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THE EFFECT OF THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT'S WITHDRAWAL LIABILITY RULES ON COLLECTIVE BARGAINING RELATIONSHIPS AND PENSION ADMINISTRATION

Carolyn Diane Gentile*

INTRODUCTION

Concern over the financial stability and continued operation of multiemployer pension plans led Congress to enact the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter referred to as MPPAA, or the Act).¹ This legislation amended the Employee Retirement Income Security Act of 1974 (ERISA) insofar as it applied to multiemployer pension plans.² According to Congress, the policy of MPPAA was to "alleviate problems which tend to discourage the maintenance and growth of multiemployer pension plans, to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans."³ In line with these objectives, the Act contains provisions applicable to multiemployer plans in the areas of funding, mergers and transfers, reorganization, plan insurance and guaranteed benefit levels.⁴ However, of all the significant changes initiated by MPPAA, the provisions that have generated greatest concern in the business community are its withdrawal liability rules.⁵ In short, the Act

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3. §3(c), 29 U.S.C. §1001a(c).
4. An in-depth discussion of each provision of MPPAA is beyond the scope of this article. For such a discussion, see Curtis, Multiemployer Plan Amendments Act of 1980: Panacea or Poison, 6 JOURNAL OF PENSION PLANNING AND COMPLIANCE 419 (1980).
requires that employers withdrawing from a multiemployer pension plan continue to fund a portion of the plan's unfunded liabilities.\footnote{6}

Prior to the enactment of MPPAA, an employer who left the industry generally incurred no liability if the withdrawal occurred more than five years before the date of the plan's termination.\footnote{7} If an employer withdrew during this five year period, liability was limited to thirty percent of the employer's net worth.\footnote{8} In effect, the employer liability provisions contained in ERISA tended to encourage withdrawal from multiemployer plans, particularly in declining industries in which the contribution base was shrinking, and the plan's liabilities were high. In addition, the thirty percent liability limit in the case of termination would frequently be far less than the employer's true liability to the plan.\footnote{9}

Because of ERISA's shortcomings, MPPAA amended the statute to provide that a withdrawing employer would be required to continue funding a portion of the plan's unfunded vested benefits in all cases except those falling specifically within the statute's exceptions.\footnote{10} Under MPPAA, both the value of a plan's assets and liabilities play a role in determining a plan's net unfunded vested benefits. A proportionate share of the plan's accrued vested benefits constitutes an individual employer's "withdrawal liability."\footnote{11}

Since the value of a plan's total assets and its total liabilities for benefits are essential components in the determination of an employer's withdrawal liability, more attention has been focused on them. However, the value of a plan's assets and liabilities is influenced by several factors. In many industries, management and union representatives agree during collective bargaining negotiations to a contribution rate rather than to

\footnote{6. §4201(b)(1), 29 U.S.C. §1381(b)(1).}
\footnote{7. §4062(a)(1), 29 U.S.C. §1362(a)(1). Prior to MPPAA, if an employer was determined to be a substantial employer as defined by ERISA, the employer was required to post a bond which would be held by the plan for 5 years. If a termination of the plan would not occur within that 5 year period, the bond would be surrendered to the employer. See, § 4063, 29 U.S.C. § 1363.}
\footnote{8. Id. at (b)(2), 29 U.S.C. §1362(b)(1).}
\footnote{9. See Curtis supra note 4, at 422.}
\footnote{10. See, e.g., §4209, 29 U.S.C. 1389, (Demimis Rule); §4245, 29 U.S.C. 1405, (limitation on withdrawal liability); §4203(b)(1) and (c)(1), 29 U.S.C. 1383(b)(1) and (c)(1) (Special definition of "withdrawal" for employers in the building and construction industry and the entertainment industry).}

\footnote{11. §4201(b)(1), 29 U.S.C. §1381(b)(1). Withdrawal liability applies to both "complete" and "partial" withdrawals. §4203, 29 U.S.C. §1383 provides in pertinent part: ". . . a complete withdrawal occurs when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all operations under the plan." §4203, 29 U.S.C. §1383 states ". . . there is a partial withdrawal by an employer from a plan on the last day of a plan year if for such plan year—(1) there is a 70 percent contribution decline, or (2) there is a partial cessation of the employer's contribution obligation."}
the amount of benefits to be provided to plan participants. The plan trustees, authorized by a trust agreement, set benefit levels based on the contribution rate negotiated. Therefore, the value of a plan's unfunded vested benefits is determined by the benefit levels that have been set by the trustees, and any decisions they may make with respect to a benefit increase can increase the value of those unfunded vested benefits.

On the other hand, the value of a plan's assets are more susceptible to outside influences, including fluctuations in the marketplace. The trustees' ability to invest in high quality securities and other investment media, as well as to obtain a high return on those investments, plays an important role in determining the ultimate value of plan assets.

Because of these relationships, MPPAA's creation of withdrawal liability has resulted in a significant rise in employer inquiries about the financial condition of multiemployer benefit plans. Employers have recognized that a limitation on the plan's unfunded liabilities, and as a consequence on employer's withdrawal liability, may be achieved through tighter controls over a plan's benefit and/or asset levels. Therefore, one can anticipate that employers will seek to obtain more input into both the setting of benefit levels, whether during the term of the collective agreement or at contract negotiations, and also into the investment decisions of plan Trustees.

This paper will examine MPPAA, specifically its withdrawal liability provisions and its impact on existing institutions, with emphasis on pension plan administration and collective bargaining relationships. While the Act is relatively young, and its full impact is yet to be determined, there are strong indications that the withdrawal liability rules have caused many employers to be seriously concerned about the financial burdens that may have to be borne by them if they continue their participation in multiemployer plans. Companies, thus, are seeking a more active role in determining issues which traditionally had been considered trust administration issues, and they have voiced their demands for more active involvement in the plans at the collective bargaining table, as well as during the term of the labor agreement.

**Role of the Trustees**

Section 302(c)(5) of the Labor Management-Relations Act of 1947 permits employers and unions to create employer-financed trust funds in order to ensure the financial stability of pension plans. The trustees of these funds are responsible for managing the assets and paying benefits to plan participants. The trustees must act in the best interests of the plan participants and ensure that the plan is solvent.

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12. Outside influence effecting the level of plan assets include: inflation, recession, stock market and interest rate fluctuations.

13. But see PENSION REP. (BNA) (hereinafter referred to as BPR) No. 416 at 1472 (Oct. 25, 1982), wherein it is stated that benefits of the Act include "...development of improved data on the part of many plans, tightened plan documentation and administration, strengthened contribution, collection, and policing activities, and improved funding schedules."

funds for the benefit of employees. The statute requires that such trust funds be jointly administered with equal trustee representation on behalf of the employees and the employers. In addition, the assets of the funds are to be administered "for the sole and exclusive benefit of the employees . . . and their families and dependents . . . ." This same concept was included in the fiduciary standards set forth in ERISA. There, a fiduciary must "discharge his duty . . . solely in the interest of the participants and beneficiaries" of the plan, and for the exclusive purpose of providing benefits to plan participants and defraying reasonable administrative costs.

