

Mandatory Arbitration and Wealth Distribution: The Policies and Politics of the Multiemployer Pension Plan Amendments Act

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INTRODUCTION

Pension law poses some of the most important distributive wealth questions for contemporary civil law in the United States. Private employment pension systems in the United States now constitute the single largest block of capital in the world, with \$1.7 trillion in accumulated assets.¹ This block of capital is a market cornerstone of our capitalist political economy. Acknowledging private pensions' indispensable role in our economy, Congress has chosen to provide federal oversight of the private employment pension regime. The fundamental legal and social policy questions inherent in Congress' supervision are how we want to accumulate, safeguard, and, ultimately, distribute this wealth, and through what sort of social benefit retirement systems.²

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¹ *Shortfall in Pension Funds Cited*, N.Y. Times, May 9, 1990, at D4, col. 4. In 1980 the United States Department of Labor projected that by 1995 almost three trillion dollars will be held within pension plans regulated by the Employee Retirement Income Security Act (ERISA). Lanoff, *The Social Investment of Private Pension Plan Assets: May It Be Done Lawfully Under ERISA?*, 31 LAB. L.J. 387, 387 (1980); Lilly, *The Employee Retirement Income Security Act*, 35 LAB. L.J. 603, 604 (1984).

² The primary contribution to pension law to be made by the academic law review literature is to objectify, clarify, and array these distributive wealth and social justice policy questions into a more meaningful and coherent topology. Then, in light of the realpolitik choices made by Congress and the courts since ERISA's enactment, realistic refinements can

Congress' first comprehensive manifestation of its commitment to regulating the private pension regime was the Employee Retirement Income Security Act of 1974 (ERISA).³ ERISA is sweeping federal legislation of extraordinary sophistication and complexity. Literally trillions of pension dollars and the retirement security of sixty-five million persons depend on the coherence and legal efficacy of this critically important federal law. As ERISA is refined by congressional amendments and by case-law construction, a body of federal pension and benefits law is beginning to mature.

In 1980 ERISA was amended by the Multiemployer Pension Plan Amendments Act (MPPAA).⁴ The MPPAA shares ERISA's

be suggested to further improve the quality of distributive justice delivered through pension law administration.

From the perspectives of federalism and the preemption doctrine, I surveyed the regulatory federal-state model for ERISA law in an earlier article. See Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427 (1987).

³ Pub. L. No. 93-406, 88 Stat. 898 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)).

⁴ Pub. L. No. 96-364, 94 Stat. 1208 (1980) (codified as amended at 29 U.S.C. §§ 1381-1453 (1988)). There is little legislative history concerning the MPPAA arbitration provision. ERISA did not refer to arbitration. There was no arbitration provision in the first version of the MPPAA passed by the House of Representatives; it was later included in the Senate's proposed amendment to S. 1076, 96th Cong., 2d Sess. § 4221, 126 CONG. REC. 20,148, 20,157 (1980). The only other reference to arbitration in the MPPAA's legislative history occurred on August 25, 1980, when arbitration was briefly endorsed by the principal sponsor of the MPPAA in the House of Representatives, Frank Thompson of New Jersey. 126 CONG. REC. 23,039 (1980).

For pertinent literature on the mandatory provision of the MPPAA, see Bendixsen, *Contributions to Collectively Bargained Pension Funds Regulated by ERISA: The Employer's Right to Arbitration of Delinquency Claims*, 27 SANTA CLARA L. REV. 61 (1987); Connelly, *The Powers and Presumptions of the MPPAA: An Unconstitutional Combination?*, 3 LAB. LAW. 83 (1987); Gabler, *Minimizing the Impact of Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980*, 85 W. VA. L. REV. 707 (1983); Gilman & Gilman, *The Arbitration of Pension Disputes Involving ERISA and MPPAA*, 1984 PROC. TWELFTH ANN. CONF., SOC'Y OF PROF. DISPUTE RESOLUTION 184; Jones, *Arbitration Under the Multiemployer Pension Plan Amendments Act of 1980*, THIRTY-SIXTH ANN. NAT'L CONF. ON LAB. § 11.01, § 11.01 (1983); Smith, *Arbitration and the Multiemployer Pension Plan Amendments: From Golden Age to Age of Reason*, 12 CAP. U.L. REV. 17 (1982); Woodrum & McBride, *Controlled Group Liability Under the Multiemployer Pension Plan Amendments Act: Liability Without Limit?*, 90 W. VA. L. REV. 731 (1988); Note, *Due Process, Retroactivity, and the Multiemployer Pension*

core policy objectives of safeguarding and stabilizing the financial health of the nation's private sector pension plans.⁵ Approximately forty percent of all private sector collective bargaining in the United States occurs between multiemployer associations composed of several employers and the union or unions representing their employees, rather than between a single employer and a single union.⁶ Multiemployer associations provide smaller individual employers with the considerable synergistic advantages of pooling expertise and related resources. Whereas the sole, smaller employer may not unilaterally be able to provide a pension plan, the synergy of the multiemployer association makes employer provision of a pension plan more realistic. Due to these advantages of multiemployer pension plans, they initially enjoyed enormous popularity: ten million retired workers and an additional twenty million spouses and dependents receive benefits from two thousand multiemployer pension plans, with \$125 billion in assets, nationwide.⁷

The most controversial feature of the MPPAA is a requirement for the mandatory arbitration of disputes concerning withdrawing employers' liability to multiemployer pension plans.⁸ When an employer withdraws from a multiemployer pension plan, the

Plan Amendments Act of 1980: Congress' Arbitrary Means to a Legitimate End, 6 CARDOZO L. REV. 357 (1984); Note, *MPPAA Withdrawal Liability Assessment: Letting the Fox Guard the Henhouse*, 14 FORDHAM URB. L.J. 211 (1986) [hereafter Note, *MPPAA Withdrawal Liability Assessment*]; Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980*, 71 GEO. L.J. 161 (1982) [hereafter Note, *Trading Fairness for Efficiency*]; Note, *The Supremacy of Arbitration in the Multiemployer Pension Plan Amendments Act of 1980*, 56 GEO. WASH. L. REV. 815 (1988) [hereafter Note, *The Supremacy of Arbitration*]; Note, *The Use of Arbitration to Determine Liability: The Multiemployer Pension Plan Amendments Act of 1980*, 2 OHIO ST. J. ON DISPUTE RESOLUTION 169 (1986) [hereafter Note, *The Use of Arbitration to Determine Liability*]; Note, *Administrative Law—Decisionmaker Bias and the Procedural Due Process Rights of Withdrawing Employers Under the MPPAA*, 9 W. NEW ENG. L. REV. 227 (1987).

⁵ For a comprehensive discussion of the history of pension plans and ERISA law, see J. LANGBEIN & B. WOLK, *PENSION & EMPLOYEE BENEFIT LAW* (1990).

⁶ Gentile, "The Check is in the Mail"—Mastering the Maze of Employer Contributions to ERISA Plans, 72 MARQ. L. REV. 349, 350 n.9 (1989) (citing INT'L FOUND. OF EMPLOYEE BENEFIT PLANS, *EMPLOYEE BENEFIT BASICS* (1988)).

⁷ *Id.*; see also *infra* note 19 (defining multiemployer plans).

⁸ 29 U.S.C. § 1401 (1988); see *infra* text accompanying notes 33-48.

employer may be liable to the plan for unfunded, vested pension benefits.⁹ Since the MPPAA places virtually all authority in the pension plan's trustee to calculate the employer's withdrawal liability, MPPAA mandatory arbitration is a hollow shell, usually void of even minimal due process for the employer.¹⁰ Instead of providing an objective determination of employer liability, mandatory arbitration more often acts as a rubber stamp of the original and inherently biased trustee determination.¹¹ The trustee, in a blatant conflict of interest, maximizes the withdrawal liability of the employer who leaves the plan, thus strengthening the financial soundness of the plan for the remaining employers and the beneficiaries. Withdrawing employers, desperate to avoid the pernicious consequences of this statutory scheme, seek alternatives to mandatory arbitration,¹² albeit usually without success.¹³

The fundamental unfairness of the MPPAA, primarily evident in its presumptions in favor of the initial determinations made by the pension plan trustee, has perverted the voluntary and consensual spirit of alternative dispute resolution. Even more ominously, the MPPAA has severely debilitated the jurisprudential integrity of the procedure and has consequently vitiated realistic prospects of substantive justice for most withdrawing employers. Risk has been shifted almost entirely onto the withdrawing employer.

Meanwhile, however, the MPPAA has largely achieved its fundamental policy objective: multiemployer pension plans are much more sound financially than they were prior to the Act.¹⁴ The MPPAA's achievement of substantive success, when contrasted with its flawed procedural means, creates a deep and glaring paradox. A decade of mandatory arbitration under the

⁹ 29 U.S.C. § 1393(c) (1988); *see infra* text accompanying note 37.

¹⁰ *See infra* text accompanying notes 49-64.

¹¹ *See infra* text accompanying notes 49-71.

¹² *See infra* text accompanying notes 101-22.

¹³ *See infra* text accompanying notes 90-99. Of course, if the withdrawing employer is bankrupt, the fatalism of liquidation can effectively moot many theoretical concerns. *See infra* text accompanying notes 119-22 (discussing Seventh Circuit's acceptance of bankruptcy court as forum for adjudication of withdrawal liability).

¹⁴ J. LANGBEIN & B. WOLK, *supra* note 5, at 50-52 (quoting R. OSGOOD, *THE LAW OF PENSION AND PROFIT SHARING* § 9.3.3, at 300-02 (1984)); Munell, *Guaranteeing Private Pension Benefits: A Potentially Expensive Business*, *NEW ENG. ECON. REV.*, Mar.-Apr. 1982, at 24, 31.

