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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ELECTRICAL WELFARE TRUST)
FUND, et al.,)
Plaintiffs,) Case No. 19-353C
vs.)
UNITED STATES OF AMERICA,)
Defendant.)
-----)

Courtroom 4
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington, D.C.
Thursday, May 11, 2023
10:30 a.m.
ORAL ARGUMENT

BEFORE: THE HONORABLE ELENI M. ROUMEL

Susanne Bergling, RMR-CRR-CLR, Reporter

1 APPEARANCES:

2

3 ON BEHALF OF THE PLAINTIFF:

4 JOSEPH H.MELTZER, ESQ.

5 JONATHAN NEUMANN, ESQ.

6 MELISSA YEATES, ESQ.

7 Kessler, Topaz, et al., LLP

8 280 King of Prussia Road

9 Radnor, Pennsylvania 19087

10 (610) 667-7706

11 jmeltzer@ktmc.com

12 and

13 CHARLES F. FULLER, ESQ.

14 MCHESNEY & DALE, P.C.

15 4710 Bethesda Avenue, Suite 205

16 Bethesda, Maryland 20814

17 (310) 657-1500

18 chuck@dalelaw.com

19

20

21

22

23

24

25

5/11/2023

Electronic Welfare Trust Fund v. USA

1 ON BEHALF OF THE DEFENDANT:
2 BORISLAV KUSHNIR, ESQ.
3 ERIC P. BRUSKIN, ESQ.
4 U.S. Department of Justice
5 P.O. Box 480
6 Ben Franklin Station
7 Washington, D.C. 20044
8 (202) 353-0461
9 steven.kushnir@usdoj.gov

10

11 ALSO PRESENT:

12 Kenneth Whitley, Esq.
13 HHS

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1 P R O C E E D I N G S

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3 (Proceeding called to order, 10:38 a.m.)

4 THE COURT: Good morning, everyone. Please be
5 seated. We are here today for oral argument in the
6 Electrical Welfare Trust Fund vs. U.S., Case Number
7 19-353C.

8 I think I am going to structure today by first
9 hearing argument on Defendant's motion for summary
10 judgment regarding Plaintiff's takings claims, which is
11 ECF Number 105, and then, if time permits, I'd like to
12 discuss Defendant's objection to the certification of
13 final membership in the illegal exaction, class, which
14 is ECF Number 114.

15 MR. KUSHNIR: Good morning, Your Honor. If I
16 might say something that might resolve some of those
17 questions?

18 THE COURT: Sure.

19 Can we just enter appearances really quick and
20 then jump in?

21 MR. KUSHNIR: Absolutely. Absolutely.

22 THE COURT: Why don't we do that first, Plaintiff
23 first and then Defendant, and then I will let you make
24 your point, Mr. Kushnir.

25 MR. MELTZER: Good morning, Your Honor, Joseph

1 Meltzer for the Plaintiffs, from Kessler, Topaz, Meltzer
2 & Check. It's very nice to see you in person.

3 THE COURT: You, too. We have been on Zoom for
4 two years.

5 MR. MELTZER: I am joined by Melissa Yeates and
6 Jonathan Neumann from my office, and Charles Fuller from
7 McChesney & Dale as well.

8 THE COURT: Nice to see you.

9 MR. KUSHNIR: Good morning, Your Honor. Borislav
10 Kushnir for the Department of Justice on behalf of the
11 United States, and I am joined by Eric P. Bruskin, also
12 from the Department of Justice, and Kenneth Whitley from
13 the Department of Health and Human Services.

14 THE COURT: Wonderful. Nice to see all of you in
15 person.

16 Go ahead, Mr. Kushnir. What were you going to
17 say?

18 MR. KUSHNIR: Oh, yes, thank you. So we have
19 given our objection to the certification of class
20 membership some more thought after seeing the reply from
21 the Plaintiffs. We have talked to some lawyers at DOL
22 as well. We still have some concerns remaining, but we
23 think that the attorney representing one of the funds,
24 who submitted I think it was an exhibit to the reply,
25 she made some valid points, and we would like to

1 withdraw our objection at this point.

2 THE COURT: Okay.

3 MR. KUSHNIR: So we would like to withdraw ECF
4 number 114.

5 THE COURT: Okay. So the 157 entities, I'll say,
6 the class members, are we deeming them -- we all agree
7 that they are in the class now?

8 MR. KUSHNIR: Yes, that's correct.

9 THE COURT: Okay, great.
10 Well, that is very helpful. Thank you for
11 letting me know that before I went down the rabbit hole
12 with you all today. I will just push this back to the
13 side, and we will just focus on this today.

14 All right, why don't we start with you since it
15 is your motion, Mr. Kushnir.

16 MR. KUSHNIR: Certainly.

17 THE COURT: Just give me one moment here.

18 Okay, go ahead.

19 MR. KUSHNIR: All right, thank you.

20 So the Affordable Care Act is certainly a lengthy
21 and intricate piece of legislation.

22 THE COURT: Yes.

23 MR. KUSHNIR: But the legal issue before the
24 Court today is a straightforward and well-settled one.
25 What Congress did by enacting Section 1341 of the ACA,

1 which was codified in 42 USC Section 18061, is a
2 statutory obligation to pay that required certain
3 entities, including the Plaintiffs, to pay into the
4 Transitional Reinsurance Program. This type of
5 statutory obligation to pay is simply not a taking.

6 The Supreme Court made that clear in *Eastern*
7 *Enterprises vs. Apfel*, and while that decision is
8 procedurally a little -- not so straightforward because
9 there is no majority opinion --

10 THE COURT: Well said.

11 MR. KUSHNIR: -- putting it mildly, and that is
12 because there is no majority opinion, but at the same
13 time, a clear five-Justice majority made clear that a
14 statutory obligation to pay is not a taking.

15 And then you have the Federal Circuit sitting en
16 banc just a few years later --

17 THE COURT: Can I just ask you, on *Eastern*, did
18 Justice O'Connor address that issue? Can you just
19 remind me? I know she was writing for the majority.
20 Did she address whether -- did she disagree whether it
21 was a cognizable property interest?

22 MR. KUSHNIR: Yes. So Justice O'Connor, writing
23 for a four-Justice -- I would call it a minority --

24 THE COURT: Right.

25 MR. KUSHNIR: -- she wrote that there is a taking

1 under the unique circumstances of that case, where there
2 was a severe retroactive liability imposed on Eastern
3 Enterprises.

4 Now, that's not the situation here, but even
5 putting that aside, Justice Kennedy, in a concurrence,
6 then wrote that there is no taking because this type of
7 statutory liability simply does not involve the kind of
8 property that is protected by the Fifth Amendment.

9 Now, the reason Justice Kennedy wrote a
10 concurrence and not a dissent is because he decided that
11 they have a claim under the due process clause of the
12 Fifth Amendment.

13 THE COURT: I saw that. I saw that. I just
14 didn't remember what she said.

15 MR. KUSHNIR: Yeas, so, she addressed it head,
16 and she disagreed with Justice Kennedy as well as
17 Justice Breyer who wrote a dissent for four members of
18 the Court. But, you know, putting all that aside, we
19 have a clear five-Justice majority that says there was
20 no taking when you have a statutory obligation to pay.

21 And then you have the Federal Circuit sitting en
22 banc just a few years later in Commonwealth Edison
23 unanimously interpreting the Eastern Enterprises opinion
24 as saying that there is no taking when there is a
25 statutory obligation to pay, and then reaching the exact

1 same conclusion on another unrelated statutory
2 obligation to pay. So we think those two cases, taken
3 together, resolve this case.

4 Now, the Plaintiffs in this case, they really
5 seem to focus primarily on two points. What they say is
6 that, number one, they had to use their own money, their
7 own assets, to which they have rights under the trust
8 agreement, to pay this liability, to make TRP
9 contribution, and that they received no direct benefit
10 from the TRP because they did not receive nor were they
11 really eligible for reinsurance payments from HHS.