The LMRA's requirements of joint administration raised unavoidable questions as to the duties and responsibilities owed by the trustees to the parties appointing them. The Supreme Court, in 1981, addressed those issues in *NLRB v. Amax Coal Co.*

A dispute between Amax and the United Mine Workers arose because the Company, which employed UMW members in its Wyoming coal mine, refused to join a multiemployer bargaining unit. When the mine opened in 1972, the Company signed an agreement with the union which mirrored the national contract and provided for contributions to the national trust funds. The Company did not participate in the selection of the national funds' Trustees. Upon expiration of the contract in 1975, Amax refused to join a new multiemployer bargaining unit and, instead, proposed to establish its own pension and welfare benefit plans. The UMW claimed that Amax should continue to contribute to the national trust funds for the benefit of its Wyoming mine employees. As a result of this dispute, the UMW struck Amax's Wyoming mine.

The Company argued that the employer Trustees on the national trust fund board were employer representatives, and as such, the union violated §8(b)(1)(B) of the National Labor Relations Act by coercing the Company to bargain through collective bargaining representatives it did not select. The NLRB held that the union had acted lawfully by striking to force the Company to participate in the plan, and stated that "while the trustee of a joint trust fund, though he may appropriately consider the recommendations of the party who appoints him, is a

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15. 29 U.S.C. §186(c)(5).
20. 29 U.S.C. §158(b)(1)(B) (1976). This section provides in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce . . . (B) an employer in the selection of his representative for purposes of collective bargaining or the adjustment of grievances."
The Court of Appeals for the Third Circuit reversed the Board’s ruling and concluded that the union violated §8(b)(1)(B). The Court held that management Trustees are not only fiduciaries of the employee beneficiaries, but also agents of the appointing employers. The Trustees, “insofar as is consistent with their fiduciary obligations, are expected to administer the trusts in such a way as to advance the employer’s interests.”

The Supreme Court reversed the Third Circuit, and determined that the national’s management Trustees were not collective bargaining representatives of the employers who appointed them. In reaching its conclusion, the Court reviewed §302(c)(5) of the LMRA and §404 of ERISA and stated that “the statutes defining the duties of a management-appointed Trustee make it virtually self-evident that welfare fund Trustees are not representatives for the purposes of collective bargaining or the adjustment of grievances within the meaning of §8(b)(1)(B).”

The Court noted that “the duty of the management-appointed trustee of an employee benefit fund under §302(c)(5) is directly antithetical to that of an agent of the appointing party.” And, “the fiduciary requirements of ERISA specifically insulate the trust from the employer’s interest.” Thus, under the law as defined by Amax Coal, plan trustees do not function as representatives of the party appointing them, but rather as fiduciaries with respect to the plan. Their loyalties must be directed solely towards the plan’s participants and beneficiaries, and the decision-making process should be free from the influence of the collective bargaining process. However, since the withdrawal liability provisions of MPPAA tie most benefit increases to additional liabilities for employers participating in a multiemployer plan, the question arises whether Amax precludes an employer trustee from considering an increase in withdrawal liability when setting benefit levels.

Congress did not perceive this potential for divided loyalties as a serious problem. In fact, ERISA specifically permits individuals to serve as §302 trustees “in addition to being an officer, employee, agent or other representative” of a union or an employer organization.

21. 453 U.S. at 327, 328.
22. Id. at 328.
23. Id. at 334.
24. Id. at 331, 332.
25. Id. at 333.
Since the enactment of MPPAA, however, disputes between trustees have become more common as employer-selected trustees oppose benefit increases in an effort to limit the plan's unfunded vested benefits and, consequently, potential employer withdrawal liabilities. Because plan trustees can create additional liabilities, contributing employers expressed concern prior to the passage of the Act that it would foster the agency-type relationship subsequently denounced by the Court in \textit{Amax Coal}. \footnote{See, e.g., ABA—Conference Report, Pension Plan Termination Insurance—Quo Vadis? (September 19–21, 1979) discussing Sheet Metal Workers International and Edward J. Carlough (Central Florida Sheetmetal Contractors Association, Inc.) 234 NLRB No. 162.} These conflicts caused deadlocks between employer and union trustees over proposed benefit levels. \footnote{Pursuant to the LMRA §302(c)(5), 29 U.S.C. §186(c)(5), such deadlocks among plan trustees must be settled through arbitration by a neutral umpire.}

Such a deadlock prompted arbitration in the matter of \textit{Bay Area Painters Pension Trust Fund} \footnote{2 Employee Benefit Cases (BNA) (hereinafter referred to as EBC), No. 2 at 1724 (1981).} when a pension benefit increase was opposed by the management Trustees on the basis that it would create an additional $625,000 in unfunded vested liabilities. The management Trustees argued that the proposal would render the pension plan less sound and create additional liabilities on employers which were not agreed to, citing the withdrawal liability provisions of MPPAA. \footnote{See BPR No. 353, at A-12, (Aug. 3, 1981).} On the contrary, the union Trustees asserted that the increase would be prudent; consistent with the Trustees' duty to act in the sole interest of the plan participants and beneficiaries, and would not put the trust in any danger of insolvency.

In ruling in favor of the union Trustees, the arbitrator stated: "The purpose of the pension trust is to provide as much benefit to the participants as is possible with the contributions and assets available." \footnote{2 EBC at 1734.} The decision rejected the claim that the benefit increase would render the plan less sound: "It is not the function of the Trust to achieve the maximum soundness possible, but instead, it is the function of the Trust to pay the greatest amounts of benefits possible within the framework of reasonable soundness." \footnote{Id.} The arbitrator noted that withdrawal liability had no place in a funding policy discussion insofar as it limited the employer from "going non-union or from selling his business for as much as he feels it is worth . . . ." \footnote{Id.}

However, the terms of the decision do not bar Trustees from consideration of withdrawal liability. "If in the opinion of the trustees or..."
their advisors, the withdrawal liability of employers has some impact on the ability of the Trust to meet its obligations to the participants and the beneficiaries, then withdrawal liability ought to be considered.” The decision concludes by suggesting that the question of withdrawal liability is a matter for negotiation. “If the employers want control over the creation of unfunded vested liability, then they must exercise this desire at the collective bargaining table.”

Since the management Trustees’ in Bay Area Painters attempted to “represent” their appointing employers when setting benefit levels, the arbitrator followed the Supreme Court’s ruling in Amax Coal by emphasizing that plan trustees must conduct their activities for the benefit of plan participants and not as representatives of their appointing employers. According to the arbitrator, if the employer wishes to control the creation of unfunded liabilities, it must be done at the bargaining table rather than during the term of the agreement.

The combination of MPPAA and Amax Coal have caused some to suggest that employer trustees will follow the same strategy as that advanced in the Bay Area case. Subsequent events lend support to that conclusion. For example, in Borden Inc. v. United Dairy Workers Pension Program Borden sought to enjoin the Pension Fund Committee from increasing benefits and, consequently, the unfunded liability of the plan. The terms of the collective bargaining agreement, established prior to the enactment of MPPAA, required a certain contribution rate from signatory employers. The employer argued that MPPAA altered its obligation under the collective bargaining agreement and a benefits improvement would result in “substantial unbargained for liability on its part.” In effect, the employer sought to enjoin the benefit increase until it had the opportunity to bargain with the union over the increase.

