

Case No. 19-1419

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DENNIS BLACK, CHARLES CUNNINGHAM, KENNETH HOLLIS, AND
DELPHI SALARIED RETIREE ASSOCIATION,

Plaintiffs-Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan (Judge Arthur J. Tarnow)

**RESPONSE TO PETITION FOR PANEL REHEARING OR
REHEARING *EN BANC***

C. Paul Chalmers, Acting General Counsel	PENSION BENEFIT GUARANTY
Kartar S. Khalsa, Deputy General Counsel	CORPORATION
John A. Menke	Office of the General Counsel
C. Wayne Owen, Jr.	1200 K Street, N.W.
Craig T. Fessenden	Washington, D.C. 20005
Assistant General Counsels	Telephone: (202) 229-3059
Erin C. Kim	Facsimile: (202) 326-4138
Attorney	Emails: efile@pbgc.gov and menke.john@pbgc.gov

Attorneys for Appellee-Defendant Pension Benefit Guaranty Corporation

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INTRODUCTION

Appellee, Pension Benefit Guaranty Corporation (“PBGC”), pursuant to Fed. R. App. P. 35 and 40 files this response to the Appellant’s Petition for Panel Rehearing or Rehearing *En Banc* (the “Appellants’ Petition”). Appellants ask the Court to rehear the well-reasoned decision of one of this Court’s panels (the “Panel”), which affirmed the decision by the United States District Court for the Eastern District of Michigan (the “District Court”) that the termination of the Delphi Retirement Program for Salaried Employees (the “Salaried Plan” or the “Plan”) did not violate Title IV of ERISA or due process.

A petition for rehearing *en banc* is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent. 6th Cir. I.O.P. 35(a); Fed. R. App. P. 35. As for a Panel rehearing, the purpose is to bring a claimed error of fact or law in the opinion to the Panel’s attention. 6th Cir. I.O.P. 40(a)(1); Fed. R. App. P. 40. Rehearing is not to be used for re-argument of issues previously presented. *Id.* The Appellants’ Petition does not satisfy any of these stringent standards for a rehearing.

First, the Appellants argue that the Panel’s finding of no due process violation is in direct conflict with the Supreme Court precedent in *Nachman Corp.*

v. PBGC and two Sixth Circuit cases that follow *Nachman*.¹ But *Nachman* never addressed the constitutional issue of what is necessary to create a property interest for due process purposes. And the Supreme Court declined to grant certiorari on the due process question addressed by the court of appeals. *Nachman*, 446 U.S. at 368. For that reason alone, the Panel decision cannot be in direct conflict with it.

Instead, *Nachman* addressed a statutory interpretation question, and the statutory discussion is fully consistent with the Panel's decision. The statutory questions that *Nachman* actually decided were whether vested benefits were guaranteed by PBGC and whether an employer was liable for unfunded benefits, notwithstanding contrary provisions in a plan document. *Nachman*, 446 U.S. 359. The Supreme Court stated that it was Congress's goal that PBGC use its funds to pay benefits up to guaranteed limits when a plan terminates with insufficient assets. *Nachman*, 446 U.S. at 374-75. Nothing in *Nachman* suggested that the existence of PBGC's policy limits raised a constitutional issue. In this case, Delphi Corporation ("Delphi") was liable for the unfunded vested benefits but had no assets to pay them, triggering benefit payments under PBGC's insurance coverage. PBGC covered the Appellants' vested benefits up to the statutory guarantee limits.

¹ See Appellants' Petition, 1-2, 5-12 (Doc #44-1) (citing *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980), *aff'g*, 592 F.2d 947 (7th Cir. 1979); *In re Defoe Shipbuilding Co.*, 639 F.2d 311 (6th Cir. 1981); and *A-T-O, Inc. v. PBGC*, 634 F.2d 1013 (6th Cir. 1980)).