12 We don't disagree with either point. We don't
13 disagree that they used their own money. We don't
14 disagree that they received no reinsurance
15 contributions. None of that matters for the point we
16 make, because, Your Honor, if you look at Eastern
17 Enterprises, both of those points were equally valid
18 there. Eastern Enterprises made payments under the Coal
19 Act from its own funds, and it received no direct
20 benefit from those payments because those payments were
21 for retirees who have long since retired from the mining
22 industry.

23 And so what it essentially had to do is fund the
24 retirement accounts of folks who were not even working
25 for the company anymore. So it received no direct

1 benefit from that payment. Nonetheless, the Supreme
2 Court, in a five-Justice majority, said that it is
3 simply not a taking.

4 The other -- the other thing the Plaintiffs do is
5 they focus on the "interest follows principle" cases.
6 Now, in those cases -- this is a line of cases in which
7 the Supreme Court has said if the Government confiscates
8 a specific fund of money, that can be a taking, but in
9 those cases the programs that were under review
10 identified a specific fund of money and appropriated
11 that entire fund without regard for how much money was
12 in there. That's not what happened here.

13 Congress did not identify the trusts that hold
14 Plaintiff's assets as the fund of money that has to be
15 used for TRP payments. It didn't identify any funds,
16 and, in fact, it probably would not have done that
17 simply because the TRP obligations were imposed on
18 insurers as well.

19 Insurers are private corporations. They don't
20 necessarily hold their money in a trust -- they could,
21 but they don't necessarily -- but it's clear from the
22 ACA that Congress did not care where the money comes
23 from, and then if you look --

24 THE COURT: That's what I was going to ask you.
25 I mean, I think Justice Kennedy made this point in his

1 concurrence, and he said the law simply proposes an
2 obligation to perform an act, a payment of benefits.
3 The statute is indifferent as to how the regulated
4 entity elects to comply or the property it uses to do
5 so. So that's my question.

6 Is there -- was there a mandate of this is coming
7 from -- this has to be paid from a specific fund or
8 could they get -- the money -- the payment could have
9 come from anywhere?

10 MR. KUSHNIR: It could have come from anywhere.
11 It could have come from anywhere, Your Honor.

12 THE COURT: It could have come from a friend, a
13 friend of the -- it doesn't matter where the source of
14 the payment stems from. Is that correct?

15 MR. KUSHNIR: That's correct. That's exactly
16 right. The ACA says nothing about the source of the
17 payment. The attendant regulations don't say anything.
18 The legislative history, as far as we know, says nothing
19 about that as well. For all of --

20 THE COURT: Not a lot of "leg" history for the
21 ACA, though.

22 MR. KUSHNIR: Not a lot of it, that's true, but
23 that's exactly correct. The Plaintiffs are probably
24 going to come up here and say, "Well, we didn't have any
25 other choice. Our money had to come from these funds

1 that's where our assets are."

2 Number one, I'm not sure that's true. I don't
3 know if they could have gone out to their lender and
4 taken out a loan to satisfy these TRP obligations, or
5 whether they could have gone back to the employers that
6 put money in the trusts and requested more money because
7 they needed to comply with these TRP obligations.

8 They may have had other options other than taking
9 assets out of the funds, but even if they didn't, it
10 still does not matter, because unlike in Brown and
11 Phillips and in that line of cases, the ACA neither
12 identifies a specific fund of money, nor does it seize
13 that entire fund, because you've got to remember, in
14 those two cases, the programs -- it's a Texas program
15 and a Washington State program -- it simply said that
16 the lawyers have to turn over all the interest that is
17 earned on the principal to the relevant state program.
18 It didn't matter how much money was in there. The
19 entire fund, the entire specific fund had to be turned
20 over.

21 That's not the case here. We've pointed out that
22 it's a fairly small percentage that they had to pay into
23 the TRP, it's not the entirety of the funds that were --
24 that were held in trust by the Plaintiffs, and it's
25 simply a different kind of situation.

1 THE COURT: So is it more like a -- getting a tax
2 bill or something like that?

3 MR. KUSHNIR: Right. It's very much like that.
4 You know, it's more of an assessment as opposed to a
5 tax. That's how Congress seems to have structured it,
6 but the same principle applies. That is correct. That
7 is correct.

8 THE COURT: Okay.

9 MR. KUSHNIR: Now, we don't think the Court
10 really needs to get past this point. This is the
11 simplest way of resolving the case, because there is,
12 like we've pointed out, case law directly on point that
13 deals with the severity issue, but I'm happy to go on to
14 our following points if the Court would like.

15 THE COURT: Yes, I think so. I think the
16 Court's -- you know, I know -- let's make clear for the
17 record, you're operating now in the hypothetical world,
18 but, you know -- and you're not conceding that there's a
19 property interest here.

20 MR. KUSHNIR: Right.

21 THE COURT: But if I were to find that there was
22 a cognizable property interest, let's go on to the per
23 se and regulatory taking schemes and your statute of
24 limitations.

25 MR. KUSHNIR: Sure. Sure thing.

1 So moving on to what kind of takings framework
2 we're operating under, again, lots of cases here that
3 say when there is a seizure of money, what we are
4 talking about is a noncategorical regulatory taking, not
5 a per se taking. The Supreme Court said that in Sperry
6 Corporation, and even the minority that recognized the
7 takings claim in Eastern Enterprises said, "Of course,
8 this is not a per se taking."

9 And then you have the case that's from the
10 Federal Circuit, you have Branch, you have Atlas
11 Corporation. Those are all cases dealing with seizures
12 of money in which those courts, the Supreme Court and
13 the Federal Circuit, had to answer the question of what
14 kind of property it is, and they all said that this is
15 not a per se taking, it's a noncategorical, regulatory
16 taking, at most.

17 THE COURT: Could you address maybe the Brown
18 case, the Supreme Court's Brown case? Does that dictate
19 the use of a per se taking analysis?

20 MR. KUSHNIR: No, we don't think so. So in
21 Brown, the Supreme Court was -- it took care to
22 distinguish between the principle in the IOLTA accounts
23 and the interest earned on that principle, and what it
24 said is, if the Government were to take the principal,
25 that would, at most, be a regulatory taking that would

1 have to be analyzed under the Penn Central analysis.

2 THE COURT: Okay.

3 MR. KUSHNIR: But the interest part of it is
4 better -- I think it said it is -- the better approach
5 is to analyze it as a per se take, and we think that's a
6 very important distinction, because the principal,
7 that's an amount that was put into these IOLTA accounts
8 by contract, right, these agreements between lawyers and
9 their clients.

10 That's the situation we have here. We have a
11 contractual right to assets. So we think that the
12 assets here are more akin to the principal in the IOLTA
13 accounts and not the interest in those accounts.

14 The interest is a unique common law right that
15 dates back -- I think before the founding of this
16 country, and that's -- that's not really applicable to
17 what we're talking about in our case.

18 THE COURT: Okay.

19 MR. KUSHNIR: Now, the other position that the
20 Plaintiffs took is that this may be a categorical
21 regulatory taking under Lucas. Again, we've cited case
22 law from the Supreme Court, the Concrete Pipe case that
23 I think is pretty clear on that point. The Plaintiffs
24 can't take the amount they paid to the Government,
25 divide it up from the rest of their assets, and say

1 we've lost all the economically beneficial use of that
2 particular portion of our property.

3 That's simply not something you can do in a Lucas
4 analysis. You have to look at the entire parcel and
5 then decide whether that entire parcel was taken in a
6 way that eliminates all economic value, and here the
7 entire parcel is all the funding that Plaintiffs
8 received during the 2014 through 2016 benefit years, and
9 that entire parcel was not taken, not even close.