MPPAA presents the classic utilitarian dilemma: should the interests of the relatively weak, withdrawing employer be so completely sacrificed for the collective good of preserving the financial health and stability of the multiemployer pension plan, and the welfare of its remaining employers, trustees, employees, retirees, and their beneficiaries?

This Article examines the policies and politics of the MPPAA through an analysis of MPPAA mandatory arbitration during the decade since the Act's passage. A careful analysis of the statute's procedures will reveal that the working policies of the MPPAA are paradigms of the exaltation of pragmatic substantive ends over procedurally unjust means. Other commentators have offered proposals for change,¹⁵ but such efforts have been unavailing. In addition to reiterating calls for statutory reform, this Article offers new thoughts on possible MPPAA ramifications upon pension law in the 1990s.

Part I of the Article presents the history, development, and purposes of the MPPAA. Part II provides a detailed analysis of the mandatory arbitration provision. In addition, Part II discusses the trustee's statutory prerogatives in determining a withdrawing employer's liability and the virtually inevitable disputes that arise between the trustee and the employer due to these prerogatives. Unfortunately, when the dispute comes before the arbitrator, the arbitrator's role is that of an appellate judge: unless the trustee's calculations are unreasonable or clearly erroneous, the arbitrator will affirm them. Part III discusses the process of judicial review of the arbitrator's findings. Although the MPPAA provides for de novo review of the arbitrator's findings, the statutory presumption in favor of the trustee's determination again contaminates the process. Courts rarely disrupt the arbitrator's findings. Part IV discusses the general policy of "arbitrate first" that has been promulgated by some circuit courts and some exceptions to that policy. Exceptions to the "arbitrate first" rule include instances where there is a question of statutory construction, such as who is an "employer" and what is a "labor dispute." In these instances some courts have held that the question should not be sent to arbitration. In addition, when the withdrawing employer is in bankruptcy, some courts have held that the bankruptcy court, as

¹⁵ See, e.g., Woodrum & McBride, *supra* note 4, at 769-71; Note, *MPPAA Withdrawal Liability Assessment*, *supra* note 4, at 252-57; Note, *The Supremacy of Arbitration*, *supra* note 4, at 825, 833.

well as the arbitrator, may determine the amount of withdrawal liability.

Finally, the Article concludes with the proposition that the MPPAA's presumption in favor of the trustee's determination should not continue. The MPPAA's harsh mandatory arbitration scheme may dissuade prospective new employers from entering multiemployer pension plans.¹⁶ Ironically, precisely what the Act was designed to safeguard — the financial stability of multiemployer pension plans — may ultimately be severely debilitated by the draconian features of the MPPAA. These features, primarily evident in the mandatory arbitration provision, may be alleviated by deleting the provision from the MPPAA. Within the MPPAA's mandatory arbitration provision lies the seed for the eventual destruction, or at least the atrophy, of multiemployer pension plans; a pernicious and unforeseen consequence diametrically opposed to Congress' original aspirations.

I. THE HISTORY, DEVELOPMENT, AND PURPOSES OF THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

In 1974, after years of hearings and studies, Congress enacted ERISA.¹⁷ Through ERISA Congress provided the first truly comprehensive federal statutory structure to safeguard the financial integrity of voluntary pension plans in the private sector workplace. Congress sought to protect employees, retirees, and their beneficiaries against loss of vested pension benefits in the event of employer insolvency, withdrawal from, or termination of, pension plans. The Pension Benefit Guaranty Corporation (PBGC) was designed, via ERISA, to safeguard and monitor pension plans and ensure against pension plan failure.¹⁸ The PBGC did not

¹⁶ Munnell, *supra* note 14, at 32.

¹⁷ Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 898 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)). For summaries of ERISA's origins see J. LANGBEIN & B. WOLK, *supra* note 5, at 53-81; Munnell, *supra* note 14, at 24.

¹⁸ 29 U.S.C. § 1302 (1988). The PBGC monitors the financial solvency of multiemployer pension plans through an insurance system financed by per capita assessments levied upon each employer with an ERISA plan. *Id.*

Unfortunately, the theory of PBGC-guaranteed stability of the financial soundness of the ERISA pension plans has not been realized. In fact, estimates of nationwide PBGC potential liability for ERISA pension plans of 50 large corporations is \$14 billion. *Shortfall in Pension Funds Cited*, N.Y. Times, May 9, 1990, at D4, col. 4.

begin insuring multiemployer pension plans until 1978; from ERISA's passage in 1974 until 1978, the PBGC insured only single employer pension funds.

Within a few years of ERISA's passage, Congress became concerned with the increasingly ominous financial volatility of multiemployer pension plans.¹⁹ In 1977 Congress directed the PBGC to study and report on the implications of employer withdrawal from multiemployer pension plans.²⁰ Between cycles of severe recession in the mid-1970s and early 1980s, the dramatic projected rise in the number of withdrawals of individual employers from multiemployer pension plans would inexorably force the PBGC to absorb crushing liability.

The PBGC study was issued on July 1, 1978.²¹ It reported on 2,000 multiemployer pension plans, or "MEPPs," with eight million participants.²² Ten percent of these plans, with 1.3 million participants, were approaching financial collapse.²³ If these plans failed, over half a billion dollars would be added to the PBGC cost of funding the vested benefits.²⁴ Multiemployer pension plans then had an aggregate unfunded liability for vested benefits of \$3.5 billion.²⁵ Ray Marshall, then-Secretary of Labor and Chair of the PBGC, testified that ERISA actually *encouraged* employers to abandon MEPPs, thereby aggravating the financial problems of these plans.²⁶ This was an ultimate irony, since Con-

¹⁹ A multiemployer pension plan is defined by 29 U.S.C. § 1301(a)(3) (1988) as one in which multiple employers contribute pursuant to one or more collective bargaining agreements. These plans may involve one or more unions. The plans are jointly administered by a board of trustees, with equal representation from employer and union representatives. *Id.* §§ 186(c)(5), 1002(37)(A)(i)-(iii). Multiemployer pension plans, or MEPPs, have been in existence for over half a century. A. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* 219 (1982). Today, an estimated 10 million retired employees and an additional 20 million spouses and dependents receive benefits from 2,000 multiemployer pension plans with \$125 billion in assets. Gentile, *supra* note 6, at 350 n.9 (citing INT'L FOUND. OF EMPLOYEE BENEFIT PLANS, *EMPLOYEE BENEFIT BASICS* (1988)).

²⁰ Pub. L. No. 95-214, 91 Stat. 1501 (1977).

²¹ PENSION BENEFIT GUAR. CORP., MULTIEMPLOYER STUDY REQUIRED BY P.L. No. 95-214 (1978) [hereafter PBGC MULTIEMPLOYER STUDY]; *see also* Munnell, *supra* note 14, at 30-31 (discussing pre-MPPAA MEPPs).

²² PBGC MULTIEMPLOYER STUDY, *supra* note 21, at 1.

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ Munnell, *supra* note 14, at 29.

²⁶ *Hearings On The Multiemployer Pension Plan Amendment Act Of 1979:*

gress' intent was to strengthen, not debilitate, the nation's private pension systems.

Before the MPPAA, ERISA allowed an employer to withdraw from a multiemployer pension plan with relative impunity, and little liability, unless the plan terminated within its first five years.²⁷ Even if the plan was terminated within five years, the withdrawing employer's share of the unfunded vested benefits was, at a maximum, thirty percent of the employer's net worth.²⁸ Especially in declining industries, employers had perverse incentives to withdraw from precarious multiemployer pension plans. The PBGC warned that ultimately the remaining employers in the multiemployer plan would find it more economical to terminate the pension plan than continue to fund it.²⁹

Congress responded to the 1978 PBGC report, and to Secretary Marshall's 1979 policy recommendations to Congress, by enacting the MPPAA on September 26, 1980.³⁰ The MPPAA

Hearings Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor, 96th Cong., 2d Sess. 361 (1979) (statement of Hon. Ray Marshall, Secretary of Labor).

See also Pension Plan Termination Insurance Issues: Hearing Before House Subcomm. on Oversight of the Comm. on Ways and Means, 95th Cong., 2d Sess. 22 (1978). In the hearing Matthew M. Lind, Executive Director of PBGC, stated:

A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage — or force — further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

See also Munnell, supra note 14, at 30-31 (discussing precarious financial condition of pre-MPPAA MEPPs).

²⁷ Munnell, *supra* note 14, at 30.

²⁸ *Id.*

²⁹ H.R. REP. NO. 869, Part I, 96th Cong., 2d Sess. 54-57, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2922-25.

³⁰ Multiemployer Pension Plan Amendments Act, Pub. L. No. 96-364, 94 Stat. 1208 (codified as amended at 29 U.S.C. §§ 1381-1453 (1988)). For the background and purpose of the MPPAA, see H.R. REP. NO. 869, Part I, 96th

amended ERISA “to protect retirees and workers who are participants in [multiemployer] plans against the loss of their pensions.”³¹ This protection was provided by creating a large disincentive for employers who withdraw from multiemployer pension plans. The MPPAA imposes upon any employer who withdraws liability equal to the employer’s share of unfunded vested benefits which have accrued under the pension plan.³²

II. MPPAA MANDATORY ARBITRATION

A. An Overview of the Process

Since the enactment of the MPPAA in 1980, disputes concerning employer withdrawal liability to the multiemployer pension plan for unfunded vested pension benefits are resolved through mandatory arbitration. The amount of withdrawal liability may involve millions of dollars; occasionally, it may exceed the employer’s net worth.³³

Employer withdrawal occurs when an employer terminates or substantially reduces contributions to the multiemployer pension plan.³⁴ Withdrawal does not automatically create liability;³⁵

Cong., 2d Sess. 52-53, *reprinted in* 1980 U.S. CODE CONG. & ADMIN NEWS 2918, 2920-21; *see also* Munnell, *supra* note 14, at 31 (stating PBGC recommendations provided basis for MPPAA).

