by ERISA?

MR. GETTLEMAN: Certainly. Today they are all affected by it equally. There are different rules for proprietorships and partnerships which do not relate to this case. With respect to corporate plans, there are even some different rules for collective bargaining plans. Some dates are extended even beyond the 1976 date for collectively bargained plans.

But we think the fact that this was collectively bargained really relates to the basic thrust I think of our opponents' argument and much of the congressional concern that these may have been either unilaterally imposed or that they promised illusory benefits. We don't

think our plan promised anything that wasn't the subject of arms length bargaining between the employer and employee, and to the extent that there is an equitable argument on the other side we think it doesn't apply to a collectively bargained plan such as the Nachman plan.

I would just like to take one more minute and reserve the rest of my time for rebuttal, and that is to mention that the language of the Manhart which I have quoted was also quoted in the Allied Structural Steel case also in 1978 at 438 U.S., where this Court struck down a statute, a state pension statute which imposed immediate liability for all employees of ten years or more, and compared once again the prospective not immediate effect of ERISA in so striking down the state statute, and we are asking really for nothing more than the continued recognition of that congressional intent and purpose which appears on the face of the statute itself. We really don't have to look to legislate debate or committee report. It is right on the face of the statute, and this Court I submit has recognized that very strong intent and the result that should be reached in this case in both the Manhart and the Allied case.

QUESTION: Well, there is no impairment of contract clause applicable against the federal government, is there?

MR. GETTLEMAN: No, but there would be a very analogous due process argument, Justice Rehnquist, which we did raise in the lower courts. The District Court did not reach that point because it interpreted the statute our way. The Court of Appeals did reach the constitutional question. The grant of certiorari was limited only to the interpretive issue and not the constitutional question. But we think that there could be a very serious constitutional question if the statute is interpreted the way the respondents contend.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Rose.

ORAL ARGUMENT OF HENRY ROSE, ESQ.,

ON BEHALF OF THE RESPONDENT, PBGC

MR. ROSE: Mr. Chief Justice, and may it please the Court:

The Pension Benefit Guaranty Corporation submits that the construction of the Act urged by the petitioner defeats the purpose of Title IV of ERISA. It would effectively destroy a major part of the program.

The Title IV program, as has been indicated, is traceable directly to the closing of the Studebaker plant in 1964, where two-thirds of the participants lost almost all of their pension benefits. And after a long study, the Congress decided to create an insurance system to

guarantee certain benefits to which the employees would have been entitled but for the termination of the plan.

The guarantee program is administered by a new agency, the Pension Benefit Guaranty Corporation. Its board of directors is made up of the Secretaries of Labor, Commerce and Treasury. The program is financed primarily by premiums paid by all of the plans that are covered by the program. And in order to share the program costs and to discourage unrealistic pension promises by employers, there is a statutory liability on employers who terminate plans.

QUESTION: Mr. Rose, what is PBGC's position as to whether after January 1, 1976 there could be a disclaimer of personal liability on the part of the employer?

MR. ROSE: There is no question that there could be such a disclaimer. In fact, there always has been and they continue to be almost universal.

QUESTION: So you disagree with your opponent on that?

MR. ROSE: Yes, Mr. Justice Rehnquist, I certainly do.

The statutory liability is less severe than if Congress had made the employers liable to the plans or to the participants for the benefits which the participants had already become entitled to under the plan terms. This

liability is measured by the unfunded benefits that the PBGC guarantees, and that liability is to the PBGC and it is limited to 30 percent of the employer's net worth.

The Title IV program is one of three distinct programs under ERISA.

QUESTION: It is less severe, you said, and it is less severe only by reason of that 30 percent limitation?

MR. ROSE: No, there are other reasons. There are certain benefits that must be phased in when a benefit increase occurs. And if it hasn't been phased in for the appropriate amount of years, it would not be guaranteed.

QUESTION: Is that applicable here?

MR. ROSE: No, it is not. It is not applicable in this case.

QUESTION: And the 30 percent allocation doesn't come into play here, does it?

