The Use of Arbitration to Determine Liability: The Multiemployer Pension Plan Amendments Act of 1980

I. INTRODUCTION

As we enter the post baby-boom era, we find that the American population as a whole is older than ever before. The increasing percentage of middle-aged and elderly individuals in our society has resulted in a growing perception that social security will not adequately be able to meet the retirement needs of the public. One result of this concern has been a proliferation of public and private pension plans. More and more, Americans are turning to pension plans to ensure their financial security upon retirement.

Pension plans are typically established through collective bargaining agreements. Disputes frequently arise concerning the creation and operation of these plans. These disputes can have a tremendous impact upon both retired employees already receiving benefits and working employees who anticipate receiving benefits.

The Employee Retirement Security Act of 1974 (ERISA)[1] was Congress' first attempt to regulate pension plans in a comprehensive manner. One of the paramount purposes of ERISA is to ensure that employees and their beneficiaries are not deprived of vested pension plan benefits because of employer withdrawal or employer refusal to contribute.[2]

Under the auspices of ERISA, the congressionally-created Pension Benefit Guaranty Corporation (PBGC) acts as an insurer for single and multiemployer pension plans, protecting covered employees against plan failures.[3] This insurance is maintained by per capita assessments against each covered plan. Under this insurance plan, PBGC pays pension fund participants the amount to which they are entitled under their employee fund.[4] PBGC then recovers its expended funds by levying against the employer for such amounts paid by PBGC, not to exceed 30% of the employer's net worth.[5] While PBGC has been insuring all single employer pension funds since the enactment of ERISA, this coverage was not extended to multiemployer funds until 1978.[6]

In 1977, Congress instructed PBGC to examine the impact and the implications of employer withdrawal from multiemployer pension plans.[7] The study, which PBGC issued on July 1, 1978, predicted that future maintenance of the program would require assessments against individual

1. 29 U.S.C. §§ 1001-1461 (1982).
2. *See* Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361-62 (1980).
3. 29 U.S.C. § 1302.
4. 29 U.S.C. § 1341(b),(c).
5. 29 U.S.C. § 1362(b)(2).
6. 29 U.S.C. § 1381(c).
7. Pub. L. No. 95-214, 91 Stat. 1501 (1977).

pension plans to be increased nearly 2000% within a few short years. The primary reason for this predicted rise in pension plan failures was the increasing number of employer withdrawals from multiemployer plans. PBGC would be forced to incur ever-increasing liability.

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)[8] was enacted by Congress in response to the problem of employer withdrawal from multiemployer pension plans. In enacting MPPAA, Congress expressly authorized arbitrators under the Act to determine the statutory liability of employer-respondents.[9] In a manner similar to administrative determinations, MPPAA empowers arbitrators to establish the liability of disputants, subject to judicial review. Hence, MPPAA extends arbitrator authority into a non-traditional area in order to facilitate resolution of disputes.

This Article examines MPPAA's attempt to deal with employer withdrawal from multiemployer pension funds. First, the provisions of the Act are explained. Next, the evolution of statutory liability arbitration is examined. Third, the role of judicial review in this scheme is discussed. Finally, statutory and constitutional challenges to MPPAA liability arbitration are examined.

II. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT

The most significant aspect of MPPAA is that the Act imposes "withdrawal liability" upon employers who permanently withdraw from multiemployer pension plans.[10] An employer is held liable for damages in an amount equal to the share of unfunded vested benefits[11] which have accrued under the plan.[12] The Act dictates that a third party, the pension plan sponsor, be appointed in accordance with the agreement between the employer and employees. The plan sponsor determines whether or not the employer has violated the Act. If the employer is found liable, the plan sponsor will calculate the amount of damages for which a withdrawing employer is liable.[13] Finally, the plan sponsor must notify the employer of its liability and establish a schedule of payments.[14] Any dispute raised by the employer over the determinations made by the plan sponsor must be submitted to an arbitrator,[15] who is chosen

8. 29 U.S.C. §§ 1381-1461 (1976 & Supp. 1981).

9. 29 U.S.C. § 1401, *infra* note 15.

10. 29 U.S.C. § 1381.

11. These are benefits which, though they have vested in the employee, are unsupported by sufficient resources in the pension fund.

12. 29 U.S.C. § 1391.

13. *Id.*

14. 29 U.S.C. § 1399(b)(1). If the withdrawing employer fails to comply, the pension plan sponsor may then demand immediate payment of the entire withdrawal liability incurred. 29 U.S.C. § 1399(c)(5).

15. 29 U.S.C. § 1401.