The court ruled in favor of the employer, and held that MPPAA imposed unbargained for liability on the employer which was not contemplated by the parties during negotiations. Accordingly, the court stated that the fully funded status of the plan should not be altered: “Having achieved this position the court believes it should be impermissible for the committee to ‘regress’ the status of the fund when to do so would impose unbargained for liability on the employer-plaintiff.” The court noted that it was not enjoining the proposed increase because it would result in an increase in the plan’s unfunded status. Rather, the

34. Id.
35. Id. at 1735.
38. Id. at 1166, 2 EBC at 1628.
decision "simply stands for the proposition that such a change in status should be effected only after the employer has agreed to it, in light of the September 1980 ERISA amendments."39

The Borden case did not involve a trustee deadlock; instead, the employer protested an existing benefit increase, and the court permitted the employer to exercise direct control over the plan's unfunded liability absent further negotiations. In effect, the court refused to uphold the Trustees' authority to set benefit levels. More importantly, Borden provides evidence that courts may favor the collective bargaining forum in order to address the question of whether plan trustees can increase benefits and, thus, the employer's potential withdrawal liability, post-MPPAA.

Returning to the arbitral forum, a recent arbitration award considered the impact a benefit increase would have on an employer's withdrawal liability. In North Texas Carpenters Pension Plan,40 the arbitrator rejected the union Trustees' proposal which would have resulted in a $5.3 million increase in the plan's unfunded vested liability. The award cited several factors, including the impact of the size of the increase in unfunded past service liability, the effect the increases would have on employer withdrawal liability . . . the Borden decision, and the phrase in the Bay Area case that reads . . . 'review the impact of the proposal and decide whether it hurts the trust more than it helps the beneficiaries.'41

A similar result was reached in Brick Masons' Pension Trust Fund,42 but in this case the dispute between the union and management Trustees arose over which benefit increase proposal to implement. The union asserted that the employer's approach "would limit participation in the benefits to future-Future service beneficiaries only" while their plan "would permit all participants to participate in improved benefits."43 Further, the union argued that the employer's concern over unfunded liabilities should not enter into a benefit decision. Citing Amax Coal and Bay Area Painters, the union claimed that the Trustees are to act "with no allegiance to any body, but to what they perceive as the best interests of their particular Fund's beneficiaries."44 The employer pointed to the sharp drop in employment in the industry as well as MPPAA's withdrawal liability provisions.45

39. Id. at 1167, 2 EBC at 1629.
40. 2 EBC 2313 (1981).
41. Id. at 2321, 2322. See also BPR No. 376, at 80 (January 18, 1982).
42. 3 EBC 1345 (1982).
43. Id. at 1347.
44. Id. at 1348.
45. Id. at 1348, 1349.
The arbitrator ruled in favor of the proposal preferred by the management Trustees. In regard to the employer's concern over unfunded liabilities, he stated: "... unfunded vested liability is and must [original emphasis] be a part of the considerations by any Trustee member of a Fund. The reasonableness with which the members act is reflected in part by the prudence of their decision." The arbitrator distinguished the Bay Area decision, insofar as the arbitrator in that case was not presented with benefit improvement options or a depressed industry. He rejected the union's reliance on Amax Coal, declaring that Trustee independence does not include a disregard of economic and industrial conditions.

The Brick Masons' case presents a situation in which the employer trustees' consideration of withdrawal liability is consistent with their fiduciary obligations. Their concern about the impact of the benefit increase on unfunded liabilities was not indicative of an attempt to protect the interests of the companies that appointed them. Instead, the decision supports the view that the effects of a benefit increase on the plan's liabilities must be the subject of inquiry. The financial condition of the fund, together with the economic conditions of the industry in question, can make an increase in accrued vested benefit liability a legitimate trustee concern. Although the employer trustees' decisions concerning benefit levels may be motivated by MPPAA's imposition of financial burdens on employers, their actions may not necessarily be contrary to the Amax Coal decision.

In that context, it must be emphasized that the issue in Amax Coal was "whether the employer-selected trustees of a trust fund created under §302(c)(5) are 'representatives' of the employer 'for the purposes of collective bargaining or the adjustment of grievances' within the meaning of §8(b)(1)(B)." While the court used strong language to emphasize that trustees are not representatives of their appointing parties, it was not presented with the question of whether the employer-selected Trustees' objection to benefit increases because of their impact on employer withdrawal liability is a violation of their fiduciary duties. According to the results in the above cited court and arbitration awards, trustee inquiries into any projected increase in a plan's unfunded liabilities when setting benefits is not a breach of their fiduciary duties. It may well be a breach.

46. Id. at 1350.
47. Id. "The court's emphasis in Amax is not, in my opinion, contraindicative to the honest, open, reasonable, and prudent position taken by those on this Fund Board who supported Plan A."
48. 453 U.S. at 325.
49. See Peick v. Pension Benefit Guaranty Corporation, 539 F. Supp. 1025 (N.D. Ill., 1982), 3 EBC 1377. In this case MPPAA withstanded a constitutional challenge. On the issue of
of fiduciary duty to ignore the impact of such changes. However, when the sole consideration in making a decision on benefit changes is its effect on withdrawal liability, then a determination of the trustees' compliance with their fiduciary duties is more problematic. Nevertheless, mere opposition to a benefit increase alone does not establish that an employer-trustee is acting as a management representative in disregard of his fiduciary obligations.

While courts and arbitrators have, at times, looked favorably upon the employer trustees' concern about withdrawal liability, it is clear that this sensitivity became particularly acute after the enactment of MPPAA. Whatever the justification proffered for setting limits on what historically would have been routine benefit increases, the conclusion is inescapable that MPPAA is greatly effecting the collective bargaining process. Since employee pension benefits arose from collective bargaining, the trustees cannot, regardless of legal principles, be totally insulated from the collective bargaining process. Employer-selected trustees, to some extent necessarily, must guard the employers' financial interests. The real issue is one of degree.

This reality of labor-management relations appears to comport with Justice Stevens' statement in his Amax Coal dissent:

The Trustees of employee benefit funds often exercise broad discretion on policy matters with respect to which management and labor representatives may reasonably have different views . . . Nothing in the statutes or the legislative history suggests that difference along labor-management lines are in any way inconsistent with the Trustees' fiduciary duties to trust beneficiaries.50

Investment Decisions

As the foregoing discussion has demonstrated, MPPAA has heightened management's interest and involvement in the setting of benefit levels. Further, the Act has caused employers to inquire into the investment performance of the plan. Because the level of plan assets affects the unfunded vested benefits of the plan, and hence withdrawal liability, employers may attempt to monitor more closely the trustees' ability to obtain high quality investments as well as to secure a high return on those investments.

Management's desire to scrutinize more carefully the plan's investment performance may create a further conflict between union and

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50. 453 U.S. at 344.
employer trustees as well as among the bargaining parties. For example, union representatives may advocate social investments and the utilization of plan assets to protect the job security of participants. Employers, in order to limit their potential withdrawal liability, will be more concerned with obtaining the maximum rate of return available on the plan's investments.

