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Daniel A. Etna  
Fordham University School of Law

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MPPAA WITHDRAWAL LIABILITY ASSESSMENT: LETTING THE FOX GUARD THE HENHOUSE

I. Introduction

In an attempt to remedy some of the defects in the private pension system, Congress unwittingly has created more problems than it has solved. The primary objective of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) "is to protect retirees and workers who are participants in [multiemployer] plans against the loss of their pensions." In its attempt to achieve this objective, Congress, through the MPPAA, has imposed significant new financial obligations on employers who withdraw from multiemployer pension plans (MEPPs). Specifically, some pension plan trustees, acting under the authority of the provisions of the new amendments which calculate liability for withdrawal from multiemployer pension plans (MEPPs), have demanded millions of dollars from withdrawing em-

1. See infra notes 41-84 and accompanying text.
3. See infra note 9.
5. A multiemployer pension plan is a defined benefit pension plan that is maintained jointly by two or more unrelated employers, pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. 29 U.S.C. § 1301(a)(3) (1982); see Obrentz & Woodward, ERISA—The Multiemployer Pension Plan Amendments Act of 1980, Tax Law & Practice Course Handbook Series No. 208, PRACTISING L. INST. 11 (June-July 1984) [hereinafter cited as Obrentz & Woodward].
6. There are a variety of methods by which a plan may calculate the withdrawing employer’s liability. Specifically, the MPPAA prescribes four methods for calculating withdrawal liability. 29 U.S.C. § 1391 (1982); see Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502, 1505 (D.C. Cir. 1984); see also Obrentz & Woodward, supra note 5, at 27-28. The four methods prescribed by the MPPAA are: (1) the presumptive method, (2) the modified presumptive or two-pool method, (3) the rolling-five or one-pool method, and (4) the attributable method. Id. at 35-39. See generally Cummings & Kershaw, Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980, 40 N.Y.U. INST. ON TAX’N § 12.02[6] (ERISA Supp. 1982). Alternatively, the plan may employ another method, subject to approval by the Pension Benefit Guaranty Corporation (PBGC). 29 U.S.C. §§ 1302(b)(3), 1391 (1982).
As a result, the MPPAA has engendered a tremendous volume of litigation and has been vigorously opposed by the private sector.


8. See Shelter Framing Corp. v. Carpenters Pension Trust for S. Cal., 543 F. Supp. 1234, 1237 (C.D. Cal. 1982) (pension fund assessed employer's withdrawal liability at 200% of employer's net assets), modified, 705 F.2d 1502 (9th Cir. 1983), cert. denied, 104 S. Ct. 3553 (1984); see also, Cahill, Pension Plan Penalty Arguments Mount, N.Y. Daily News, Apr. 23, 1985, at K12, col. 3.


10. E.g., Oversight of Private Pension Plans, 1983: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 98th Cong., 1st Sess. 273-310 (1983) (statement of Paul G. Bell, President, P.G. Bell Co., General Contracting, Houston, Tex., on behalf of the Associated General Contractors of America, accompanied by Dennis Bradshaw and Dan Knise, Staff Members, Associated General Contractors of America); id. at 239-50 (statement of Daniel F. McGinn, President, Dan McGinn & Associates, Anaheim, Calif.); id. at 250-76 (statement of Howard W. Ryder, President, Coastal Tank Lines, Akron, Ohio, and Vice-Chairman, Board of Directors, American Trucking Associations, Inc., accompanied by Herve Aiken, Director, Industrial Relations Department, American Trucking Associations, Inc.) [hereinafter cited as Oversight]. The above statements, in large part, represent employers' dissatisfaction with the MPPAA.

The workers covered by MEPPs are not pleased with the MPPAA either:

The workers that are covered by these plans are not happy with them. Their disenchantment arises because too many of the benefit dollars that are being paid by their employers are going toward payment of past unfunded liabilities of the funds. Little is left to give present benefits to the active workers. An actual example will illustrate why the employees are frustrated.

The employer is engaged in the garment industry in the New York City area. It pays from $175 to $275 by union contract to its employees. It pays an amount equal to 20.5% of the gross weekly payroll to various union funds for benefits, including approximately one-half of those pay-
A MEPP is within one of the four categories of pension plans in existence. This Note focuses on MEPPs. A MEPP is a plan in which unions and employers, usually within a single industry, are the sole participants. Congress has provided for a system of withdrawal liability assessment which is to be invoked when an employer decides to or is forced to leave a MEPP due to unfavorable economic conditions. Under this system the MEPP trustees, who usually use overly conservative, if not unreasonable, assumptions, assessments to retirement and health benefit plans that are at the international level.

In this illustration, which is a real example, the workers whose hourly labor is causing these various contributions by their employer, feel that they are actually receiving very little present benefit. The employee being paid $275 in direct wages is causing contributions of at least $37.50 per week to be made to fund past obligations, at the international and local level. Many employees have actually told the employer that they do not want the union. The employer does not want the union either. However, it cannot afford to become non-union. By doing so it will have been considered to have withdrawn from the multiemployer pension fund and it cannot afford to be assessed with the withdrawal liability.

It does not console the present workers to know that their work is producing benefits for former workers. They feel they are part of a chain letter. They see fellow workers drifting to other employers. And they wonder who will be around to work for their employer so that their benefits will be paid.

When MPPAA passed, no one told these workers that the money to go to the fund to pay benefits for former workers would come at their expense. Now that they see it is happening they do not like it. The sense of frustration of the employer, and its employees, leads to all sorts of alternatives. It encourages "double-breasted" shops by employers (but not to such a large extent that a partial withdrawal under MPPAA would be triggered). It encourages acrimony between older union members and leaders, who like the system because they are close to retirement, and the younger employees and union leaders that want a greater share of benefits from the employer now.


11. See infra notes 27-36 and accompanying text.

12. See supra note 5.

13. Withdrawal liability is the amount an employer withdrawing from a MEPP is assessed by the plan's trustees. It is a share of the plan's unfunded vested benefits, which is an amount equal to the value of the nonforfeitable or vested benefits (i.e., the future promised benefits) under the plan, less the value of the plan's assets. 29 U.S.C. § 1393 (1982).


15. The board of trustees is comprised of one-half employer appointees and one-half union appointees. 29 U.S.C. § 186(c)(5) (1982).

16. It is all too common to have the plan trustees arrive at a withdrawal liability assessment based upon actuarial assumptions that are very conservative and in some cases unreasonable. See Classic Coal Corp. v. UMW 1950 and 1974 Pension Plans, 5 EBC (BNA) 1449, 1465-66 (1984) (Nagle, Arb.) (actuarial assumptions relied on by plan trustees utilized an extremely low rate of interest and a mortality rate
the withdrawing employer's liability. This method of assessment often results in litigation between the withdrawing employer and the trustees of the MEPP due to the natural antagonism between the parties.

The assumptions embodied within the MPPAA cause withdrawal liability litigation to be resolved against the departing party. These

projecting life expectancies of 100 to 110 years); McCulloch, supra note 10, at 4-5.


18. This antagonism has been described in a variety of ways:

A withdrawing employer "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. v. New England Teamsters and Trucking Indus. Pension Fund, Inc., 762 F.2d 1137, 1146 (1st Cir. 1985) (Aldrich, Senior Cir. J., dissenting).

"In practice this assessment mechanism is something like letting Gimbel's determine what sales tax Macy's has to charge its customers, with the proceeds going to Gimbel's." McCulloch, supra note 10, at 4. For a further discussion, see id. at 3-5.

Should those staying behind determine how much a withdrawing employer has to pay? This scenario is akin to that of a poker game, where the losing players "tell" the winning player when he can leave. Interview with Kenneth J. McCulloch, Partner, Townley & Updike, in New York City (Aug. 16, 1985).

19. For purposes of any proceeding under the MPPAA, any determination which relates to the calculation of withdrawal liability is presumed correct, unless the party contesting the
determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

(B) In the case of the determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that-

(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or

(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.


Disputes over the determination of withdrawal liability are required to be reconciled by means of arbitration. See infra note 165 and accompanying text. Pursuant to a final judgment from an arbitrator, a federal district court (upon request by any of the parties to the arbitration proceedings) reviewing the arbitrator's award must presume the arbitrator's findings of fact to be correct unless they are rebutted by a "clear preponderance of the evidence." 29 U.S.C. § 1401(c) (1982); see Obrentz & Woodward, supra note 5, at 27-28, 65, 68.

assumptions greatly favor the remaining participants and place upon
the withdrawing employer the burden of proving the unreasonableness
of the withdrawal liability assessment.\textsuperscript{21}

This Note proposes legislation which, if adopted, would cure the
withdrawal liability assessment problem associated with MEPPs.\textsuperscript{22}
This Note will first discuss the history of pension plan development
in the United States with the focus being on MEPPs.\textsuperscript{23} Then this
Note will consider the current system used to calculate withdrawal
liability from MEPPs.\textsuperscript{24} Finally, this Note suggests that Congress
establish a system whereby pension fund trustees would set forth
the components of a particular plan used in making a withdrawal
liability assessment and then grant insurance companies access to
this information, so they may bid competitively to guarantee the
departing employer’s exposure to withdrawal liability.\textsuperscript{25}

II. The History of the Pension Plan in the United States

A. Categories of Plans

Private, defined benefit pension plans were established in the
United States in 1875.\textsuperscript{26} Today, there are four categories of private
pension plans: union plans, corporate plans, single-employer Taft-
Hartley plans, and multiemployer Taft-Hartley plans (MEPP).\textsuperscript{27} Union
plans which were sponsored exclusively by a union,\textsuperscript{28} were outlawed
by the Labor-Management Relations Act of 1947 (Taft-Hartley Act).\textsuperscript{29}
Union plans currently comprise less than ten percent of all private pension plan funds.  

Corporate plans are established either through a collective bargaining agreement with a union or through unilateral sponsorship by the employer. The establishment of a corporate plan, pursuant to a collective bargaining agreement, does not necessarily mean that the union will have a voice in either the administration of the plan or the investment of pension funds.

Plans established pursuant to section 302(c)(5) of the Taft-Hartley Act provide for union input into the administration and investment of pension funds. Single-employer Taft-Hartley plans outnumber multiemployer Taft-Hartley plans, although the latter are increasing in importance.

B. Multiemployer Pension Plans

MEPPs have been in existence for more than fifty years. Initially, the responsibility for establishing and administering these plans rested solely with the unions. The employer was required only to make an agreed to per-hour contribution. Today, however, much more is required of an employer.

31. For a discussion of corporate plans, see generally D. Logue, Legislative Influence on Corporate Pension Plans 6 (1979).
32. P. Harbrecht, supra note 27, at 43.
33. Id. at 43-44.
34. 29 U.S.C. § 186(c)(5) (1982). This section provides for the establishment of trusts jointly administered by "representatives" of the employer and employees. Id. The board of trustees in such a "Taft-Hartley plan" is comprised of one-half employer appointees and one-half union appointees. See id.
35. Multiemployer plans covered 22% of all private plan participants in 1980 and this percentage has been increasing. See A. Munnell, The Economics of Private Pensions 219 (1982) [hereinafter cited as Munnell]. In 1950, only 9% of private plan participants were covered by multiemployer plans. Id.
36. Id.
37. Id. Although multiemployer plans have been increasing, the rate of increase in pension plans generally is currently 8%, one-half of the historical pre-ERISA rate. See Oversight, supra note 10, at 13, 16 (statement of Dallas L. Salisbury, Executive Director, Employee Benefit Research Institute).
38. See Oversight, supra note 10, at 279 (statement of Paul G. Bell, President P.G. Bell Co., General Contracting, Houston, Tex., on behalf of the Associated General Contractors of America).
39. Id.
1. Multiemployer Plans Under Taft-Hartley

When Congress enacted the Taft-Hartley Act in 1947, it included a provision requiring the administration of a multiemployer pension plan to be governed by a board consisting of an equal number of management and labor trustees. This provision was the "result of concern over abuse and improper administration" of pension plans by the unions. Despite the increased participation necessitated by the Taft-Hartley Act, employers still have minimal, if any, involvement with the administration of these plans. From an employer's perspective...

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41. See supra notes 15, 29, 34 and accompanying text.
42. See Oversight, supra note 10, at 279 (statement of P.G. Bell, President, P.G. Bell Co., General Contracting, Houston, Tex., on behalf of the Associated General Contractors of America). See, e.g., Arroyo v. United States, 359 U.S. 419, 425-26 (1959). The abuses feared included the use of funds "to perpetuate control of union officers, for political purposes, or even for personal gain." Id. at 426.
43. NLRB v. Amax Coal Co., 453 U.S. 322 (1981) (Supreme Court held that language and legislative history of 29 U.S.C. § 186(c)(5) and ERISA demonstrate that a pension fund trustee is a fiduciary whose duty to the fund's beneficiaries must overcome any loyalty to the interest of the party that appointed him). The duties required under these two statutes have been found to create an inherent conflict.