³¹ H.R. REP. NO. 869, Part I, 96th Cong., 2d Sess. 51, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2919; *see also* ILGWU Nat’l Retirement Fund v. Levy Bros. Frocks, 846 F.2d 879, 880-81 (2d Cir. 1988). In *Levy Bros.* the court described Congress’ concerns:

(1) the magnitude of the risk and the potential exposure of the [multiemployer plan] system are intolerably high; and (2) existing law and particularly the plan termination insurance provisions are inadequate to assure financially sound multiemployer plans, may accelerate declines and further weaken and hasten the termination of financially weak plans.

Id. (quoting H.R. REP. NO. 869, 96th Cong., 2d Sess. 51, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2925).

³² *See infra* text accompanying note 37.

³³ *See, e.g.,* Shelter Framing Corp. v. Carpenters Pension Trust, 543 F. Supp. 1234, 1237 (C.D. Cal. 1982) (finding employer’s withdrawal liability was twice employer’s net assets), *modified*, 705 F.2d 1502 (9th Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984).

³⁴ 29 U.S.C. §§ 1381, 1385 (1988).

³⁵ *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1123 (D.C. Cir. 1989). MPPAA arbitrators must determine whether withdrawal occurs when the employer ceases to make contributions to the pension plan or when the employer ceases operations. 29 U.S.C. § 1383(a) (1988) (stating that “a

rather, the trustee of the pension plan calculates the employer's liability, and notifies the employer, subsequent to its withdrawal.³⁶ The amount of withdrawal liability is the employer's proportionate share of unfunded vested benefits, "an amount equal to . . . the value of nonforfeitable benefits under the plan, less . . . the value of the assets of the plan."³⁷ Calculation of the withdrawal liability occurs by one of four actuarial methods provided by the MPPAA, with actuarial assumptions regarding employee life expectancies and rates of return on plan assets.³⁸ The pension plan's unfunded vested benefits, which are the earned benefits minus the value of the plan's assets, are then allocated among the contributing employers.³⁹

The plan trustee notifies the employer of the amount of withdrawal liability and establishes a payment schedule.⁴⁰ The employer has ninety days to request review by the trustee.⁴¹ The employer or the trustee can initiate arbitration within 60 days after notification of withdrawal liability,⁴² or within 120 days after requesting the trustee to review its liability determination.⁴³ The employer and the trustee can jointly request arbitration within 180 days after the trustee demands payment of withdrawal liabil-

complete withdrawal from a multiemployer plan occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan").

See also Trustees of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp., 872 F.2d 208 (7th Cir.) (holding withdrawal occurs when all covered operations cease), *cert. denied*, 110 S. Ct. 143 (1989); Williamson Coal Co., 11 Employee Benefits Cas. (BNA) 2193 (1989) (Tilove, Arb.) (holding withdrawal occurs upon cessation of contributions); Vipond & Vipond, 11 Employee Benefits Cas. (BNA) 2188 (1989) (Hughes, Arb.) (same); United Mine Workers 1974 Pension Plan, 6 Employee Benefits Cas. (BNA) 1593 (1985) (Pritzker, Arb.) (holding employer has withdrawn when no longer making contributions or bidding on projects); Western Dominion Coal Co., 6 Employee Benefits Cas. (BNA) 2353 (1985) (Gordon, Arb.) (holding employers cannot avoid withdrawal by mass layoffs and protracted periods without work, even though collective bargaining agreement remains in effect).

³⁶ 29 U.S.C. §§ 1382, 1399(c)(1)(B) (1988). The liability amount may be paid in installments over a period of up to 20 years. *Id.* § 1399(c)(1)(B).

³⁷ *Id.* § 1393(c).

³⁸ *Id.* § 1391.

³⁹ *Id.*

⁴⁰ *Id.* §§ 1382, 1399.

⁴¹ *Id.* § 1399.

⁴² *Id.* §§ 1401(a)(1), 1399(b)(2).

⁴³ *Id.* §§ 1401(a)(1), 1399(b)(2)(A).

ity from the employer.⁴⁴ Until the arbitration occurs, the employer must make the withdrawal liability payments as scheduled by the trustee,⁴⁵ with an adjustment, if necessary, after arbitration.⁴⁶ If the parties fail to initiate arbitration, the decision of the trustee becomes final, and the trustee can bring a collection action against the employer for the full amount of the withdrawal liability.⁴⁷ Employer failure to pursue arbitration will generally result in a waiver of employer defenses in a trustee's subsequent

⁴⁴ *Id.* § 1401(a)(1).

⁴⁵ *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 263 (2d Cir. 1990) (holding "employer must commence making the demanded payments within 60 days, even if it has sought review and arbitration and that process is pending"); *Carrier Containers Council, Inc. v. Mobile S.S. Ass'n*, 896 F.2d 1330, 1345 (11th Cir. 1990). The *Carrier Containers* court held: "A stay of arbitration does not suspend the employer's duty to make interim payments, which, by definition, applies during the interim between demand by the plan administrator and the decision by the arbitrator or a court." *Id.* at 1345 n.27. To obtain interim payments a plan need only "show that it complied with the MPPAA's procedural requirements: (1) determine that the employer has withdrawn from the multiemployer plan; (2) determine the amount of the employer's withdrawal liability; (3) notify the employer of the amount of liability and payment schedule; and (4) demand payment according to the schedule." *Id.* at 1346 n.28.

See also *Debrenceni v. Merchants Terminal Corp.*, 889 F.2d 1 (1st Cir. 1989) (holding MPPAA empowers court to order interim payments notwithstanding pending arbitration); *Robbins v. Lady Baltimore Foods, Inc.*, 868 F.2d 258 (7th Cir. 1989) (same); *Marvin Hayes Lines, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 814 F.2d 297 (6th Cir. 1987) (same); *Robbins v. McNicholas Transp. Co.*, 819 F.2d 682, 684 (7th Cir. 1987) (same, stating that MPPAA "creates a duty to make the payments, and permits resort to the powers of a court" to compel payments); *Robbins v. Pepsi-Cola Metro. Bottling Co.*, 800 F.2d 641, 642 (7th Cir. 1986) (per curiam) (same, stating that Congress envisioned a "'pay now, dispute later' collection procedure" for withdrawal liability); *Trustees of Amalgamated Ins. Fund v. Getman Indus.*, 784 F.2d 926 (9th Cir.) (same), *cert. denied*, 479 U.S. 822 (1986); *T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds*, 756 F.2d 939 (2d Cir. 1985) (same, stating payment should be made regardless of dispute as to exact amount); *Fur Mfg. Indus. Retirement Fund v. Getto & Getto, Inc.*, 714 F. Supp. 651 (S.D.N.Y. 1989) (same); *Flying Tiger Line, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*, 704 F. Supp. 1277 (D. Del. 1989) (same).

⁴⁶ 29 U.S.C. § 1401(d) (1988); Pension Benefit Guar. Corp. Regulations on Withdrawal Liability in Multiemployer Plans, 29 C.F.R. § 2644.2(c) (1989); *see also* *I.A.M. Nat'l Pension Fund Benefit Plan v. Cooper Indus.*, 789 F.2d 21, 25 (D.C. Cir.) (holding interest will be paid on any money refunded), *cert. denied*, 479 U.S. 971 (1986).

⁴⁷ 29 U.S.C. § 1401(b)(1) (1988).

action to recover the assessed withdrawal liability.⁴⁸

⁴⁸ *New York State Teamsters Conference Pension & Retirement Fund v. McNicholas Transp. Co.*, 848 F.2d 20, 23-24 (2d Cir. 1988) (refusing to “disregard the clear language of the statute in order to relieve the Company of the consequences of its failure to meet the time limitations imposed by the Act”); *see also Philadelphia Journal, Inc. v. Teamsters Pension Trust Fund*, No. 87-7637 (E.D. Pa. May 2, 1989) (LEXIS, Genfed library, Dist file) (finding that since employer failed to seek arbitration, employer is precluded from asserting defense of laches when later sued for collection of withdrawal liability by trustees), *aff’d mem.*, 891 F.2d 282 (3d Cir. 1989); *Robbins v. Admiral Merchants Motor Freight Co.*, 846 F.2d 1054, 1056 (7th Cir. 1988) (noting employer’s failure to initiate arbitration results in amount demanded becoming due); *Robbins v. B&B Lines, Inc.*, 830 F.2d 648 (7th Cir. 1987); *Grand Union Co. v. Food Employers Labor Relations Ass’n*, 808 F.2d 66, 70 (D.C. Cir. 1987) (holding recourse to arbitration is statutory prerequisite and not subject to judicial discretion); *IUE AFL-CIO Pension Fund v. Barker & Williamson*, 788 F.2d 118, 129-30 (3d Cir. 1986) (holding arbitrator has jurisdiction to decide whether withdrawal liability arbitration was timely initiated); *Cardone Realty Corp. v. Teamsters Pension Fund*, 11 Employee Benefits Cas. (BNA) 2367, 2370 (W.D.N.Y. 1989) (affirming bankruptcy court decision finding employer to be in procedural default under MPPAA because it failed to seek arbitration on issue of liability); *Fur Mfg. Indus. Retirement Fund v. Getto & Getto, Inc.*, 11 Employee Benefits Cas. 1561, 1564-65 (S.D.N.Y. 1989) (holding pension fund’s attorneys’ fees can be assessed against employer who attempts in bad faith to avoid arbitration); *Combs v. Leishman*, 10 Employee Benefits Cas. (BNA) 1377, 1381 (D.D.C. 1988) (striking down employer defenses because of failure to timely initiate arbitration); *In re Seaman Paper Co.*, 10 Employee Benefits Cas. (BNA) 1985, 1995 (1989) (Jaffe, Arb.) (holding arbitrator has jurisdiction to decide whether withdrawal liability arbitration timely initiated).