MR. ROSE: Not as far as I know. We don't have those facts.

QUESTION: So in this case it is neither more nor less severe.

MR. ROSE: As far as I know, that is true, yes. But we are construing the statute for a universe of 80,000 plans.

This is one of three distinct programs under the umbrella ERISA and there are three different agencies

with three different effective dates. In general, the Title IV program administered by the PBGC was made effective immediately, that is September 2, 1974. The Title I and Title II programs administered by the Labor and Treasury Departments respectively had deferred effective dates.

Now, the congressional sense of urgency about getting the Title IV program under way was so great that they even provided for the coverage of participants in plans that terminated in the two months preceding the date of enactment and for that preenactment coverage the Congress completely waived employer liability. For plan terminations that took place within a nine-month period immediately following the date of enactment, the Congress made a special rule, that is they authorized the PBGC to waive or reduce the employer liability upon a showing of hardship.

Now, Congress knew that Title IV had to go into effect immediately in order to provide prompt and effective protection to the employees concerned. And since the termination insurance program operates by statutory rule without the need of plan amendments, there was no reason for delay.

In contrast, the vesting standards and related provisions in Titles I and II required plans to make

complex amendments. For example, there are three permissible vesting rules permitted by the statute and plans must conform with at least one of them. Congress deferred the effective date of these provisions for 16 months so that employers would have an opportunity to study them and make their choice and to effect the amendments. The reasons for deferring these Title I provisions simply don't apply to Title IV.

The guarantee which is the heart of Title IV provides that the corporation shall guarantee the payment of all non-forfeitable benefits subject to the limitations we have discussed. The controversy here turns on the meaning of non-forfeitable.

The PBGC adopted a definition in a regulation which fulfills the congressional objective to guarantee benefits for which employees had attained eligibility and would have received but for the termination of the plan.

The Court of Appeals accepted the substance of the PBGC definition but it read it into the definition of non-forfeitable found in Title I. That reasoning works in this case in order to reach the right result, because there is no condition here on the participants entitled to a benefit, but that approach might tragically deprive participants in other situations of needed benefits.

QUESTION: So that is apart from the reasoning

of the Seventh Circuit at that point?

MR. ROSE: To this extent, yes, sir. Let me illustrate. Disability benefits are normally conditional on continued disability. There is always the --

QUESTION: Although it doesn't affect your client.

MR. ROSE: I'm sorry, sir?

QUESTION: Although it doesn't make any difference in this case which approach you --

MR. ROSE: That's correct, it does not make a difference in this case, but we are construing a statute that has to be applied to 80,000 other plans.

QUESTION: I understand but as applied to this one it will reach the same result with either approach.

MR. ROSE: That is correct. In case of disability benefits there is always the possibility and hope of recovery, and if Title I definition were applied there would be a serious question as to whether any disability benefits could be guaranteeable under Title IV; whereas, the PBGC definition guarantees such benefits as we think the Congress intended.

QUESTION: Do you think that Congress used the terms "vested" and "non-forfeitable" interchangeably throughout the Act?

MR. ROSE: Yes, I think that is clear, Justice Rehnquist. They did throughout the debates and you will

even notice that where the statute says unforfeitable frequently in the conference report or the committee report also used the term "vested."

It is not necessary to take the risk that benefits such as disability benefits will have that result. It is clear from the scheme of the statute that it does not call for a rigid uniformity of definition. The Congress itself established three separate definition sections in Titles I, II and IV. All of the definitions in Title I including non-forfeitable are expressly restricted to Title I by the statutory language.

Had Congress wanted in Title I definition to apply in Title IV, it would have said so explicitly. For example, Title IV defines the word "administrator" by explicit reference to the Title I definition of "administrator." In contrast, Title IV does not define the fundamental word "participant." There is such a definition in Title I. Title I defines "participant" in very broad terms. That is so that an individual who has a claim under a plan will have ready access to the plan documents, as Title I would give him, and it gives him standing to pursue that claim under Title I. Now, that definition applied to Title IV simply doesn't work.