A legal dispute between management and labor trustees of the big Western Conference of Teamsters pension plan illustrates a troubling conflict faced by multiemployer pension plan trustees under two federal statutes.

The plan's management trustees filed suit April 25, 1985 in the Western District of Washington . . . alleging that the plan's union trustees breached their fiduciary duty by blocking a proposed restructuring of the plan designed to eliminate employers' withdrawal liability under the Multiemployer Pension Plan Amendments of 1980. The suit alleges that the union trustees initially proposed the disputed restructuring plan, only to reject it later under coercion from Teamsters officials who feared that the proposal would be detrimental to unions.

Pension practitioners noted that the case illustrates an inherent conflict between multiemployer plan trustees' role as representatives of management or labor interests under the Taft-Hartley Act and their fiduciary duty to plan participants under . . . ERISA. Multiemployer pension plans established under § 302 of Taft-Hartley are administered jointly by trustees appointed by participating unions and employers.

The management trustees' fiduciary claims are predicated on a 1981 case (NLRB v. Amax Coal Co., 453 U.S. 322) in which the Supreme Court held that Taft-Hartley plan trustees are not representatives of the employers or unions that appointed them, but instead owe their primary duty to plan participants in accordance with ERISA's fiduciary standards. Legal questions surrounding Taft-Hartley trustees' conflicting duties have become increasingly important in recent years as trustees have struggled to reduce plans' unfunded liability under pressure from employers, who face stiff penalties for withdrawing from underfunded plans under the 1980 multiemployer plan amendments.
There is a need for clarification "of trustees' fiduciary duty under those statutes," said Stephen E. Tallent of Gibson, Dunn & Crutcher in Washington, D.C., counsel for the management trustees who filed the suit. Tallent added that the case "may be a harbinger of whether these multiemployer plans with all of their defects can work their way out of trouble and make themselves attractive" to employers under the 1980 law.

Arthurs, Teamsters Pension Case Sparks Trustee Conflict, Legal Times, June 3, 1985, at 4, col. 1.

The union often has de facto control over the decisions of the board of trustees of Taft-Hartley plans. Blodgett, Union Pension Fund Management, in ABUSE ON WALL STREET: CONFLICTS OF INTEREST IN THE SECURITIES MARKETS 321-29 (1980) [hereinafter cited as Blodgett]; Pension Fund Investment Policies: Hearings Before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Senate Comm. on the Judiciary, 95th Cong., 2d Sess. 22 (1978) (statement of Prof. Roy Schotland); N. LEVIN, ERISA AND LABOR-MANAGEMENT BENEFIT FUNDS 226-27 (1975). Where employers are fragmented, as often occurs in MEPPs, see Blodgett, supra, at 330 (fears erosion of distinction between funds and unions), the union-appointed trustees, voting as a bloc on the board of trustees, can influence the investment policy by choosing an investment manager. Id; see McCulloch, supra note 10, at 3-4.

The courts give broad discretion to plan trustees to set benefit levels as they see fit and will rarely, if ever, second guess the trustees' decisions. See Rosen v. Hotel and Restaurant Employees and Bartenders Union of Phila., Bucks, Montgomery, and Delaware Counties, Pa., 637 F.2d 592 (3d Cir.), cert. denied, 454 U.S. 898 (1981); Seafarers Pension Plan v. Sturgis, 630 F.2d 218 (4th Cir. 1980); Aitken v. IP & GCU-Employer Retirement Fund, 604 F.2d 1261 (9th Cir. 1979); Rehmar v. Smith, 555 F.2d 1362 (9th Cir. 1976).

The fact that these trustees are biased was stressed by Robert L. Wilkinson:

[T]he delegation of authority to the trustees was to a biased group of decisionmakers. One half of the trustees are union representatives who can be expected to have little sympathy for withdrawing employers who have gone non-union. The other half of the trustees are employer representatives who frequently work for companies that are competitors of the withdrawn employer. It is very likely that these employer trustees will also have little sympathy for the withdrawn employer who will be a non-union competitor with lower costs of doing business. The employer representatives have an added incentive to maximize liability on a withdrawn employer because every dollar that is collected from that employer is one less dollar the company for which the trustee works will potentially be liable for. In addition, many management trustees are former union members who are entitled to pensions under the plan. As such, these individuals will have a personal interest in seeing that as much withdrawal liability is collected from a withdrawn employer as possible.

On top of all these biases, the trustees are ERISA fiduciaries who have an obligation to act solely in the interest of plan participants and beneficiaries and who are personally liable for the failure to do so. It is likely that the trustees will interpret their fiduciary duty to require maximization of withdrawal liability, thereby enhancing the abilities of the plan to pay benefits to participants and beneficiaries.

Stabilization Act, supra note 2, at 305-06 (statement of Robert L. Wilkinson, President of the Associated Specialty Contractors, Inc.); see id. at 333 (statement of Howard Kraft, President of Climate Controls, Inc., of Phoenix, Ariz., on behalf of the Associated Specialty Contractors, Inc.) ("The trustees of the management
perspective, these Taft-Hartley plans were defined contribution plans since the only obligation of the employer was to make agreed upon per-hour contributions.

In general, the Taft-Hartley Act furnished participants in the labor relations field with a flexible framework for the administration of pension plans. This result did not occur fortuitously; the stated goal of the Taft-Hartley Act was to avoid industrial strife. The Taft-Hartley Act also provided tax incentives for participating employers, which encouraged the growth and maintenance of MEPPs.

plan are made up of management trustees, many of whom are past union members, who have vested rights in a pension plan, so they are already biased in their opinions.


44. A 1969 glossary of pension plan terms for internal use by the U.S. Dept of Labor defined “defined contribution plan” as: “A pension plan under which the employer’s contributions are fixed, e.g., a fixed amount for each hour worked or a fixed percentage of compensation. Two types are money purchase plans and collectively bargained multi-employer [sic] plans.” OFFICE OF LABOR-MANAGEMENT AND PENSION REPORTS, U.S. DEP’T OF LABOR, GLOSSARY-CORRESPONDENCE COURSE ON PENSION PLANS (1969), quoted in W. Jett, Employer Contingent Liabilities Under Union Pension Plans: ERISA Fact or Fiction, 27 LAB. L.J. 361, 363 (1976).

A more recent yet similar definition is as follows:

In a defined contribution plan, employer contributions are fixed year after year, but yearly benefits for employees gyrate with the returns on the pension investment portfolio. Harper & Row Publishers Inc. [for example] has adopted such a plan for future retirees, funding it with Harper & Row stock. That means that pension checks of an employee now in his [twenties] will be determined by the performance of the stock. The young worker does not have to wait to be vested, however, and can carry his “portable pension” with him to a new job after only a year or two at Harper & Row.

Williams, Raking in Billions From The Company Pension Plan, N.Y. Times, Nov. 3, 1985, § 3, at 8, col. 2 [hereinafter cited as Williams].

45. See Nachman Corp. v. PBGC, 592 F.2d 947 (7th Cir. 1979), aff’d on statutory grounds, 446 U.S. 359, reh’g denied, 448 U.S. 908 (1980); Oversight, supra note 10, at 14 (statement of Dallas L. Salisbury, Executive Director, Employee Benefit Research Institute); see also supra note 44.


47. The purpose of Taft-Hartley was to avoid industrial strife, which would be minimized “if employers, employees, and labor organizations each recognize under law one another’s legitimate rights in their relations with each other . . . .” 29 U.S.C. § 141(b) (1982).

48. See PBGC Study, supra note 46, at 151, table 1.
Given this environment, it is not surprising that multiemployer pension plans today are a primary component of many collective bargaining agreements.\textsuperscript{49}

Upon agreement between the employer and the union to establish a pension plan and the requisite trust agreements, the parties engage in a two-step process to fund the plan and to fix benefit levels. The first step is to determine a fixed rate of employer contribution.\textsuperscript{50} The second step is for the trustees to fix the benefit levels.\textsuperscript{51}

Prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA),\textsuperscript{52} if a MEPP's funding level fell below the requisite amount, there was nothing to prevent the trustees from lowering the benefits. Thus, MEPP terminations were rare.\textsuperscript{53} This

\textsuperscript{49} Courts have recognized pension benefits as mandatory subjects of collective bargaining and thus have recognized the bargaining unit's right to strike for pension funding. See Inland Steel Co. v. NLRB, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949), aff'd, 339 U.S. 382 (1950) (citing with approval Communications Ass'n v. Douds, 339 U.S. 382 (1950)); Williams, supra note 44, at 9, col. 1 ("The pension plan is now, and always has been, an item for collective bargaining"). Thus, during the term of a labor agreement, an employer cannot install, alter or terminate a pension plan for organized workers without the assent of a union. D. McGill, Fundamentals of Private Pensions 27 (3d ed. 1975) [hereinafter cited as D. McGill]; see, e.g., Wilson & Sons, 193 N.L.R.B. 350 (1971). The pension benefits of retirees are not mandatory subjects of collective bargaining. Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

\textsuperscript{50} Examples of this rate are per hour of employment or per unit of production. Davis, Multiemployer Pension Plan Provisions in 1973, Monthly Lab. Rev., Oct. 1974, at 10 [hereinafter cited as Davis].

\textsuperscript{51} J. Melone, Collectively Bargained Multi-Employer [sic] Pension Plans 49, 91 (1963) [hereinafter cited as J. Melone]. This computation is based primarily upon actuarial estimates of future demands for benefits and upon forecasts of income for the upcoming period. Some of the more salient actuarial estimates utilized are: the level of contributions, mortality rates, employee turnover, retirement age, salary scales, investment expenses and administrative costs. Id. at 76-87; F. Pomeranz, G. Ramsen & R. Steinberg, Pensions, 23-24 (1976). Union efforts for high benefit rates, see D. McGill, supra note 49, at 97, may focus on the choice of an actuary with a reputation for recommending high benefits. See J. Melone, supra, at 10; supra note 11. As a result, upon retirement an employee is entitled to a benefit determined by the trustee's benefit formula. "Two basic types of benefit formulas are predominant in multiemployer plans: benefit amounts vary solely on the basis of service or they are uniform for all eligible retirees, regardless of years of service." Davis, supra note 50, at 12. The degree to which the plans mirror the actual expenses of the plan is greatly dependent upon the accuracy of the actuarial estimates. J. Melone, supra, at 51.

\textsuperscript{52} See ERISA, supra note 9.

\textsuperscript{53} See Connolly v. PBGC, 581 F.2d 729, 734 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979); 126 Cong. Rec. 12,179 (1980) (remarks of Rep. Biaggi indicate that Congress viewed MEPPs as more stable and secure than single employer plans and thus felt less need to insure the former). The trustees are no longer as free
was not the only recourse available to the trustees. An additional solution, which could be used by itself or in conjunction with the lowering of benefits, was to implement higher contribution rates when the then current collective bargaining agreement terminated.\(^4\)

In addition, the employer was relieved from any liability for failure to provide promised benefits under the provisions of these pre-ERISA MEPP trust agreements, which was perhaps the most important element of these agreements.\(^5\)

From the time of the Taft-Hartley Act's inception through the mid-1960's, the number of MEPPs greatly increased,\(^6\) as did the reliance by employees on these plans as a primary source of retirement income.\(^7\) As a result, Congress began to consider regulation of MEPPs.\(^8\)

The problem of MEPP termination was highlighted by the unfortunate consequences of the Studebaker shut-down. The 1964 shut-down by Studebaker, Inc. of its operations in its South Bend, Indiana automobile plant,\(^9\) was probably the most publicized incidence of a substantial benefit loss.\(^6\) While the Studebaker situation was prob-

\^4\ See J. MELONE, supra note 51, at 51, 94; Davis, supra note 50, at 10.

\^5\ J. MELONE, supra note 51, at 49; PBGC Study, supra note 46, at 2, 3; see supra note 106.


\^7\ Private Pension, supra note 56, at 1267-68.

\^8\ Id.


\^6\ Inadequate funding left most of the 8500 Studebaker employees with either reduced pensions or no pensions at all. Only those employees age 60 or older with at least 10 years of service received full benefits. Workers between age 50 and 59 with 10 years of service received only 15 percent of their promised benefits and the remaining plant employees received nothing.