But see Crown Cork & Seal Co. v. Central States, Southeast & Southwest Areas Pension Fund, 881 F.2d 11, 18-19 (3d Cir. 1989) (holding failure to seek timely arbitration does not bar employer from asserting statutory defenses created after arbitration deadline); *Chicago Truck Drivers Pension Fund Trustees v. Rentar Indus.*, 12 Employee Benefits Cas. (BNA) 1029 (N.D. Ill. 1989) (holding when right to arbitration in issue from outset of litigation, 60-day MPPAA statutory time limit to demand arbitration may be stayed at court’s discretion).

Both the American Arbitration Association and the PBGC have promulgated administrative procedures for MPPAA arbitrations. *See* AAA MULTIEMPLOYER PENSION PLAN RULES (1986); Pension Benefit Guar. Corp. Regulations on Arbitration of Disputes in Multiemployer Plans, 29 C.F.R. 2641.1-13 (1989). Within 30 days of the arbitration decision, either party can request judicial review of the arbitrator’s award in federal district court. 29 U.S.C. § 1401(b)(2) (1988).

B. *The Trustee's Statutory Prerogatives in Determining Employer Withdrawal Liability*

The initial determination by the pension plan trustee of the amount of the employer withdrawal liability is extremely significant throughout the process. The arbitration does not occur *de novo*.⁴⁹ Likewise, in turn, judicial review of the arbitration award is limited in scope.⁵⁰ Unless the trustee's determination of employer withdrawal liability is unreasonable or clearly erroneous, it will be sustained if brought to arbitration or upon judicial review.⁵¹

The actuarial assumption made by the pension plan trustee "is as much an art as a science, involving the application of past experience to the future."⁵² The most important single factor in the assumption is the reasonableness of the interest rate used to calculate the unfunded vested benefits of the withdrawing employer.⁵³ A slight difference in the interest rate can represent

⁴⁹ See 29 U.S.C. § 1401(a)(3)(A) (stating determination by plan trustee is presumed correct in subsequent arbitration); Note, *The Use of Arbitration to Determine Liability*, *supra* note 4, at 173; see also *Connors v. B&H Trucking Co., Inc.*, 871 F.2d 132 (D.C. Cir. 1989) (setting aside district court decision which upheld arbitration determination of date employer incurred withdrawal liability, and finding that trustee, not arbitrator, had reasonably, and not clearly erroneously, fixed the proper date of withdrawal liability); *Parmac, Inc. v. I.A.M. Nat'l Pension Fund Benefit Plan A*, 872 F.2d 1069 (D.C. Cir. 1989) (restating arbitrator's conclusion that pension plan trustee's determination presumed correct absent clear and convincing evidence of unreasonableness or clear error).

⁵⁰ The United States Arbitration Act provides generally for judicial review of arbitration Awards. See 9 U.S.C. §§ 1-14, 201-208 (1988). The scope of review is described at *id.* §§ 9-11.

⁵¹ 29 U.S.C. § 1401(a)(3)(A) (1988); Alan C. Ells, 5 Employee Benefits Cas. (BNA) 1161, 1175-76 (1984) (Zimring, Arb.); see also *Combs v. Classic Coal Corp.*, 12 Employee Benefits Cas. 1229, 1234-36 (D.D.C. 1990) (noting numerous cases).

⁵² Note, *Trading Fairness for Efficiency*, *supra* note 4, at 167-68; see also *Penn Textile Corp.*, 3 Employee Benefits Cas. (BNA) 1609, 1617 (1982) (Pritzker, Arb.) (finding decrease of 3.25% in interest rate assumption increased employer's withdrawal liability by 26%).

⁵³ *Alan C. Ells*, 5 Employee Benefits Cas. at 1174-76 (stating "interest rate assumption . . . is probably the most important one as far as its impact on the amount of withdrawal liability"); *In re Hertz Corp.*, 81 Lab. Arb. Rep. (BNA) 1, 16 (1983) (Mittelman, Arb.) (finding "interest rate assumption is by far the most important assumption made by the actuary in determining the value of unfunded vested benefits").

For a discussion of the three major actuarial methods of selecting interest

the difference between no liability and significant liability.⁵⁴ Generally, each percentage point difference in interest assumption could make a ten percent difference in the consequent liability.⁵⁵ If the actuarial assumptions in the aggregate are reasonable, the trustee's calculation of the employer withdrawal liability cannot be effectively challenged.⁵⁶ Facing these formidable obstacles, withdrawing employers unsurprisingly have lost most of these important arbitrations.⁵⁷

Thus far, of all the federal circuits to consider the constitutionality of the MPPAA statutory presumption in favor of the trustee's determinations, only the Third Circuit has found it unconstitutional on the basis of deprivation of due process. In *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*⁵⁸ the Third Circuit ruled that "because the trustees are biased and have significant discretion, and because their determination of liability is deferentially reviewed in arbitration and in district court, we believe MPPAA deprives employers

rate assumptions — the "majority", "Grubbs", and "Segal" methods — see *Combs*, 12 Employee Benefits Cas. at 1232 n.5.

⁵⁴ *Penn Textile*, 3 Employee Benefits Cas. at 1617. In *Penn Textile* the arbitrator upheld a 6% interest assumption by trustee, which produced \$188,000 in employer withdrawal liability. If the arbitrator had used a 9.25% assumption, liability would have been \$148,500. *Id.* The employer offered evidence that insurance companies used 13%-15% assumptions and that a 15% assumption would produce a \$128,000 liability. *Id.* The PBGC rate was 11% which would have produced a \$134,500 liability. *Id.*

See also *Perkins Trucking Co.*, 4 Employee Benefits Cas. (BNA) 1489, 1491 (1983) (O'Loughlin, Arb.) (estimating difference of over \$900,000 in liability, using assumption of market rate of return). But see *Woodward Sand Co.*, 3 Employee Benefits Cas. (BNA) 2351 (1982) (Kaufman, Arb.) (finding trustee's assumption of 6.5% rate of return on investment was unreasonable and should have been 7.9%).

⁵⁵ *Jones*, *supra* note 4, at § 11.04[4].

⁵⁶ *Combs*, 12 Employee Benefits Cas. at 1230 (overturning arbitrator's award which directed recomputation of withdrawal liability because trustee's assumptions were reasonable in aggregate).

⁵⁷ See Note, *MPPAA Withdrawal Liability Assessment*, *supra* note 4, at 249 n.238 (providing arbitration decisions). There is little doubt that the pension plan trustee's significant discretion to calculate withdrawal liability "stems from the inherent uncertainty and flexibility of actuarial assumptions necessary to the calculation . . . render[ing] disputes almost inevitable." Note, *Trading Fairness for Efficiency*, *supra* note 4, at 165.

⁵⁸ 787 F.2d 128 (3d Cir. 1986), *aff'd per curiam by an equally divided Court sub nom.* *Pension Benefit Guar. Corp. v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987).

of their constitutional right to a fair hearing.”⁵⁹ The court, however, preserved the constitutionality of the MPPAA by severing section 1401(a)(3)(A) from the Act.⁶⁰ This portion of the MPPAA stipulates that any determination made by a trustee is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.⁶¹

The matter of inherent trustee prejudice remains problematic for several reasons. First, when *Yahn* came before the United States Supreme Court, the Court was equally divided and issued a decision without an opinion.⁶² While the Supreme Court decision has the effect of affirming the Third Circuit’s decision in *Yahn*, it is not precedential. Since the Court issued the decision without an opinion, it shed no further light on the statutory presumptions in favor of the initial determination of employer withdrawal liability made by the trustee.

Second, all other circuit courts of appeals to examine the MPPAA statutory presumption in favor of the determination made by the trustee have upheld the presumption as constitutional.⁶³ This overwhelming acceptance of the presumption has led several commentators to state that “[w]ith respect to the assessment and collection of liability, MPPAA is as avowedly pro-plaintiff as any statute ever enacted. Indeed, it would be difficult to construct a collection mechanism more favorable to plaintiffs or more disadvantageous to defendants.”⁶⁴

⁵⁹ *Id.* at 142.

⁶⁰ *Id.* at 143.

⁶¹ 29 U.S.C. § 1401(a)(3)(A) (1988).

⁶² *Pension Benefit Guar. Corp. v. Yahn & McDonnell*, 481 U.S. 735 (1987).

⁶³ See, e.g., *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc.*, 762 F.2d 1137, 1146 (1st Cir. 1985), *rev’g en banc* 762 F.2d 1124 (1st Cir. 1984); *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1403-04 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1511 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 854-55 (2d Cir.), *cert. denied*, 467 U.S. 1259 (1984); *Republic Indus. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628, 639-42 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

⁶⁴ *Woodrum & McBride*, *supra* note 4, at 734.

C. *The Withdrawing Employer's Difficult Position*

The withdrawing employer is left in an unenviable position,⁶⁵ facing a pension plan trustee with every incentive to set the highest possible withdrawal liability amount for the employer. The trustee's fiduciary duties are solely to the pension plan, and not to any particular employer.⁶⁶ The plan trustee can best keep the pension plan solvent — and possibly even increase benefits — and guard against future shortfalls by assessing the highest possible liability from every withdrawing employer. The trustee who remains a contributing employer can indirectly reduce this future burden for the future costs of unfunded vested benefits and can reduce competition from a withdrawing employer with fewer resources.⁶⁷ The pension plan trustee can accomplish all of these objectives under the guise of fulfilling fiduciary duties to the pension plan.