The investment goals of both union and management representatives however, are limited and ultimately defined in ERISA's fiduciary requirements which impose a duty upon trustees to preserve and to augment plan assets through sound investments for the sole and exclusive benefit of the participants. 51

The prudence rule contained in §404(a)(1)(B) of ERISA requires that fiduciaries act "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." 52 Diversification of plan investments also is mandated unless clearly it is not prudent to do so. 53

Since the statutory standards were general in their terms, and clarification was thought to be desirable, the Department of Labor issued regulations which attempt to further define and clarify the "prudence standard." The regulation states that the prudence standard is met if the fiduciary gives "appropriate consideration of those facts and circumstances, that, given the scope of such fiduciaries' investment duties," he knows or should know are relevant, including the role that such investment or investment course of action plays in the portfolio over which the fiduciary has investment duties. 54

Although an increasing number of cases have been initiated which pose the issue of whether the fiduciaries of multiemployer plans acted in accordance with ERISA's prudence standard, MPPAA's impact on the decisions of plan fiduciaries remains an open question. Nevertheless, recent case law provides some guidance concerning the meaning of ERISA's requirements, and is useful in an analysis of the present limits on trustee investment decisions.

In Donovan v. Mazzola, 55 the Trustees of a Pension Trust Fund were found to have breached their fiduciary duties by making an additional $1.5 million loan to the local union's convalescent fund and

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52. Id. §1104(a)(1)(B).
53. Id. §1104(a)(1)(C).
55. 2 EBC 2115 (1981).
by extending credit to the fund without taking appropriate steps to protect the pension plan. Even though there was a substantial risk of default, the loan was made at below prevailing interest rates for comparable mortgages at that time.

The Trustees also were found to have acted imprudently in approving a $650,000 loan to a limited partnership because they did not attempt to obtain necessary and relevant information concerning the loan. Finally, the Trustees were found to have violated ERISA’s diversity requirement because there was too much concentration on mortgages in one area. The court, accordingly, ordered the appointment of an investment manager, the repayment by the Trustees of $369,500 and the posting of a $1 million bond as security for any contingent claims that may arise.56

In a similar matter, the Department of Labor, in Marshall v. Glazier’s Pension Plan,57 sought a preliminary injunction barring the Trustees of a pension plan from committing 23% of its assets for a loan to a land development project. The loan, for eighteen months, was to pay 25% interest. When the court granted the injunction, it found that the loan violated ERISA’s diversification requirements. “Both on its face and according to the standards of experienced lenders, a commitment of 23% of the Glazier’s Pension Plan’s total assets to a single loan subjects a disproportionate amount of the trust assets to the risk of a large loss.”58 The court held that the Trustees had violated the “prudence standard” by failing “to follow the procedures which a prudent lender would utilize” and not perceiving “the dangers to which they were exposing the Plan.”59

The preceding decisions, albeit only those of federal district courts, illustrate that ERISA’s fiduciary standards are being strictly construed. While the effect MPPAA will have on trustees’ investment strategy is yet to be determined, it is clear that trustee investment decisions must conform to ERISA’s fiduciary standards. To date, both the Department of Labor and the courts have narrowly construed ERISA’s §404, thus limiting the trustees to those investments which provide the maximum rate of economic return regardless of other considerations, such as social utility or the creation of employment. Given the positions taken in applying ERISA, increased employer scrutiny of investment performance brought about by MPPAA will add further impetus to an already growing reluctance of trustees to invest in anything other than tradi-

56. Id. at 2133-37.
58. Id. at 384, 2 EBC at 1011.
59. Id. at 384, 2 EBC at 1012.
tional, conservative investment media. It is possible that where the trustees’ performance, although prudent, fails to satisfy the employers, demands will be made that investment policy be decided at the collective bargaining table.

**Collective Bargaining Negotiations**

**Benefit Levels**

The frequent occurrences of trustee deadlocks over the question of benefit increases exemplifies one of MPPAA’s effects. Not surprisingly, arbitrators and judges favor the collective bargaining process as the best method for settling disagreements regarding appropriate levels of benefit and plan liabilities. If the parties choose to control the amount of unfunded liabilities during negotiations, the problem of Trustee deadlocks probably will diminish.

At a subsequent round of collective bargaining, employers can insist that restrictions upon trustee behavior be written into the actual contract and declaration of trust establishing their plan. They can bargain for language forbidding future benefit improvements which increase the plan’s unfunded vested liability by more than a set amount or percentage.60

Resolution of such problems through collective bargaining is a keystone of American labor law. Section 1 of the NLRA states that the policy of the United States is to be carried out by “encouraging the practice and procedure of collective bargaining . . .”61 Historically, the ability of the collective bargaining process to adapt to resolving problems in the work place, as well as to varying economic conditions, is a major reason for the continued viability of labor-management relations. MPPAA, however, is changing collective bargaining negotiations on a number of fronts. The Act’s withdrawal liability provisions seem to be transferring many of the decisions presently made by plan trustees to the collective bargaining parties. However, the sheer complexity of benefit issues may create an unworkable situation during negotiations.62

Initially, such a radical change in the issues to be determined during collective bargaining will create a need for substantially more disclosure of financial information prior to and during the bargaining process. The practical difficulties in the communication of complex data relating to benefit costs, unfunded liability, actuarial assumptions, etc., from the

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62. See Vesely, Boisseau, and Curtis, supra note 32 at 363.
trustees to the bargaining parties are staggering, and dealing with these matters may prove burdensome for negotiators. In fact, union and management representatives may be forced to rearrange priorities regarding subjects of bargaining, and certainly the process will be more protracted. If the parties do manage to settle all benefit issues during negotiations, they may find that they have taken on the status of fiduciaries because their decisions with respect to benefit levels will directly affect plan participants and the assets of the fund. In the alternative, considering the inconvenience and difficulties of coping with these issues during negotiations, the employer simply may refuse to provide any new money until the plan's unfunded liabilities are eliminated.

Indeed, the response to recent benefit proposals have reflected the employer's desire to maintain only existing benefit levels in order to prevent the creation of further unfunded liabilities. For example, the association representing California Grocers has asserted that monies should not be allocated to improving pension benefits before unfunded vested liabilities are substantially eliminated.63 This potential effect of MPPAA was anticipated by Congress. During the Senate debate over the enactment of MPPAA, it was suggested that the "imposition of withdrawal liability will, of itself, cause employers to demand that benefit levels be a subject of bargaining."64

Further impetus for increased party involvement in determining benefits is found in United Mine Workers v. Robinson.65 In Robinson, the parties had set the level of benefits paid by an employee benefit fund in the collective bargaining agreement. The issue faced by the Court was the legality under section 302(c)(5) of allegedly unreasonable discrimination between two classes of widow-beneficiaries by a multiemployer benefit fund established by the United Mine Workers of America and the National Coal Miners Operators Association. Based on trustee resolutions, a widow of a retired miner who was receiving a pension at the time of his death, was entitled to a death benefit of $2,000 payable over a two year period. On the other hand, a widow of a miner who was eligible for a pension, but was still working at the time of his death, was entitled to a $5,000 death benefit over a five year period. A second resolution provided for health care coverage for such widows for the same time periods.

In 1974, the UMW and the Operators agreed to restructure the benefit program to provide that the level of benefits, the eligibility...
requirements, and the rate of contributions would be established at the
collective bargaining table. The parties also agreed to replace the original
1950 fund with the “1955 Benefit Trust” and the “1974 Benefit Trust,”
both of which provided for health and death benefits.