\^10\ In Congressional committee reports and debates, repeated references were made to the loss of $49 million in pension benefits by 19,400 employees caused by the closing of the Studebaker factory in Indiana, and to similar losses by employees elsewhere. See, e.g., S. REP. No. 383, 93d Cong., 1st Sess. 17 (1973), reprinted in 1 LEG. HIST. 1085; H.R. REP. No. 799, 93d Cong., 2d Sess. 13 (1974), reprinted in 2 LEG. HIST. 2602; 120 CONG. REC. 29,194, 29,208, 29,213, 29,934-35, 29,949-51, 29,952-54 (1974); see also Nachman Corp. v. PBGC, 592 F.2d 947 (7th Cir. 1979), aff'd on statutory grounds, 446 U.S. 359, reh'g denied, 448 U.S. 908 (1980).
ably the best known, it was not the only instance of a loss of benefits due to inadequate funding. The unfortunate mishaps served as a catalyst for congressional interest in the area of pension plan reform and regulation.

2. ERISA

In 1974, after ten years of numerous proposals, prolonged hearings, and protracted debate, Congress enacted pension reform legislation in the form of ERISA. ERISA's two principal goals were "[t]he growth and continuance of private pension plans and the security of workers' pension benefits." Thus, ERISA introduced funding and vesting standards and imposed minimal restrictions on private pension plans. These standards were introduced to facilitate a worker's legal claim to benefits. However, the possibility still remained that some plans would terminate with insufficient assets to cover their benefit commitments. Fortunately, however, Congress anticipated such a contingency and enacted title IV of ERISA (Title IV). Title IV softened the impact of insufficient assets by establishing the Pension Benefit Guaranty Corporation (PBGC), which

61. See supra note 60.
62. See supra note 60.
63. See ERISA, supra note 9.
68. 29 U.S.C. § 1302 (1982). The PBGC is part of the Department of Labor. D. McGill, supra note 49, at 39. The Secretary of Labor is the chairman of the board of the PBGC. Id. Other board members are the Secretary of the Treasury and the Secretary of Commerce. Id. A seven-person advisory committee, appointed by the President, represents management, labor, and the public's interest. Id.; see Peick v. PBGC, 724 F.2d 1247, 1251 (7th Cir. 1983), cert. denied, 104 S. Ct. 3554 (1984).
69. A recent report on the status of the PBGC was anything but complimentary: Many corporate pension funds may be overflowing, but it is the worst of times for the Pension Benefit Guaranty Corporation, the federal agency that insures and regulates private pension plans. The agency is itself woefully underfunded, buried under liabilities that exceed its assets by approximately $1 billion.
provided funds in the event a deficiency existed in the fund's assets upon termination of a plan. The PBGC was also empowered to bring a cause of action against employers who failed to fulfill their share of contributions.

The PBGC's obligation to pay benefits for MEPPs, which was generally greater in size and scope than it was in single employer plans, was not to become mandatory until January 1, 1978. During the intervening period, the decision whether to pay benefits upon termination of a MEPP was left solely to the discretion of the PBGC. If an employer withdrew from a MEPP, it was subject to contingent liability for a share of the unfunded vested benefits.

The agency's condition is a direct result of the financial woes of basic industries over the last few years. Despite the plentitude of pension assets at most companies, there are still several large corporations that are pitifully underfunded. Some of the country's largest corporations, including Pan Am, American Motors, Chrysler, Bethlehem Steel and General Motors have unfunded pension liabilities in excess of $100 million.

The agency's situation became critical when Wheeling-Pittsburgh, an ailing steelmaker in reorganization under Chapter 11, terminated its plan, leaving the agency to pay $475 million in unfunded liabilities. Weeks earlier, Allis-Chalmers, the financially battered farm machinery maker, terminated its plan for hardship reasons and saddled the pension insurers with $165 million in unfunded claims.

These laggards have pushed the Federal agency into the red, and guarantors are begging Congress for corrective revenue-raising legislation to erase the agency's deficit. The agency raises funds by collecting premiums to insure private pension plans. Now it wants to raise rates more than threefold, to $8.10 per employee per year from $2.60.

Meanwhile, the agency got some good news when International Harvester, one of the most beleaguered victims of the strong dollar and the agricultural recession, announced that it would be able to cut its unfunded liabilities by $500 million, to about $400 million. Harvester is borrowing the money from its finance subsidiary.

Williams, supra note 44 at 8, col. 5.

73. See supra note 72.
74. An employee's right to receive a present or future benefit vests when that right to eventually receive the benefit is no longer contingent on remaining in the service of the employer. Peick v. PBGC, 539 F. Supp. 1025, 1030 (N.D. Ill. 1982), aff'd, 724 F.2d 1247 (7th Cir. 1983), cert. denied, 104 S. Ct. 3554 (1984); S & M Paving, Inc. v. Construction Laborers Pension Trust, 539 F. Supp. 867, 868 (C.D. Cal. 1982) ("Under ERISA-sponsored [MEPPs], the pension benefits an employee could receive were not directly tied to the actual contributions made by his employer. Thus, the funds held in trust by each plan did not always equal the amount of vested pension benefits that had accrued and were outstanding. [This]
Congress chose not to insure MEPPs immediately for two reasons: (1) MEPPs were viewed as more stable and secure than their single employer counterparts; and (2) the cost factor of such a program was prohibitive. Unfortunately, however, as January 1, 1978 approached, the date on which the PBGC would become obligated to fund MEPPs which had terminated with insufficient assets, Congress realized that MEPPs were not as stable as it initially thought. Congress, confronted with this situation, postponed the effective date to July 1, 1979 and ordered the PBGC to prepare a study of the MEPP situation. The PBGC’s discretionary authority was later extended to May 1, 1980, July 1, 1980, and then finally to August 1, 1980. On each occasion, Congress made the postponement to
provide time for thorough consideration of the complex issues posed by the termination of MEPPs.\textsuperscript{83}

3. **MPPAA**

In response to the problems revealed in the study, Congress passed the MPPAA.\textsuperscript{84} The MPPAA’s implementation was delayed several times.\textsuperscript{85} Rep. Carl D. Perkins, then chairman of the House Labor Committee, was empowered to insist that there be no further delays on the enactment of the MPPAA.\textsuperscript{86} He provided Congress with an ultimatum: either pass the MPPAA “as is” or forget about passing the MPPAA at all.\textsuperscript{87}

When the MPPAA was enacted on September 26, 1980, it was made retroactive to April 29, 1980,\textsuperscript{88} to alleviate fears that some


\textsuperscript{84} The House of Representatives passed the MPPAA by a unanimous vote. 126 Cong. Rec. H4170 (daily ed. May 22, 1980). The Senate voted in favor of the MPPAA by a count of 85 to 1. Id. at S10,169. Differences between the House and Senate versions were eventually reconciled in September of 1980. The House repassed its version 363-0 on August 26, 1980, 126 Cong. Rec. H7909 (daily ed.), and the Senate approved a slightly different bill the same day. Id. at S11,676 (daily ed.). A conference followed, with the Senate and House agreeing to the Conference Committee report on September 18th and 19th respectively. Id. at S12,901 (daily ed.); id. at H9180 (daily ed.) (vote of 324-1). The legislation was signed into law by President Carter on September 26, 1980. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980).

\textsuperscript{85} See supra notes 78-82.

\textsuperscript{86} Interview with Charles T. Carroll, Jr., Counsel, Subcomm. on Labor, in Washington, D.C. (January 9, 1985).

\textsuperscript{87} In effect this was a form of “legislative blackmail.” See Stabilization Act, supra note 2, at 263-64 (statement of Robert A. Georgine, Chmn., National Coordinating Committee for Multiemployer Plans) (the MPPAA was “the product of extraordinary efforts and painful compromise. Four Congressional committees worked intensively for more than two years. The compromise was developed out of substantial give and take by [all the parties involved] . . . . [T]he 1980 law was one of the most difficult legislative products undertaken by the Congress in recent memory.”); id. at 332 (statement of Richard Hall on behalf of the Associated General Contractors of America) (in regard to the MPPAA: “we were faced with the alternative of taking the compromise which was reached—but not very happily agreed to by anybody—or going back to the 1974 act, [ERISA] as has been interpreted by the courts in 1978, which was the real fatal blow . . . .”).

Charles T. Carroll in stressing the need for reform in this area used colloquial terms to describe the situation employers found themselves in after the implementation of the MPPAA: “There is a great need to relieve employers who have been dragooned into this blunderbuss approach regarding withdrawal liability.” Interview with Charles T. Carroll, Jr., Counsel, Subcomm. on Labor, in Washington, D.C. (January 9, 1985).

employers might escape from their plans before the MPPAA became effective.\textsuperscript{89} The MPPAA requires that an employer withdrawing from a MEPP pay a "fixed and certain debt" to the pension plan.\textsuperscript{90} This withdrawal liability is the employer's proportionate share of the plan's unfunded vested benefits—the difference between the present value of vested benefits and the current value of the plan's assets.\textsuperscript{91} Thus, the MPPAA eliminated the contingent and limited aspects of multiemployer liability.

Unfortunately, the MPPAA encompasses many complex issues involving labor, tax, and insurance.\textsuperscript{92} As a result, many major industries did not take a position because of the confusion resulting from the complexity of the law.\textsuperscript{93} The construction and entertainment industries, however, became actively involved and received somewhat more favorable treatment.\textsuperscript{94} In light of this background, it is not surprising that the application of the withdrawal liability assessment system often subjects employers to unfair, unequal treatment and harsh results.\textsuperscript{95}

### III. The Current Status of MEPPs

Approximately one-half of the labor force participates\textsuperscript{96} in private

\textsuperscript{89} One Senator noted, that the retroactive effective date was designed to prevent "the withdrawal of . . . opportunistic employers without imposition of liability" and was to also serve "as a deterrent to hasty employer withdrawal." \textsuperscript{126} Cong. Rec. S10,156 (daily ed. July 29, 1980) (statement of Sen. Matsunaga).


\textsuperscript{91} The term "unfunded vested benefits" is defined as "an amount equal to—the value of nonforfeitable benefits under the plan, less the value of the assets of the plan." 29 U.S.C. § 1393(c) (1982); see 29 U.S.C. § 1381 (1982).

Unfunded vested liability may be created: (1) when the employer's contributions are set by collective bargaining, independent of benefits prescribed by the fund's trustees; (2) when ERISA has increased an employer's liability for a pension fund that was enacted before ERISA with less stringent funding provisions; (3) when there is an increase in benefits for past work, and no contributions have been made for that work; (4) when fund assets diminish as a result of market forces; or (5) when actuarial assumptions have to be modified. Republic Indus. v. Teamsters Joint Council No. 83 Pension Fund, 718 F.2d 628, 632 n.2 (4th Cir. 1983), cert. denied, 104 S. Ct. 3553 (1984); see supra note 74.


\textsuperscript{93} See, e.g., Stabilization Act, supra note 2, at 170 (statement of Jerry Freirich on behalf of the National Meat Association) ("In point of fact, only a handful of people participated in developing the law . . . . Few people are expert enough to understand that the Bill had an unintended impact on the business community.").


\textsuperscript{95} See supra notes 172-255 and accompanying text.

\textsuperscript{96} Department of Labor, \textit{Employee Retirement Income Security Act, 1978 Report to Congress} 53.

\textsuperscript{97} Lynn, \textit{Private Pensions in Perspective: Problems of the Years Ahead}, 15
pension plans subject to ERISA's coverage. Specifically, these plans cover 50 million workers and 10 million beneficiaries. A 1982 study revealed that there were approximately 745,000 private employer-sponsored plans in the United States. Private pension funds' holdings were vast. One forecast predicted a growth of total assets of private plans from the 1982 amount of over $624 billion to $3 trillion by 1995. In addition, the resources of these private pension plans are concentrated; approximately eighty percent of all pension funds in the corporate sector are comprised of some 1600 large corporations.

GA. L. REV. 269, 277 (1981). Private pensions cover 96% of the workers in firms of 500 or more workers, 78% of the jobs in firms of between 100 and 500 workers, and 46% of the jobs in firms of under 100 workers. [July-Dec.] PENS. REP. (BNA) No. 315, at A-17 (Nov. 3, 1980) (statement by Thomas S. Boyd, Jr., Legislative Advisor on Employee Relations, Mobil Oil Company).

98. See Oversight, supra note 10, at 323 (statement of Hon. Jacob K. Javits).
99. See Oversight, supra note 10, at 7, 40, table 3 (statement of Dallas L. Salisbury, Executive Director, Employee Benefit Research Institute).
100. Oversight, supra note 10, at 323 (statement of Hon. Jacob K. Javits).