1401. Resolution of disputes.

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc. (1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 4201 through 4219 [29 U.S.C. §§ 1381 - 1389] shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 4219(b)(2)(B) [29 U.S.C. § 1399(b)(2)(B)], or

(B) 120 days after the date of the employer's request under section 4219(b)(2)(A) [29 U.S.C.S. § 1399(b)(2)(A)].

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 4219(b)(1) [29 U.S.C.S. § 1399(b)(1)].

(2) An arbitration proceeding under this section shall be conducted in accordance with fair and equitable procedures to be promulgated by the corporation [PBGC]. The plan sponsor may purchase insurance to cover potential liability of the arbitrator. If the parties have not provided for the costs of the arbitration, including arbitrator's fees, by agreement, the arbitrator shall assess such fees. The arbitrator may also award reasonable attorney's fees.

(3)(A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 [29 U.S.C.S. §§ 1381 - 1399 and 1405] 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 assumption or methods.

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings. (1) If no arbitration proceeding has been initiated pursuant to subsection (a), the amounts demanded by the plan sponsor under section 4219(b)(1) [29 U.S.C.S. § 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of the arbitrator's award, in an appropriate United States district court in accordance with section 4301 [29 U.S.C.S. § 1451] to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceeding under this section shall, to the extent consistent with this title, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena [sic] power), and enforced in the United States courts as an arbitration proceeding carried out under Title 9, United States Code [9 U.S.C.S. § 1 et seq.].

(c) Presumption respecting findings of fact by arbitrator. In any proceeding under subsection (b), there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

(d) Payments by employer prior and subsequent to determination by arbitrator; adjustments; failure of employer to make payments. Payments shall be made by the employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515) [29

in accordance with the employer-employee agreement or the pension trust document. If the parties fail to initiate MPPAA arbitration, the determination of the plan sponsor becomes final. The plan sponsor may then, if necessary, bring an action in any competent state or federal court enforcing collection of the damages owed by the employer.[16]

Either the plan sponsor or the withdrawing employer may initiate arbitration within a 60 day period after the notification of liability, or within 120 days after an employer's request for a liability determination. Another possibility is that the parties may jointly initiate arbitration within 180 days after the pension plan sponsor's notification of liability and demand for payment from the employer.[17] An arbitration hearing is then conducted in accordance with fair and equitable procedures as promulgated by PBGC,[18] or, if no procedures are promulgated, by any reasonable procedures agreed to by the parties.[19] The arbitrator will assess fees, including reasonable attorneys fees, unless the parties agree otherwise.[20] The pension plan sponsor is entitled to purchase insurance to cover the costs of arbitration.

The pension plan sponsor is required to provide the withdrawing party with information reasonably necessary for the employer to compute its own liability in order to challenge the plan sponsor's computation.[21] Either party may further challenge the arbitrator's determination in a court of law. However, a statutory presumption of arbitral accuracy exists, and, upon review, the findings of fact by the arbitrator may be rebutted only by a clear preponderance of the evidence.

During the time period prior to a decision by the arbitrator, the withdrawing employer is liable in accordance with the determination made by the pension plan sponsor.[22] The arbitrator's award will make

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U.S.C.S. § 1145].

(e) Furnishing of information by plan sponsor to employer respecting computation of withdrawal liability of employer; fees. If any employer requests in writing that the plan sponsor make available to the employer general information necessary for the employer to compute its withdrawal liability with respect to the plan (other than information which is unique to that employer), the plan sponsor shall furnish the information to the employer without charge. If any employer requests in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability with respect to the plan or to provide information unique to that employer, the plan sponsor may require the employer to pay the reasonable cost of making such estimate or providing such information.

16. 29 U.S.C. § 1401(b)(1), *supra* note 15.

17. U.S.C. § 1401(a)(1), *supra* note 15.

18. 29 U.S.C. § 1401(a)(2), *supra* note 15. See also PBGC Opinion Letter 82-32 (1982) (In the absence of PBGC guidelines, arbitration of withdrawal liability may be conducted under any reasonable procedures the parties may select).

19. Presumptions which are established by § 1401(a)(3), *supra* note 15, control the substantive process of arbitration while regulations which PBGC is yet to enact would control the process procedurally.

20. 29 U.S.C. § 1401(a)(2), *supra* note 15.

21. 29 U.S.C. § 1401(e), *supra* note 15.