During the 1974 negotiations, the union demanded that widows
receiving health benefits for two or five years under the old plan receive
lifetime health coverage. The Operators agreed to this demand, insofar
as it related to widows of miners whose death occurred after the contract
became effective, but they objected to the increase in benefits for widows
whose miner husbands had already died. The final agreement included a
provision of health care coverage for widows of miners whose death
predated the contract, with the exception of those widows of miners who
had been working at the time of their death, but who were eligible for
pensions. Those widows who were denied lifetime health coverage under
the 1974 arrangement sued and claimed that the decision excluding them
was arbitrary and capricious in that it had no rational relationship to the
purposes of the trust. Thus, it was alleged that a violation of §302 of the
LMRA had been committed.

The District Court rejected the widows’ claims and held that the
“trustees are bound to adhere to the terms of the agreement.”66 The
Court of Appeals reversed and held that the “requirement in §302(c)(5)
... means that eligibility rules fixed by a collective bargaining agree-
ment must meet a reasonableness test.”67 The court was unable to find a
satisfactory explanation for the different treatment of widows. The
Supreme Court reversed the Court of Appeals and held that §302(c)(5)
does not authorize the federal courts to review the reasonableness of
collective bargaining provisions. It stated that the plain meaning of §302
“is simply that employer contributions to employee benefit trust funds
must accrue to the benefit of employees and their families and depend-
ents, to the exclusion of all others.”68 There is nothing in the statute
that imposes “any restriction on the allocation of the funds among the
persons protected by §302(c)(5).”69

Unlike other cases challenging the actions of trustees, Robinson did
not present a situation in which the courts had the authority to review
trustees’ compliance with their fiduciary duties and to correct any
arbitrary and capricious actions. The Court emphasized that trustees were not
given full authority to determine eligibility requirements. Rather, the trust agreement was amended to give the collective bargain-

66. Id. at 569.
67. Id. at 570.
68. Id.
69. Id. at 572.
The Court concluded that "[a]bsent conflict with federal law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective bargaining agreement." 70

Given that because of MPPAA, management is seeking control of benefit levels through negotiations, Robinson provides an additional impetus to that principle; i.e., the federal courts cannot review the bargaining parties' determination of benefits under §302.

Even if the parties do not wish to become involved in fixing benefit levels, employers may resist union attempts to raise contribution rates, recognizing that the next step may result in a proposal to raise benefits, and thus increase unfunded liabilities. If the parties do fix benefits at the bargaining table, unions may find that concessions must be made in other areas in order to improve benefit levels. It is likely that these differences over benefit levels will lead to heightened tension in the collective bargaining arena. The conflict which resulted in trustee deadlock now may produce a bargaining stalemate, and unions may be forced to use economic weapons to force management to concede to a benefit increase. In Robinson, management acceded to the final benefit package partially in response to a strike by the UMW. The Supreme Court recognized in Amax that economic weapons frequently come into play when parties disagree. In fact, the court distinguished between trustees and bargaining representatives by noting that strikes and other economic weapons are appropriate in the collective bargaining arena, while settlement through arbitration applies to pension administration. 71

However, the agreement of the bargaining parties may not, of itself, be dispositive of the issue. Subsequent to the Robinson decision, the Court of Appeals for the Fourth Circuit held that trustees of a multiemployer welfare benefit fund were not bound by a collective bargaining provision which fixed benefit levels. 72 In Sinai Hospital, five hospitals which participated in a multiemployer fund sought to enjoin the trustee from increasing benefits. The trust agreement authorized the trustees to determine eligibility standards as well as benefit levels for the fund's participants. During negotiations for their 1980-1982 contract, the hospitals and the union agreed to a reduction in the percentage contribution to the fund and to a maintenance of current benefit levels. The contract was the first in which the union and the hospitals had agreed to a specific level of benefits.

70. Id. at 574.

71. 453 U.S. 336, 337; see also Botto v. Friedberg, 3 EBC 2534 n.16 (E.D. N.Y. 1982).

72. Sinai Hospital v. Hospital Employees Benefit Fund, 697 F.2d 562 (4th Cir. 1982), 3 EBC 2417.
In February, 1981, the fund notified the hospitals that it would not comply with the collective bargaining provisions which set benefit levels. The fund asserted its authority to fix benefits by the terms of the trust agreement and as a matter of law. Accordingly, when the trustees implemented a benefit increase, the hospitals filed their complaint and application for a temporary injunction in the federal district court arguing that the trustees’ action breached the hospitals’ collective bargaining contracts with the unions. Specifically, the hospitals claimed that the benefit increase violated provisions of the LMRA, by permitting an outside party to alter the collective bargaining agreements and allowing the union to receive more than that which was contained in the contract.

The hospitals relied on the Supreme Court’s decision in Robinson for the proposition that the parties may control the level of benefits paid from a trust fund. The District Court ruled against the hospitals and concluded “that the trustees and the fund were governed by the provisions of the trust agreement and could not be bound by contrary provisions of the subsequent collective bargaining contracts between the hospitals and the union.”

The Court of Appeals affirmed the District Court’s decision. The court distinguished Robinson on the basis that the trust agreement in that case had been amended. “The union and the employers in Robinson in 1974 dismantled the pre–1974 trust funds which had left the benefit levels to the trustees’ discretion, and created new trusts by whose terms any change in benefit levels required the approval of the employers and the union.” Under the Sinai facts, the court found that the trustees’ obligations to the fund’s beneficiaries were based on the terms of the trust agreement and “it is clear . . . that the trustees’ May, 1981 action raising benefit levels was consistent with their obligation.”

Sinai Hospital, therefore, illustrates the importance of recognizing the interaction between the trust agreement and the collective bargaining contract, and the obligation created by each of these documents. Clearly, the Sinai Hospital decision stands for the proposition that in order to transfer the trustees’ authority over benefit levels to the negotiators, the trust agreement must be amended. If parties to a collective bargaining agreement wish to take over functions that were traditionally performed by plan trustees, they must make this desire evident in the plan’s document. Significantly, however, the court in Botto v. Friedberg was able

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73.  Id. at 564, 3 EBC at 2420.
74.  697 F.2d 563, 564, 3 EBC 2419, 2420.
75.  Id. at 568, 3 EBC at 2423.
76.  Id.
77.  3 EBC 2529.
to utilize the plan documents to reach a result that is contrary to that of Sinai Hospital.

In Botto, the Trustees of Plumbers Local No. 457 Pension Trust Fund deadlocked on the issue of a proposed 17% benefit increase. The Trust Agreement provided for the appointment of an impartial umpire if the Trustees failed to agree on "a matter relating to the administration of the Pension Trust Fund," and it gave the Trustees authority over the "determination of benefits and the administration of the program."78 The employer Trustees requested summary judgment claiming that the proposed increase was not a matter of plan administration subject to arbitration, nor was it a proper question for decision by the Trustees pursuant to ERISA's fiduciary provisions. Based upon the language of the Trust Agreement ("determination of benefits and the administration of the program"),79 the court stated that the "... employer trustees and the union trustees intended that the determination of benefits be clearly separate from, and subject to different treatment than, the day to day management of the Fund."80 Therefore, arbitration over the proposed increase was improper.