The Panel's decision on due process, which followed the Supreme Court's analysis in *Board of Regents of State Colleges v. Roth* and correctly reviewed the Plan document and the financial realities of the situation, was fully consistent with the Supreme Court and Sixth Circuit. *See* Slip op. 13 (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

The Appellants also claim that the Panel erred in finding that PBGC's decision to terminate the Plan was not arbitrary or capricious and that such alleged flaw was a precedent-setting error of exceptional public importance. The Appellants' argument that the Panel failed to review the statutory grounds of 29 U.S.C. § 1342(c)(1) is false given that the Panel found that the requirements of that subsection were satisfied by the agreement between PBGC and Delphi to terminate the Plan (the "Termination Agreement"). Further, the Appellants also make blatantly incorrect assertions that the Panel wrongly reviewed 29 U.S.C. § 1342(a) grounds because the PBGC decisionmaker did not consider § 1342(a). The undisputed facts show that PBGC in fact extensively considered § 1342(a) grounds. Appellants' unsupported arguments amount to nothing more than their disagreement with the Panel's decision that PBGC properly addressed § 1342(a), which is insufficient to warrant any rehearing. Therefore, the Appellants' Petition should be denied in its entirety.

ARGUMENT

I. The Panel Decision that No Due Process Violation Occurred is Correct and Does Not Conflict with a Decision of the Supreme Court or of the Sixth Circuit.

Appellants argue that the Panel’s finding of no due process violation conflicts with the Supreme Court’s decision in *Nachman* and the Sixth Circuit decisions that follow *Nachman*. But their argument mischaracterizes the Supreme Court’s decision in *Nachman*. They assert that it stands for the proposition that the Appellants have a property interest in unfunded benefits.² Appellants’ Petition, 1-2, 5-12 (Doc #44-1). They are wrong.

In *Nachman*, an employer filed suit against PBGC seeking to limit its liability to PBGC. The employer asserted that a provision in its pension plan that limited the benefits it would pay its employees to those amounts that were funded by plan assets prevented the unfunded benefits from being covered by PBGC. Thus, they argued, the employer was not liable to PBGC for the asset deficiency. *Nachman Corp.*, 446 U.S. at 359. The Supreme Court rejected this argument. It held that Congress’s goal was to ensure that, despite such pension plan provisions, if a plan terminates without sufficient assets to pay all vested benefits, PBGC would cover “the difference between the employee’s vested benefits under the

² The Supreme Court never addressed the issue of what is necessary to create a property interest for due process and declined to grant certiorari on the due process question addressed by the court of appeals. *Nachman*, 446 U.S. at 368.

terms of the plan (subject to the dollar limitations in § 4022(b)(3), see n. 23, *supra*) and the amount that could be paid from the terminated plan's assets." *Id.* at 375, 382. Accordingly, the Supreme Court held that a plan provision limiting benefits to the amount funded by plan assets neither prevented a pension plan from being insurable by PBGC nor limited an employer's liability for unfunded benefits.

Appellants focus on the discussion in *Nachman* regarding the meaning of "nonforfeitable" benefits under ERISA. This discussion had nothing to do with any obligation of PBGC to pay benefits above the guarantee. The Supreme Court discussed "nonforfeitable" benefits in the context of the *employer's* liability. The employer could not escape liability by limiting pension benefits to those that could be provided by plan assets. Whatever the vested benefits are called or however they are defined under ERISA, there is no dispute that the Appellants' vested benefits are insured by PBGC. In fact, PBGC has been paying those vested benefits up to the guarantee limit for over ten years. And there is no dispute that Delphi, albeit now defunct, was liable for the Appellants' unfunded benefits.

The unfortunate circumstance that the Appellants faced in 2009 was not that their vested benefits were being taken away from them or that their nonforfeitable benefits under ERISA were being forfeited, it was that there was not enough money, by some \$2 billion, to pay those vested, nonforfeitable benefits. And if the PBGC insurance program did not exist, those \$2 billion in vested, nonforfeitable

benefits would forever go unpaid, because Delphi, the only debtor responsible for paying them, was liquidating in bankruptcy. Instead, PBGC used its own funds to pay the insured benefits Delphi was unable to pay – a total of \$1.5 billion in benefits that otherwise would have been totally lost to the Appellants. As stated in *Nachman*, this is precisely what Congress intended – to have PBGC cover a pension plan that terminates with insufficient assets and pay benefits from PBGC’s funds up to the guarantee limit. *Nachman*, 446 U.S. at 374-75.