I have already made reference to the fact that the program is financed by premiums paid by the plans.

That premium is a function of the number of participants in the plan. And in a number of plans, the administrator has no way of knowing how many people might have claims against that plan.

Congress did not define "non-forfeitable" for Title IV purposes and accordingly the PBGC supplied its own.

Now, under the Title I definition, a benefit as the petitioner has argued here just a moment ago, a benefit is not forfeitable only when the claims of the benefit is unconditional. Referring to its own plan at page 28 of its brief, petitioner says that the invested benefits were not non-forfeitable since they were conditioned on full funding and were not in fact fully funded and therefore not guaranteed. Well, what benefits could be guaranteed under this theory of fully funded benefits? But that doesn't make any sense.

There is no need to establish a new social program through insurance in order to pay benefits that the plan already has the funds to pay. The petitioner argues that the Congress intended the guarantee to apply only in plans that were not conditioned on full funding and by that the petitioner means plans without a limitation of liability clause. But virtually all plans have such provisions.

The Congress knew that they did and clearly stated its intent to soften the impact of those clauses on employees through termination insurance.

QUESTION: Mr. Rose, your opponent said about half the plans terminated during this period did not have such clauses. Do you disagree as a matter of fact?

MR. ROSE: Yes, sir.

QUESTION: How do we resolve this? Do we have to look at all of these plans?

MR. ROSE: The fact of the matter is there was an affidavit filed to the effect that 78 out of 136 plans had limitation of liability clauses like the one in the petitioner's plan, but that does not mean that, as the petitioner would have it, that the other plans did not have other language which was just as effective and accomplished the same purpose. It is just that the --

QUESTION: Why would you file that affidavit?

MR. ROSE: Well, at that time, Justice Rehnquist, we thought it was enough to show that a majority of the plans had practically identical language, but the fact of the matter is that practically all plans have similar language with the same legal effect.

In fact, the proposition that virtually all of the pension plans have had and continue to have limitation of liability clauses is supported by the standard

literature in the field. It is a finding of the Court of Appeals below, and it is a premise on which the Congress acted. The Studebaker plan had such a class in 1964 and the Internal Revenue Service includes such a clause in a prototype plan that it issued in 1977, and thousands of plans have been established on the basis of that prototype. Therefore, it is true, as the Court of Appeals observed below, that the petitioner's view would make the enactment of Title IV almost meaningless.

Now, reference is made to retroactivity here. The Congress was very clear as to when Title IV was to be effective, and it was immediately. And the Congress specified which portions of the program should have retroactive effect and which not.

For example, Title IV certainly had retroactive impact upon participants in plans that terminated in the two months preceding enactment because it made them eligible for benefits under the program. As to the imposition of employer liability, the Congress was careful. It applied -- it imposed employer liability only on employers that terminated plans after the date of enactment.

Now, it is true that that liability is measured in part by service of employment that took place prior to the date of enactment, but in that sense it has a

retroactive impact. But that kind of retroactive impact would be here whether the effective date of the employer liability was 1974, 1976, 1980, or even later.

Let me correct for the Court a couple of impressions that have been left by the petitioner. Reference has been made that the act requires after 1976 a minimum level of benefits. There is nothing in the act that requires any minimum level of benefits. It is not relevant to this case, but I thought it was misleading to the Court.

There are minimum standards for vesting, funding, participation and such things, but there are no minimum level of benefits. There certainly is no limitation as the petition suggests on liability clauses after 1976, none whatsoever.

I suggest you look at the General Motor clause that is presently in existence, and clearly that is a legal clause.

The point has been made that this plan is a collectively bargained plan, and certainly that is true. However, I think it is important for the Court to have in mind the fact that we are construing a statute applicable to a universe on which almost 90 percent of the plans are not collectively bargained.

Reference has also been made --

QUESTION: Mr. Rose, let me just clarify one

thing in my mind. Your opponent, in response to a question I asked, said that if this plan had been terminated a year later, in that interval between '76 and '77 they would have been required by the statute to amend the plan to make what are now vested benefits also non-forfeitable. Do you agree with that?