In order to answer the employer Trustees' second argument, the court reviewed Amax Coal and emphasized the principle that "decisions to be made in the collective bargaining arena cannot be made by Pension Fund Trustees."81 The court stated that it was inappropriate for the Trustees to consider an increase without a collective bargaining agreement on the subject: "... consideration by the trustees of increased benefits, in the absence of a collective bargaining agreement between the employer association and the union, placed the employer trustees in the position of dual loyalty prohibited by the Supreme Court in Amax."82 Consequently, the issue of increased benefits was not a matter for the Trustees, but rather a subject for the collective bargaining process.83

Choice of Withdrawal Formula

Although the Act provides that the trustees must choose either one of four statutory withdrawal formulas or submit an alternative to the

78. Id. at 2531.
79. Id.
80. Id. at 2532.
81. Id. at 2534, citing Amax Coal, 453 U.S. 334.
82. Id.
83. The extent to which MPPAA has changed the dynamics of negotiations with respect to benefit issues cannot yet be ascertained. However, it is clear that its effect on negotiations has been the subject of considerable discussion and concern. The Act itself mandates the Secretary of Labor to "... study the feasibility of requiring collective bargaining on both the issues of contributions to, and benefits from multiemployer plans." §412(b)(1).
Pension Benefit Guaranty Corporation for approval, the trustees' decision also may become a subject of collective bargaining because it will have a substantial impact on the employer contributors to the pension plan. For example, unless the trustees elect otherwise, the statutory "Presumptive Method" will apply. Under that formula, employers are divided into two groups. The first group consists of those employers who contributed to the pension plan for the plan year ending prior to April 29, 1980, and the second group is composed of those employers who did not contribute to the plan during that time period. The withdrawal liability of employers in the first category is based upon the unfunded vested benefits of the plan for the plan year ending prior to April 29, 1980, as well as those changes in the plan's unfunded vested benefits for each year ending on or after April 29, 1980. The withdrawal liability of the second group of employers is calculated only with respect to the changes that occur in the plan's unfunded vested benefits for those years ending on or after April 29, 1980.

The first alternative method is a modified version of the presumptive method described above, and its principal differences are the combining of the changes in the plan's unfunded vested benefit liabilities for years after April 29, 1980 and the use of a straight 15 year amortization schedule for the plan's liabilities for unfunded vested benefits for the years ending prior to April 29, 1980. The presumptive method assumes a 5% amortization rate. Like the presumptive method, however, the employers who contributed to the plan for years ending prior to April 29, 1980 would be the only employers who have a share of the plan's unfunded vested benefits for those prior years. Each of these two methods favors new employers at the expense of older contributors because new companies will not have to bear any share of the plan's unfunded vested benefits existing for plan years prior to April 29, 1980. Consequently, their portion of the plan's liabilities is far less than for employers who contributed to the plan prior to April 29, 1980.

The second alternative method called the "Rolling Five Method" makes no distinctions among employers. The calculation of an employer's withdrawal liability is based solely upon the employer's share of the total unfunded vested benefits of the plan as of the date that the employer withdraws. Since all employers are treated equally, this second
alternative method would favor older contributing employers because newer companies would have to pay a proportionate share of the fund’s liabilities for unfunded vested benefits regardless of the date they occurred.

The third alternative method, which is probably the most equitable, is called the “Direct Attribution Method.” Pursuant to this formula, the unfunded vested benefits of the plan that are directly attributable to the employer’s employees are charged to that employer, and, similarly, the employer receives credit for all of its contributions. As a result, the plan must maintain separate records showing credits and liabilities for each employer who contributes to the plan.

The foregoing summary of the alternatives provided by the statute demonstrates that the choice of a method for the calculation of withdrawal liability must have an economic impact not only upon withdrawing employers, but also upon those who remain with the plan. It is an employer in this latter group who may be required to note its potential liability to the pension plan on its balance sheets. If this figure equals or exceeds the company’s net worth, there must, for example, be negative effects on its borrowing capacity.

The plan’s trustees, who must determine the choice of formula, usually represent the larger companies which have participated in the plan for many years. Predictably, such trustees will prefer those methods of calculation that will favor their particular employer’s interest. On the other hand, union trustees would favor a formula that would permit it to attract new contributors—broadening the base of the pension plan. Because of the divergent points of view between union and employer trustee groups occasioned by the necessity to choose a withdrawal liability formula, deadlocks also may arise on this issue. Should such conflicts be incapable of resolution by the trustees, the choice of a withdrawal formula possibly may be another subject that is referred to the parties to be settled during collective bargaining. Thus, further burdens are added to the process.

**Proposals For Defined Contribution Plans**

Employers who realize that MPPAA’s constraints are applicable only to defined benefit plans may attempt to limit their potential withdrawal liability by bargaining for the formation of defined contribution plans. Multiemployer plans are typically defined benefit plans which provide participants with ascertainable pre-established benefits. These

89. ERISA §3(35), 29 U.S.C. §1002(35).
plans are normally funded by contributions made on a negotiated rate basis. Under a defined benefit plan, even though the contribution rate is set by contract, the plan has promised the participants something in excess of the specific contribution rate. Under a defined contribution plan, however, the ultimate benefit is based entirely upon the actual contributions contained in an individual employee’s account. Therefore, no unfunded vested benefits are created. Accordingly, if an employer contributes to a defined contribution plan, it avoids any obligations other than those set forth in its collective bargaining agreement.

It has been suggested that the withdrawal liability provisions of MPPAA “could easily result in the ultimate demise of multiemployer defined benefit plans.” However, the substitution of defined contribution plans for defined benefit plans is not free of difficulty. A change from a defined benefit plan to a defined contribution plan will not automatically eliminate the pre-existing liability for unfunded vested benefits of the defined benefit plan. Employers must continue to fund the plan’s unfunded vested benefits.

The Act provides that termination of a multiemployer plan occurs if plan documents are amended for the purposes of forming a defined contribution plan. When termination of the plan occurs, employers are obligated to continue contributing to the plan until the fund’s liabilities are eliminated. Therefore, an employer contributing to a plan with large unfunded vested benefits may be hesitant to bargain for the formation of a defined contribution plan, if agreement to such a change would not result in a real or immediate economic gain. Such an agreement, however, would eliminate the possibility that the unfunded vested benefit liability would grow. Nevertheless, the creation of a defined contribution plan would be very beneficial to employers participating in a well funded plan who wish to prevent the creation of future unfunded vested benefits. Since no liability would be created, it is likely

90. §3(34), 29 U.S.C. §1002(34).
92. But see BPR No. 437, at 548, Status of Defined Benefit Plans Discussed During Senate Panel Hearing, (March 28, 1983). According to Dallas L. Salisbury, executive director of the Employee Benefit Research Institute “... on an annual average, 24.2 percent of new plans established post-ERISA have been defined benefit plans. Approximately 55 percent of net new plans established each year were defined benefit plans before ERISA was enacted ...”
95. See supra note 93 at 1389; § 4041A(e), 29 U.S.C. §1341A(e).
that proposals to substitute a defined contribution plan for a defined benefit plan will be common in such circumstances.