Further, *Nachman* supports the Panel’s ruling because it recognizes that PBGC can only pay out benefits up to the level of its guarantee as required in 29 U.S.C. § 1322(b)(3). *Id.* As noted in *Nachman*, PBGC has policy limits on the amount it covers. *Id.* Policy limits are a feature of federal insurance, such as programs covering bank and savings and loan deposits, flood losses, and crop losses.³ Here, upon the occurrence of an insurable event – the termination of an underfunded pension plan without a viable plan sponsor to pay the unfunded benefits – PBGC stepped in. It paid participants the benefits that Delphi was liable for but unable to pay, up to the guaranteed amount, exactly as the *Nachman* court

³ See <https://www.fdic.gov/deposit/deposits/faq.html> (FDIC deposit insurance limit is \$250,000 per account per bank); https://www.nh.gov/insurance/consumers/documents/summary_cov.pdf (federal flood insurance covers dwelling up to \$250,000); 7 U.S.C. § 1508 (crop insurance). See generally Fiscal Exposures: Federal Insurance and Other Activities That Transfer Risk of Losses to the Government (GAO Rep. 19-353), available at <https://www.gao.gov/assets/700/697964.pdf>.

stated. PBGC is aware of no court that has ever held that adherence by a federal insurer to its insurance limits constitutes an unconstitutional taking by the insurer. If PBGC's payments are "subject to" the limits of § 1322(b)(3) as recognized in *Nachman*, then Appellants can have no property interest in payments above the guarantee, no matter what the pension plan provides.

In sum, the Panel's decision does not conflict with *Nachman*, but rather is fully consistent with the Supreme Court's due process analysis in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Panel decision looked to the source that created the alleged entitlement – the plan document. It states that the "right of all affected employees to benefits accrued to the date of such termination ...to the extent funded as of such date, is nonforfeitable." *See* Slip op. 13; Delphi Retirement Program for Salaried Employees at 12, Menke Decl., Ex. 9, RE 304-11, Page ID # 11638. The Panel correctly decided that the Appellants do not have a property interest in the full amount of their vested benefits because, in the absence of a sponsor capable of funding the plan, the unfunded portion of the vested benefits would never be paid.

Accordingly, the Panel's decision that there was no due process violation was correct and does not conflict with a Supreme Court or Sixth Circuit decision.⁴

⁴ The two Sixth Circuit cases cited by Appellants, *In re Defoe Shipbuilding Co.*, and *A-T-O, Inc. v. PBGC*, address whether certain benefits are covered by PBGC

II. The Panel Decision that PBGC’s Termination Decision was Not “Arbitrary and Capricious” is Correct and Does Not Constitute a Precedent-setting Error of Exceptional Public Importance.

Appellants argue that the Panel’s decision reviewed the Plan termination’s legality under the wrong statutory criteria and on grounds that PBGC decision-makers did not invoke at the time of termination. These arguments are incorrect and inconsistent with the undisputed facts of this case and the Panel’s decision.

The Appellants assert that the Panel should have reviewed the termination’s legality pursuant to § 1342(c)(1), arguing that the Panel failed to consider whether PBGC had satisfied one of the criteria for obtaining a court decree under that subsection. But determining the legality of the pension termination is precisely what the Panel decision did when it found that the Termination Agreement satisfied § 1342(c)(1). Slip op. 5-12. Spanning over 7 pages of the decision, the Panel’s extensive discussion and analysis thoroughly considered the statutory language and the relevant case law interpreting it and concluded that the Termination Agreement satisfied the fourth sentence of 29 U.S.C. § 1342(c)(1), and stated that the Termination Agreement “obviates all other requirements found in subsection (c), including any requirement for an adjudication.” Slip op. 8. The

and whether an employer is liable for unfunded benefits. *In re Defoe Shipbuilding Co.*, 639 F.2d at 311, and *A-T-O, Inc.* 634 F.2d at 1013. Like *Nachman*, neither of those cases address whether participants have a property interest in vested, but unfunded pension benefits.

Appellants' illogical contention that the Panel should have ruled that the termination decision was arbitrary and capricious under § 1342(c)(1) where the Panel had already decided that § 1342(c)(1) was met through the Termination Agreement is completely meritless.