22. 29 U.S.C. § 1401(d), *supra* note 15.

necessary adjustments reflecting any underpayments or overpayments.[23] A withdrawing employer who fails to make the requisite payments is considered delinquent and will suffer the resulting consequences.[24]

III. STATUTORY LIABILITY ARBITRATION

Arbitration traditionally has been confined to two types: grievance arbitration and interest arbitration.[25] Grievance arbitration generally seeks to resolve disputes over interpretation of collective bargaining agreements without resort to litigation or economic weapons. Interest arbitration operates mainly as a substitute for collective bargaining.[26] Now, however, the enactment of MPPAA establishes a separate category of arbitration, called "statutory liability arbitration." Statutory liability arbitration is a congressionally imposed adjudicatory procedure. In this scheme, the arbitrator is placed in a position similar to that of a bureaucratic administrator for the purpose of determining employer withdrawal liability.[27]

Though the arbitrator is in a position similar to an agency administrator, there is no *de novo* review of the issues. Instead, the arbitrator's purview is circumscribed by rebuttable presumptions established under the Act. The MPPAA arbitrator functions more like a reviewing court than an agency administrator acting upon a dispute of first impression. Hence, the arbitrator's position is one of compromise. Arbitration provides a service which could have been assigned to an administrative agency. An arbitrator differs, however, from a bureaucratic administrator in that his functions are limited in the same way that a reviewing court is limited.

MPPAA restricts the arbitrator's authority in three ways. First, the Act establishes two presumptions:

(a) The determination of the pension plan sponsor will be upheld unless shown to be unreasonable or clearly erroneous;[28] and,
(b) With regard to the pension plan sponsor's determination of the plan's unfunded vested benefits for any plan year, actuarial assumptions and

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23. *Id.*

24. *Id.* The penalties incurred by such deliquency may be established by the collective bargaining agreement, the trust agreement or the statute. Under the statute, delinquency in contributions violates 29 U.S.C. § 1145. Civil action may thereafter be brought pursuant to 29 U.S.C. § 1132 for accounting, audit expenses, damages, interest and/or injunctive relief.

25. *See generally* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (3d ed. 1973).

26. Smith, *Arbitration and the Multiemployer Pension Plan Amendments: From the Golden Age to Age of Reason*, 12 CAP. U. L. REV. 17 (1982).

27. But unlike a court, the arbitrator is limited by the presumptions established by § 1401(a)(3) of the Act, *supra* note 15.

28. 29 U.S.C. § 1401(a)(3)(A), *supra* note 15.

> methods are upheld unless the calculation is shown to be unreasonable in the aggregate or unless the actuary is shown to have made a significant error in applying those assumptions or methods.[29]

Second, as mentioned previously, the Act empowers PBGC to promulgate procedures under which an MPPAA arbitration must be conducted. To date, however, PBGC has failed to promulgate any such regulations. Third, because an employer receives the information to challenge damage calculations and liability charges from the plan sponsor,[30] the only question for arbitration is whether the plan sponsor or the employer drew the correct conclusions from the uncontested substantive information. These restrictions further limit an arbitrator's decision-making authority.

IV. The Evolution of Statutory Liability Arbitration

Statutory liability arbitration is a logical extension of the use of dispute resolution techniques in our increasingly complex society.[31] This method of dispute resolution is judicially approved. Case law[32] authorizes arbitration when the interests involved are created statutorily or through a collective bargaining agreement.[33]

Nonetheless, prior case law did not envision the broad type of administrative/adjudicatory arbitration established under MPPAA. Those cases found that because such arbitration would effectively supplant either an administrative agency or a judicial determination in the first instance, procedural safeguards were required.

The two leading Supreme Court cases which limited the scope and depth of arbitrator authority are *Alexander v. Gardner-Denver Co.*[34] and *Barrentine v. Arkansas-Best Freight System, Inc.*[35] Both cases involved determination of the degree of deference to which labor arbitrators acting under collective bargaining agreements are entitled. Both cases held that claims arising out of violations of federal statutes can be immediately adjudicated in federal courts, notwithstanding any arbitration clause to the contrary.[36] Further, if a dispute had already been arbitrated, a reviewing court was under no obligation whatsoever to defer to the arbitrator's findings.[37] In *Alexander,* the Supreme Court

29. 29 U.S.C. § 1401(a)(3)(B), *supra* note 15.
30. *See* 29 U.S.C. § 1401(e), *supra* note 15.
31. Smith, *supra,* at 17.
32. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981).
33. Smith, *supra,* at 17, 20 (*citing* Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974) and Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981)).
34. 415 U.S. 36 (1974).
35. 450 U.S. 728 (1981).
36. *See* Smith, *supra,* at 26.
37. *Id.*

reasoned that a fact-finding forum could not have binding authority without some type of judicial record.[38] *Barrentine* reaffirmed that the function of a labor arbitrator is merely to consider liability issues.