10 THE COURT: Okay.

11 MR. KUSHNIR: So we think that this would be
12 under the per se takings analysis if the Court were to
13 move past the Eastern Enterprises and Commonwealth
14 Edison line of cases, and then the question is whether
15 this claim is even timely. In Campbell, the Federal
16 Circuit made clear that when we're talking about a
17 noncategorical regulatory taking, what matters for
18 accrual purposes is the final decision of the government
19 actor that caused to taking, and we think that in the
20 prior decision this Court issued in this case -- the one
21 granting in part and denying in part our motion to
22 dismiss -- the Court made clear that the decision to
23 impose an obligation to pay on the types of entities
24 that Plaintiffs represent -- specifically, self-insured
25 entities administered by third-party administrators that

1 are not insurers -- that obligation was imposed by
2 Congress, because the ACA, on its face, is clear that
3 those types of entities are covered.

4 And so the government actor that made the
5 decision to impose this obligation on Plaintiffs, it
6 wasn't HHS, it was Congress. Congress made that --

7 THE COURT: Why isn't it then -- why isn't it
8 HHS? Can you just delve into that a little bit,
9 about -- just ex -- it's in your brief, and I generally
10 understand it, but just sort of in plain English,
11 what -- why isn't it when HHS came to their final
12 definition of who's going to contribute and who is not
13 going to contribute?

14 MR. KUSHNIR: Right. So the definition of
15 "contributing entity" throughout its iterations -- and
16 there were three of them, as the Court knows -- all of
17 those iterations of the definition covered the types of
18 entities that plaintiffs represented -- and I do want to
19 clarify, when I say "plaintiffs," I'm talking about
20 OETF, the stonemasons, not about EWTF.

21 THE COURT: Yes, the takings plaintiffs.

22 MR. KUSHNIR: Right, the takings plaintiffs. So
23 all three of those iterations covered the takings
24 plaintiffs takings, and the reason is because Congress
25 directed HHS to get TRP contributions from these kinds

1 of entities in the ACA. So it's not like HHS had a
2 choice in whether to obtain TRP contributions from
3 plaintiffs and those types of entities. It was directed
4 to do so by Congress.

5 THE COURT: But it could have defined
6 "contributing entity" differently, perhaps. I mean, you
7 know, to exclude -- it would have been against the law,
8 but -- but as I've already found, they did do that for
9 at least EWTF in this case. I know you disagree with
10 that ruling --

11 MR. KUSHNIR: But, Your Honor, even taking that
12 ruling at face value, putting aside our disagreement
13 with it, that was a little different. The ACA, I think
14 what the Court said is, the ACA said nothing about
15 self-insured/self-administered entities like EWTF, and
16 so HHS came forward and interpreted the ACA in a way
17 that includes SITPAs in the definition of "contributing
18 entity." It, in a sense, filled a gap that was left by
19 the statute.

20 Now, the statute was clear that the takings
21 Plaintiffs and those types of -- let's call them
22 SITPAs -- those types of entities were included and had
23 to pay into the TRP --

24 THE COURT: Right, because it was just plainly on
25 the face of the statute.

1 MR. KUSHNIR: Exactly, exactly. So if HHS had
2 decided to exclude them, that would have been in clear
3 violation of the ACA. I don't believe HHS would have
4 done something like that.

5 THE COURT: All right. Let's go back to the
6 cognizable property interest.

7 MR. KUSHNIR: Sure.

8 THE COURT: Can you come up with a scenario here
9 where there would be, for example, in your view, a
10 cognizable property interest, again, in a hypothetical
11 world?

12 MR. KUSHNIR: So a hypothetical world under the
13 ACA or a different statute?

14 THE COURT: Under this statute. You know, if
15 things were structured differently, if -- or are you
16 saying there can't be really under any circumstance here
17 where there's a cognizable property interest?

18 MR. KUSHNIR: So I suppose if the ACA was
19 structured differently, there could have been a property
20 interest. So, for instance, if Congress did essentially
21 what Texas and Washington State did in Brown and
22 Phillips, if they had identified a specific fund of
23 money and said that that fund of money is confiscated
24 for the purpose of these reinsurance payments, then
25 perhaps this would be more appropriately analyzed under

1 the Brown and Phillips and Webb's Fabulous Pharmacy line
2 of cases, but that's simply not what Congress did.

3 What Congress did is they imposed an obligation
4 to pay without identifying a specific fund, without
5 confiscating that entire fund, and that type of
6 obligation to pay is not a taking.

7 THE COURT: So really you're saying if the law
8 were different, then perhaps, but not if the structure
9 of the Plaintiffs' fund were different, that it's not
10 going to matter.

11 MR. KUSHNIR: That's correct, it doesn't matter,
12 and that -- you know, that may be part of the issue
13 here. When Plaintiffs think of the "specific fund of
14 money" line of cases, it seems like they're thinking,
15 well, we used a specific fund of money, so to them, the
16 focus is on how they paid, how they made -- how they
17 satisfied these statutory obligations to pay.

18 But in reality, when the Supreme Court talked
19 about a specific fund of money, the focus on how the
20 statute was structured, right? Because every assessment
21 that is paid from a bank account is paid from a specific
22 fund of money. Every tax that is paid from a bank
23 account is paid from a specific fund of money. A
24 specific fund of money is always involved or almost
25 always.

1 The point is not how the statutory obligation is
2 satisfied. It's how the law is structured and what the
3 law requires.

4 THE COURT: Okay. Let me listen to your
5 colleague on the other side. Thank you so much.

6 MR. KUSHNIR: Thank you.

7 THE COURT: And I'll give you more time. If you
8 would like to follow up, I will give you some time.

9 MR. KUSHNIR: Sure, thank you.

10 MR. MELTZER: Thank you, Your Honor.

11 As usual, my best laid plans are now in a sea of
12 notes and scraps of paper, and so I want to -- let me
13 address some of Mr. Kushnir's primary points. Maybe we
14 could start, Your Honor, with it doesn't matter where
15 this comes from, right? And so the argument that the
16 Government seems to be making is -- and I believe
17 Mr. Kushnir said something to the effect of -- Congress
18 did not identify the trust that had to be used to pay
19 this money. It just said pay these TRP contributions.
20 He also made the point that it applies to commercial
21 insurers. Let me break that down a little bit.

22 The contributing entities are defined as group
23 health plans. Since 1974, under ERISA, they are
24 required to have all of their assets in trust. I'm not
25 using ERISA as their property interest or basis. I'm

1 saying the federal law, which obviously the Government
2 knows about, requires all of their assets to be held in
3 trust. The trust agreements that are now part of this
4 record confirm that.

5 The OETF, the plan, has a trust fund. The
6 stonemasons have a trust fund. They have all of their
7 assets. So when you pass this piece of legislation and
8 you have contributing entities identified as the group
9 health plans, there is a 100 percent chance that that
10 money is going to be taken from a trust, absent
11 something that Mr. Kushnir hypothesized as a loan -- I
12 can't believe that a federal statute that would require
13 an entity that has no other assets in it to go out and
14 take a loan to satisfy this particular obligation, that
15 doesn't -- that seems nonsensical to me.

16 They don't have operational money. The
17 commercial insurers that Mr. Kushnir talked about, they
18 do have operational money. They can pay that money.
19 They don't have to keep all of their assets in a trust
20 because they're not governed and run the same way that a
21 group health plan is. The takings class or the takings
22 claim that we're pursuing is on behalf of the group
23 health plans. It's not on behalf of the commercial
24 insurers. We're differently situated.

25 I fully and freely admit that, and the -- and

1 this idea that they didn't identify and seize money to
2 be used for a public purpose, if you look at the
3 cases -- and I can go through some of them -- but this
4 is as specific and identifiable a fund of money as
5 you're going to get, and it's -- the only difference --
6 I'm not sure that there really is any difference with
7 the IOLTA accounts, those are funds of money that are
8 there, that this statute was directed at taking assets.