102. 10 [Jan.-June] PENS. REP. (BNA) No. 427, at 95 (Jan. 17, 1983). Approximately 192,000 of these plans are defined benefit plans and over 545,000 are defined contribution plans. Oversight, supra note 10, at 14 (statement of Dallas L. Salisbury, Executive Director, Employee Benefit Research Institute). A 1969 glossary of pension plan terms published by the U.S. Dep’t of Labor for internal use defined “defined benefit” plan as: “[a] pension plan which provides a definite schedule of benefits. The employer’s contributions under such a plan are determined actuarially on a basis of the benefits expected to become payable.” OFFICE OF LABOR-MANAGEMENT AND PENSION REPORTS, U.S. DEP’T OF LABOR, GLOSSARY—CORRESPONDENCE COURSE ON PENSION PLANS (1969), quoted in W. Jett, Employer Contingent Liabilities Under Union Pension Plans: ERISA Fact or Fiction, 27 Lab. L.J. 361, 362 (1976).

A “defined contribution” plan is defined as: “[a] pension plan under which the employer’s contributions are fixed, e.g., a fixed amount for each hour worked or a percentage of compensation.” Id. at 363.

Ninety-eight percent of defined benefit plans are single employer, while the remaining two percent are multiemployer. Oversight, supra note 10, at 14 (statement of Dallas L. Salisbury, Executive Director, Employee Benefit Research Institute). Employer sponsored defined contribution plans are nine and nine-tenths percent single employer and one-tenth percent multiemployer plans. Id. There are approximately 3600 [sic] multiemployer defined benefit plans in existence. Id.; see 29 U.S.C. § 1002(34)-(35) (1982).
IV. Sources of Multiemployer Liability

Businesses today are constantly undergoing or responding to changes. This may have an effect on the company's pension plan. There are several potential sources from which, as a result of a business change, an employer's liability may arise.

A. Liability Under the Pension Plan Agreement

To ascertain the nature and scope of an employer's liability under the pension plan agreement, the pension plan agreement itself must be considered. A pension plan is a special type of contract between an employer and its employees. An employer's liability under these agreements is usually minimal because the employer includes a disclaimer provision. The disclaimer provision absolves the employer from the obligation to make future contributions in the event the plan is terminated, and reserves in the employer the right to terminate the plan at will. In addition, an employee's right to a vested benefit is limited to the amount accrued as of the termination date. This amount is payable only if the benefit is funded by such date.

103. Some of the more significant changes are mergers, reorganizations, plant shutdowns, plant slowdowns, deregulation, capital asset sales, union decertifications, and in the most extreme cases involuntary and voluntary cessation of business. Stabilization Act, supra note 2, at 67-68 (statements of Howard W. Ryder, President, Coastal Tank Lines, Inc., Vice-Chmn. of the Bd. of the American Trucking Association; Hugh C. Shurtleff, President T.I.M.E.-D.C.; David W. Howell, Chmn. of the Willet Companies).

104. See infra notes 105-71 and accompanying text. It must be emphasized before analyzing these sources separately that these sources' effects must be considered in conjunction with one another in order to form a proper conclusion as to the business change's effect. Interview with Kenneth J. McCulloch, Partner, Townley & Updike, in New York City (Aug. 16, 1985).


106. An example of such a disavowal was present in the Nachman case: Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of the Plan, there shall be no liability or obligation on the part of the company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid. Nachman Corp. v. PBGC, 592 F.2d 947, 950 (7th Cir. 1979), aff'd on statutory grounds, 446 U.S. 359, reh'g denied, 448 U.S. 908 (1980).

107. See, e.g., id.

B. Liability Under the Collective Bargaining Agreement

The collective bargaining agreement also needs to be scrutinized. Specifically, such agreement may contain a separate provision providing for the continuance of contributions even if the employer terminates the plan. If such a provision is present, termination of the plan could result in contractual liability for the employer even though the pension plan agreement provides for termination at will, without liability.

C. Liability on the Basis of the Employer's Promise Under the MEPP

MEPP statutory liability under Title IV applies only to defined benefit plans. This liability does not apply to defined contribution plans because of the difference in legal obligations under these two types of plans.

Under a defined contribution pension plan, an employer's contributions are determined with respect to specific individuals. These contributions usually take the form of either a fixed plan, such as a stock sharing plan or, more commonly, a discretionary contribution plan. The benefits available upon retirement are based on the value of the contributions allocated to the employee's account. The employee is not entitled to a specific amount of benefits. Unless the employer has made a specific agreement to the contrary, his obligation to contribute ends when the plan terminates. As a result, the employee bears the risk of poor investment performance by the trustees.

Conversely, under a defined benefit pension plan, an employee becomes entitled to a specific determinable pension benefit. This

110. Id.
111. 29 U.S.C. § 1321(a) (1982); see supra notes 130-71 and accompanying text.
112. See supra note 102.
113. Oversight, supra note 10, at 14 (statement of Dallas L. Salisbury, Executive Director, Employee Benefit Research Institute).
114. Id. at 15.
115. Id. at 14.
116. Id. at 14-15.
118. Oversight, supra note 10, at 15 (statement of Dallas L. Salisbury, Executive Director, Employee Benefit Research Institute).
119. Id. at 14. ERISA mandates that a plan contain definitely determinable benefits. Prior to ERISA, for example, if a plan did not provide for vesting of
benefit is usually based on factors such as age, years of service, and salary. While the benefit is certain, the method in which it is funded is not. Both ERISA and the Internal Revenue Code (IRC) contain requirements regarding minimum funding standards for defined benefit plans. In the usual case, actuarial assumptions are relied upon to determine the employer’s yearly contributions. A great degree of latitude is given to these actuarial computations.

Upon termination of a defined benefit plan, two rights come into direct conflict with one another. Specifically, the employer usually has reserved the right to terminate the plan at will. Under a defined benefit plan, however, the employer also has promised the employee benefits, some of which have vested. A problem arises when the employee’s vested benefit has not been fully funded. Title IV resolves this problem. One of the two principal goals of ERISA is to provide security for the worker’s pension benefits. Thus, when an employer is involved with such a plan, Congress has provided statutory liability to ensure that the employee receives his vested benefits, regardless of whether the pension plan agreement provides otherwise.

D. Liability Under ERISA as Refined by Title IV

Initially, it is important to distinguish two plans which resemble MEPPs but do not qualify as MEPPs under Title IV. The first type of non-MEPP, whereby employers contribute to a fund that is not subject to any collective bargaining agreement, is a single employer benefits until retirement, an employee with 30 years of service could lose all pension benefits if his employment were terminated before retirement. Nachman Corp. v. PBGC, 592 F.2d 947, 951 (7th Cir. 1979), aff’d on statutory grounds, 446 U.S. 359 (1980).

120. Berin, Unfunded Liabilities and Private Pension Costs in the United States, BENEFITS INT’L, April 1979, at 14, 19 (describing actuarial assumptions used in calculating pension fund liabilities); see supra notes 16, 51 and accompanying text.

121. Oversight, supra note 10, at 14 (statement of Dallas L. Salisbury, Executive Director, Employee Benefit Research Institute).


125. E.g., Ells, 5 EBC (BNA) 1161, 1175-76 (1984) (Zimring, Arb.).


127. See supra notes 74, 91.

128. See supra note 64.

129. See supra notes 65-66.

plan. The second type of non-MEPP is a plan where the contributing employers are all under the common control of a corporation,\textsuperscript{131} as with a parent-subsidiary pension plan. Members of such a plan would be treated as a single employer under Title IV.\textsuperscript{132}

A MEPP, by contrast, is "a plan to which more than one employer is required to contribute," and "which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer."\textsuperscript{133} As a result of the enactment of Title IV via the MPPAA, employers who are members of MEPPs became subject to a new set of rules regarding employer liability.\textsuperscript{134}

1. MEPP Liability Triggered as a Result of Business Changes

Termination of a MEPP is not likely, given the fact that more than one employer contributes to the plan. An employer is more likely to become liable when he has "withdrawn."\textsuperscript{135} An employer can withdraw either completely\textsuperscript{136} or partially.\textsuperscript{137} Under what is known as the "de minimus rule," however, an employer is exempt from paying withdrawal liability if he owes an amount less than three-quarters of one percent of the plan's unfunded vested obligations, or $50,000.\textsuperscript{138}

\textbf{a. Complete Withdrawal}

A complete withdrawal occurs when an employer either permanently ceases to have an obligation to contribute under the plan or permanently ceases all operations covered under the plan.\textsuperscript{139} Thus,

\textsuperscript{135} 29 U.S.C. § 1381(a) (1982).
\textsuperscript{136} 29 U.S.C. § 1383(a) (1982).
\textsuperscript{137} 29 U.S.C. § 1385(a) (1982). Any one of the aforementioned business changes, see supra note 103, may fall within the penumbra of either a complete or partial withdrawal and thus trigger employer liability. See infra notes 139-50 and accompanying text.
\textsuperscript{139} 29 U.S.C. § 1383(a) (1982). Given the unique nature of certain industries, special rules apply to them. These unique industries frequently work on a project-by-project basis rather than the usual day-in, day-out type of operation. A problem occurs when the project is completed. Under the general rules, an employer would be considered as having completely withdrawn even though the project was known to be temporary from the start. The assessment of withdrawal liability in such a
the type of business change that produces the complete withdrawal is irrelevant under the MPPAA. It is also irrelevant under the MPPAA whether the complete withdrawal has been caused by only one or by more than one business change.\(^{140}\)

A complete withdrawal, however, does not occur simply because an employer ceases to exist, whether via a change in corporate form or a transformation into an unincorporated form,\(^{141}\) provided that the change does not alter the employer's contribution or its obligation to contribute.\(^{142}\) Furthermore, an employer who suspends contributions during a strike or other labor dispute is not deemed to have completely withdrawn.\(^{143}\)

b. Partial Withdrawal

An employer may also incur withdrawal liability if it partially withdraws from the plan. Title IV partial withdrawal liability can be triggered on the last day of a plan year if there is: (1) a seventy percent contribution decline;\(^{144}\) (2) a cessation of an obligation to

situation would in essence be an assessment on a "phantom withdrawal." As a result, Congress enacted special rules for the building and construction, entertainment, and the long and short-haul trucking industries. 29 U.S.C. § 1383(b)-(d) (1982). Moreover, plans in other industries are permitted, with the approval of the PBGC, to adopt withdrawal liability rules similar to those that apply to the aforementioned industries. 29 U.S.C. § 1383(f) (1982).

Unfortunately, not all of these special rules have achieved their intended effect. For example, in the trucking industry a special rule applies if substantially all of the contributions required to be made to a plan are made by employers primarily engaged in the long and short-haul trucking industry, the household goods moving industry, or the public warehousing industry. See 29 U.S.C. § 1383(d)(2) (1982). "Substantially all" has been defined by the PBGC to mean that 85% of the plan participants must be in the trucking industry. Stabilization Act, supra note 2, at 62 (statement of Howard W. Ryder, President, Coastal Tank Lines, Inc., Vice Chmn. of the Bd. of the Associated Trucking Association). Unfortunately, the trucking industry's major plans are not structured this way. Id. Moreover, the deregulation of the trucking industry in 1980 has caused a lot of business failures, id. at 227 (statement of Theodore R. Groom, Esq., on behalf of the Western Conference of Teamsters Pension Trust Fund), and it is tragic that this industry has such a meaningless exemption.

142. Id.
144. 29 U.S.C. § 1385 (1982). The 70% contribution decline test concentrates on the number of "contribution base units." 29 U.S.C. §§ 1301(a)(11), 1385 (1982). There are two crucial time periods associated with this test. First, there is a "3-year testing period," see 29 U.S.C. § 1385(b)(1)(B)(i) (1982), which is defined as the plan year involved in the determination and the two plan years immediately preceding it. Id. Second, there is the 5 plan years immediately preceding the
contribute;\textsuperscript{145} or (3) a cessation of an obligation to contribute at a facility.\textsuperscript{146}

The permanent closing of a plant may trigger partial withdrawal liability under either the seventy percent contribution decline rule or the cessation of an obligation to contribute rule.\textsuperscript{147} If all of the facilities are covered by one agreement and one of the facilities is closed, it is quite possible that partial withdrawal liability may be

\textsuperscript{145} 29 U.S.C. § 1385 (1982). The second way in which partial withdrawal liability may be incurred is via a partial cessation of the obligation to contribute. In order for this provision to apply, the employer’s obligation to contribute must cease under one or more (but not all of its) collective bargaining agreements. 29 U.S.C. § 1385(b)(2)(A) (1982). Moreover, the employer must continue to perform work of the type which previously required contributions in the jurisdiction of the collective bargaining agreement or transfer this business to another location for partial withdrawal liability to apply. \textit{Id}. A cessation of an obligation to contribute to a plan is deemed not to have occurred if the employer has simply substituted one agreement for another agreement requiring contributions to the same plan. 29 U.S.C. § 1385(b)(2)(B) (1982). This rule, which provides for partial withdrawal liability upon cessation of an obligation to contribute, does not apply to any cessations occurring before April 29, 1980 (the effective date of the MPPAA). Pub. L. No. 96-364, § 108(d), 94 Stat. 1267, 1269, \textit{amended by} 98 Stat. 899.