These two Supreme Court cases seem to indicate that statutory liability arbitration can never bind the parties. However, MPPAA establishes a binding form of statutory liability arbitration which withstands most challenges. MPPAA's expanded use of arbitration undoubtedly portends an expanded use of arbitration in other legal areas as well.

V. Statutory Liability Arbitration and Judicial Review

MPPAA presumes that the arbitrator's factual determinations are correct. This presumption is rebuttable upon a showing of clear preponderance of the evidence.[39] To this extent, the role of a court reviewing MPPAA arbitration determinations is analogous to judicial review under the Administrative Procedure Act (APA). The APA instructs a reviewing court to strike down agency factual determinations only when "unsupported by substantial evidence."[40] Both the MPPAA and the APA allow a non-judicial third party to decide statutory liability questions with only limited judicial review.

In the context of administrative law, one justification for the limited judicial review is that administrative agencies are statutorily presumed to have expertise in their respective fields.[41] This justification does not apply to MPPAA arbitrators, however, since the MPPAA does not require its arbitrators to be experts in the field. Indeed, the Act does not provide any procedural or substantive guidelines for choosing an arbitrator; rather, this is left to the discretion of the parties.[42] Courts must thus defer to MPPAA arbitrators even though the arbitrators may have no expertise. However, this lack of a statutory expertise requirement may have little or no practical effect on the validity of arbitral determinations because it is unlikely that business executives and pension plan administrators would choose an ignorant or inexperienced arbitrator.

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38. Smith, *supra,* at 21. No record is required under MPPAA.

39. 29 U.S.C. § 1401(c), *supra* note 15.

40. 5 U.S.C. § 706(2)(E) (1980). Similarly, the Uniform Law Commissioners' Revised Model State Administrative Procedure Act (1961) authorizes the reviewing court to strike down an administrative factual determination only if it is "*clearly erroneous* in view of the reliable, probative, and substantial evidence on the whole record." (emphasis added) § 15(g)(5).

41. *See generally, Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum,* 75 COLOM. L. REV. 1 (1975); Note, Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals, 88 HARV. L. REV. 980 (1975).

42. *Supra* note 15.

VI. STATUTORY AND CONSTITUTIONAL CHALLENGES

A. *Interpretation of Statutory Provisions*

The language of the MPPAA is broad. Section 1401(a) of the Act states that "[a]ny dispute between an employer and the plan sponsor" concerning a withdrawal liability determination is relegated to arbitration.[43] However, the courts have concluded that a literal application of this broad language was never Congress' intent. Rather, the courts have found that statutory liability arbitration is limited to the narrow question of whether or not an employer wrongfully withdrew from a fund; MPPAA arbitration does not displace the role of the judiciary as the interpreter of statutory language.

For example, in *Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund,*[44] the only question raised by the plaintiff corporation in an action for declaratory judgment and injunctive relief was whether the corporation was an employer as defined by the Act.[45] The corporation contended that, because only an employer is required to arbitrate under Section 1401(a), defining the term "employer" for purposes of the Act is a necessary precedent to the requisite arbitration procedures.[46] Relying upon the Supreme Court case of *McKart v. United States,*[47] the district court found that issues involving statutory interpretation need not be followed.[48] The court stated that

> [n]either an arbitrator nor the trustees of a pension are authorized to interpret or construe a federal statute. The interpretation of a federal statute is a matter reserved for the federal courts. *Northwest Airlines, Inc. v. Air Line Assn.,* 442 F.2d 251, 255 (8th Cir. 1971) . . . . [Here] liability vel non is initially dependent upon the interpretation of the term. . . . Inasmuch as an arbitrator could not interpret [the statute], a request for arbitration . . . would serve no useful purpose.[49]

The court limited the scope of arbitrator authority under MPPAA to issues involving

> whether an employer has totally, partially or not withdrawn from a plan and what

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43. 29 U.S.C. § 1401(a), *supra* note 15.

44. 580 F. Supp. 1457 (S.D.N.Y. 1984).

45. Defined in 29 U.S.C. § 1002(5).

46. The court noted that although "exhaustion" was not precisely the correct term, courts interpreting MPPAA have generally held the exhaustion doctrine applicable. 580 F. Supp. 1457, 1459 *citing* Republic Indus., Inc. v. Teamsters Joint Council, 718 F.2d 628 (4th Cir. 1983) and Republic Indus., Inc. v. Central Pennsylvania Teamsters, 693 F.2d 290 (3d Cir. 1982).

47. 395 U.S. 185, 197-98 (1969).

48. Refined Sugars, Inc. v. Local 807 Labor-Management Pension Fund, 580 F. Supp. 1457, 1461 (S.D.N.Y. 1984) (*citing* Meatcutters Local 88 Pension Plan v. Del Monte Supermarkets, Inc., 565 F. Supp. 27 (E.D. Mo. 1983)).