MR. ROSE: No. This plan had non-forfeitable benefits in it already.

QUESTION: I understand, but would they have been required to make any change in the plan?

MR. ROSE: All plans were required to amend themselves to comply with Titles I and II. Yes, if the vesting standards in the plan did not meet the minimum standards for investing, funding and participation, they had to be amended, but that would not affect in any way whatsoever the employer liability or the relationship to Title IV except insofar as the guarantee is related to the plan terms, as the plan terms became improved the guarantee would improve also.

QUESTION: I see.

MR. ROSE: Reference has been made to statutory subjugation. There is no subjugation under this statute, none whatsoever. The liability of the employer under Title IV is a statutory liability to the PBGC. We have no subjugated right against the employer derivative from

the participants at all.

In closing, let me say that before the enactment of ERISA, the defined -- when a defined benefit pension plan terminated without sufficient funds to pay the accrued benefits that the participants had already accrued, the entire burden of that insufficiency fell on the shoulders of the participants. By enacting Title IV, Congress has made a decision that no longer should that burden of insufficiency be borne by the participants alone. Congress decided that that burden should be shared by their employer and by the premium payers to the PBGC.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Whitman.

ORAL ARGUMENT OF M. JAY WHITMAN, ESQ.,

ON BEHALF OF THE RESPONDENT, UAW

MR. WHITMAN: Mr. Chief Justice, and may it please the Court:

When you are dealing with any statutory issue as we are here, it really makes sense to begin with understanding the problem that Congress was trying to solve. The problem here as Congress saw it was that people who had worked for employers for a good long piece of time were losing their expected pension benefits. Congress wanted to stop that. Congress knew that very often, as a matter of contract law, these expectations couldn't be

met as a matter of contract law.

But this isn't a contractual case, it isn't a contractual issue. In fact, the fact that the contractual arrangements were not adequate is what made Congress seek a legislative solution. That is what required a legislative solution.

Now, in coming to that solution, Congress was trying to solve a difficult problem and obviously it had to make judgments, to strike a balance at the economic hardships and the economic benefits in them, but that is nothing novel. That is the function of the Legislative Branch. They do it every day.

The petitioner disagrees with the burden that was struck in this situation because Nachman voluntarily chose to terminate its plan rather than say freeze the plan. They are now facing the consequence of that termination.

But the solution has really nothing to do with the contractual arrangements other than, as Mr. Rose said, they take their measure in some degree from the contractual arrangements. The loss that Congress was trying to prevent, loss of these expectations occurred in a couple of different ways.

In on-going pension plans, it occurred because of overly restrictive vesting requirements, the sort of

provision we had in the Daniels case, the 20 years, if you don't work 20 continuous years you lose your pention. Or it could have occurred because of lax funding and the money wasn't there or because some fiduciary embezzled the money. Those were problems where the loss occurred in on-going plan situations.

Congress was well aware from the Studebaker example, which was a very painful example, and from the Department of Labor and Treasury study which it relied on, the '72 study, that it was entirely possible and indeed generally the case that in plans where you had exemplary vesting requirements and where the funding was not questioned, it was actuarily sound, you could still have a loss, you could still have that human tragedy because of a plan termination short of the full amortization cycle so that the money wasn't there.

Now, Title I and Title II, the vesting requirements which petitioner wants to bring into this case, obviously couldn't solve that problem. They couldn't solve the Studebaker problem. You needed Title IV. You needed an insurance arrangement to solve that problem.

If you understand the two different sources of the loss and the functions of the different titles, you see, then it is clear why the effective dates of Title I and II really have nothing to do with the method chosen

by Congress to solve the problem in Title IV.

Now, the legislative history is plain in terms of Congress' intent to make Title IV effective immediately, indeed retroactively. It is also plain that Congress realized that the bulk of the losses occurred because of these limitation liability clauses. That 1972 joint departmental study I think said some 72 percent of the cases, the loss of benefit expectations was 1/1000th of the net worth of the employer that terminated the plan, and only 3 percent of the cases where the loss was occassioned by some insolvency problem because the employer's net worth was down to about the level of the benefits that were lost.