If the pension plan trustee's calculation of the employer's withdrawal liability is not unreasonable or clearly erroneous, it will be virtually impossible for the employer to challenge it successfully. All circuit courts, except the Third Circuit as exemplified in *Yahn*, impose a nearly impossible burden of proof upon the employer. The clearly erroneous standard does not permit the arbitrator to set aside the pension plan trustee's determination of the amount of withdrawal liability if the arbitrator would have simply reached a different result. Rather, the arbitrator must be convinced that the trustee's calculation of the employer withdrawal liability is clearly mistaken. Under either the unreasonable or clearly erroneous statutory standard, the pension plan trustee has significant discretion to set the withdrawal liability as high as possible. The employer usually finds that it is very difficult to counter effectively the withdrawal liability calculated by the plan trustee. The liability is originally calculated *ex parte* by the trustee, without any viable means for direct input by the employer at this crucially important, and often determinative, stage of the MPPAA process.

⁶⁵ The dilemma of the withdrawing employer has been cogently described as one who "finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight." *Keith Fulton & Sons, Inc.*, 762 F.2d at 1146 (Aldrich, J., dissenting).

⁶⁶ 29 U.S.C. § 1104(a)(1)(A) (1988). Trustees may be held personally liable if they breach their fiduciary duty. *Id.* § 1109(a).

⁶⁷ Note, *Trading Fairness for Efficiency*, *supra* note 4, at 168.

The MPPAA structure for assessing withdrawal liability has exacerbated the “natural antagonism”⁶⁸ between the trustee and the withdrawing employer and has led to “unfair, unequal treatment and harsh results” for employers.⁶⁹ Disputes between the plan trustee and the withdrawing employer over the amount of the withdrawal liability are inevitable. The trustee’s interest in maximizing withdrawal liability is bound to clash with the withdrawing employer’s interest in minimizing, or eliminating, its withdrawal liability.⁷⁰

Yet, in many circumstances, these are battles that are never joined, especially where the employer has entered bankruptcy; “[t]hus, the decision to leave the corporation’s remaining assets to the creditors, including the multiemployer plan, may come easily.”⁷¹ Even if the employer has not lost completely by bankruptcy liquidation, the MPPAA statutory scheme is designed to transmogrify even solvent withdrawing employers from winners into financial losers.

D. *The Arbitrator as Appellate Judge*

The MPPAA arbitrator does not hear the dispute regarding the employer withdrawal liability *de novo*. Instead, the arbitrator considers the employer withdrawal liability statutorily established by the trustee in an appellate adjudicatory procedure analogous to that of a bureaucratic administrator.⁷² The arbitrator operates under the statutory presumption that the withdrawal liability determination by the pension plan trustee will be upheld unless unreasonable or clearly erroneous.⁷³ The actuarial assumptions of the plan trustee are upheld unless they are unreasonable in the aggregate or unless the actuary made a significant error.⁷⁴ As one commentator has summarized: “In operation, this scheme places the pension plan trustee in the role of a jury, a trial judge, or an administrative agency, and the arbitrator in the role of an appellate judge.”⁷⁵

The MPPAA arbitration occurs in a statutory construct of very

⁶⁸ Note, *MPPAA Withdrawal Liability Assessment*, *supra* note 4, at 214.

⁶⁹ *Id.* at 226.

⁷⁰ *Id.* at 243.

⁷¹ Woodrum & McBride, *supra* note 4, at 737.

⁷² Note, *The Use of Arbitration to Determine Liability*, *supra* note 4, at 173.

⁷³ 29 U.S.C. § 1401(a)(3)(A) (1988).

⁷⁴ *Id.* § 1401(a)(3)(B).

⁷⁵ Note, *Trading Fairness for Efficiency*, *supra* note 4, at 173.

dubious constitutionality.⁷⁶ Yet, only the Third Circuit, in *Yahn*, was sufficiently troubled by this statutory scheme to find it unconstitutional. Although the MPPAA arbitrator typically considers the same factors as the trustee,⁷⁷ the arbitrator is unable to cure the inherent bias in the pension plan trustee's calculation of withdrawal liability. Because the trustee will almost always be sophisticated enough to provide reasonable and not clearly erroneous calculations, the arbitrator will usually not have reason to re-evaluate them. Provided that the trustee was not unreasonable or clearly erroneous in these calculations, the arbitrator's exercise is largely redundant and superfluous.

III. JUDICIAL REVIEW

The pension plan trustee or the employer can seek judicial review of the arbitration decision in federal district court. The district court may enforce, vacate, or modify the arbitration award. The MPPAA provides for a fairly expansive judicial review

⁷⁶ Within the first 2½ years of the MPPAA, there were over 130 cases challenging the Act as unconstitutional. Note, *MPPAA Withdrawal Liability Assessment*, *supra* note 4, at 212 n.9. Most of these disputes are now resolved, and their complete reexamination is beyond the scope of this Article.

Several circuits have held that MPPAA mandatory arbitration did not violate the seventh amendment right to a jury trial. *See, e.g.*, *Terson Co. v. Bakery Drivers & Salesmen Local 194*, 739 F.2d 118 (3d Cir. 1984); *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502 (D.C. Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843 (2d Cir. 1984); *Peick v. Pension Benefits Guar. Corp.*, 724 F.2d 1247 (7th Cir. 1983); *Republic Indus. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628 (4th Cir. 1983).

Several other cases have found that the retroactive effects of ERISA and MPPAA do not violate due process. *See, e.g.*, *Pension Benefits Guar. Corp. v. R.A. Gray & Co.* 467 U.S. 717 (1984) (MPPAA); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980) (ERISA). The retroactive provisions of the MPPAA were rescinded, however, by the Tax Reform Act of 1984 after *Gray* was decided. Pub. L. No. 98-369, § 558, 98 Stat. 494, 899 (1984) (codified at 26 U.S.C. § 401, 29 U.S.C. § 1381 (1988)).

Finally, the MPPAA survived a constitutional attack on fifth amendment grounds. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986).

⁷⁷ These factors are: the interest rate assumptions used to calculate the proportionate withdrawal liability, the history of the pension plan (its investment record and its mix of investments), and employee and retiree turnover. *Jones, supra* note 4, § 11.04[3], at 11-9.

of the arbitrator's findings,⁷⁸ but the Act also provides for a more limited judicial review according to the United States Arbitration Act.⁷⁹ The Arbitration Act permits judicial review only in very limited circumstances.⁸⁰ This is at least partially inconsistent with the MPPAA's other provisions for more expansive judicial review, and the bare legislative history of the MPPAA provides no guidance. Fortunately, the courts have chosen to subordinate the United States Arbitration Act's very limited scope of review to the MPPAA's broader mandate allowing courts to enforce, vacate, or modify the arbitrator's award.⁸¹ This interpretation puts some life into what would otherwise be a contradictory and perhaps meaningless provision for judicial review.

The major anomalies and deficiencies in the determination of employer liability are firmly in place, however, before judicial review occurs. The pension plan trustee's calculation of employer withdrawal liability is very difficult to undo. The arbitrator acts as an appellate court, giving the trustee wide discretion in its calculations. Although the district court can review *de novo* the arbitrator's findings of law and facts, the court functions primarily as a second level of review.⁸²

Recently, this peculiar accordion-like scope of review was clarified and expanded somewhat by the Seventh Circuit. The Seventh Circuit has held that courts can fully review the MPPAA arbitrator's legal determinations because of the MPPAA's "broad mandate" permitting courts to enforce, vacate, or modify the arbitrator's award.⁸³ In *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Zahn Drug Co.*⁸⁴ the Seventh Circuit extended judicial review to all mixed questions of law and fact before the MPPAA arbitrator. In *Chicago Truck Drivers* the MPPAA arbitration presented questions as to whether there was a bona

⁷⁸ 29 U.S.C. § 1401(b)(2) (1988) (allowing district court to enforce, vacate, or modify arbitrator's award).

⁷⁹ *Id.* § 1401(b)(3). The United States Arbitration Act, 9 U.S.C. §§ 1-14, 201-208 (1988), provides very narrow grounds for judicially vacating an arbitration award. The grounds are limited to fraud, corruption, prejudicial misconduct, or misuse of power by the arbitrator. *Id.* § 11.

⁸⁰ 9 U.S.C. § 10 (1988).

⁸¹ 29 U.S.C. § 1401(b)(2) (1988).

⁸² *Trustees of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.*, 872 F.2d 208, 211, (7th Cir.), *cert. denied*, 110 S. Ct. 143 (1989).

⁸³ *Id.* at 212 (citing 29 U.S.C. § 1401(b)(2) and holding district courts may fully review arbitrator's legal determinations).

⁸⁴ 890 F.2d 1405 (7th Cir. 1989).

fide sale of assets, and whether the purpose of the transaction was to evade or avoid MPPAA withdrawal liability. The Seventh Circuit found these to be "classic examples of 'mixed questions of law and fact.'"⁸⁵ The court determined that both aspects of the MPPAA arbitrator's decision were reviewable de novo by the court.⁸⁶

As a practical matter, however, because of the strong statutory imbalance in favor of the trustee and MPPAA limitations on the scope of the arbitration, MPPAA judicial review has little substantive meaning other than to force the occasional recalcitrant arbitrator to endorse the original determination by the trustee. Furthermore, it is unlikely that this limited role of judicial review was substantially changed by the Supreme Court's 1989 decision in *Firestone Tire & Rubber Co. v. Bruch*.⁸⁷ Although the *Firestone Tire* Court held that, under ERISA, federal courts can review de novo trustee benefit determinations,⁸⁸ it indicated continuing judicial deference to pension plan documents which expressly give the trustee discretion in the interpretation of benefit rules.⁸⁹ While courts have de novo capability in MPPAA review contexts, the *Firestone Tire* decision will probably not be extended so far as to vitiate the trustee's original "reasonable" determination of employer withdrawal liability.

IV. ATTEMPTS TO AVOID MPPAA ARBITRATION — WHEN "ARBITRATION REIGNS SUPREME"

A. The Policy of "Arbitrate First"

Employers have had little success in challenging adverse determinations of withdrawal liability by the pension plan trustee. Neither MPPAA mandatory arbitration nor judicial review have been viable avenues for the withdrawing employer seeking relief. Consequently, employers have desperately sought litigation alternatives to avoid MPPAA arbitration altogether, or at least to obtain judicial resolution of as many MPPAA issues as possible. This alternative channelling has been very difficult, although not

⁸⁵ *Id.* at 1409.