9 THE COURT: Can you just address maybe Adams and
10 sort of what your definition of, like, "specific" is as
11 it relates to "specific fund," because it seems like --
12 it seems like Adams counsels against what you're saying,
13 and I just -- if you could just address that.

14 MR. MELTZER: Your Honor, when the Government --
15 the Government essentially changed the statute of
16 limitations, right, on the entitlement to overtime
17 compensation.

18 THE COURT: And if you want to come back to this
19 question, you know --

20 MR. MELTZER: No, I'm fine.

21 THE COURT: -- I'll give you time to -- I'll sit
22 down and give you time to --

23 MR. MELTZER: No, no, no, it's fine. I
24 understand that, and I keep reading Adams, and I read
25 the transcript from our last argument, and I'm not

1 following how it's a similar or analogous situation
2 because the -- because the Government basically took a
3 statute of limitations on overtime compensation from the
4 FLSA and -- or the FMPA, I should say -- and moved it
5 from six years to two years, so they -- that doesn't
6 mean they don't have a due process claim to that money,
7 but that money -- there is no specific fund of money
8 that was paid out or held in trust for these employees
9 that the Government is now attaching and clawing back
10 and saying, you know, "This is ours now."

11 So it's -- I think it's the retroactivity or the
12 retroactive application of that statute that's really
13 being challenged in Adams under the -- under the guise,
14 frankly, of a takings claim, and when I read it,
15 candidly, Your Honor, I don't think that's a takings
16 claim.

17 I mean, I think if the Government would do that,
18 and then they would have the opportunity or they would
19 make a decision about a particular statute and the way
20 it's applied or a statute of limitations, then I agree
21 with this sort of bootstrapping argument that we see a
22 little bit in the Government's reply, that every time
23 the Government did that, they might be susceptible to
24 liability under the Fifth Amendment takings clause. I
25 don't -- I don't think that's what we have here.

1 What we have here is money that's already there,
2 money that is sitting in this trust, required by federal
3 law to be there, the only assets of the -- of the group
4 health plans who are defined as the contributing entity,
5 and they have to use that money. It's -- and if I can
6 make one more analogy, it's like horn.

7 So the regulation in Horne was as to the reasons
8 or the particular share of the raisin crop, but it was
9 assessed on the growers of the raisins, and, yes, the
10 growers of the raisins had a crop that they were using
11 obviously to satisfy this government taking, and I
12 just -- that's sort of a very sophisticated line that
13 you're drawing if you're saying, well, Congress didn't
14 identify by name the trust funds. It only said the
15 group health plans.

16 And Your Honor brought up the line in Eastern
17 Enterprises from Justice Kennedy. Yeah, the statute was
18 indifferent there because, again, that's a -- that's
19 somebody with operations, the coal mining plant has
20 operations, they have accounts that are not specifically
21 designated and assigned and under trust agreements, and
22 that statute was indifferent, and he was right. That
23 was without regard to the particular property.

24 But here, this statute or this contribution is
25 being required of group health plans. So by its nature

1 it's targeting that specific fund of money. It has to
2 be.

3 THE COURT: I guess I go back to this quote from
4 Adams about what a "specific fund" means, and they say,
5 "It means an actual sum of money representing interest
6 derived from ownership of particular deposits in an
7 established account" -- and here's the part that I'm
8 struggling with with your case -- "as opposed to some
9 abstract sum of money capable of being calculated."

10 So how is this here not a sum of money capable of
11 being calculated? You know, we're not identifying a
12 whole fund. We're identifying sort of a calculation and
13 that's the fee, right?

14 MR. MELTZER: Well, okay, Your Honor. Let me see
15 if I can do it this way. When they say an "abstract
16 fund of money that can be calculated," they're talking
17 about the entitlement to benefits that they -- you know,
18 the Plaintiffs were alleging has been vested, right, and
19 accrued, but not paid.

20 Here, there is -- and I mentioned this at the
21 motion to dismiss argument -- but there are forms that
22 each plan files -- a Form 55 00, it's in the record in
23 this case -- that says this is the amount of plan
24 assets. This is what's in the plan. And what you have
25 to do is you have to take that \$63 per individual

1 covered life and pay it over.

2 So I -- it's not -- we don't -- it's not that --
3 it's not an abstract situation where we're not sure
4 what's in the plan or where we're not sure how much
5 money would be necessarily available to satisfy this
6 contribution. They know precisely what that -- that's
7 part of the math that HHS used to back its way into how
8 much are they going to need from this pool of covered
9 lives and health insurance to help stabilize the market
10 when high-risk individuals were moved into it.

11 But it's not -- that's what I say about --
12 obviously, I mean this respectfully, Your Honor -- but
13 when I read Adams, there isn't any money there. They
14 had a -- it just so happened to be the Federal
15 Government that they say owed them money. If an
16 employer made a decision that said -- and let's say,
17 hypothetically, if we can, for a second -- that it's --

18 THE COURT: Sure.

19 MR. MELTZER: -- they're not bound by the FLSA or
20 any other federal statute or any other state overtime
21 requirement, but let's say an employer did it for 50
22 years, and they said, "You know, we're going to pay you
23 time and a half, and you have four years to make that
24 claim if we don't give it to you," and if they said
25 immediately thereafter that, "All right, now it's one

1 year that you have to make that claim," that would just
2 be a contract claim. That wouldn't be -- the only --
3 the only reason that the Federal Government got involved
4 is because it's a federal statute and federal employees,
5 but it has nothing -- it has nothing to do with whether
6 there was a takings in that case.

7 So -- and I'm not trying to skirt your --

8 THE COURT: That's okay. Let's just -- let's
9 just move forward.

10 MR. MELTZER: Okay.

11 THE COURT: I get your points. I understand your
12 points.

13 MR. MELTZER: Okay.

14 THE COURT: Let's move to Edison --

15 MR. MELTZER: Okay.

16 THE COURT: -- because it seems like the Circuit
17 said an obligation to pay money can't be a taking, and
18 so we've covered this a little bit, but just directly,
19 sort of how is the interest that you assert here
20 different from the interest -- their own money? Why is
21 yours a cognizable interest but theirs in Edison would
22 not be?

23 MR. MELTZER: Because, again, Your Honor -- and
24 now we're -- we're assessing all of these things against
25 regulatory takings cases, which, you know, respectfully,

1 I would disagree are the ones that we should be looking
2 at, but, you know, the Court was pretty clear in Edison
3 that if there was a specific fund of money attached to
4 it, then a takings could occur, and I think Judge Dyk
5 says that verbatim -- and I apologize, I can't put my
6 finger on precisely the language -- but I --

7 THE COURT: I guess what I'm struggling with is
8 how a TRP contribution is not just an ordinary
9 obligation to pay money --

10 MR. MELTZER: Because --

11 THE COURT: -- and your briefs make this point,
12 but it didn't have a ton of reasoning behind it, and I
13 just want to hear from you sort of your thought process
14 of why that's the case here.

15 MR. MELTZER: I guess, Your Honor, the way that
16 we have always viewed this case is you need to have an
17 identifiable property interest. I don't think it could
18 be more clear here that we have that with a trust fund
19 that is designed and set up for a specific purpose,
20 so --

21 THE COURT: But that's who pays it, not what's
22 being taken, right?

23 MR. MELTZER: Yes, but it's -- but the TRP
24 contribution is being assessed as against the group
25 health plan, and the group health plan's assets are all

1 held in trust, so --

2 THE COURT: Okay, I understand your point. So
3 you're saying it has -- I mean, it has to by law come
4 from the trust?

5 MR. MELTZER: I think by operation of this
6 statute, yes. I don't -- the hypothetical of a friend
7 could pay it or a bank could pay it I think does not
8 give enough deference to the way this statute is written
9 and applied and against a backdrop of the federal
10 statute that requires this money to be held this way.