\textsuperscript{146} 29 U.S.C. § 1385 (1982). The third way in which partial withdrawal liability may be incurred is via a permanent cessation of an obligation to contribute at a facility. 29 U.S.C. § 1385(b)(2)(A)(ii) (1982). A partial withdrawal can occur under this provision only where there is a single plan and one or more collective bargaining agreements covering more than one facility under the plan. \textit{See id}. A partial withdrawal will occur only if the obligation to contribute ceased at one or more, but not all, of the facilities and work continued at the facility. \textit{Id}. Thus, partial withdrawal liability will not be triggered under this provision by the permanent shutdown of a plant. This rule, which provides for partial withdrawal liability upon cessation of an obligation to contribute at a facility, does not apply to any such cessations occurring before April 29, 1980 (the effective date of the MPPAA). Pub. L. No. 96-364, § 108(d), 94 Stat. 1267, 1269, \textit{amended by} 98 Stat. 899.

\textsuperscript{147} \textit{See supra} notes 144-46 and accompanying text.
triggered under the seventy percent contribution decline rule. The other possibility arises when each facility is covered by a separate collective bargaining agreement and a single plan, and the cessation of the obligation to contribute occurs when the plant is closed. If the employer continues to perform work at another location which is under the jurisdiction of the collective bargaining agreement, the cessation of the obligation to contribute rule will be violated.

c. Sale of Assets

Given the Title IV definitions of complete and partial withdrawal, it is quite likely that a “bona fide, arm's-length sale of assets to an unrelated party” by the employer will trigger some form of withdrawal liability. For example, where an employer sells assets to an unrelated party and ceases covered operations, or when it ceases to have an obligation to contribute to such operation, there is a potential for liability. Title IV, however, contains a provision pertaining to the sales of assets, whereby complete or partial withdrawal liability will not be triggered under certain conditions.

Title IV empowers the PBGC to issue rules and regulations which

148. See supra note 144 and accompanying text.
149. See supra note 146 and accompanying text.
150. In addition to these three general rules, there are also special rules which apply to certain industries. A more restrictive partial withdrawal liability rule applies to the retail food industry. 29 U.S.C. § 1385(c) (1982). Another special rule applies to certain Great Lakes maritime industry employers. Pub. L. No. 96-364, § 108(c)(2), 94 Stat. 1267, 1268, amended by 98 Stat. 899.
154. A complete or partial withdrawal does not occur if the following three conditions are met:
   1. The purchaser must contribute to the plan substantially the same number of contribution base units as the seller had prior to the sale. 29 U.S.C. § 1384(a)(1)(A) (1982).
   2. The purchaser must provide to the plan a cash or security bond for a time period of five plan years beginning after the year of sale. 29 U.S.C. § 1384(a)(1)(B) (1982). This bond must be in an amount whichever is the greater of either the seller's average required annual contribution to the plan over the three preceding plan years preceding the year of sale or the annual contribution that the seller had to make for the last plan year before the year of sale. Id. This bond protects the plan for the five year plan year period following the year of the sale in case the purchaser withdraws or fails to make required contributions. Id.
   3. The asset's sales contract contains a provision whereby the seller is secondarily liable if the purchaser withdraws, either completely or partially, during the five year plan years following the year of sale and fails to pay its withdrawal liability. 29 U.S.C. § 1384(a)(1)(C) (1982).
vary the above standards. These standards would govern the triggering of complete or partial withdrawal liability in sale of asset situations. The PBGC recently issued regulations dealing with bond/escrow and sale-contract requirements. Moreover, Title IV contains a separate provision which deals exclusively with the liability of the purchaser.

E. Additional Liability Issues

In situations where the original employer has either ceased to exist or is only secondarily liable under a defined benefit plan, the successor or purchaser is deemed primarily liable under Title IV. Additional rules, outside of Title IV, apply to further ensure that the plan is properly funded. Specifically, if the MEPP is deemed qualified under the IRC, minimum funding standards are imposed upon the MEPP. Should an employer fail to meet these minimum funding requirements, an excise tax may be imposed upon the employer. As a result, any successor or purchaser should scrutinize the funding policies of the acquired plan or plans before making a commitment. In addition, any successor or purchaser should thoroughly review the plan or plans to determine if the acquired plan or plans will cease to be qualified or if they contain any possible qualification deficiencies. If a plan should cease to be qualified, the successor or purchaser not only would suffer adverse tax consequences but also would be liable to employees who suffered adverse tax consequences as a result of disqualification.

V. Actuarial Assumptions and Judicial Review Under ERISA as Refined by the MPPAA

In determining the total amount of unfunded vested benefits of a plan, certain assumptions, such as interest and mortality, must be made in order to ascertain the present value of the benefits. As
to these assumptions, the terms of Title IV provide that disputes over the determination of withdrawal liability must be reconciled by arbitration. These determinations, made by the plan sponsor or trustees, are "presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was either unreasonable or clearly erroneous." Another provision, relating to unfunded vested plan benefits for a particular year, is one of the key variables in withdrawal liability formulas. Upon completion of the arbitration proceedings, either side may appeal to the appropriate United States' district court for a review of the arbitrator's award. The arbitrator's findings of fact are presumed to be correct unless they are rebutted by "a clear preponderance of the evidence." Court enforcement of the arbitral award is governed by the United States Arbitration Act, which authorizes only a limited review of arbitration awards. This limitation on the power of the district court judge would be proper if arbitration is not commenced on the unequal footing which normally results from the presumption favoring the MEPP fund's withdrawal liability assessment.

VI. Shortcomings of the Current Withdrawal Liability System of Calculations

A. MPPAA when Juxtaposed with Voluntary Arbitration

Several reasons have been posited as to why the current system of withdrawal liability calculation leads to inequitable results. First, arbitration under the MPPAA differs in several ways from standard

166. 29 U.S.C. § 1401(a)(3)(A) (1982); see supra note 19, for a reproduction of this statute in full.
167. 29 U.S.C. § 1401(a)(3)(B) (1982); see supra note 19 for a reproduction of this statute in full.
168. 29 U.S.C. § 1401(b)(2) (1982); see supra note 19 for a reproduction of this statute in full.
169. 29 U.S.C. § 1401(c) (1982); see supra note 19 for a reproduction of this statute in full.
171. Wilko v. Swan, 346 U.S. 427, 436-37 (1953). The Court held that under title 9 arbitrators need not provide a record of their proceedings or an explanation of their reasons for an award. Id. at 436; see 9 U.S.C. §§ 9, 10, 11(a)-(c) (1982).
labor law arbitration. Specifically, since arbitration is mandated by the MPPAA, the parties have not voluntarily agreed to resort to arbitration. Usually, the arbitration of claims between private parties results from voluntary agreements designed to resolve disputes without resorting to the judicial system. Moreover, the issues raised in an arbitration proceeding under the MPPAA are often resolved by factors outside of the expertise of the typical labor law arbitrator. Since arbitration under the MPPAA usually results from the total or partial cessation of an employer’s obligation to contribute to a MEPP, the goal under standard labor arbitrations “of promoting stability and labor peace in the parties’ relationship is [rendered] nearly irrelevant.”

B. MPPAA when Juxtaposed with Compulsory Arbitration

The MPPAA requires that an employer and the trustees of a MEPP resolve any dispute concerning withdrawal liability through arbitration. Under the MPPAA, an employer who receives notice that it is subject to withdrawal liability under a plan may ask the plan’s trustees to review any matter concerning the liability. The trustees of the plan must conduct such a review and notify the employer of the bases for the findings in question. At that point, either party may initiate arbitration. If neither party seeks arbi-
tration, the withdrawal liability is due and owing, and the MEPP may sue for collection in the appropriate state or federal court. 181

The legislative history of the arbitration requirement is sparse. No mention of arbitration appeared in the version of the MPPAA first passed by the House of Representatives. 182 The requirement was included in the later Senate version. 183 The joint explanation of the two Senate committees which proposed the bill stated simply that disputes arising from an employer’s challenge to a plan’s determination of withdrawal liability were subject to compulsory arbitration. 184 This proposed arbitration provision was enacted without change. 185

Although arbitration of claims between private parties usually takes place as a result of voluntary agreements to resolve disputes without resorting to the judicial system, 186 some state and federal statutes do compel arbitration of certain kinds of disputes. 187 The MPPAA process, however, differs both in purpose and in operation from

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181. 29 U.S.C. § 1401(b)(1) (1982). The amount is payable in installments over a period of up to 20 years. Id.; 29 U.S.C. § 1399(c)(1)(B) (1982). The amount of each annual installment is based on the employer’s prior history of contributions to the plan and will equal or exceed the highest annual amount the employer was obligated to pay the plan during the ten years preceding the withdrawal. 29 U.S.C. § 1399(c)(1)(C)(ii)(I)-(II) (1982). The employer’s obligation to pay installments may not exceed 20 years even if more than 20 years would be required to amortize the entire amount of withdrawal liability. Id.; 29 U.S.C. § 1399(c)(1)(A)(i)-(ii) (1982).


184. See 126 CONG. REC. S10,111, S10,120 (daily ed. July 29, 1980) (joint explanation of S. 1076 by Senate Finance Committee and Senate Committee on Labor and Human Resources).


186. See United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (“arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute he has not agreed to submit”).

187. See infra note 189 and accompanying text.
Comparing the MPPAA arbitration to such other statutes demonstrates the ways in which the MPPAA breaks new ground.

188. See infra note 189 and accompanying text.
189. For example, compulsory arbitration appears in the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (1982). RLA mandates arbitration by the National Railroad Adjustment Board of disputes between railroad employees and employers which arise under agreements governing rates of “pay, rules, or working conditions.” 45 U.S.C. § 153(First)(i) (1982). Judicial review of the Board’s decisions is limited. See 45 U.S.C. § 153(First)(q) (1982) (grounds for reversal by courts of National Railroad Adjustment Board are: (1.) failure of the Board to comply with the requirements of RLA; (2.) action by the Board beyond the scope of its jurisdiction; and (3.) fraud or corruption).

RLA deals with labor disputes in private industry, 45 U.S.C. § 151a (1982); see, Roberts v. Lehigh & N.E. Ry. Co., 211 F. Supp. 379, 382 (D.C. Pa.) (primary purpose is “promotion of mutually advantageous labor-management climate, one of fairness, harmony, and necessary degree of predictability”), aff’d, 323 F.2d 219 (3d Cir. 1963); American Airlines, Inc. v. Transport Workers Union of Am., Intern., AFL-CIO, 202 F. Supp. 806, 810-11 (S.D.N.Y. 1962) (purpose “is to prevent employers and unions ... from engaging in acts which may adversely affect the national economy, without first having used the means provided by law for the adjustment of their disputes”), therefore, its provisions for compulsory binding arbitration are a close analog to the arbitration provisions of MPPAA. There are, however, notable differences. First, rail transportation uninterrupted by labor strife, was the public interest Congress intended to protect by providing for compulsory binding arbitration under RLA. Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 36 (1957).

MPPAA’s objective of assuring the retirement security of participants in MEPPs is important, but it does not approach in magnitude the public concern with maintaining the flow of commerce which Congress envisioned when it enacted the RLA. California v. Taylor, 353 U.S. 553, 566 (1957) (Railway Labor Act is essentially an instrument of industry wide government, having primary purpose of avoiding “any interruption to commerce or to the operation of carrier engaged therein”) (quoting 45 U.S.C. § 151a); Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950) (same); see 45 U.S.C. § 151a (1982). In addition, arbitration under RLA applies to employee grievances concerning rates of pay, rules, and working conditions which Congress considered to be “minor” conflicts. Union Pac. Ry. Co. v. Sheehan, 439 U.S. 89, 94 (1978) (per curiam). By contrast, disputes about withdrawal liability under MPPAA may involve millions of dollars; these sums may even exceed the net worth of withdrawing employers. See Complaint for Plaintiff, American Trucking Ass'ns, Inc. v. PBGC, No. J82-0061 (S.D. Miss. filed Feb. 4, 1982), summarized in [Jan.-June] PENS. REP. (BNA), No. 380, at 228 (Feb. 15, 1982) (many members of American Trucking Association have received demands for payment of withdrawal liabilities that approach or exceed their net worth); see also supra note 8 (case in which withdrawal liability exceeded employer's net assets). It should be noted, however, that disputes under RLA can in some instances involve substantial sums of money. See Brotherhood of R.R. Trainmen v. Denver & R.G.W.R.R., 370 F.2d 833, 834 (10th Cir. 1966) (National Railroad Adjustment Board awarded employees $472,000), cert. denied, 386 U.S. 1018 (1967). Arbitration under MPPAA, therefore, applies to claims of a different size and nature than those governed by the RLA, and was mandated for a different purpose than was arbitration under the RLA. See 29 U.S.C. § 151a (1982).
C. Trustee Bias

An additional important characteristic of withdrawal liability determinations is that they are not made by an impartial third party,
but by the trustees of the pension plan itself. The Labor Management Relations Act requires equal representation of employees and contributing employers on a pension plan's board of trustees. Consequently, the plan's trustees have a direct interest in collecting the maximum possible withdrawal liability.