⁸⁶ *Id.*

⁸⁷ 489 U.S. 101 (1989). *Firestone Tire* was not an MPPAA arbitrator case. See Flint, *ERISA: The Arbitrary and Capricious Rule Under Siege*, 39 CATH. U.L. REV. 133, 136 (1989) (discussing *Firestone Tire*).

⁸⁸ *Firestone Tire*, 489 U.S. at 114-15.

⁸⁹ *Id.*

wholly impossible, for employers to accomplish because courts have generally been reluctant to entertain employer tactics designed to circumvent MPPAA mandatory arbitration. In fact, courts have reinforced the MPPAA statutory scheme by expressly declaring that “arbitration reigns supreme,”⁹⁰ or that the employer must at least, before coming into court, “arbitrate first.”⁹¹

For example, in two 1987 decisions the D.C. Circuit Court of Appeals held that an employer disputing withdrawal liability must first proceed to MPPAA arbitration before coming into court.⁹² The court also ruled that an employer who failed to seek MPPAA arbitration of a withdrawal liability dispute is thereafter barred from raising defenses to liability in a subsequent collection action by the plan trustee.⁹³ Although this waiver of employer defenses to withdrawal liability imposes significant financial hardship, the court of appeals reasoned that this result is “in the main a ‘self-inflicted wound.’”⁹⁴ These important decisions from the D.C. Circuit unequivocally support the MPPAA arbitration mechanism; however harsh the reality may be, “arbitration reigns supreme under the MPPAA.”⁹⁵ The court of appeals stated that it would not be receptive to attempts to circumvent arbitration by any premature resort to the courts: “the value of arbitration in fulfilling Congress’ intent to provide an efficient, expeditious dispute resolution mechanism lies in *initial* resort to that mechanism.”⁹⁶

These 1987 “arbitrate first” decisions of the D.C. Circuit Court were bolstered by the Sixth Circuit in 1988 in *Mason & Dixon Tank Lines v. Central States, Southeast & Southwest Areas Pension Fund*.⁹⁷ In *Mason & Dixon Tank Lines* the Sixth Circuit reiterated the principle that issues of statutory construction, standing alone, are not

⁹⁰ I.A.M. Nat’l Pension Fund v. Clinton Engines Corp., 825 F.2d 415, 422 (D.C. Cir. 1987).

⁹¹ Grand Union Co. v. Food Employers Labor Relations Ass’n, 808 F.2d 66, 70 (D.C. Cir. 1987).

⁹² *Id.*; see also *Clinton Engines*, 825 F.2d at 427.

⁹³ *Clinton Engines*, 825 F.2d at 429.

⁹⁴ *Id.* at 427.

⁹⁵ *Id.* at 422; see also *Central States, Southeast & Southwest Areas Pension Fund v. Tom Boy, Inc.*, 10 Employee Benefits Cas. (BNA) 2547, 2550 (N.D. Ill. 1988) (holding employer’s claim that liability would be so severe as to be bankrupting and unconstitutional is first subject to arbitration.)

⁹⁶ *Clinton Engines*, 825 F.2d at 427 (emphasis in original).

⁹⁷ 852 F.2d 156 (6th Cir. 1988).

exempt from MPPAA mandatory arbitration.⁹⁸ In addition, the court found that the following issues had to be resolved first in arbitration: whether the employer has a right to cure partial withdrawal by tendering past-due pension contributions; whether the pension fund's calculation of employer withdrawal liability can include the histories of all enterprises under common control; whether the MPPAA is constitutional as applied; and whether equity justifies reduction of amount of liability.⁹⁹ The *Mason & Dixon Tank Lines* decision is the broadest possible judicial endorsement of MPPAA arbitration.

*B. Some Exceptions to Arbitration: Judicial Interpretation
of Statutory Issues*

Although the Sixth Circuit's opinion in *Mason & Dixon Tank Lines* accurately reflects the growing trend in the circuits that have addressed the issue, some courts will not yield their judicial prerogative of interpreting purely statutory issues to the MPPAA arbitrator. In addition, some arbitrators have eschewed any role in statutory construction, especially if constitutional issues are implicated.¹⁰⁰

For example, the Second Circuit in *Park South Hotel Corp. v. New York Hotel Trades Council*¹⁰¹ stated that arbitration was not required where there were only issues of statutory interpretation and no issues of fact.¹⁰² The court found that the suit had been filed before the time period for seeking arbitration had run and

⁹⁸ *Clinton Engines*, 825 F.2d at 422 (stating that "questions of statutory interpretation will not, standing alone, suffice to remove a case from the arbitrability requirement"); see also *Central States, Southeast & Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc.*, 826 F.2d 320, 328-29 (5th Cir. 1987) (holding exceptions apply only in extraordinary circumstances).

⁹⁹ *Mason & Dixon Tank Lines*, 852 F.2d at 166.

¹⁰⁰ See, e.g., *Tom Boy, Inc.*, 10 Employee Benefits Cas. (BNA) 2532, 2543 (1989) (Glanzer, Arb.) (finding arbitrator has no power to determine constitutional claims and must defer to court of law).

¹⁰¹ 851 F.2d 578 (2d Cir. 1988).

¹⁰² *Id.* at 582. The Second Circuit noted four factors that obviated the arbitration requirement. First, the case presented no factual issues, only legal questions of statutory interpretation. Second, both parties agreed that no arbitration was required. Third, *Park South* filed suit before the arbitration time limit expired. Fourth, since further judicial proceedings would certainly follow any arbitration proceedings, judicial economy would not be served by remanding. The court limited its decision eliminating the arbitration requirement to cases in which all four of these factors are present. *Id.*

that judicial economy would not be served by remanding the case for arbitration.¹⁰³ This generally comports with principles involving the arbitration of ERISA disputes outside the MPPAA context.¹⁰⁴ In *Bird v. Shearson Lehman/American Express, Inc.*,¹⁰⁵ a case involving allegations of ERISA fiduciary breach for stock churning, the Second Circuit ruled that statutory claims are not com-

¹⁰³ *Id.*; see also *Dorn's Transp. v. Teamsters Pension Trust Fund*, 787 F.2d 897, 903 (3d Cir. 1986) (holding arbitration not necessary when issue is not one with which arbitrator has expertise, arbitration not likely to moot further proceedings, and arbitration could not help to develop factual record to assist court); *T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds of Local 1730 Int'l Longshoremen's Ass'n*, 756 F.2d 939 (2d Cir. 1985) (interpreting transfer of assets to new pension plan as beyond scope of MPPAA's mandatory arbitration provision).

¹⁰⁴ See, e.g., *Management-Labor Welfare & Pension Funds, Local 1730*, 756 F.2d at 945 (holding requirement of exhaustion of administrative remedies is prudential matter within court's discretion); *T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621, 632-33 (N.D.N.Y.) (same), *aff'd per curiam*, 735 F.2d 60 (2d Cir. 1984); *T.I.M.E.-DC, Inc. v. Trucking Employees of N. Jersey Welfare Fund*, 560 F. Supp. 294, 302 (E.D.N.Y. 1983) (holding arbitration not the proper forum for statutory interpretation issue); see also *Laborers Health & Welfare Trust Fund v. Advanced Light Weight Concrete Co.*, 484 U.S. 539 (1988) (stating National Labor Relations Act, and not ERISA, is source of remedies for failure to contribute to pension funds, in violation of collective bargaining agreement); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984) (holding pension plan trustee could maintain lawsuit for delinquent pension contributions, without exhausting grievance-arbitration process of collective bargaining agreement).

There are many other labor and employment law based cases wherein the Supreme Court did not mandate arbitration, instead permitting the litigation to proceed independent of arbitration. See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (holding award in previous arbitration proceeding should not bar subsequent § 1983 claim); *Barrentine v. Arkansas-Best Freight System Inc.*, 450 U.S. 728 (1981) (holding employee wage claim under Fair Labor Standards Act could proceed in court, even though claim previously submitted to labor contract arbitration); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding adverse labor contract arbitration decision does not bar de novo Title VII litigation).

See generally *Shell, ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?* 68 TEXAS L. REV. 509 (1990) (discussing Supreme Court's view that statutory interpretations in labor disputes should be resolved by courts, not arbitrators); *Speidel, Arbitration of Statutory Rights Under the Federal Arbitration Act: The Case for Reform*, 4 OHIO ST. J. ON DISPUTE RESOLUTION 157 (1989) (tracing Supreme Court treatment of agreements to arbitrate statutory rights in disputes governed by Arbitration Act).

¹⁰⁵ 871 F.2d 292 (2d Cir. 1989).

pulsorily arbitrable because arbitration, as opposed to the judicial forum, does not provide the maximum level of protection for pension plan participants and beneficiaries.¹⁰⁶

If MPPAA arbitration is ultimately compelled, those employers who originally, in good faith, bypassed MPPAA arbitration by litigation may not be unduly prejudiced. Some courts have held that these employer claims will not be waived if the employer fails to seek MPPAA arbitration before resorting to the courts. In *Banner Industries v. Central States, Southeast & Southwest Areas Pension Fund*¹⁰⁷ the plaintiff filed suit in federal district court for a declaratory judgment that it was not an MPPAA “employer.” Although the court decided that the question was ultimately for the arbitrator to decide, the court tolled the MPPAA statute of limitations to allow the plaintiff to request arbitration. The court noted that since the employer had taken immediate steps to contest its liability, it was not a case in which the employer “did absolutely nothing, waited until the pension plan filed a collection action against it, and then for the first time tried to assert its defenses in court when it should have proceeded in arbitration.”¹⁰⁸

¹⁰⁶ *Id.* at 293. The court reasoned: “Because Congress envisioned a judicial forum, particularly a federal court, as the central arena for implementing ERISA’s underlying purpose — providing maximum protection to pension plan participants and beneficiaries — we hold that statutory ERISA claims are not compulsorily arbitrable.” *Id.*

¹⁰⁷ 875 F.2d 1285 (7th Cir. 1989).