11 I think it's different for -- you know, for the
12 commercial insurers. I agree with that. They don't
13 have this same type of protected property interest, and
14 I think it's different where you have, as in Edison or
15 Eastern Enterprises, where you have a regulation that's
16 basically saying you have to pay a certain amount into a
17 particular fund for either cleanup costs or health
18 benefits for coal workers, and there's no specific fund
19 of money there.

20 I think Justice Breyer makes that point clear in
21 Eastern Enterprises. I think Justice Kennedy makes that
22 point pretty clear, that it's without regard to the
23 particular property, and I -- I don't want to repeat
24 myself and I don't want you to get frustrated with me,
25 but --

1 THE COURT: I won't get frustrated with you.

2 MR. MELTZER: -- but I just want to go back to
3 how -- again, how this is set up is -- it's semantical
4 to say you're going to assess this amount of money on a
5 group health plan based on covered lives -- so, you
6 know, based on money that is sitting in a trust that
7 they then calculate and then say, well, we didn't target
8 or identify any particular fund of money.

9 The Government knows, obviously, that 100 percent
10 of the assets of these plans are held in trust. They
11 have been for decades, and they are required federally
12 under ERISA to be held that way. So you really need to
13 thread the needle where -- if you're going to say, okay,
14 well, this was only as against group health plans, but
15 not trusts. That's two sides of the same point.

16 You can't -- to sort of make that distinction,
17 respectfully, I think just doesn't make sense in the
18 context of how this statute was written, what it was
19 proposed to do, how these group health plans are
20 organized, and how, as the Government knows, they hold
21 their assets.

22 They weren't asking for a change in coverage.
23 They weren't telling group health plans you have to
24 cover high-risk individuals -- they do, by the way, they
25 always have -- but they weren't making any of those

1 types of regulatory pronouncements. They were saying
2 this is an amount of money that we need from you --
3 which essentially means from your trusts -- in order to
4 put it into this pool that you can never benefit from
5 because we need to stabilize the market for -- you know,
6 for insurance premiums in the face of the passage of the
7 ACA.

8 I -- again, I apologize if I keep going over the
9 same points, but --

10 THE COURT: No, I understand. I think I
11 understand your point. It takes a leap or two, but I
12 understand your point now much better than I did before.

13 MR. MELTZER: Okay, okay. That's probably
14 because I didn't articulate it well the first time, so I
15 apologize.

16 THE COURT: No, no, not at all. I am here to
17 learn today, so I appreciate the education.

18 MR. MELTZER: Right. So, if I may --

19 THE COURT: Sure. Is the money in the funds
20 fungible? Is it replaceable?

21 MR. MELTZER: No, and that --

22 THE COURT: Why?

23 MR. MELTZER: Because it's -- fungible money --

24 THE COURT: Just explain it to me.

25 MR. MELTZER: I will. I will.

1 THE COURT: Thank you.

2 MR. MELTZER: Fungible money is -- and the
3 Government makes this point in its reply, that if we do
4 this, then extrapolating this out every time we assess
5 money, and it's clear from the cases that that's not the
6 case -- but this is a specific amount of money that is
7 held pursuant to these trust agreements for a specific
8 purpose. So there is no ability for the trustees to go
9 in and use this money. They don't -- they can't use
10 this for -- for operations, they can't -- and
11 Mr. Kushnir made the point that, well, maybe the
12 employers could put more money into this. This doesn't
13 work that way.

14 There are -- that -- those are probably
15 collective bargaining agreements. In the case of a
16 single employer who -- a single employer who provides a
17 group health plan, it's even more clear. A single
18 employer -- let's just pick Verizon, for instance.
19 Verizon cannot satisfy the TRP contribution out of its
20 general operations. It could, but it would be
21 committing some type of fraud, shareholder fraud, or
22 some type of corporate, culpable conduct. It has to
23 look to the group health plan where the money is held
24 for a specific purpose in order to satisfy this.

25 The fungibility is not there. The only

1 fungibility -- well, it's not -- that's not even really
2 fungibility. I mean, it just represents a pool of
3 assets that's being used to provide healthcare, health
4 and welfare benefits that's specific.

5 Now, ERISA requires it, but, frankly, ERISA
6 requires the assets to be held in trust. Beyond that,
7 all of these trusts were created. There's no
8 fungibility across that way. Verizon -- if this was
9 truly fungible money, right, Verizon could say, you know
10 what, I'm going to cut health coverage for half of the
11 people, and then I'm going to take those savings out of
12 the group health plan, move them over to my business
13 account, and pay the TRP contribution. They can't do
14 that. That -- this money is fixed, it's there, they
15 have no -- they have no legal entitlement to do that.

16 And if you look at the -- some of the things that
17 we cited in our brief that talk about trust law -- and I
18 think this is important -- the fundamental tenets of
19 trust law make it very clear, that when you put, you
20 know, something in trust, you're putting property aside,
21 and there's an equitable interest in it for the
22 beneficiaries -- they're not plaintiffs here -- but
23 there's a legal interest in that property for the
24 trustees. They are plaintiffs here.

25 And so that's what makes this different than any

1 type of money that is otherwise in a bank account, in an
2 operations account for a business. There aren't
3 specific guidelines and strictures for how that money is
4 to be allocated or how it's to be held. I hope that
5 answered the question.

6 THE COURT: It does. It does.

7 MR. MELTZER: Your Honor, if I could just
8 briefly --

9 THE COURT: Let me ask you one more question on
10 cognizable property interest.

11 MR. MELTZER: Sure, um-hum.

12 THE COURT: Let's say -- and I truly have not
13 decided -- but let's say hypothetically that I sort of
14 reject the view that these trust funds are a specific
15 fund of money for purposes of the takings analysis. Do
16 you have an alternative -- alternative support for the
17 funds being a cognizable property interest or is this
18 the one -- this is the one argument before me with
19 regard to this prong of the takings analysis?

20 MR. MELTZER: Well --

21 THE COURT: I think it is from your brief, but I
22 just --

23 MR. MELTZER: Yeah.

24 THE COURT: -- I want to be clear.

25 MR. MELTZER: Yeah, I -- I guess what you're

1 asking is, do we have an argument --

2 THE COURT: Do you have a backup?

3 MR. MELTZER: -- that the group health plans
4 should -- you know, because they can't benefit, and if
5 you want to view this under -- you know, through a
6 regulatory prism, would there be an argument that there
7 was nevertheless a taking without the specific fund of
8 money that would lead you to a per se analysis? Did
9 I -- is that the question?

10 THE COURT: I'm just asking, is this your -- is
11 this your -- this is your argument.

12 MR. MELTZER: I -- I -- this is our argument.

13 THE COURT: Got it. That's it.

14 MR. MELTZER: This is our argument.

15 THE COURT: It's not a trick question. I just
16 want to make sure I haven't missed something.

17 MR. MELTZER: Look, lawyers, myself included, we
18 have a hard time letting go and pinning ourselves down,
19 but, yes, this is essentially what our argument is, is
20 that these trust funds represent specific and
21 identifiable property interests that were appropriated
22 for public use.

23 THE COURT: Okay. Why don't you move to maybe
24 the statute of limitations argument and your per se and
25 regulatory -- and I understand -- I went back through

1 your complaint. You're arguing per se primarily with an
2 alternative of a regulatory taking, if that's still
3 correct.