49. *Id.,* (*citing* Meatcutters Local 88 Pension Plan v. Del Monte Supermarkets, Inc., 565 F. Supp. 27 (E.D. Mo. 1983)).

> the amount, if any, its consequent liability should be. These determinations are made by reference to and by interpretation of the Act, which has detailed provisions as to when withdrawal has occurred, whether such withdrawal is total or partial, whether the employer is liable for payment of withdrawal liability after a withdrawal has taken place and how that liability is to be computed.[50]

Though no clear consensus on the role of the judiciary under MPPAA has been reached, *Refined Sugars, Inc.* represents the majority view. In *T.I.M.E.-D.C., Inc. v. Trucking Employees of North Jersey Welfare Fund,*[51] a New York district court held that interpretation of the term "labor dispute," as used in the MPPAA,[52] must be left to the courts, not the arbitrators. Similarly, in *Meatcutters Local Pension Plan v. Del Monte Supermarkets, Inc.,*[53] a Missouri district court found that the term "facilities," as used in the Act, was to be defined by the courts, not through an arbitration proceeding.

However, in *Williamson Shaft Contracting Co. v. United Mine Workers 1974 Pension Plan,*[54] a Pennsylvania district court allowed the MPPAA arbitrator to interpret the term "facility," because there was no showing of irreparable injury. The court relied on *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,*[55] in finding that the MPPAA arbitration scheme was "elaborate and calls for findings of fact by the arbitration as a basis for later judicial review."[56] The court expressly rejected *Refined Sugars, Inc.,* however, reasoning that "[questions] of statutory interpretation do not require any particular expertise which is the usual distinguishing characteristic in the administrative process."[57] The court's reliance on *Republic Industries, Inc.* may be somewhat misplaced, in that *Republic Industries, Inc.* primarily dealt with constitutional challenges to MPPAA's arbitration procedure; the question of statutory interpretation was ancillary at best. The petitioners in *Republic* argued that judicial review of arbitral interpretation violated due process because review would be meaningless.[58] It was within this narrow context that the Fourth Circuit suggested

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50. *Id.*, (*citing* Baldwin v. Shopmen's Ironworkers Pension Trust, 3 Employee Benefits Cases ("EBC") 1713, 1716 (C.D. Cal. 1982)).

51. 560 F. Supp. 294 (E.D.N.Y. 1983).

52. 29 U.S.C. § 1398(2).

53. 565 F. Supp. 27 (E.D. Mo. 1983). *See also* I.A.M. Nat'l Pension Fund v. Schulze Tool and Die Co., 564 F. Supp. 1285 (N.D. Cal. 1983).

54. 585 F. Supp. 633 (W.D. Pa. 1984).

55. 718 F.2d 628 (4th Cir. 1983), *cert. denied,* 467 U.S. 1259 (1984). In the instant case the issue of whether two trucking terminals were separate "facilities" and whether one had been closed down prior to MPPAA enactment were found to be mixed questions of law and fact appropriate for an arbitrator.

56. Williamson Shaft Contracting Co. v. United Mine Workers 1974 Pension Plan, 585 F. Supp. 633, 635 (W.D. Pa. 1984).

57. *Id.* at 634.

58. Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund, 718 F.2d 628, 639 (4th Cir. 1983).

that MPPAA arbitration is an appropriate forum for statutory definitional questions.

In addition, the court in *Williamson* seems to have perceived the petitioner as trying to avoid the obligations altogether. Petitioner did not bring this action until the arbitration proceeding was well underway. The arbitration involved many interrelated questions, only one of which involved statutory interpretation. Despite this, petitioners sought to stay the entire arbitration proceeding, rather than seeking a declaratory judgment as to the arbitrator's authority. The court stressed that staying arbitration would violate equitable principles and impede judicial economy.

B. *Constitutional Challenges*

1. *Right to a Jury Trial*

The arbitration provisions of MPPAA have been challenged on seventh amendment grounds in five circuits. In each instance, MPPAA procedural requirements withstood the seventh amendment challenge.