¹⁰⁸ *Id.* at 1293 (quoting *Banner Indus. v. Central States, Southeast & Southwest Areas Pension Fund*, 657 F. Supp. 875, 884 (N.D. Ill. 1967)); *see also* *Trustees of the Centennial State Carpenters Pension Trust Fund v. Centric Corp.*, 901 F.2d 1514, 1518 (10th Cir. 1990) (stating “[g]enerally, therefore, the only defenses which are waived by a failure to timely initiate arbitration are those which go to the merits of the liability assessment itself”); *Masters, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727, 736 (4th Cir. 1990) (allowing arbitration to be postponed for trustee to refine calculation of withdrawal liability); *Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Central Transp., Inc.*, 888 F.2d 1161, 1164 (7th Cir. 1989) (stating “actively pursuing a legitimate issue of statutory construction in federal court will toll the period during which arbitration must begin”); *I.A.M. Nat’l Pension Fund v. Stockton Tri Indus.*, 727 F.2d 1204, 1208-09 (D.C. Cir. 1984) (holding arbitration not required where only issue was one of statutory interpretation); *Republic Indus. v. Teamsters Joint Council No. 83 Pension Fund*, 718 F.2d 628, 644 (4th Cir. 1983) (holding pending challenge of arbitration requirement’s constitutionality tolled statute of limitations); *Shelter Framing Corp. v. Pension Benefit Guar. Corp.*, 705 F.2d 1502, 1509 (9th Cir. 1983); *Republic Indus. v. Central Pa. Teamsters Pension Fund*, 693 F.2d 290 (3d Cir. 1982)

1. Who Is an “Employer”?

The Second Circuit has most prominently defied the trend in most of the other circuits to send even pure statutory interpretation questions to MPPAA arbitration.¹⁰⁹ In *Korea Shipping Corp. v. New York Shipping Association-International Longshoremen’s Association Pension Trust Fund*¹¹⁰ the Second Circuit addressed the question of who is an “employer” for MPPAA purposes. The Second Circuit held that the definition of who is an employer for purposes of determining withdrawal liability under the MPPAA is one that “must be left to the courts.”¹¹¹ The MPPAA per se does not define “employer.” Title I of ERISA defines an employer as “any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.”¹¹² PBGC Regulations define “employer” as “an individual, partnership, corporation or other entity against which a plan sponsor had made a demand for payment of withdrawal liability.”¹¹³

The Third Circuit, however, has not asserted the same degree of judicial prerogative in determining who is an MPPAA “employer.” According to its decision in *Flying Tiger Line v. Team-*

(holding arbitration not required when employer challenged constitutionality of statute); *I.A.M. Nat’l Pension Fund Benefit Plan C v. Schulze Tool & Die Co.*, 564 F. Supp. 1285, 1289-90 (N.D. Cal. 1983) (holding arbitration not required where issue involved interpretation of federal statute).

¹⁰⁹ See *supra* note 98 (providing examples of decisions holding arbitration requirement to apply).

¹¹⁰ 880 F.2d 1531 (2d Cir. 1989).

¹¹¹ *Id.* at 1536; see also *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 261 (2d Cir. 1990); *Carriers Container Council, Inc. v. Mobile S.S. Ass’n-Int’l Longshoremen’s Ass’n Pension Plan & Trust*, 896 F.2d 1330, (11th Cir. 1990); *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund*, 580 F. Supp. 1457 (S.D.N.Y. 1984). But see *Drivers Hire, Inc.*, 11 Employee Benefits Cas. (BNA) 2029 (1989) (Folk, Arb.) (arbitrator finding companies leasing employees were not employers for purposes of MPPAA withdrawal liability).

See generally Annotation, *What Constitutes “Employer” for Purposes of Employer’s Withdrawal Liability Under Multiemployer Pension Plan Amendments Act of 1980* (29 U.S.C.S. §§ 1381 et. seq.), 95 A.L.R. FED. 703 (1989); LeBlanc, *ERISA’s Definition of “Employer” and the Collection of Delinquent Multiemployer Benefit Plan Contributions from Corporate Officers*, 1987 DET. C.L. REV. 1.

¹¹² 29 U.S.C. § 1002(5) (1988).

¹¹³ 29 C.F.R. § 2640.3 (1989).

sters Pension Trust Fund,¹¹⁴ most employer status questions should be resolved in MPPAA arbitration, and not by the courts.¹¹⁵

2. The Labor Dispute

A labor dispute does not trigger MPPAA employer withdrawal. The question of whether there is a labor dispute is generally a question for the courts, not for MPPAA arbitration.¹¹⁶ Generally, protracted labor disputes will preclude MPPAA withdrawal.¹¹⁷ In some cases, however, MPPAA arbitration of surrounding facts may be appropriate in order to determine proper application of the labor dispute statutory exception.¹¹⁸

3. Bankruptcy

Significantly, many employers facing MPPAA withdrawal liabil-

¹¹⁴ 830 F.2d 1241 (3d Cir. 1987).

¹¹⁵ *Id.* at 1251-52; *see also* Carl Colteryahn Dairy, Inc. v. Teamsters & Employers Pension Fund, 847 F.2d 113, 123 (3d Cir. 1988) (holding determination of contributions is issue properly resolved by arbitrator), *cert. denied*, 488 U.S. 1041 (1989); Crown Cork & Seal Co. v. Central States, Southeast & Southwest Areas Pension Fund, 881 F.2d 11 (3d Cir. 1989) (ordering arbitration six years after assessment when employer asserted statutory defenses unavailable before lapse of arbitration time limit).

¹¹⁶ T.I.M.E.-DC, Inc. v. Management-Labor Welfare & Pension Funds, of Local 1730 Int'l Longshoremen's Ass'n, 756 F.2d 939, 944-45 (2d Cir. 1985); T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 621, 625-26 (N.D.N.Y.), *aff'd per curiam*, 735 F.2d 60 (2d Cir. 1984); T.I.M.E.-DC, Inc. v. Trucking Employees of N. Jersey Welfare Fund, 560 F. Supp. 294, 302-03 (E.D.N.Y. 1983).

¹¹⁷ 29 U.S.C. § 1398(2) (1988) (providing that employer is not considered to have withdrawn because contributions suspended during labor dispute); *see also* Sheet Metal Workers' Pension Fund, Local Union No. 85 v. Advanced Metal & Welding Corp., 643 F. Supp. 1201, 1208 (N.D. Ga. 1986); Central States, Southeast & Southwest Areas Pension Fund v. T.I.M.E.-DC, Inc., 639 F. Supp. 1468, 1474-75 (N.D. Tex. 1986), *rev'd on other grounds*, 826 F.2d 320 (5th Cir. 1987); T.I.M.E.-DC, Inc. v. Western Teamsters Pension Fund, 7 Employee Benefits Cas. (BNA) 2124, 2131-32 (N.D. Cal. 1986).

¹¹⁸ Coles Express v. New England Teamsters & Trucking Indus. Pension Fund, 702 F. Supp. 355 (D. Maine 1988) (holding arbitration of surrounding facts is appropriate when facts may be relevant to proper application of labor dispute statutory exception); *see also* Delta S.S. Lines & Masters, 10 Employee Benefits Cas. (BNA) 1621 (1988) (Sands, Arb.) (arbitrator determining when withdrawal occurs); Loomis Armored, Inc., 8 Employee Benefits Cas. (BNA) 1899 (1987) (Tilove, Arb.) (same); Garland Coal Co., 7 Employee Benefits Cas. (BNA) 1771 (1986) (Dreyer, Arb.) (same).

ity problems are bankrupt. Business liquidation, from the employer's perspective, usually overwhelms and moots concerns about withdrawal liability; the pension plan trustee is just another creditor.¹¹⁹ Although the case law has not yet taken on a definitive contour, bankruptcy proceedings may generally be a more flexible environment for the withdrawing employer than MPPAA mandatory arbitration for the resolution of claims. In *Trustees of Chicago Truck Drivers, Helpers & Warehouse Workers Union Pension Fund v. Central Transp., Inc.*¹²⁰ the Seventh Circuit found that a claim filed in bankruptcy court by a multiemployer pension plan trustee against a bankrupt employer tolled the time period for the employer to file for MPPAA mandatory arbitration.¹²¹ Especially when the trustee initiates litigation of MPPAA withdrawal liability claims against the employer in bankruptcy court, the trustee cannot very well later seek summary judgment claiming that the employer, defending against the trustee's claim in bankruptcy court, did not seek MPPAA arbitration within the narrow MPPAA section 1401(a)(1) time limits. As the Seventh Circuit summarized in *Chicago Truck Drivers*:

¹¹⁹ For a discussion of the status of MPPAA withdrawal liability claims in bankruptcy, see generally, M. PULLIAM & R. CONN, *COLLIER LABOR LAW AND THE BANKRUPTCY CODE* § 4.03[2][a] (L. King ed. 1989); Soble, *Bankruptcy Claims of Multiemployer Pension Plans*, 33 *LABOR L.J.* 57 (1982); Wohl, *Pension and Bankruptcy Laws: A Clash of Social Policies*, 64 *N.C.L. REV.* 3 (1985). One half of the bankrupt employer's withdrawal liability has lower priority than other general creditors. 29 U.S.C. § 1405(b) (1988); see also *Trustees of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98 (2d Cir. 1986); *In re Advance-United Expressways, Inc.*, 86 *Bankr.* 602 (Bankr. D. Minn. 1988).

¹²⁰ 888 F.2d 1161 (7th Cir. 1989).