4 MR. MELTZER: Right. So, per se, I think we've
5 been pretty clear on why we think this is per se.
6 Regulatory, I can go through some of the steps. I would
7 note procedurally that if we are going to go down that
8 road, I think we should probably have a couple of our
9 experts testify and give testimony into the record at a
10 trial so this ad hoc analysis is actually complete,
11 because I'm not sure that the record is sufficient for
12 the Government to be able to say or for the Court to be
13 able to determine that the Government has proven, with
14 no genuine issues of fact, as to whether a regulatory
15 taking is --

16 THE COURT: Well, discovery is closed, right?

17 MR. MELTZER: Yeah, that's correct, yeah.

18 THE COURT: Right.

19 MR. MELTZER: Yeah.

20 But we also think that, if you do look at the
21 Penn Central factors, that we should prevail under that
22 analysis in any case. I mean, it's in -- basically in
23 our briefing. It's a secondary point to our per se
24 point for sure, but if you just look at -- and I'll do
25 this briefly, I promise -- but for context, you know,

1 there's three market stabilization programs in the ACA.
2 There's the risk adjustment, the risk corridors, and the
3 TRP, and the first two don't take assessments from group
4 health plans, and this one, even though it's under the
5 guise of reinsurance -- and Mr. Block writes about this
6 in his report -- you know, reinsurance as a practical
7 matter and in the ordinary course means you could
8 actually benefit from some of it at some point.

9 So if you do want to go down into the line of
10 cases that says, well, okay, I understand I didn't
11 target a specific fund -- which I really, wholeheartedly
12 disagree with -- but then the group health plan is
13 standing there in the shoes of having to shoulder this
14 sort of market stabilization burden -- which is what
15 they talked about in Horne, by the way -- and with no
16 potential.

17 They didn't create any of these problems. They
18 don't decline high-risk individuals from coverage. They
19 could never recover -- the Government has conceded
20 that -- they could never recover any portion of this
21 reinsurance pool that was created. Even the NAIC in
22 that -- there's a document in the appendix -- basically
23 said this is an involuntary reinsurance pool by group
24 health plans who could never benefit from it.

25 So even if you went down that road and moved past

1 the per se argument, I still think -- and that's why
2 we've always kind of made the record in this case to
3 show the unfairness of it and that --

4 THE COURT: I mean, it's a lot of the ACA though,
5 right? People pay in, but they don't get a direct
6 benefit.

7 MR. MELTZER: Well, you know, and Mr. Kushnir
8 made this point about Eastern Enterprises and that there
9 are retirees that they're funding their health benefits
10 from, well, there's a difference there, right? If
11 you're drawing a line between a coal operator and what
12 may have happened to employees, it's a lot straighter
13 than if you're trying to draw that -- irrespective of
14 whether they're current or former employees -- it's a
15 lot straighter of a line than if you're trying to draw
16 between a group health plan, again, in the context of
17 stabilizing the market for health insurance premiums
18 that is going to fluctuate because of people that they
19 don't insure, that they don't decline coverage to.

20 They don't underwrite insurance policies. They
21 essentially -- you are provided coverage, whether it's a
22 multi-employer plan or a single employer plan, there is
23 none of that analysis that goes into it. So you
24 really -- and I understand the -- the temptation to say,
25 sure, there's a lot of things that people have to pay

1 for that you can't directly derive a benefit from, but
2 if I can -- you know, if I can just do it very quickly,
3 Your Honor, and in your motion to dismiss opinion, I
4 think you set it out in a pretty straightforward way,
5 what this was for. I mean, it's to stabilize premiums
6 in a market in which they've never participated.

7 So trying to make an analogy between Eastern
8 Enterprises and its former employees or people in the
9 coal industry who are directly affected by the
10 activities and operations of a company like Eastern
11 Enterprises, to the insurance or the compelled
12 contribution here that goes to high-risk individuals who
13 are never a part and not in the -- were not in the
14 commercial insurance market, I think is very different.

15 And I'll move to statute of limitations, because
16 I think you're losing patience with that argument,
17 but --

18 THE COURT: I'm not losing patience.

19 MR. MELTZER: So the statute of limitations,
20 again, only applies if we're going down the regulatory
21 side. I think there is no statute of limitations if
22 we're on a per se takings claim. And, you know, again,
23 in looking at the motion to dismiss opinion, there is
24 six to seven pages of -- that kind of outlines the facts
25 of this case and all the deliberative process that HHS

1 went through in finalizing its rule, and it wasn't
2 really until the final rule in 2013, after comment, when
3 they made the distinction between, well -- because there
4 was confusion in the market, and there was -- and as you
5 may expect or may know from this case, there was a
6 substantial amount of disagreement and discord amongst
7 the ranks of people like our clients who have group
8 health plans who don't participate in the commercial
9 market, and they were very active during the comment
10 period, and one of the things that wasn't clear is,
11 well, is the group health plan paying this or is the
12 third-party administrator paying this? And that's a
13 substantial difference.

14 And, again, by tying that line between -- this
15 is -- and your question, Your Honor, to Mr. Kushnir was
16 why isn't HHS the government actor, and I don't see a
17 scenario in which HHS is not the government actor in
18 this case. To say that in 2010 the ACA was passed, and
19 everyone -- a light bulb went on and said, "Oh, I have a
20 claim that's accrued that I better file within a certain
21 period of time," and then to ignore the intervening
22 three to four years of comments and changes to the rule
23 and promulgating the final rule in 2013, set aside that
24 there was no final calculation given until much later.

25 So the numerator and the denominator that

1 Mr. Kushnir points to in his brief wasn't set yet, but
2 even if you move that to the side, everything from 2013,
3 that final rule, it's very hard to overlook that and say
4 they should have known as of -- and you know the statute
5 of limitations is a mixed question of fact and law, and
6 you need to really dig into what the history is here,
7 and, respectfully, even when I just read your opinion,
8 I'm left with, in my -- in my humble opinion, you know,
9 a conclusion that really says it can't be before that
10 final rule in 2013.

11 THE COURT: Okay.

12 MR. MELTZER: I'm happy to address any additional
13 points, Your Honor, or further questions.

14 THE COURT: No. I mean, I go back to cognizable
15 property interest. That's where I think the real
16 struggle is here, and I have a lot more clarity now on
17 what your point is, and that's very helpful.

18 But I still -- I still have this struggle with
19 how is this different from just sort of a -- and it's
20 clearly not a tax -- but a tax that you pay from your
21 bank account. You know, you're saying -- you're not
22 saying you must pay it from a specific fund -- and I
23 know you disagree because you say they must know it's
24 from a specific fund because ERISA mandates that this is
25 all -- that all the money is in a specific fund --

1 MR. MELTZER: May I, Your Honor? A tax in a bank
2 account is -- is just --

3 THE COURT: A tax or a fee as opposed to --

4 MR. MELTZER: Right.

5 THE COURT: -- I'm taking this whole IOLTA fund,
6 and that's in the statute.

7 MR. MELTZER: Well, look at Webb's, right?
8 Webb's had both. So Webb's had the fee for service --
9 this Florida statute had a fee for service that was
10 applied, right, and then they wanted the interest on top
11 of it. The fee-for-service part of the case wasn't even
12 challenged. That's fine. That's -- you know, they took
13 that as a fee for service. I don't think there's any
14 real argument on our side whether it's Sperry or Shoe or
15 that part of Webb's that you can do that, and this is
16 not a tax -- the Government told me that very
17 unequivocally the first time around -- and, you know,
18 and they called it a fee, but this isn't really a fee.
19 For what service?

20 And, you know, again, Webb's had both components
21 to it. Brown -- and I want to argue against the idea
22 that we're just using the "interest follows principal"
23 cases, I think it's different. I think we consider them
24 the "specific fund of money" cases, and it's just
25 incidental that they happen to involve IOLTA accounts

1 and principal and interest, but Brown makes the point
2 pretty clearly that -- and Mr. Kushnir talked about
3 this -- the principal in Brown wasn't taken. It was
4 held in a trust. It wasn't subject to any takings
5 analysis because there was no taking.