In *Terson Co., Inc. v. Bakery Drivers and Salesmen Local 194,*[59] the Third Circuit held that the seventh amendment right to a jury trial is not violated when a statute establishes a particularized tribunal to perform a specialized adjudicatory function, so long as the statute further provides for judicial review.[60] Under MPPAA, the particularized tribunal is the section 1401 arbitrator. The Second Circuit found that MPPAA provides for full and fair judicial review despite statutorily imposed presumptions favoring arbitral findings. In *Textile Workers Pension Fund v. Standard Dye and Finishing Co.,*[61] the Second Circuit further determined that the elaborate procedures established under MPPAA, including the use of a specialized tribunal, are constitutionally sound even though issues of fact are not decided by a jury.[62]

In *Republic Industries, Inc.,*[63] the Fourth Circuit rejected the same constitutional challenge. Relying upon the 1977 Supreme Court decision of *Atlas Roofing Co. v. O.S.H.A.,*[64] the Fourth Circuit held that in civil actions, the seventh amendment right to a jury trial applies only to common law causes of action between private parties. The court noted that this case involved the interests of a non-private party, the PBGC, which it described as "a public body representing the public interest."[65] The court stated the longstanding rule that "Congress may

59. 739 F.2d 118 (3d Cir. 1984).
60. *Id.* at 121.
61. 725 F.2d 843 (2d Cir. 1984).
62. *Id.* at 854-55. Under the Act, facts are determined by the arbitrator in accordance with the presumptive strictures established in § 1401(a)(3).
63. 718 F.2d 628 (4th Cir. 1983).
64. 430 U.S. 442 (1977).
65. Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension

constitutionally enact a statutory remedy unknown at common law, vesting fact finding in an administrative agency or others without the need for a jury trial."[66]

The Seventh Circuit, in *Peick v. Pensions Benefits Guaranty Corp.*,[67] similarly relied upon *Atlas Roofing Co.* in rejecting a seventh amendment challenge to MPPAA. "Liability under the MPPAA is not a contractually or privately created burden, rather it is imposed by law and its benefits eventually inure to all beneficiaries of multiemployer plans."[68] Therefore, the court found that vesting the function of fact finding in an arbitrator does not violate the seventh amendment.

The D.C. Circuit reached the same result in *Washington Star Co. v. International Typographical Union Negotiated Pension Plan,*[69] citing *Republic Industries, Inc., Textile Workers Pension Fund,* and *Atlas Roofing Co.*

2. *Due Process Challenges*

MPPAA's retroactive arbitration provisions have faced numerous due process challenges. The Supreme Court in *Usery v. Turner Elkhorn Mining Co.*,[70] affirmed that retroactive civil legislation may be legitimately enacted. *Usery* held that the test for determining whether a retroactive civil statute is legitimate is one of rationality.[71] The Court in *Usery,* however, did not articulate any specific test for determining rationality.

The most often used test for determining rationality was first articulated in *Nachman Corp. v. Pension Benefits Guaranty Corp.*:[72]

> Rationality must be determined by a comparison of the problem to be remedied with the nature and the scope of the burden imposed to remedy the problem. In evaluating the nature and scope of the burden, it is appropriate to consider the reliance interests of the parties affected, . . . whether the impairment of the private interest is in an area previously subjected to regulatory control, . . . and the inclusion of statutory provisions designed to limit and moderate the impact of the burden.[73]

Thus, the *Nachman* test involves a balancing of four factors: (1) the reliance interests of the parties; (2) whether the impairment of the private interest is in an area previously subject to regulatory control; (3) the equities of imposing legislative burdens; and (4) the inclusion

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Fund, 718 F.2d 628, 642 (4th Cir. 1983).
66. *Id.*
67. 724 F.2d 1247 (7th Cir. 1983).
68. *Id.* at 1277.
69. 729 F.2d 1502, 1511 (D.C. Cir. 1984).
70. 428 U.S. 1 (1976).
71. *Id.* at 18-19.
72. 592 F.2d 947, 960 (7th Cir. 1979).
73. *Id.*

of statutory provisions designed to limit and moderate the impact of the burdens to determine rationality.[74]

The due process issue under MPPAA is whether or not its retroactive provisions are rational, i.e. constitutional. While several district courts[75] have summarily rejected these challenges, at least four circuits have considered the problem at length.

The D.C. Circuit addressed the problem in *Washington Star Co.*[76] The issue here was whether the retroactive liability provisions of MPPAA were rationally related to the end sought. The employer argued for stringent application of the four-part *Nachman* test to determine "rationality." However, the court instead applied a facial test of rationality, relying primarily upon the Supreme Court's analysis in *Usery.*[77] In *Usery,* as noted earlier, the Supreme Court upheld a retroactive liability provision in a federal coal mining statute, stating that

> the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labors . . . [The retroactive liability provisions] allocate to the mine operator an actual, measurable cost of his business.[78]

The D.C. Circuit held that MPPAA's liability scheme was a rational response to inadequacies in ERISA's multiemployer provisions, thereby upholding the constitutionality of the plan.