¹²¹ *Id.* at 1164-65; see also, *In re Mushroom Transp. Co.*, 10 *Employee Benefits Cas. (BNA)* 1179, 1182 (Bankr. E.D. Pa. 1988) (holding issue of liability was within bankruptcy court's jurisdiction; issue of whether or not entity is an "employer" is properly reserved for arbitration); *In re T.D.M.A., Inc.*, 66 *Bankr.* 992, 996 (Bankr. E.D. Pa. 1986) (holding Congress's desire for speedy bankruptcy proceedings would be thwarted if withdrawal liability issue was referred to arbitration); *In re Amalgamated Foods, Inc.*, 41 *Bankr.* 616, 617-18 (Bankr. C.D. Cal. 1984) (noting Congress could have declared, but did not, that MPPAA arbitration prevails over bankruptcy court processes); *Cott Corp. v. New England Teamsters & Trucking Indus. Pension Fund*, 26 *Bankr.* 332, 335 (Bankr. D. Conn. 1982) (citing cases holding that bankruptcy court has exclusive jurisdiction over claims against bankrupt employers).

But see *I.A.M. Nat'l Pension Fund Plan A, A Benefits v. Slyman Indus.*, 901 F.2d 127 (D.C. Cir. 1990) (refusing to toll time period for arbitration while employer in bankruptcy proceedings).

[A]rbitration is not the *sole* forum in which withdrawal liability claims can be adjudicated. While we certainly do not resolve the question of whether bankruptcy courts have jurisdiction to determine withdrawal liability under MPPAA, those bankruptcy decisions provided a basis for the reasonable belief of defendants in this case that the issue of withdrawal liability could be addressed in the bankruptcy claim filed by the Fund. . . . [T]he filing in the bankruptcy court by the Fund, accompanied by a timely response by the defendants, tolled the time period for seeking arbitration under section 1401(a)(1).¹²²

CONCLUSION

The MPPAA has had a rocky, checkered first decade. Its constitutionality has justifiably been challenged as suspect, although most of the earlier constitutional disputes, such as the statute's retroactivity, have been resolved by litigation, judicial severance of the offensive provision, or remedial legislation. Yet MPPAA arbitration cannot be considered in a jurisprudential vacuum: its constitutionality should be examined independent of any of the "high esteem" generally given to arbitration in labor proceedings.¹²³

One might argue that the fundamental policy objectives of the MPPAA have been largely achieved: multiemployer pension plans are more sound financially, and much less volatile, than they were prior to the Act. A narrow, result-oriented jurisprudence, therefore, would generally endorse the Act's first decade. The peculiar, convoluted arbitration scheme, and the structural unfairness of shifting virtually all risk onto the withdrawing employer, would be tolerated as a necessary evil to the realization of greater financial stability in multiemployer pension plans.¹²⁴

¹²² *Chicago Truck Drivers*, 888 F.2d at 1165 (emphasis in original) (citations omitted). The bankruptcy court has jurisdiction to determine whether the entity was ever an employer for MPPAA withdrawal liability purposes, especially where multiemployer pension plan contributions were never made. *Mushroom Transp. Co.*, 10 Employee Benefits Cas. at 1182.

¹²³ Smith, *supra* note 4, at 34. Smith states:

It is difficult to consider the constitutionality of the MPPAA arbitration scheme without reference to the remedial context in which it is written. Arguments about the *per se* constitutionality of arbitration as a dispute resolution mechanism are not useful, particularly in view of the high esteem in which arbitration is held in the area of labor relations.

Id.

¹²⁴ *But see id.* at 44. Smith states:

There is no reason, however, to settle for such a crabbed and narrow positivism. There are severe adverse consequences to the present system, such as the increased resistance of employers to participate in multiemployer pension plans.¹²⁵ There is little or no incentive for an employer to join a multiemployer pension plan, and the few incentives that exist are completely overwhelmed by the looming specter of a withdrawal liability that could be in excess of the employer's net worth.

Alternative dispute resolution should not be reduced to such a hollow formality. The MPPAA's mandatory arbitration process should either be restored to a meaningful substantive role or it should be scrapped in favor of *de novo* litigation. Under the present MPPAA regime, arbitration serves largely as a rubber-stamp approval of the trustee's inherently biased calculation of withdrawal liability. Judicial review is a final, hollow formality endorsing both the trustee's determination and the arbitrator's affirmance. Especially given the *ex parte* withdrawal liability determination by the plan sponsor, and the absence of any viable opportunity for litigation, MPPAA arbitration should be made voluntary. Instead, the deck is stacked against the employer.¹²⁶ It is manifestly clear that the MPPAA arbitration provision was hastily incorporated into the Act without careful consideration of the provision's ramifications for multiemployer pension funds.

The most important and realistic statutory refinement to the MPPAA would follow the Third Circuit's decision in *Yahn*, removing the statutory presumptions which the MPPAA now requires the arbitrator to make: namely, that the plan trustee's calculation of withdrawal liability is correct unless unreasonable or clearly erroneous.¹²⁷ This statutory refinement would restore some fair-

The incorporation of mandatory arbitration into the MPPAA's enforcement scheme may prove to be one of the most successful aspects of this legislation. . . . [P]rovided MPPAA arbitration proceedings are reasonably well-designed, the parties to the arbitration can receive substantial benefit from the lower costs and quick results of the process.

Id.

¹²⁵ Fischel & Langbein, *ERISA's Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1106 (1988).

¹²⁶ Note, *The Supremacy of Arbitration*, *supra* note 4, at 833.

¹²⁷ Note, *Trading Fairness for Efficiency*, *supra* note 4, at 190. See *supra* text accompanying notes 58-61 (discussing *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc.*, 787 F.2d 128 (3d Cir. 1986), *aff'd per curiam by an equally*

ness into the process, make mandatory arbitration more meaningful, and significantly reduce desperate employer tactics to avoid arbitration. While “fair procedures are rarely as economical as summary ones,”¹²⁸ raw statutory positivism, which bows to inherent trustee bias, is antithetical to justice. The employer’s right to an impartial tribunal to determine the amount of withdrawal liability is absolute and is not negotiable. As the Third Circuit recognized in *Yahn*, no matter how important the solvency of multiemployer pension plans, the requirement of judicial fairness, embodied in an *unbiased party* assessing liability, should not be compromised.¹²⁹

All of these objectives could be achieved without returning to the financial instability of multiemployer pension plans in the pre-MPPAA era. Arbitration has been proven an effective instrument of dispute resolution in the employment sphere for over half a century. Viable, substantive, and voluntary arbitration could make a more important and meaningful contribution in the MPPAA environment. Reforms such as encouraging settlement by the parties, requiring fair procedures in arbitration, and providing increased judicial review of the arbitration could guarantee the continued vitality — and integrity — of arbitration.¹³⁰

The Act’s mandatory arbitration provision, as it continues to operate after *Yahn*, is a contradiction in terms. If unremedied, MPPAA arbitration may spell the demise of multiemployer pen-

divided Court sub nom. Pension Benefit Guar. Corp. v. Yahn & McDonnell, Inc., 481 U.S. 735 (1987)). To some extent, this may have occurred de facto after the *Yahn* decision, but plan trustees continue to have a nearly unchallengeable blank check to set employer’s withdrawal liability. Note, *MPPAA Withdrawal Liability Assessment*, *supra* note 4, at 257.

¹²⁸ Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, 762 F.2d 1124, 1135 (1st Cir. 1984).

¹²⁹ United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 141-42 (3d Cir. 1986), *aff’d per curiam by equally divided Court sub nom.*, Pension Benefit Guar. Corp. v. Yahn & McDonnell, Inc., 481 U.S. 735 (1987) (emphasis added). The Third Circuit wrote:

Regardless of the importance of ensuring the solvency of pension plans, and the reasonable relation between that end and the statutory scheme, one requirement can be clearly deduced from basic principles of judicial fairness and from Supreme Court jurisprudence: *the assessment of liability must be made by an unbiased party.*

Id. (emphasis added).

¹³⁰ Note, *Trading Fairness for Efficiency*, *supra* note 4, at 192.

sion plans by removing at the inception any incentive or inducement for an employer to join these plans. Ultimately, the specter of MPPAA arbitration overwhelms withdrawing and prospective entering employers alike. One economist correctly concluded that arbitration, designed to stabilize multiemployer pension plans in the eighties, may well auger the plans' demise in the nineties:

The severe penalties seem certain to discourage employers from withdrawing from multiemployer plans, but critics charge that the bill also discourages companies from joining these plans. Without an inflow of new employers and with the traditional high attrition among sponsoring firms, multiemployer plans will decline in importance. Congress, in trying to structure a more equitable system, may have shifted too much of the burden to withdrawing employers.¹³¹

Distributive justice, which pension law is designed to achieve, cannot be realized if major instruments for the delivery of pensions, such as multiemployer pension plans, atrophy over time through the reduced entry by new employers. If this occurs, which it inexorably will under the current scheme, perhaps it will lead to a gradual transition to a public, universal system from the current private pension regime. This, however, seems very unlikely for the foreseeable future given the current motif of our capitalist economy.

Congress should not passively allow another decade of the MPPAA to pass. A second decade of mandatory arbitration could completely choke off any entrance into multiemployer plans. As it did in 1978, Congress should direct the PBGC to conduct an empirical study of the health and stability of multiemployer pension funds. Such a study would undoubtedly reveal the MPPAA's effect of reducing entry into multiemployer pension plans and destabilizing those plans' futures. Preserving financially sound multiemployer pension plans, the original goal of the MPPAA, is inextricably bound up with the even more fundamental question of whether, in the Act's second decade, there will be any realistic employer incentives remaining for joining multiemployer pension plans. If multiemployer pension plans gradually diminish in scope and number, adverse repercussions will result throughout the private employment pension plan system.

¹³¹ Munnell, *supra* note 14, at 33.