6 The interest was taken. They used a per se
7 analysis. It's a specific fund of money. They found
8 that very clearly. It's not like a regulation that
9 says -- that says you have to do something a certain
10 way. I keep coming back to health plans, and if you
11 look at Judge Hertling's recent opinion in King --

12 THE COURT: I've read it.

13 MR. MELTZER: -- he goes through a lot of this
14 and says, well, you know, this case would be like Horne
15 if there was a specific fund of money attached. This
16 case would be like Brown if there was a specific fund of
17 money attached.

18 That's a very good example, even though the
19 result went for the Government, because they're talking
20 about ERISA regulations and calculations of benefits.
21 It's a little bit like Adams in that -- in that fact,
22 and that I understand as being abstract.

23 You know, you don't have anything in -- in those
24 cases. Those -- the participants were bringing those
25 cases or beneficiaries, not the plans themselves. There

1 isn't a specific pool of assets that they can point to.
2 The trustees in this case can hold up their 5500 and
3 say, "Here's the trust fund, here's what's in it, this
4 is what the Government is coming in and taking, even
5 though it's assessed as to the group health plan and not
6 the trust fund."

7 And that's the only way I think you can make
8 any -- and respectfully, Your Honor, and I've said this
9 over and over -- that's a distinction without a
10 difference. When you consider the way these things are
11 set up and the way that they have to hold these assets
12 in trust, the Government knows -- if a group health plan
13 said we don't have any money to pay the TRP
14 contribution, so we can't pay it, do you think -- the
15 Government would not have taken that as a satisfactory
16 answer. They would have said, "Use the trust fund.
17 That's where your assets are located."

18 Theoretically, the Government health plans or the
19 group health plans -- excuse me -- could have just filed
20 for bankruptcy protection if they wanted. That -- but
21 the Government, again, would not have allowed -- they
22 knew what they were getting. They got all -- and it
23 worked, by the way, and I'm not impugning the -- the --
24 you know, the overarching sort of good-natured or
25 altruistic principle of stabilizing the market. I get

1 it.

2 But they knew exactly what they were doing. They
3 made a calculation that wasn't based on the group health
4 plan's assets, because there are none. They were based
5 on the trust fund assets, and they used them, and they
6 collected all of this money from them.

7 So, you know, we've talked about it on my side
8 over and over again, and I keep coming back to --

9 THE COURT: I think -- no, go ahead.

10 MR. MELTZER: Yes, I'm sorry. We keep coming
11 back to that that's really two sides of the same thing.

12 THE COURT: Let me hear from Mr. Kushnir.

13 MR. MELTZER: Thank you, Your Honor.

14 THE COURT: He can address your specific funds
15 argument.

16 MR. KUSHNIR: Thank you, Your Honor.

17 THE COURT: Sure.

18 MR. KUSHNIR: I just have a few points, but I'm
19 happy to address anything else.

20 THE COURT: And if you could make -- within those
21 points, if you could just address what your colleague
22 said about, you know, this must be a taking and must be
23 a specific fund because ERISA mandates that all -- the
24 money can only come from one place, that would be
25 helpful.

1 MR. KUSHNIR: Absolutely, absolutely, and I
2 can -- I can start with that.

3 THE COURT: Sure.

4 MR. KUSHNIR: So that's a point that they've
5 made, that all of their assets are in this trust and it
6 has to come from the trust. There's no other option.

7 Again, there's no evidence that's been put before
8 the Court on summary judgment that there was no other
9 option for them. I think my friend on the other side
10 said, "Well, it doesn't work that way. We can't just go
11 back to -- or our clients can't just go back to the
12 employers and say give us more money, because this is
13 governed by collective bargaining agreements or CBAs."

14 That's true, but collective bargaining agreements
15 are regularly amended, and often they are amended to
16 increase the amount of contributions that employers
17 provide to the plans.

18 I don't know if there's a reason -- I haven't
19 heard one -- why the plans couldn't have gone back to
20 the employers and amended the CBAs in a way that would
21 have increased the amount in the funds so they can make
22 their TRP payments, nor have I heard any legal reason
23 why the funds were unable to take out a loan or do
24 something else of that nature in order to satisfy their
25 TRP obligations.

1 But at the end of the day, this does not matter,
2 because if you look at the "interest follows principal"
3 cases -- and by the way, just as an aside, I do agree
4 with my friend on the other side that it's not limited
5 to interest, that's just the way the Federal Circuit has
6 characterized it, and I think that's what the Court
7 called it in Texas State Bank -- but, yes, it could
8 apply to noninterest sums of money as well.

9 But the point there is that the statute or the
10 regulation, the program under review has to specifically
11 identify the fund of money, and just as importantly,
12 Your Honor, it has to confiscate that entire specific
13 fund. Even if we disagree about identification -- I'm
14 not sure how we can because my friend on the other side
15 has not pointed to anything in statute, regulation,
16 legislative history, nothing of the sort, that
17 identifies a specific fund of money from which these TRP
18 payments have to come -- but the --

19 THE COURT: So really I'm looking at does the
20 statute identify what's being taken and was that entire
21 fund taken, as opposed to who pays it?

22 MR. KUSHNIR: Exactly. That's exactly right. To
23 be in the Brown and Phillips universe as opposed to the
24 Eastern Enterprises and Commonwealth Edison universe,
25 you have to have something that goes beyond a simple

1 statutory obligation to pay, and the Court at one point
2 asked my friend on the other side, point blank, how is
3 this different from an obligation to pay, which is --
4 that's -- you know, that's the whole -- that's the whole
5 case, I would argue.

6 And my friend on the other side did not have an
7 answer for that that either cited any law, any statute,
8 regulation, or even any meaningful, legally important
9 difference between the obligation to pay within the ACA
10 and the obligation to pay in Eastern Enterprises and the
11 Coal Act, or the obligation to pay that was at issue in
12 Commonwealth Edison.

13 Those are all the same kinds of obligations to
14 pay, which puts this case squarely in the Eastern
15 Enterprises/Commonwealth Edison universe and not in the
16 Brown and Phillips universe.

17 THE COURT: Okay.

18 MR. KUSHNIR: I only have two other points. One
19 of them, I think you asked at one point, Your Honor, why
20 are the funds and the trusts not fungible, and my friend
21 on the other side said that, well, it can't be used for
22 other purposes.

23 So I don't think they're saying that the plans
24 could not have paid -- could not have satisfied their
25 TRP obligation. I haven't seen any reason why paying --

1 contributing in to the TRP the way the ACA required
2 plans to do violated ERISA or violated the Taft-Hartley
3 Act, which are the two acts that really govern these
4 types of plans, nor do I see a reason why that would
5 have violated the trust agreements, and, in fact, in our
6 reply brief, we cited to a provision in the trust
7 agreements that recognized that these trusts may have to
8 make payments for things to go outside the context of
9 ERISA. It says "and other laws." So it could have been
10 used for other legal purposes, including to satisfy TRP
11 obligations, and that's exactly what happened here.

12 But more directly to your point, Your Honor, when
13 we talk about whether something is fungible, I think
14 we're talking about whether a sum of money can be used
15 for different purposes, and the assets that were held in
16 trust could have been used for different purposes.

17 If you take one dollar that is located in the
18 trust, that one dollar could have gone to paying out
19 benefits to beneficiaries, it could have gone out to
20 paying administrative costs, it could have gone out to
21 paying statutory obligations that the fund had, whether
22 it's under ERISA or the ACA or whatnot. That's what
23 makes the funds that are in the trust fund fungible.

24 THE COURT: And I ask because of Sperry.

25 MR. KUSHNIR: I understand. I understand.

1 I only have one final point. I don't think this
2 is something the Court needs to get to and hopefully
3 will not get to, but there was at some point, my friend
4 on the other side said if we are in the noncategorical
5 regulatory taking world and we're talking about a Penn
6 Central analysis, this isn't something the Court can
7 resolve on summary judgment. We're going to need to
8 hear from experts on this.