> Due process . . . leaves Congress with considerable flexibility in determining how to spread the cost of ensuring the retirement security of participants in multiemployer plans. As the Supreme Court noted in [*Usery*], '[i]t is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.'[79]

The First Circuit initially found MPPAA procedures to be unconstitutional; however, it reversed itself one year later. In *Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund,*[80] the First Circuit struck down section 1401(a)(3), which established the rebuttable presumption that the determination of the plan sponsors was correct. The court struck down this section as a violation of procedural due process. Recognizing that plan trustees owed a fi-

74. As set forth in Textile Workers Pension Fund, 725 F.2d 843, 850 (2d Cir. 1984).

75. *See e.g.,* Dorn's Transportation, Inc. v. I.A.M. National Pension Fund, Benefit Plan A, 578 F. Supp. 1222 (D.D.C. 1984); Shelter Framing Corp. v. Carpenters Pension Trust for Southern California, 543 F. Supp. 1234 (C.D. Cal. 1982).

76. 729 F.2d 1502 (D.C. Cir. 1984).

77. 428 U.S. 1 (1976).

78. Washington Star Co. v. International Typographical Union Negotiating Pension Plan, 729 F.2d 1502, 1509-10 (D.C. Cir. 1984), *citing* Usery, 428 U.S. 1, 17-18 (1976).

79. *Id.* at 1510 (D.C. Cir. 1984).

80. 762 F.2d 1124 (1st Cir. 1984).

duciary duty to the beneficiaries of the fund which might lead them to collect as much as possible from the withdrawing employer,[81] the court further held that the double presumptions established by the Act made these determinations virtually unchallengeable. In light of these two serious handicaps facing withdrawing employers, the court found that procedural due process was violated notwithstanding the fact that Congress could have rationally provided for the use of arbitrators in statutory liability determinations.[82]

On rehearing the First Circuit reversed its original decision.[83] The court found that the judiciary's role was not to decide whether a fairer method could have been established by Congress to determine liability under the Act, but only "whether the method Congress chose is fair enough."[84] While recognizing the hardship inflicted upon withdrawing employers, the court discounted both the trustee bias and presumption arguments.[85]

In addressing the trustee bias, the court rejected the suggestions that the trustee would always choose the highest withdrawal liability without becoming unreasonable or clearly erroneous. Citing a Congressional Report,[86] the First Circuit intimated that plan trustees would not set *excessively* high withdrawal liabilities because they then would not be meeting their fiduciary obligations to the fund.

The court also relied upon the same House Report in examining the validity of the statutory presumptions. "These [presumptions] are necessary in order to ensure the enforcability [sic] of employer liability. In the absence of these presumptions, employers could effectively nullify their obligations by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination."[87] However, establishing these presumptions merely shifts the impossibility of proving the unreasonableness of the actuarial determination from the plan sponsors to the withdrawing employers. The court agreed with

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81. The court likened the trustees' position to that of the town mayor in Ward v. Village of Monroeville, 409 U.S. 57 (1972), in which the Supreme Court found that allowing the mayor to act as an initial judge for certain minor violations, even if the accused had a right to trial *de novo* in a higher court, was unconstitutional because the accused had the right to a "neutral and detached judge in the first instance." 762 F.2d 1124, 1134 (*citing* 409 U.S. 57, 60-62 (1972)).

82. Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1124, 1133-35 (1st Cir. 1984).

83. Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1137 (1st Cir. 1985).

84. *Id.* at 1140.

85. *Id.* at 1140-46.

86. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980), *reprinted* in 1980 U.S. CODE CONG. & AD. NEWS 2918, 2954.

87. Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, 762 F.2d 1137, 1143 (1st Cir. 1985) (quoting H.R. REP. NO. 869, 96th Cong. 2d Sess. 86, *reprinted* in 1980 U.S. CODE CONG. & AD. NEWS 2918, 2954.

Congress that this burden, although too high for pension plan sponsors, is nevertheless acceptable for withdrawing employers.

This reasoning highlights the fact that MPPAA is essentially a punitive act. Congress, recognizing the need to avert financial disaster for PBGC, imposed the burden of maintaining a financially stable fund upon those withdrawing employers who might seek to avoid their responsibilities as contributors to multiemployer pension plans.