When faced with employer demands to create defined contribution plans, unions predictably will be opposed because such plans tend to exaggerate existing differences in their members' interests which can lead to tension and protest within the union. For example, the establishment of a defined contribution plan may adversely affect older participants who will be unable to continue to accrue benefits under the existing plan. On the contrary, younger workers perceive defined contribution plans as better serving their needs because these plans maintain separate accounts for each participant that are usually available to the owner upon termination, death, disability or retirement. Given this prospect of fueling divisions within the membership, it is probable that a union's leadership likely will be unwilling to agree to the creation of a defined contribution plan, if the principal or only justification for such a proposal is either the prevention or the lessening of an employer's withdrawal liability.

Here again, employers are reacting to their concerns resulting from MPPAA. This issue, in combination with the others previously discussed, can only create added grounds for dissension between the parties.

**INFORMATION NECESSARY FOR BARGAINING**

The flow of data from pension plans to the bargaining parties will take on greater significance during negotiations which deal with MPPAA's impact on the plan and the contributing employers. Complete discussions of benefit levels will, at a minimum, require communication of benefit cost and liability information to the bargaining parties. An employer involved in a multiemployer plan may attempt to obtain information beyond that which relates to his particular company and its employees. Under MPPAA, "the fund assesses liability against a withdrawing employer purely on the basis of the arithmetical relationship between the employer's contribution level and the total contributions by all employers [emphasis added] over the same period." Thus, "there is no necessary relationship between the vested benefits attributable to that employer's former employees and the amount of liability."96 Moreover, a portion of a plan's unfunded liabilities may not be attributable to any one employer, as in the case of employer insolvency and the cessation of contributions.97

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97. *See §4225, 29 U.S.C. §1405(b).*
Questions also may arise concerning the obligations of the bargaining parties regarding the furnishing of benefit and related data. To what extent must the employer rely on the union to provide the necessary information? MPPAA requires the disclosure of certain information from the plan to the contributing employers. The Act states that upon the request of an employer, "the plan sponsor [should] make available . . . general information necessary for the employer to compute its withdrawal liability with respect to the plan." In addition, the employer may request that the plan sponsor prepare an estimate of withdrawal liability or provide information unique to that employer.

Of somewhat broader scope is the National Labor Relations Board ruling that it is an unfair labor practice for a trust fund and a union to withhold benefit information from contributing employers. In National Union of Hospital and Health Care Employees, Sinai Hospital of Baltimore brought an action before the Board to compel two unions (National and District) and the Trust Fund to disclose certain benefit information for the purpose of negotiations. The record revealed that the Trust's Fund Director and its Board Chairman were the respective union presidents.

Prior to the 1978 negotiations, the hospital requested certain information from the Fund Director which included the names of the contributing employers, their gross payroll, the amounts contributed, the number of employees covered, and the type of quality of benefits provided. The hospital claimed that this data was necessary for it to bargain intelligently and to prepare for coming negotiations. When the Fund Director refused to supply the information on the grounds of confidentiality and costs, the hospital pursued the matter with letters to the union presidents, requesting them "to instruct your agent (the Fund) to furnish the data." The Fund Director referred the hospital's request to the Trustee Administrative Committee, which was divided on the question: The Management Trustees voted in favor of supplying the information, while the Union Trustees voted against it.

As the 1978 negotiations began, the hospitals asked both unions to provide the information, and the unions responded that only the Fund had such information. Meanwhile, the parties reached an agreement which did not increase the hospital's contribution rate to the Fund. At the hearing, an administrative law judge "found that the requested informa-

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99. Id.
100. National Union of Hospital and Health Care Employees, 248 NLRB 631, 103 L.R.R.M. at 1459 (1980).
101. Id. at 632, 103 L.R.R.M. at 1460.
102. Id.
tion was relevant and necessary to enable the hospital to perform its collective bargaining functions." The NLRB agreed and found that the unions had "failed to bargain collectively" with the hospital and had violated §8(b)(3) of the NLRA. The Board stated that it was proper for "union officials to also wear the hat of a fund trustee," but it asserted that this dual role was not to interfere with the trustees' fiduciary purpose. The Fund Director/Union President "as a controlling benefits plan trustee utilized groundless reasons which were not supportive of that purpose and which instead had the inevitable result of permitting the Unions to evade their bargaining obligations with respect to a matter . . . which was primary to both the Hospital and respondent Unions." Furthermore, the NLRB stated that the information requested by the hospital was necessary for bargaining, regardless of the dual roles played by the Union President. On the issue of the Fund Director/President's refusal to furnish the data, the Board stated:

And even if it had been made under his fiduciary hat, no reason has been shown why this precludes the furnishing of the information . . . Here, his action was inimical to the interests of the beneficiaries in that it undermined the good-faith bargaining on which the employer contributions providing the benefits depend.

Clearly, the parties' access to information is essential if negotiators choose to assume the additional responsibilities of negotiating benefit levels at the bargaining table. It also is evident that management will continue to press for access to plan data because of their concern over withdrawal liability. Since the results of negotiations on benefits and the fund's outstanding liabilities can have a profound impact on the Fund's participants, it may be difficult to avoid disclosure to the employers.

**Fiduciary Status**

Choosing to negotiate benefit levels at the bargaining table may pose other fundamental legal questions for union and management representatives. As a result of the parties direct involvement with the plan,

103. *Id.*, 103 L.R.R.M. at 1461.
104. *Id.* at 634, 103 L.R.R.M. at 1462.
105. *Id.* at 633, 103 L.R.R.M. at 1461 "... there is nothing in either ERISA or the NLRA to prohibit a person . . . from operating in separate spheres as a trustee and as a union official." ERISA §408(c)(3), 29 U.S.C. §1108(c)(3) permits individuals to serve as Section 302 trustees "in addition to being an officer, employee, agent or other representative . . ." of a union or an employer organization.
106. *Id.* at 633, 103 L.R.R.M. at 1461.
107. *Id.*
they may become fiduciaries under ERISA's standards. ERISA defines a fiduciary as follows:

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary responsibility in the administration of such plan.\(^{108}\)

It has been noted that this definition applies "not to positions a person may hold, but rather to the functions he may perform in exercising control over the management of a plan or the disposition of its assets."\(^{109}\)

Indeed, the term fiduciary has been interpreted broadly by the courts. One federal court has stated that:

Officials of a company which sponsors a plan are themselves fiduciaries to the extent that they retain authority for selection and retention of plan fiduciaries because, to that extent, they have retained 'discretionary authority or discretionary control respecting management' of the plan . . . Individuals within the corporation who exercise the type of authority and control described in §3(21)(A) of ERISA will themselves be fiduciaries with respect to the plan.\(^{110}\)

The definition of fiduciary has been held to encompass attorneys as well as plan advisors and consultants.\(^{111}\) Even an arbitrator, in the view of the Department of Labor, can be a fiduciary based on his/her decision with respect to plan management.\(^{112}\)

As bargaining parties move away from simply negotiating contribution rates and begin to set benefit levels, they inevitably will exercise

\(^{108}\) §3(21), 29 U.S.C. §1002(21).

\(^{109}\) Trudgeon, Recent Litigation Regarding Fiduciary Responsibility Under ERISA, 7 JOURNAL OF PENSION PLANNING AND COMPLIANCE 250, 251 (1981).


\(^{111}\) Id. at 252.