This interest arises in three ways. First, the trustees have a natural interest in increasing the plan's assets, so that the plan can remain solvent and possibly increase benefits. Moreover, the MPPAA makes no provision for periodic adjustment of an employer's withdrawal liability and permits reductions in only a few limited situations. The trustees thus have a compelling incentive to set the

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id. at 436 & n.4, 294 N.W.2d at 72-73 & n.4 (compulsory arbitration statutes successful in averting strikes). See generally McAvoy, Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector, 72 COLUM. L. REV. 1192 (1972) (describing various forms of binding arbitration in public sector, costs and benefits). The arbitration requirement of MPPAA differs from them in two respects. First, the pension plans and the employers are neither local governments nor public employees, but private parties bound by a private contractual relationship. See, e.g., Republic Indus. Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 632 n.1 (4th Cir. 1983) ("MEPPs predominate in industries typified by small employers, systems of shifting work sites and 'portability' of employment, such as the construction, mining, entertainment, and motor carrier industries"), cert. denied, 104 S. Ct. 3553 (1984). Second, the public interest in avoiding strikes by public servants differs in nature from the public interest in assuring the viability of MEPPs. The former seeks to avoid the imminent disruption of essential public services; the latter concerns only the allocation of the burden of ensuring the economic well-being of employees covered by MEPPs. International Teamsters Union Pension Plan, 5 EBC (BNA) 1193, 1199 (1984) (Mittelman, Arb.); see PBGC Study, supra note 46, at 48. See generally MPPAA, supra note 9. Thus, although these statutes, like MPPAA, replace the judicial forum with arbitration, the public purposes they serve are significantly more compelling than those served by MPPAA.

The differences between MPPAA, RLA and state arbitration statutes indicate that the compulsory arbitration provisions of MPPAA are unique. Unlike state statutes compelling arbitration of certain private claims, MPPAA provides for no de novo trial of a pension plan's claim that an employer owes it withdrawal liability payments. On the contrary, MPPAA requires a binding, nonjudicial procedure for the resolution of a private dispute that differs in nature and magnitude from the types of disputes federal and state legislatures have heretofore seen fit to compel binding arbitration. See supra notes 166-74; infra notes 190-211 and accompanying text.

190. See 29 U.S.C. § 186(c)(5)(B) (1982) (authorizing employer-financed trust funds for employees' benefits provided that employer and employees equally represented in administration of trust funds); see also supra notes 15, 29 & 34 and accompanying text (discussion of board of trustees).

191. McCulloch, supra note 10, at 3-4; see supra note 43.

192. See supra note 191.

liability as high as possible to help protect against subsequent shortfalls in the event their predictions, which are based upon actuarial assumptions, prove to have been too conservative. Second, trustees who continue as contributing employers have an interest in avoiding additional burdens on themselves. If an employer withdraws, and does not pay his full share of unfunded vested benefits, then the remaining employers will ultimately bear the cost themselves. Third, the employer trustees are usually members of the same industry as the withdrawing employer and, therefore, may well be the withdrawing employer's direct competitor. To the extent that imposition of large withdrawal liability damages the withdrawing employer's financial status or puts him out of business, the employers remaining in a MEPP will benefit from reduced competition.

Calculating the withdrawal liability in a manner that maximizes the amount owed by a withdrawing employer would, moreover, be consistent with the fiduciary duties imposed on the plan trustees by ERISA. ERISA requires a plan trustee to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of providing benefits to participants and their beneficiaries . . . ." Furthermore, the trustees face potential civil liability if they breach these statutorily imposed fiduciary obligations. The Supreme Court has made it clear that

194. See supra note 191.
196. McCulloch, supra note 10, at 3; Interview with Kenneth J. McCulloch, Partner, Townley & Updike, in New York City (Aug. 16, 1985); see infra note 227 (trustees and withdrawing employers involved in the withdrawal liability litigation all were members of the same industry in each case).
197. See McCulloch, supra note 10, at 3-4.
198.

[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and
(A) for the exclusive purpose of:
   (i) providing benefits to participants and their beneficiaries; and
   (ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .


A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under th[e] subtitle
ERISA requires a trustee appointed by an employer to overcome his loyalty to the employer and instead solely represent the plan’s beneficiaries. Thus, when the trustees representing plan beneficiaries and those representing non-withdrawing employers make withdrawal liability determinations, their interests are identical: each may benefit from collection of as large a withdrawal liability as possible, and neither owes a duty to the withdrawing employer.

Withdrawal liability determinations are made in such a way, therefore, that disputes between trustees of pension plans and employers from whom they demand withdrawal liability payments are virtually inevitable. The trustees of the pension plan have an interest in maximizing withdrawal liability payments. They may serve that interest by manipulating both the flexibility of the statutory provisions governing a plan’s determination of employer liability, and the flexibility of the actuarial assumptions used in calculating the amount of the liability. The interest of the departing employer is, of course, to minimize or eliminate withdrawal liability payments. Consideration of these opposing interests is crucial to the evaluation of the fairness and propriety of MPPAA’s procedures for resolving withdrawal liability disputes.

D. Information Imbalances Under the MPPAA

Another important factor which distinguishes MPPAA arbitration from standard labor law arbitration centers upon interpretation. In the standard labor law arbitration proceeding, the arbitrator usually examines the collective bargaining agreement entered into by the parties. From this document the arbitrator tries to ascertain the intent of the respective parties. Conversely, under a MPPAA

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201. McCulloch, supra note 10, at 3-4; see supra note 200.
202. McCulloch, supra note 10, at 3-4; see infra note 227 (cases indicate that as withdrawal liability assessment increases, the remaining liability of trustees decreases); supra note 43.
203. McCulloch, supra note 10, at 4; see supra note 6 and accompanying text.
204. McCulloch, supra note 10, at 4; see supra note 19 and accompanying text.
205. See Smith & Friedman, supra note 20, at 15, col. 3.
206. See Smith & Friedman, supra note 20, at 15, col. 2; A. Cox, D. Bok & R. Gorman, Labor Law, 518-20 (9th ed. 1981); Cox, Reflections Upon Labor
arbitration, the arbitrator will be "construing the intent of a third party: Congress. Thus, he must pay careful attention to how the legislature intended the statute to operate, regardless of whether the result reached was within the contemplation of either party to the dispute." Thus, questions of pure statutory interpretation are being resolved by arbitrators. As a result of these differences, serious doubts have been raised as to whether the use of arbitrators is appropriate under the MPPAA.

Another reason for the inequitability of the present system relates to the information imbalance. Under the MPPAA, the pension fund calculates withdrawal liability ex parte. As a result, an employer will find it difficult, if not impossible, to respond effectively to a withdrawal liability claim. The withdrawal liability claim document will rarely provide information sufficient to allow the employer to deduce the way in which the liability assessment was derived. Furthermore, requests by employers for additional information regarding this liability calculation from the MEPPs are not responded to. Since these disputes are resolved by resort to arbitration, rather than the courts, the discovery rules available in the latter forum are


207. See Smith & Friedman, supra note 20, at 15, col. 3.
208. Id. at 15, 19-20.
210. "Because the claim is calculated and assessed ex parte, the employer has no knowledge of what data were used, what decisions and judgments were made, and who made them." Weinstein & Roach, supra note 209, at 16, col. 1; see Obrentz & Woodward, supra note 5, at 70-72.
211. Weinstein & Roach, supra note 209, at 16, col. 3; see Obrentz & Woodward, supra note 5, at 70-72.
212. Stabilization Act, supra note 2, at 79, 90 (statements of Dennis L. Hansen, Sec'y and Treas., Ramsey Winch Company); id. at 122-23 (statement of Laurence S. Fordham, Attorney, on behalf of C & S Wholesale Grocers, Inc.) ("[t]he fact of the matter is that the union has the information, but we cannot get it. We have asked, . . . but they have refused to give it to us."); id. at 175 (statement of Charles Naylor, Vice President, Labor Relations, Dubuque Packing Co., on behalf of the American Meat Institute) ("[w]e asked for several types of information and received this response: 'It has further been determined, however, that the other information requested would not be material or relevant to any review of the accuracy of the withdrawal liability computation that you undertake, and is confidential and privileged.'"); id. at 232 (statement of Sen. Nickles, Chairman Subcomm. on Labor) ("[w]e have had many people, particularly the employers, that stated they could receive very little information concerning the status of plans."); see supra note 211.
not available to withdrawing employers.\textsuperscript{213} In addition, regulations proposed by PBGC on the arbitration of multiemployer plan disputes are silent on the subject of discovery under arbitration proceedings.\textsuperscript{214} Moreover, these proposed regulations have suggested that arbitration proceedings should strive for quick resolution of disputes, and thereby leave insufficient time for proper discovery.\textsuperscript{215} The presence of the evidentiary presumptions contained in the MPPAA, and the great reliance upon actuarial assumptions\textsuperscript{216} in the calculation of withdrawal liability highlight the need for complete disclosure.

E. Effect of MPPAA Presumptions

The effect of the MPPAA presumptions on withdrawal liability calculations provides another inequity inherent in the present system. MPPAA sets forth three requirements governing arbitration of disputes over the withdrawal liability. First, the arbitration must be conducted in accordance with the fair and equitable procedures promulgated by PBGC.\textsuperscript{217} Second, the arbitrator must presume that the plan’s determinations concerning the withdrawal liability are correct, absent a showing by the employer, by a preponderance of the evidence, that a challenged determination was "unreasonable or clearly erroneous."\textsuperscript{218} Third, the plan’s calculations of its unfunded vested benefits are presumed correct unless the employer shows, by a preponderance of the evidence, that the actuarial assumptions used

\begin{itemize}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{See supra} notes 19, 163-69 and accompanying text; \textit{see also} Weinstein \& Roach, \textit{supra} note 209, at 18, col. 4.
\item \textsuperscript{217} 29 U.S.C. § 1401(a)(2) (1982). The PBGC has proposed such procedures, but to date they have not been adopted. \textit{See infra} note 229; \textit{PBGC Proposes Arbitration Rules for Plan Withdrawal Liability Disputes, [July-Dec.] Pens. Rep. (BNA)}, No. 452, at 1146 (July 11, 1983). For the interim period, the PBGC has endorsed the arbitration proceedings of the American Arbitration Association. \textit{See} Republic Industries, Inc. v. Central Pa. Teamsters Pension Fund, 534 F. Supp. 1340, 1348 (E.D. Pa.) (order denying preliminary injunction), \textit{rev'd on other grounds}, 693 F.2d 290 (3d Cir. 1982). MPPAA § 405 indicates that any reasonable action taken during the period before regulations take effect shall be treated as complying with the regulations. 29 U.S.C. § 1461 (1982). Thus, prior to adoption of final regulations, § 405 of the MPPAA must be interpreted as entitling arbitrators to rely upon their own judgment when finding actions to be reasonable. \textit{See id.}
\item \textsuperscript{218} 29 U.S.C. § 1401(a)(3)(A)-(B)(i) (1982); \textit{see supra} note 217.
\end{itemize}
in the calculation were, "in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations)."\textsuperscript{219}

The MPPAA presumptions have three effects. First, they place the burden of proof on the employer.\textsuperscript{220} Second, they define the standard of proof as "by a preponderance of the evidence," the usual standard in civil cases.\textsuperscript{221} Finally, they define what the employer must prove to rebut the presumption: that the plan's determination is unreasonable or clearly erroneous.\textsuperscript{222}

These statutory presumptions transform the arbitration from a de novo adjudication into a limited review of the pension plan's determinations. In operation, this scheme places the pension plan in the role of a jury, a trial judge, or an administrative agency, and places the arbitrator in the role of an appellate judge.\textsuperscript{223} This unusual

\begin{enumerate}
\item \textsuperscript{219} 29 U.S.C. § 1401(a)(3)(B)(i) (1982). The employer may also challenge the plan's determination by showing by a preponderance of the evidence that the plan's actuary made a significant error in applying actuarial assumptions or methods. \textit{Id.; 29 U.S.C. § 1401(a)(3)(B)(ii) (1982); see supra note 217.}
\item \textsuperscript{220} In a normal civil suit where a plaintiff seeks to collect a debt, common law places the burden on the plaintiff to prove both the existence of and the amount of the debt. Hoffman, \textit{Litigation Over Multiemployer Pension Plans}, Nat'l Law Journal, Sept. 24, 1984, at 20, col. 2.
\item \textsuperscript{221} See \textit{G. Lilly, An Introduction To The Law Of Evidence} 41 (1978) (party must prove elements of claim by preponderance of evidence in typical civil case).
\item \textsuperscript{222} See \textit{supra} note 19.
\item \textsuperscript{223} "Clearly erroneous" is the language used to define the standard of federal appellate review of a trial judge's findings of fact in a nonjury trial. See Fed. R. Civ. P. 52(a) (findings of fact shall not be set aside unless clearly erroneous). A finding is clearly erroneous if the reviewing court "is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The "clearly erroneous" standard does not permit an appellate court to decide the facts \textit{de novo} or to set aside findings merely because the court itself would have reached a different result. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

The "unreasonable" standard resembles the standard of judicial review in which "reasonableness" is the principal criterion. Specifically, it resembles the standard for judicial review of jury verdicts. A judge generally may overturn a jury verdict only if, without considering the credibility of the witnesses or the weight of the evidence, "there can be but one conclusion as to the verdict that \textit{reasonable} men could have reached." Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970) (emphasis added); see 9 C. \textsc{Wright} & A. \textsc{Miller}, \textit{Federal Practice And Procedure} § 2524, at 545-46 (1971) (citing numerous cases phrasing test for judgment notwithstanding the verdict in terms of what reasonable men could do).