The Appellants also argue that the Panel based their decision on grounds that the PBGC decisionmaker did not consider. Appellants' Petition, 2-3, 12, 14-17 (Doc #44-1). This again has no basis in fact. It is undisputed that the PBGC decisionmaker considered the grounds under 29 U.S.C. § 1342(a). AR 21, RE 58, Page ID # 1621, Appellee's Br. 9-11 (Doc #27). In addition to the Administrative Record discussing the § 1342(a) grounds, the Notice of Determination that PBGC issued to Delphi clearly states that PBGC determined that the Plan should be terminated because the grounds under § 1342(a) had been satisfied. Appellee's Br. 14-15 (Doc #27); AR 33, RE 52 (Sealed); AR 1-9, RE 53, Page ID # 1601-09.

The Appellants also allege that that the Panel reviewed the wrong subsection of § 1342⁵ and failed to consider whether termination was necessary to avoid an unreasonable increase in losses to the insurance fund. Appellants' Petition, 2-3,

⁵ Appellants' apparent new position that § 1342(a) was the wrong subsection for the Panel to review is puzzling given that the very allegations for which the Appellants sought appeal and are now seeking rehearing are in Count 4 of their Second Amended Complaint. In Count 4, the Appellants alleged that PBGC "cannot satisfy the standards for termination of the Salaried Plan under 29 U.S.C. § 1342(a) and (c) [...]." Second Amended Complaint ¶ 56, RE 145, Page ID # 8083.

12-16 (Doc#44-1). Aside from the fact that the Panel clearly decided that no judicial review of the termination grounds set out in subsection 1342(c) is warranted given the Termination Agreement, Appellants' argument again ignores the Panel's thoughtful consideration of the arguments regarding Count 4. Termination of the Plan was necessary to avoid unreasonable increase in the liability of PBGC's funds, as PBGC would have lost the claims that produced the bulk of its \$660 million settlement if it had waited to terminate until after the Delphi controlled group had broken up. *See* AR 36, RE 52 (Sealed). The Panel stated that "PBGC had to consider that a delayed termination decision might affect the GM negotiations and could endanger PBGC's ability to recover funds from statutory liens that had been put into place." Slip op. 18. Upon such review, the Panel decided that "[a]t bottom, it is inappropriate for this court to play armchair administrative agency with the benefit of hindsight. Even if we would have reached a different conclusion in the first instance, PBGC's decision to terminate the Salaried Plan was supported by sufficient evidence." Slip op. 19.

The Panel correctly decided that PBGC's termination decision was not arbitrary and capricious. The Appellants' attempts to reargue facts and ignore the Panel's thoughtful decision fail to satisfy the standards for any rehearing.

CONCLUSION

For these reasons, this Court should deny the Appellants' Petition.

Date: November 10, 2020

Respectfully submitted,

Local Counsel:

Matthew J. Schneider
UNITED STATES
ATTORNEY
Peter A. Caplan
Chief of the Civil Division
Eastern District of Michigan
211 West Fort Street, Suite
2001 Detroit, MI 48226
Phone: (313) 226-9784
Email: peter.caplan@usdoj.gov

/s/ John A. Menke
C. Paul Chalmers, Acting General Counsel
Kartar S. Khalsa, Deputy General Counsel
John A. Menke
C. Wayne Owen, Jr.
Craig T. Fessenden
Assistant General Counsels
Erin C. Kim
Attorney
PENSION BENEFIT GUARANTY
CORPORATION
Office of the General Counsel
1200 K Street, N.W.
Washington, D.C. 20005
Tel: (202) 229-3059
Fax: (202) 326-4138
E-Mail: menke.john@pbgc.gov
Attorneys for Defendant

CERTIFICATE OF COMPLIANCE

1. This document complies with the page limitation of this Court's order directing a response because it is 10 or fewer pages.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman in 14-point.

/s/ John A. Menke

Attorney for Pension Benefit Guaranty Corporation

Dated: November 10, 2020

CERTIFICATE OF SERVICE

I hereby certify, that, on 10th day of November, 2020, I electronically filed the foregoing **Response to Petition for Panel Rehearing or Rehearing *En Banc*** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Anthony F. Shelley
Timothy P. O'Toole
Miller & Chevalier Chartered
900 Sixteenth St., N.W.
Black Lives Matter Plaza
Washington, D.C. 20006

/s/ John A. Menke
John A. Menke