Now, turning to the -- Mr. Rose has already spoken about the fact that you really can't square a 16-month delay which follows from Nachman's position with the two-month retroactivity and the none-month post act possibility of a waiver. But let me turn to the language of Title IV itself.

Throughout Title IV, the language presumes a logical ability to distinguish between the existence of non-forfeitable claims and claims which are not fully funded, and that is not at all odd because it is claims that are non-forfeitable but not fully funded that need a guarantee. Yet, of course, Nachmsn's position doesn't

admit that ther can be such a beast. The clearest example of that is in the provisions in 4044(d) the distribution of assets. There is a fifth category which says other non-forfeitable benefits.

Well, of course, the existence of that category makes absolutely no sense on Nachman's reading, assuming arguendo we apply 319, and we have good reasons not to.

And throughout the other parts of Title IV we have the trustee being charged to do a calculation as to what the non-forfeitable benefits are and what the funds available are. The PBGC becomes trustee in some situation and it is charged with doing that calculation. The trustees have to make reports under Title I as to what non-forfeitable benefits exist that aren't fully funded. Those things are either trivial or nonsensical on Nachman's reading.

In conclusion, I would like to address this problem of limitation of liability clause that Mr. Justice Rehnquist raised. Those limitation of liability clauses were lawful before ERISA. They are lawful now. Westinghouse, GM, Studebaker, and others are indistinguisable in result. They serve a real purpose, and General Motors is right to have some trepidations there. They provide that a participant cannot bring a direct action against the assets of, say, the General Motors

Corporation for his benefit entitlement. They regulate dealings between the participant and the employer. They have nothing to do with Title IV. Indeed, if anything, it was Congress' purpose in Title IV to make those limitation of liability clauses irrelevant because what they were doing was preventing people from actually coming into possession of their benefits.

Thank you, Your Honor.

QUESTION: I'm sorry, could I ask you one question. If they are irrelevant, isn't there an action on the part of the PBGC against the company? I mean I just didn't quite follow that last argument. You said that those limitation of liability clauses protect the company and the plan from direct action by the beneficiary.

MR. WHITMAN: By the beneficiary.

QUESTION: But the beneficiary may collect from PBGC or whatever the name of it is --

MR. WHITMAN: PBGC, right.

QUESTION: -- who in turn may collect from the company.

MR. WHITMAN: Excuse me, Your Honor. PBGC provides its benefit guarantee by virtue of federal statute 4022. It doesn't stand in the shoes of the company in operating the plan.

QUESTION: I understand. We are addressing the question of what good do these limitation of liability clauses do the company. You say the good is it protects them from a suit by the employee, and my question is what difference does that make if they are going to have to pay to the insurance corporation anyway.

MR. WHITMAN: I can illustrate with a simple example. Suppose you have a plan where the level of benefits exceeds the guarantee level, where because of the phase-in rules PBGC's guarantee is substantially lower, which is, by the way, the case in the General Auto Industry plan. In that situation, the limitation liability clause would operate to prevent PBGC from going any further to collect for those benefits above the level.

QUESTION: In other words, the insurance isn't for the full amount of the non-forfeitable benefit, it is only for the amount that the statute prescribes that it must be.

MR. WHITMAN: That's right, which in many cases is substantially less because PBGC doesn't guarantee the full sum.

QUESTION: Is there any difference between the benefit level and the statutory mandated level?

MR. WHITMAN: In this situation, Your Honor, the benefit levels in the plan were very low. It was a low

wage enterprise in the inner City of Chicago and it happens that the PBGC guarantees are essentially the same, perhaps identical. I am not sure the exact figures.

QUESTION: So there are two differences then. One is that the limitation is only 30 percent of the assets, the net worth of the company; and, secondly, it is a different benefit level.

MR. WHITMAN: Yes.