9 I don't want to get too deep into Penn Central,
10 because that's the very back-end of this analysis, and
11 like I said, hopefully, we won't get there, but I did
12 just want to point out that the economic impact factor,
13 the very first factor within Penn Central, requires the
14 Court to take a look at a numerator and a denominator
15 and quantify the economic impact that the program had on
16 the Plaintiff.

17 We've presented that to the Court in our motion
18 for summary judgment. The Plaintiffs have not. They
19 have not articulated a different numerator or a
20 different denominator than the Government. They have
21 made no effort to quantify the economic impact that
22 resulted because of the TRP. They've done none of that,
23 and on summary judgment, based on the briefing and the
24 evidence that's before the Court, that is enough to rule
25 in our favor even on the Penn Central analysis.

1 THE COURT: Thank you.

2 MR. KUSHNIR: Thank you.

3 MR. MELTZER: Your Honor, if I promise to be very
4 brief, may I?

5 THE COURT: Yes, Mr. Meltzer.

6 MR. MELTZER: Very briefly, Your Honor. I am
7 just going to hit quick points. Thank you for your
8 patience today, Your Honor.

9 Brown says very specifically you don't need to
10 confiscate the entirety of a parcel or a piece of
11 property in order for it to constitute a takings.
12 Mr. Kushnir is talking about, well, the assets of the
13 trust could have been used for other purposes. That
14 sort of underscores my point.

15 It's not the group health plan that we're talking
16 about, it's the assets of the group health plan, and
17 even if you believe that it's not -- I don't think we're
18 saying it was a violation of ERISA for them to pay the
19 TRP contributions out of the trust. We're saying it's a
20 takings to require them to pay the TRP contributions out
21 of the trust.

22 But when the Government speaks about how the
23 trust assets can be deployed and they're not limited by
24 ERISA to do that, yeah, I have no argument with that,
25 but it underscores the fact that this statutory

1 framework and the ACA and the TRP was all directed at
2 the trust assets.

3 The last -- very quickly, this -- Mr. Kushnir
4 said that you can renegotiate and amendment collective
5 bargaining agreements, again underscoring the points the
6 trusts and the funds are not parties to collective
7 bargaining agreements. That's employers and unions that
8 do that.

9 Then the money then goes into a trust, which is
10 separate and specific, but the trust has no ability to
11 do that. It would have to be the employers. They don't
12 have the same incentives to stand up for the rights of
13 the trust funds. They just don't. That's not affecting
14 their bottom line operationally.

15 The same with the single employer plan. They
16 can't take their money out of operations and then decide
17 that they're going to use it to pay the TRP contribution
18 because it's in a separate place, and it's -- and it's
19 over -- that's what the right word? -- but it's managed
20 and administrated. There's a fiduciary board that
21 oversees those assets.

22 Finally, with respect to Penn Central, there's a
23 lot of evidence in this record. Now, Mr. Kushnir is
24 right, we didn't provide a numerator and a denominator,
25 per se -- forgive the pun -- but there are two expert

1 reports that are in this record -- Ms. Bakich and
2 Mr. Block that talk about the economic impact of
3 these reg -- of the TRP contributions on group health
4 plans, including the Plaintiffs, and that it's a
5 material impact, and I believe Mr. Block talks about
6 the -- it outpacing the rising cost of healthcare by
7 eight times, or something to that effect, but it is not
8 the case that there is no evidence in this record, and
9 that's what I was referring to when I said if you wanted
10 to have that, we should have a more fulsome discussion.

11 I took your point, Your Honor, that discovery is
12 closed, but then I would submit that all of the evidence
13 that's been submitted as part of the record should be
14 considered in that analysis.

15 THE COURT: Okay, thank you.

16 MR. MELTZER: Thank you.

17 THE COURT: Thank you so much.

18 Let's just go back to class objections really
19 quick. I just want to clean this up and just make sure
20 that everyone consents that there's no remaining issue
21 before I certify this class, the illegal exaction class.
22 Are there any remaining issues?

23 MS. YEATES: Not from Plaintiff's perspective.

24 THE COURT: I see Mr. Meltzer --

25 MR. MELTZER: Can we confer for --

1 THE COURT: Why don't you confer. Why don't you
2 take a moment and confer, and if you want to come back
3 in ten minutes or five minutes, we can do that. Why
4 don't we take a brief adjournment. Thanks.

5 (A brief recess was taken.)

6 THE COURT: Please be seated.

7 I will ask my question again. Do we have any
8 more issues with regard to certification of final class
9 membership and entry of judgment?

10 MR. MELTZER: Your Honor, I -- I don't believe
11 so. I just wanted to make clear two points for the
12 record. The ECF-111 is where we identify the members of
13 the class. There were 357 of them. ECF-114 is the
14 Defendant's objection that objected to 157 of those 357.
15 That is withdrawn.

16 THE COURT: Right.

17 MR. MELTZER: The only thing I wanted to -- the
18 only reason I hesitated -- and I wanted to at least flag
19 this for Your Honor's attention, although I don't think
20 it requires any change in the course -- is that we
21 recently got contacted by somebody who claims to have
22 claimants for this. This was about ten days ago, and
23 we've gotten a lot of these over the course of this
24 opt-in period, and I dealt with Mr. Kushnir on one very
25 early on. It allowed us to follow supplemental

1 certification. The Government was very accommodating on
2 that.

3 We have told these most recent claimants that,
4 effectively, you're too late. That's been our position.
5 The deadline was a long time ago. We've submitted the
6 certification. We're pretty far down the line. But I
7 didn't want something to land on your desk, Your Honor,
8 right after this hearing, and say, "Well, you could have
9 at least let me know about it."

10 So there's no objection from the Government,
11 there certainly isn't from us, to certifying the 357
12 members of the class, but just in case that comes up, I
13 did at least -- I didn't want you to be surprised by it.

14 THE COURT: How would it come up?

15 MR. MELTZER: Oh, if somebody -- if a claimant on
16 their own --

17 THE COURT: I see.

18 MR. MELTZER: -- filed something with the Court.
19 I can't -- I don't preclude them from doing that.

20 THE COURT: Understood.

21 MR. MELTZER: But that's what I mean.

22 THE COURT: Got it. Thank you.

23 MR. MELTZER: Thank you.

24 THE COURT: Mr. Kushnir?

25 MR. KUSHNIR: And I will just quickly respond.

1 We don't have any remaining objections to the 357 class
2 members that were certified in -- I think it was ECF
3 number 111. We appreciate opposing counsel flagging
4 this potential issue for the Court. We don't think it's
5 really an issue the Court needs to be concerned with,
6 because the time to opt in has long since passed.

7 So really all that's left to this one plan or one
8 collection of plans is to file their own claims against
9 the Government, and if they were to do that, they would
10 be well out of time, well outside the statute of
11 limitations. So we don't think it's an issue, and the
12 Court can proceed --

13 THE COURT: Mr. Kushnir, I appreciate you arguing
14 a case that doesn't even exist yet. You are dogged on
15 this.

16 Well, thank you so much. I am -- I will issue
17 something soon and make sure that judgment is entered
18 with I guess the list that you provided of who's getting
19 what, and I hope to do that quite soon.

20 So thank you for your work on this case, and as
21 far as the illegal exaction claims go, and we'll see
22 about the takings claims. I'll try to issue an opinion
23 fairly soon, probably within the next 60 days or so.

24 Thank you so much, and have a great day.

25 ALL COUNSEL: Thank you, Your Honor.

1 (Whereupon, at 11:59 a.m., the proceedings were
2 adjourned.)
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CERTIFICATE OF TRANSCRIBER

I, court-approved transcriber, certify that the foregoing is a correct transcription from the official digital sound recording of the proceedings in the above-titled matter.

DATED: 5/15/2023

Susanne Bergling

SUSANNE BERGLING, RMR-CRR