Although the meaning of the terms "reasonable" and "clearly erroneous" may vary depending on the cases to which they are applied, both have a common underlying purpose: to grant some degree of deference to the entity that first decides a matter. Appellate courts defer to a trial judge's findings of fact because of his firsthand familiarity with the testimony and evidence. See Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 621 n.20 (1974) (citing White v. Regester, 412 U.S. 755, 769-77 (1973)) (district judge with firsthand
allocation of functions is suspect because the plan and the interested party possess none of the characteristics of juries, judges, or agencies which justify deference to their findings.\(^\text{224}\)

In creating these presumptions the House Education and Labor Committee thought that placing the burden of proof on the employer would prevent delay in the payment of the imposed withdrawal liability to the pension plan.\(^\text{225}\) The actual effect of the presumptions goes far beyond the Committee's intent to prevent the employer from delaying payment through protracted litigation. The requirement that the employer prove the unreasonableness of the plan's determinations and actuarial assumptions prevents the arbitrator from reaching an independent conclusion, as long as the determinations of the plan's trustees are reasonable.\(^\text{226}\)

A central issue in many withdrawal liability cases is whether the MEPP's assumed interest rate, used to calculate the employer's unfunded vested benefits (UVB), is reasonable.\(^\text{227}\) The employer usually views this assumption as most important.\(^\text{228}\) The MPPAA requires

\(^{224}\) Deference to jury findings is based on traditional respect for the ability of a panel of one's peers to evaluate the credibility of witnesses and to find the truth. See Tennant v. Peoria & P.U. Ry., 321 U.S. 29, 35 (1944) (because function of jury is to weigh evidence, judge credibility of witnesses, and draw ultimate conclusion as to facts, courts cannot set aside jury verdict because judges feel other results more reasonable). Deference to an administrative agency's findings of fact arises from respect for the agency's superior expertise in the matters at issue. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (findings of agencies equipped by experience to deal with specialized field of knowledge carry authority that courts must respect). Agency expertise and respect for congressional delegation of authority to agencies justify judicial deference to an agency's construction of statutory terms in specific cases. Gray v. Powell, 314 U.S. 402, 411-12 (1941).

\(^{225}\) H.R. REP. No. 869, Part I, 96th Cong., 2d Sess. 52, 86, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 2918, 2954. As reported by the House Committee, MPPAA did not include an arbitration requirement; the presumptions applied to judicial review of the pension plan's determinations. Id. When the Senate added an arbitration requirement, the presumptions were retained. Id.

\(^{226}\) See infra note 238 and accompanying text (trustees' determinations held to be reasonable although extremely conservative); McCulloch, supra note 10, at 3-4.


\(^{228}\) Ells, 5 EBC (BNA) 1161, 1176 (Zimring, Arb.) ("the interest rate assumption
that the plan trustees, in calculating the UVB, use actuarial assumptions and methods that "in the aggregate are reasonable" and "in combination offer the actuary's best estimate of anticipated experience under the plan...". Unfortunately, setting actuarial assumptions is an art as much as a science; it involves the application of past experience to the future. Forecasts of future wage and interest rates are particularly uncertain given the wide fluctuations these rates have undergone in recent years. Yet, even small differences in certain assumptions can dramatically affect the actuary's calculations. For example, a slight variation in the interest rate assumed for the determination of UVB often can mean the difference between liability and no liability. In one case, a decrease of three and a quarter percentage points in the interest rate assumptions used by the trustees of a pension plan to calculate the UVB attributable to a withdrawing employer, resulted in an increase of twenty-six percent in the employer's withdrawal liability. In another case the plan's interest rate assumption resulted in a withdrawal liability assessment of $1,210,400. However, the employer's interest rate

229. 29 U.S.C. § 1393(a)(1) (1982). Plans may also use actuarial assumptions set forth in PBGC regulations. Id.; § 1393(a)(2) (1982). The PBGC has proposed regulations which to date have not been adopted; see supra notes 207, 209; Obrentz & Woodward, supra note 5, at 27-28.


231. See TOWNLEY & UPDIKE'S PERSONNEL PRACTICES NEWSLETTER 6 (March 1985) (available from Townley & Updike, 405 Lexington Ave., New York, N.Y.) (rate of inflation varies in direct proportion with interest rate).


233. Stabilization Act, supra note 2, at 170 (statement of Jerry Freirich on behalf of the National Meat Association) ("[d]epending upon the interest assumptions used by the []trustees, the plan may have a greater or lesser UVB [unfunded vested benefit][liability]. In some situations, the UVB [liability] may entirely disappear when the trustees use a high interest [rate] assumption."); Smith & Friedman, supra note 20, at 19, col. 2.

234. See Penn Textile Corp., 3 EBC (BNA) 1609, 1617 (1982) (Pritzker, Arb.) (employer's withdrawal liability calculated to be $188,000 with six percent interest rate assumption and $148,500 with nine and a quarter percent assumption).

assumption, based on a market rate of return assumption, resulted in an assessment of only $300,000.236 This conflict has occurred in other cases as well.237 Generally, the decisions in these cases have gone against the employer.238

This result is not surprising given the obstacle which an employer must overcome. The arbitrator must find only that the assumption is not unreasonable.239 Unfortunately, a broad spectrum of interest rate assumptions may be deemed reasonable.240 One arbitrator, in deciding this issue, found the MEPP's assumption to be reasonable even though "it might not be the most reasonable approach. To hold such an approach to be unreasonable is tantamount to holding that most fund actuaries are professionally unreasonable in their duties as actuaries."241 Thus, the MPPAA presumptions force the arbitrator to affirm any reasonable determination of the plan. Therefore, the employer will predictably be assessed the "reasonable" determination that most favors the plan.242 When this low standard, upon which MEPP fund assessments are judged, is combined with the MEPP fund's predilection for assessing conservative interest rates,

236. Id. at 1491.
237. See, e.g., Hertz Corp., 4 EBC (BNA) 1367 (1983) (Mittelman, Arb.); see also supra note 227.
238. Buy-Low, Inc., 5 EBC (BNA) 2641 (1984) (Bowles, Arb.) (6% interest rate held reasonable); Palmer Coking Coal Co., 5 EBC (BNA) 2369 (1984) (Gordon, Arb.) (5 1/2% interest rate held reasonable); Calvert and Youngblood Coal Co., 5 EBC (BNA) 2361 (1984) (Polak, Arb.) (5 1/2% interest rate held reasonable); Ells, 5 EBC (BNA) 1161 (1984) (Zimring, Arb.) (6% interest rate held reasonable); Joy Mfg. Co., 5 EBC (BNA) 1129 (1984) (Hannon, Arb.) (6% interest rate held reasonable); Hertz Corp., 4 EBC (BNA) 1367 (1983) (Mittelman, Arb.) (7% interest rate held reasonable); Woodward Sand Co., 3 EBC (BNA) 2351 (1982) (Kauffman, Arb.) (6 1/2% interest rate held reasonable); Penn Textile Corp., 3 EBC (BNA) 1609 (1982) (Pritzker, Arb.) (6% interest rate held reasonable).
239. See supra notes 19, 163-71 and accompanying text.
240. See supra note 238; infra notes 241-42 and accompanying text.
242. A 1982 decision by an arbitrator illustrates the impact of the presumption that a plan's assumptions are reasonable. In Penn Textile Corp., 3 EBC (BNA) 1609 (1982) (Pritzker, Arb.), an arbitrator sustained a pension plan's use of an assumption that the plan would earn interest of 6 percent on its assets. The arbitrator found that the employer failed to show by a preponderance of the evidence that the 6 percent rate was unreasonable, despite the employer's arguments that insurance carriers use 13 to 15 percent interest rate assumptions, that the rates used by PBGC for single employer plans were 9.25 percent at the time, and that the pension fund's actual return on investment was 10 percent for the four years prior to the employer's withdrawal and currently was 8 percent. Id. at 1617-20, 1630. The use of a higher interest rate assumption would have increased the valuation of the plan's assets and therefore decreased the employer's withdrawal liability.
it is clear that the current system works a grave injustice upon withdrawing employers.

F. The Reasonableness of the Interest Rate Assumption Outside of the MPPAA

As their assessments of withdrawal liability indicate, the trustees of MEPPs can, and very frequently do, rely on assumptions.\textsuperscript{243} One of these assumptions is that invested monies will produce income at the rate of approximately six percent both now and in the foreseeable future.\textsuperscript{244} This assumption has been sustained by arbitrators\textsuperscript{245} and courts,\textsuperscript{246} and has not drawn any reaction from Congress or the federal agencies.\textsuperscript{247} This assumption would be offensive in other contexts.\textsuperscript{248} Thus, the legitimacy of the six percent interest rate assumption depends upon who has made the assumption. This assumption is

\begin{itemize}
  \item \textsuperscript{243} See supra notes 16, 19, 163-71 and accompanying text.
  \item \textsuperscript{244} See supra note 238.
  \item \textsuperscript{245} See supra note 238.
  \item \textsuperscript{246} See infra note 253 and accompanying text.
  \item \textsuperscript{247} See generally Stabilization Act, supra note 2; Oversight, supra note 10 (congressional hearings held on problems associated with MEPPs).
  \item \textsuperscript{248} The IRS has had a 13% interest rate on tax underpayments or overpayments until July 1, 1985, when the annual interest rate was decreased to 11%. Rev. Rul. 85-47, 1985-16 I.R.B. 10.

  From April 1, 1985 to June 30, 1985 the rate of interest to be charged by MEPPs on withdrawal liability payments overdue or in default, according to regulations of the PBGC, was 10.50%. PENS. PLAN GUIDE (CCH) ¶ 23,682H. From July 1, 1985 to September 30, 1985 that rate was 10%. Id.

  Private employers that rely on 6% assumptions have been the target of IRS threats that their defined benefit plans will be disqualified. Private employers have been making 'excessive' contributions to their defined benefit plans with pre-tax dollars. These monies generate interest and the build up in that fund is tax free. When and if the company needs money, it can buy annuities or otherwise assure that the defined benefits will be paid. The excess is then recaptured by the company. One of the methods used by private employers to justify these excessive annual contributions is to rely on a 6% interest rate assumption. Congress has found this offensive and is considering legislation to prevent or limit such reversions. IRS has found this offensive because it reduces current tax revenues. It has instituted a program to review plans, starting in California, and as part of that program employers are being required to justify the 6% assumptions. IRS contends that fully secure long term federal government money instruments are guaranteeing a return of at least 10% and, for that reason, a 6% interest rate assumption by private employers is not justified and is merely an illegal tax avoidance scheme.

  McCulloch, supra note 10, at 7-8; cf. Foltz v. U.S. News & World Report, 760 F.2d 1300 (D.C. Cir. 1985) (employee stock ownership plans face similar consequences); 1 TERMINATION OF EMPLOYMENT (P-H) No. 11, at 7-8 (same).
suspect when it causes the government revenues to be reduced, yet reasonable when the effect is to increase employer withdrawal assessments.

VII. Constitutionality of the MPPAA

The constitutional guarantee of due process requires that an individual receive an opportunity to be heard "at a meaningful time and in a meaningful manner" before government action deprives him of property. Under the dispute resolution process of the MPPAA, deprivation of an employer's property occurs when the employer complies, under threat of penalty as required by law, with an arbitrator's decision requiring him to make payments under the imposed withdrawal liability. Although it is well settled that "due process is flexible and calls for such procedural protections as the particular situation demands," the MPPAA's dispute resolution

251. MPPAA requires an employer to make payments in accordance with the arbitrator's award, or face substantial penalties. 29 U.S.C. §§ 1401(d), 1132(g)(2) (1984). Arbitral awards are enforced by the United States district courts. See supra notes 19, 163-65 & 168 and accompanying text.