QUESTION: And the guarantee is different than the plan level.

MR. WHITMAN: Yes.

QUESTION: I understand that.

QUESTION: Mr. Whitman, if the company disclaims liability in its agreements with the employees as to the company itself, you say that Title IV nonetheless entitles PBGC to come after the company under the circumstances specified by Justice Stevens?

MR. WHITMAN: No, the limitation of liability clause in the plan would prevent PBGC from pursuing the company on its own assets. PBGC can only pursue the company when it does so under 4062 of the act and then only under the conditions specified. Among those are that 4062 claimed liability can only arise from the fact that PBGC guarantees benefits and only to the extent that it does guarantee benefits. If it doesn't guarantee benefits

because of the phase-in rule or because you hit the 30 percent pay, the 4062 liability drops correspondingly.

QUESTION: Okay. But after January 1, 1976, General Motors flatly provided in a contract that there shall be no liability on the part of the company for pension benefits. Now, under ERISA can PBGC come after General Motors if the plan defaults?

MR. WHITMAN: If today for some reason that I can't imagine General Motors would --

QUESTION: Let's say General something or other then.

MR. WHITMAN: We should all go home if General Motors terminated its pension plan.

If General Motors were to terminate and as a result PBGC had to pay benefits under 4022, which would be the case because there is an unfunded past service liability in the General Motors pension plan, indeed an immense one. Then PBGC would have a 4062 employer liability claim against General Motors for that amount but only that amount.

QUESTION: So then an employer cannot completely disclaim liability and figure that he is home free?

MR. WHITMAN: You cannot, an employer cannot by prospective contract get immunity from a legislative enactment, yes, sir, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gettleman, you have about three minutes.

ORAL ARGUMENT OF ROBERT W. GETTLEMAN, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. GETTLEMAN: Fine. I shouldn't need more than that, Your Honor.

Mr. Justice Rehnquist, let me read the clause from the GM contract. It is on page 9 of their amicus brief. "No liability for the payment of pension benefits or supplements under the plan shall be imposed upon the corporation, officers, directors or stockholders except as otherwise may be required by the Employee Retirement Income Security Act of 1974."

It is an exercise in tail-chasing but an exercise which is permitted by the Internal Revenue Service. We have cited I think in both of our briefs -- I am reading from page 9 of our reply brief -- the I.R.C. Regulation 1.411(a), which says, "Rights which are conditioned upon sufficiency of plan assets in the event of termination or partial termination are considered to be forfeitable because of such condition." Therefore, it would violate section 203 which requires non-forfeitable benefits. But it goes on to say that the GM-type clause will not be considered to be forfeitable and will be tax qualified.

Whether that is a correct provision maybe will have to wait until the day GM does terminate its plan or Chrysler or somebody else. That is not the provision that was in our plan, apparently not the provision in a lot of other plans which had a general disclaimer clause in it.

And as far as the affidavit Mr. Rose and Justice Rehnquist referred to, rather than read it, I will just refer the Court. It begins at page 70 and it goes through page 74, and if it doesn't say what I said it said, then I am just not reading the English language correctly either.

As far as Mr. Whitman's argument goes, for him to say that the contract is not important is rather odd when the Title IV guarantee by the PBGC is to guarantee non-forfeitable benefits, not period, but it goes on, "under the terms of a plan." You must always look to the terms of the plan to determine whether a benefit is non-forfeitable.

And I think it is an odd day when the U.A.W. is before this Court arguing that employees or employers should get something other than they bargained for across the collective bargaining table. To eht extent that ERISA changed the rules of that plan, it did so after 1976. The statute holds together when you read Titles I and II, and

read them separately -- to read Title I and Title II with Title IV -- to read them separately results in a fragmented nonsensical congressional purpose which I think this Court once again, referring to Justice Stevens' comments in the Manhart case, has found to be very coherent, very clear, and that is the only thing we are seeking today, is the recognition of that congressional intent.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:11 o'clock p.m., the case in the above-entitled matter was submitted.)

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