In its consideration of the due process issue, the Second Circuit employed the *Nachman* analysis in *Textile Workers Pension Fund v. Standard Dye and Finishing Co.*,[88] though it did so without expressly determining whether *Nachman* or the traditional due process analysis was the correct test. The court tested MPPAA's arbitration provisions against the four factors defined in *Nachman*.[89]

The court was unpersuaded by the employers' contention that imposition of retroactive MPPAA violated the first *Nachman* factor of the parties' reliance interests. Rather, the court noted that ERISA already contained provisions to extend mandatory PBGC coverage to multiemployer plans in 1978. Moreover, at the time the challenging employers withdrew from their plans, MPPAA passage was imminent. By this date the employers had constructive notice of their potential liability. The court, disagreeing with the Ninth Circuit,[90] found that the covered employees' reliance interest would be impaired absent MPPAA liability. Although an individual employer's withdrawal would directly impact only upon the pension fund which it had established, this withdrawal would also force the remaining employers to assume the financial responsibilities of the withdrawn employer. Consequently, these employers would have an incentive to withdraw given their heightened financial burden. Thus, many covered employees may be affected by the withdrawal of one employer. In this manner, the reliance interest of the covered employees would be impaired absent the imposition of withdrawal liability. Thus, according to the court, the employees' interests outweigh those of the withdrawing employer.

The court quickly disposed of the second *Nachman* factor, ruling that since the adoption of ERISA in 1974, the area of pension fund solvency had come under intense congressional scrutiny and had been subject to pervasive regulation. Moreover, the equities weighed heavily

88. 725 F.2d 843, 850 (2d Cir. 1984). *See also* Terson Co., Inc. v. Bakery Drivers and Salesmen Local 194 (3d Cir. 1984).

89. *See* note 74 and accompanying text.

90. *See* Shelter Framing Corp., 705 F.2d 1502 (9th Cir. 1983), *vacated and remanded sub nom.* Carpenters Pension Trust for Southern California v. Shelter Framing Corp., 467 U.S. 1257 (1984), and text *infra*. Shelter Framing Corp. was vacated in light of Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984), which rejected due process challenges against the *retroactive* provisions of the Act. 467 U.S. 717, 728 n.7 (1984).

in favor of the covered employees. Withdrawing employers were merely being required to fulfill obligations they had assumed in the establishment of the pension fund and covered employees were getting the benefits of their bargain. Finally, the court found that MPPAA did contain provisions which ameliorated the burden of imposing withdrawal liability upon employers.[91]

In *Shelter Framing Corp. v. Carpenters Pension Trust,*[92] the Ninth Circuit also applied *Nachman,* but reached a different result. Because the court found that the employees' reliance interest was vested in the solvency of the pension plan, rather than in the actions of the withdrawing employer, it concluded that the first *Nachman* factor weighed in favor of the employer. The Ninth Circuit did not engage in the type of indirect analysis utilized by the Second Circuit in *Textile Workers Pension Fund.* Unlike the Second Circuit, it refused to find that all members of multiemployer pension funds had been put on constructive notice as to potential withdrawal liability because of the imminent coverage by PBGC of those plans in 1978.

However, in *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.,*[93] another panel of the Ninth Circuit upheld section 1401, eschewing *Nachman* in favor of the simple rationality analysis. In applying the simple rationality test, the court relied upon *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,*[94] which reversed, *inter alia, Shelter Framing Corp.* Although *R.A. Gray & Co.* did not address the due process challenges by employers who withdrew after MPPAA's effective date, it did provide a basis for the Ninth Circuit to reject such employer challenges. The respondent in *R.A. Gray & Co.* had argued that MPPAA violated due process by imposing financial obligations which had neither been agreed to nor contemplated by the collective bargaining agreement. Thompson Building Materials' principal claim of unconstitutional contractual infringement was therefore expressly rejected in *R.A. Gray & Co.* Relying upon *Usery,* the court applied a rationality test, which was easily met. Thus, the Supreme Court's analysis of the Act in *R.A. Gray & Co.* coupled with the circuit courts' decisions on the due process issue suggest a futility of future challenges.[95]

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91. Textile Workers Pension Fund v. Standard Dye and Finishing Co., 725 F.2d 843, 851-52 (2d Cir. 1984).

92. 705 F.2d 1502 (9th Cir. 1983), *vacated and remanded sub nom.* Carpenters Pension Trust for Southern California v. Shelter Framing Corp., 467 U.S. 1257.

93. 749 F.2d 1396 (9th Cir. 1984).

94. 467 U.S. 717 (1984).

95. It should be noted, however, that the First Circuit delineated a number of reasonable due process objections to section 1401 in Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry, 762 F.2d 1137 (1984), *rev'd on rehearing,* 762 F.2d 1137 (1st Cir. 1985).

VII. CONCLUSION

Section 1401 arbitration represents an extension of a traditional dispute resolution technique into a non-traditional area. Although MPPAA's use of dispute resolution in determining statutory liability is unique, it has withstood numerous challenges. Needless to say, the success of MPPAA arbitration provides both a foundation and a beacon for the expanded use of dispute resolution in the federal statutory scheme.

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