MPPAA's mandate of employer compliance with the arbitrator's award constitutes public action for purposes of application of constitutional due process safeguards. The United States Supreme Court described the limitations of such public action in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978). In Flagg the court refused to apply fourteenth amendment due process protection to creditor's self help remedies authorized by New York statute. The MPPAA dispute resolution scheme differs from the statute upheld in Flagg in three respects. First, the New York statute provided only one of several means available to creditors and debtors to resolve their private disputes. 436 U.S. at 160. The Court found there was no state action in part because settlement of creditor-debtor disputes was not an exclusive public function. Flagg, 436 U.S. at 161-62. The MPPAA, on the other hand, compels arbitration and subsequent judicial enforcement of the arbitral award.

Second, the New York statute merely authorized a particular creditor's remedy. Id. at 164-65. Because the state did not compel the creditor's act, the state was not responsible. Flagg, 436 U.S. at 164-65. The MPPAA, on the other hand, compels arbitration and subsequent judicial enforcement of the arbitral award. Third, the dispute between the warehouseman and debtor in Flagg was "purely private." Id. at 160. Withdrawal liability disputes are not purely private; in fact, they would not exist were it not for the MPPAA's imposition of withdrawal liability on employers. These differences place deprivation of employers' property under MPPAA well within the penumbra of state action subject to due process protections. See generally Comment, Flagg Brothers, Inc. v. Brooks, The Public Function Doctrine in Retreat, 12 J. MAR. J. PRAC. & PROC. 637 (1979) (discussing impact of Flagg Brothers).

procedure is unprecedented in its combination of compulsory arbitration, arbitrable presumptions, and limited scope of judicial review.

Employers who have brought suit in cases which attack the MPPAA on the ground that it deprives employers of procedural due process, have focused their attack upon the presumptions relating to the determination of withdrawal liability. In one case the Court of Appeals for the First Circuit, discussing the application of procedural due process standards to economic legislation, stated:

[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

Thus, arguments claiming that the MPPAA’s presumptions are unconstitutional receive rigorous scrutiny. Those Circuits of the Court of Appeals which have considered this issue have all supported the conclusion that the MPPAA’s presumptions do not violate procedural due process and are therefore constitutional. Given the fact that economic legislation is at issue, this result is not surprising.

VIII. A More Equitable Alternative

Congress stated that its purpose in including the presumptions


255. See supra note 253 and accompanying text.
was to "ensure the enforceability of employer liability." It is indisputable this was a rational goal for Congress to pursue. However, this goal could have been achieved without giving the MEPP fund trustees an amount of power, so great as to allow them to control the final outcome of the litigation. Thus, it has been clear to unions, employers and employees for quite some time that the present system of withdrawal liability calculation is in desperate need of reform. Congress, too, has begun to recognize the gross inequities associated with the current system. Many Senators have echoed Senator Hatch's views on the MPPAA, calling for reform in this area. Moreover, Congress has realized that the final responsibility for reforming such plans does not rest with the court.

The frequency of litigation over withdrawal liability assessments and the dollar amounts involved are perhaps the most salient indicators of the need for either reform or repeal in this area. Specifically, it is very difficult for a withdrawing employer to overturn a withdrawal liability assessment, either by arbitration or in court. Nevertheless, the frequency of such attempts has increased dramatically. Recently, a survey of cases contained in a national labor relations reporter indicated that the percentage of cases in which MPPAA withdrawal liability assessments were at issue has increased to approximately thirty percent of all reported cases. The reasons litigation has increased dramatically in this area are dollars and desperation. The dollars involved can be huge. A 1984 survey indicated that in that year alone over 100 million dollars in withdrawal liability assessments were contested. Thus, a change in

257. Id.
258. See generally Oversight, supra note 10 (statements of various Senators, lawyers, professors, employer associations, and employers about the adverse effects of the MPPAA); Stabilization Act, supra note 2 (same).
259. See supra note 2.
262. See infra note 265 and accompanying text.
263. See infra notes 267-68 and accompanying text.
264. See supra notes 19, 163-71, 238, 253 and accompanying text.
265. McCulloch, supra note 10, at 5; Interview with Kenneth J. McCulloch, Partner, Townley & Updike, in New York City (Aug. 16, 1985). This survey was based on the cases reported by the Bureau of National Affairs in its Employee Benefit Cases service.
266. See infra notes 267-70 and accompanying text.
267. Interview with Kenneth J. McCulloch, Partner, Townley & Updike, in New York City (Feb. 15, 1985); McCulloch, supra note 10, at 5.
the projected income rates of invested monies can mean hundreds of thousands, if not millions, in the withdrawal liability assessment.268 The desperation arises because the employer generally has no alternative. It cannot reverse the situation which gave rise to withdrawal liability assessment.269 Once the employer is at the withdrawal liability stage, it is too late to do anything but fight against that assessment through litigation.270

Due to the prominent role the pension system has assumed in the lives of many Americans,271 any change in the current system would have to occur by way of reform rather than repeal of the current system. In short, the concept envisioned by the MPPAA could be better accomplished by letting private insurance companies assume the withdrawing employer’s liability. The proposal which follows would reform the pension law while keeping most of the present system intact.

Assume ABC Co. withdraws from a MEPP. The amount of the fund assets attributable to ABC Co., as of the time of the withdrawal, is one million dollars. ABC Co. is assessed with a withdrawal liability award of two million dollars, payable over two years.

Under this proposal, government approved insurers would be allowed to submit bids to ABC Co. indicating how much they will charge to assume the responsibilities owed by ABC Co. to the fund. To prepare their bids, these insurers would receive from the fund certified records indicating the plan participants and beneficiaries, obligations due, ages, etc.—in short, all the data the fund used to prepare its withdrawal liability assessment for ABC Co. In preparing these bids, these insurers will know that if they prevail as the

268. Id.
The best way to appreciate the significance of the dollar amounts involved because of the assumptions made by the trustees of multiemployer pension funds is by an illustration.

If $1 million is invested in 1985, and the assumption is that it will produce income at the rate of 6%, compounded monthly, then at the end of 10 years that $1 million will have grown to $1,819,317. At the end of 20 years it would have grown to $3,310,204. If all other assumptions remain but an 11% interest rate is assumed, then at the end of 10 years that $1 million would have grown to $3,140,947 and at the end of 20 years it would have grown to $9,865,555.

McCulloch, supra note 10, at 6; see supra notes 8, 256-61 and accompanying text.


271. See supra notes 96-102 and accompanying text; Williams, supra note 44, at 1, col. 4.
successful bidder to ABC Co., the one million dollars already in the fund and attributable to ABC Co. will thereafter be theirs to invest to meet the obligations that the insurer is assuming. The insurers will also know that the benefit level that they are assuming will not thereafter be changed by the fund without their approval. Finally, the insurers will know that they do not have to produce any “up-front” dollars. All they will have to do is, in effect, provide annuities of a certain level to plan participants and beneficiaries in the future.

Based on all the assumptions, an insurer might offer ABC Co. a price of $1.2 million to assume its withdrawal obligations. Furthermore, the insurer may allow ABC Co. a long time period to pay this $1.2 million. It can take collateral from ABC Co. In other words, it can treat this business deal just like any other business venture. This alternative procedure could benefit every legitimate interest.

A primary goal of pension plan law is to assure that people will have a pension upon retirement. Therefore, these insurers, who would be bidding competitively for an employer’s withdrawal liability, would need to be governed by standards which would guarantee that the insurer can pay the future liabilities. This result could be achieved in one of three ways: (1) the PBGC could use insurance companies’ premiums to establish a reserve fund on every obligation. In effect, this would put the federal government behind every obligation as a secondary insurer. Thus, in regard to this function, the PBGC would function like the Federal Deposit Insurance Corporation, or the Securities Investors Protection Corporation; (2) Congress could set up standards and establish a separate commission to oversee the insurance companies; or (3) The matter of supervision could be handled under the mechanisms of existing state insurance commissions. This method would provide a mechanism for complete insurance coverage without cost to the federal government. The likelihood that the Pension Benefit Guaranty Board would have to pay funds would be greatly reduced. More importantly, all three of these methods would prevent any conflict from arising.

The employees would benefit because they would know that at least to some extent their benefits are guaranteed by private insurers.

272. See supra notes 4, 64 and accompanying text.
275. N.Y. Ins. Law §§ 201-408, 1101-1116 (McKinney 1985) (organizational purposes, procedures, and licensing requirements).
276. See supra notes 2, 10, 43, 172, 255 and accompanying text.
and are not dependent upon the wisdom or integrity of the fund trustees. The employees also would benefit in another way. They would have available to them a yardstick by which they can measure the performance of their fund trustees. If, year after year, their fund is producing poor results, for example, it is producing only a six percent increment on invested funds, either through poor investment decisions, imprudent loans or excessive fees, these employees can compare this performance to that of the private insurer who has taken custody of the one million dollars attributable to ABC Co. If the return generated by the insurers is better, the employees, or the employees and the employers together, or the fund trustees on their own initiative, may decide to let the private insurer make investment decisions for the entire fund. The return generated by the private insurers, to the extent that it exceeds the return generated by the fund trustees, translates directly into more benefits for the employees, and lesser contributions by the employers.

The withdrawing employer will also benefit under this proposed alternative. The typical ABC Co. will be able to better negotiate with the fund trustees about its withdrawal assessment. It will also avoid litigation. If it cannot obtain a better price, or better terms, the withdrawing employer will know that it is hopeless to litigate.

There are certain parties that have a vested interest in the existing system, but to the extent they oppose this proposal, their opposition would not be in the public interest. One such vested interest is the present fund trustees. These persons, delegated by the remaining employers or the union, will lose discretion to invest at least some of the funds they presently are investing. Furthermore, if their investment performance is poor, it will be more obvious to the employers and the employees.

IX. Conclusion

The dispute resolution process prescribed by the MPPAA is unprecedented in that it compels arbitration of a private dispute and requires the arbitrator to defer to the findings of one party, while denying either party the right to a trial de novo. Because withdrawal liability determinations are imprecise, there may be any number of reasonable answers to the questions whether an employer is liable, and if so, for what amount. Yet, the statute insulates the determinations of the trustees of the pension plan from full scrutiny,

277. See supra notes 19, 163-71, 217-26 and accompanying text.
278. See supra notes 230-42 and accompanying text.
provided they are reasonable and not clearly erroneous, even if the arbitrator or reviewing court considers other determinations more reasonable.\textsuperscript{279} This insulation results from the presumptions the arbitrator must make concerning the correctness of the plan's determinations and from the limited scope of judicial review provided by the statute.\textsuperscript{280}

It is indisputable that there is great dissatisfaction associated with the present system of withdrawal liability assessment.\textsuperscript{281} The problems associated with withdrawal liability assessment are caused by the inequitable, unsound, and often irresponsible actions of plan trustees.\textsuperscript{282} Clearly, there is a pressing need for legislative reform in this area. The present practice of placing blank checks in the hands of the trustees must be stopped, and a new system of withdrawal liability assessment should be instituted in accordance with the proposal set forth in this Note.\textsuperscript{283}

**Addendum**

On June 10, 1985, the United States Supreme Court noted probable jurisdiction to review a ruling from the United States District Court in Los Angeles, California, that rejected a broad attack on the 1980 MPPAA.\textsuperscript{284} The Court, in this case, will consider the constitutionality of the entire statute.\textsuperscript{285} In addition, the Reagan Administration announced on January 20, 1986, that it was developing proposals similar to those proposed in this Note,\textsuperscript{286} to reduce the role of the federal government in insuring private pension benefits.\textsuperscript{287}

Daniel A. Etna

\textsuperscript{279} See supra note 277 and accompanying text.
\textsuperscript{280} Id.
\textsuperscript{281} See supra notes 2, 10 and accompanying text. See generally Stabilization Act, supra note 2; Oversight, supra note 10.
\textsuperscript{282} See supra notes 43, 190-204 and accompanying text.
\textsuperscript{283} See supra notes 271-76 and accompanying text.
\textsuperscript{284} Woodward Sand Co. v. PBGC, No. 75 Civ. 2037 (D. Cal. 1975) (three judge district court panel), prob. juris. noted, 105 S. Ct. 2699 (1985).
\textsuperscript{285} High Court to Weigh Pension-Liability Law, Engineering News-Record, June 20, 1985, at 153, col. 1.
\textsuperscript{286} See supra, notes 271-76 and accompanying text.