\(^{112}\) "The Department of Labor has taken the position that an arbitrator would be a plan fiduciary if he/she performed any of the functions described in the statute which defines the term fiduciary." International Union United Auto Workers & Local 656 & 985 v. Greyhound Lines, Inc., No. 81–1377 (6th Cir. slip. op. March 11, 1983). Dep't. of Labor Advisory Opinion No. 79–86A advised the parties that when an arbitrator resolves a dispute regarding whether a plan participant is entitled to pension benefits, he is acting as a fiduciary because a fiduciary's duties include the payment of valid benefit claims and the disallowance of invalid claims.

But see contra, Advisory Opinion 78–14. "Arbitrator is not a fiduciary when he resolves an issue concerning the employer's monthly contributions to the fund and has the authority to decide on a contribution rate. The Department reasoned in 78–14 that the arbitrator did not perform any of the functions described in §3(21)(A) ERISA; viz., he had no authority to manage or dispose of plan assets, to render investment advice or to assist in the administration of the plan." Id.
more direct control over the management and administration of the plan's assets. These actions, in conclusion, may result in the court's imposing fiduciary status on the parties.

MAINTENANCE OF THE COLLECTIVE BARGAINING RELATIONSHIP

Another concern faced by employers who participate in multi-employer benefit plans, is that events which may be beyond their control can trigger MPPAA's withdrawal liability provisions. For instance, a change in a collective bargaining representative because of a decertification of an existing union can terminate a company's participation in a multiemployer plan even though the employer may desire to maintain an existing collective bargaining relationship. However, pursuant to the NLRA, employers cannot interfere with their employees' free choice in the selection of a bargaining agent. If employees choose to change their union representative or if the incumbent union is decertified, the employer cannot act even though it may be faced with MPPAA's withdrawal liability.

Recently, though, an ameliorating factor has been introduced into the situation. In 1982, the NLRB re-examined the law applicable to instances wherein an incumbent union is challenged by an outside union for purposes of representation. In November, 1974, the Company and the incumbent union commenced negotiations for a new contract. The union struck on January 9, 1975, through February 26, 1975. On January 27, 1975, the union, Union Independiente (UI), filed a representation petition with the Board. At first, RCA refused to recognize or to negotiate with the IBEW due to the UI's petition. However, on February 25, 1975, the Company agreed to resume negotiations. On the following day, RCA and the IBEW executed a new contract.

The NLRB's General Counsel argued that RCA violated the requirement established in Midwest Piping that an employer must

113. §8(a)(1), 29 U.S.C. §158(a)(1). This section provides: “(a) It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in §7”; §7, 29 U.S.C. 157 grants employees the right “... to bargain collectively through representatives of their own choosing...”

114. In anticipation of such situations, MPPAA directs the PBGC (Pension Benefit Guaranty Corporation) to “conduct a separate study with respect to ... the necessity of adopting special rates in cases of union-mandated withdrawal from multiemployer pension plans.” Section 412(a)(1)(B) of MPPAA does not amend ERISA, but establishes requirements for studies to be conducted by the PBGC.


maintain strict neutrality in the face of competing representational claims. Specifically, the General Counsel claimed that the Company rendered unlawful assistance to the IBEW in violation of §8(a)(1) and (2)\(^{117}\) and it further violated §8(a)(3)\(^{118}\) in that the contract contained a union security clause. RCA argued that the filing of a representation petition by the UI did not raise a real question concerning representation.

The Board noted that it is impossible for an employer with an existing collective bargaining relationship to observe strict neutrality. If the employer chooses to bargain with the incumbent union, it will exhibit favoritism towards that union. Conversely, the rival union will gain favored status if the employer withdraws from negotiations with the incumbent.\(^{119}\) Accordingly, the Board overruled \textit{Shea Chemical Corporation},\(^{120}\) which held that an employer faced with a pending petition from an outside union must cease collective bargaining with the incumbent and maintain a position of strict neutrality. The Board held that

the mere filing of a representation petition by an outside, challenging union will no longer require or permit an employer to withdraw from bargaining or executing a contract with an incumbent union. Under this rule, an employer will not violate Section 8(a)(2) by post-petition negotiations, or execution of a contract with an incumbent, but an employer will violate section 8(a)(5) by withdrawing from bargaining based solely on the fact that a petition has been filed by an outside union.\(^{121}\)

Importantly, the Board emphasized that despite its ruling, it would continue to process valid petitions timely filed by outside unions and to conduct elections as expeditiously as possible.

\(^{117}\) Section 8(a)(2), 29 U.S.C. §158(a)(2) makes it unlawful for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”

\(^{118}\) Section 8(a)(3), 29 U.S.C. §158(a)(3) makes it an unfair labor practice for an employer to discriminate against employees “in regard to hire or tenure of employment or any term or condition of employment” in order to encourage or discourage membership in a labor union.

\(^{119}\) See \textit{Bruckner Nursing Home}, 262 NLRB No. 115, 110 L.R.R.M. 1374 (1982). In this companion case to \textit{RCA del Caribe}, the Board modified the “Midwest Piping Doctrine” as it applied to initial organizing situations involving rival unions. The Board held that “...the duty of strict employer neutrality and the necessity for a Board-conducted election attach only when a properly supported petition has been filed by one or more of the competing labor organizations. Where no petition has been filed, an employer will be free to grant recognition to a labor organization with an uncoerced majority, so long as it does not render unlawful assistance of the type which would otherwise violate Section 8(a)(2) of the Act.” \textit{Id.} slip op. at 14, 110 L.R.R.M. at 1377, 1378.

\(^{120}\) 121 NLRB 1027, 42 L.R.R.M. 1486 (1958).

\(^{121}\) 262 NLRB slip op. at 10-11, 110 L.R.R.M. at 1371.
Because of the combined effects of MPPAA's withdrawal liability provisions and the Board's decision in RCA, labor union efforts to organize where there is an incumbent union may meet insurmountable barriers. The economic interests of an employer, after MPPAA, dictate that the employer continue to bargain with an incumbent union where an outside union files an election petition; and, if possible, reach an agreement with the incumbent. Such a scenario would prevent the termination of the employer's participation in the plan; thus avoiding the imposition of withdrawal liability. The only danger to the employer is the possibility of an NLRA violation. It now appears that RCA has effectively removed such a threat.

Where a change in the bargaining representative, however, does occur, there are provisions in MPPAA designed to lessen the impact of that change on the "withdrawing" employer. Section 4235 provides that when an employer withdraws due to a certified change in the bargaining representative, and the participants in the previous plan continue to participate in a new multiemployer plan, the first plan shall transfer its assets and liabilities to the new plan.\(^{122}\) In addition, the statute provides for the reduction of a withdrawing employer's liability where there is such a transfer of liabilities to another plan. The reduction in liability is the amount equal to the "value . . . of the transferred unfunded vested benefits."\(^{123}\) Therefore, MPPAA does provide for the reduction of withdrawal liability where there is a change in the bargaining representative, provided the conditions of §4235 are met.

PROPOSED LEGISLATION TO AMEND MPPAA

The results brought about since the passage of MPPAA have prompted various employer organizations to draft legislation which would amend the Act, specifically, in the area of withdrawal liability. The most notable bills are the proposed "Multiemployer Pension Plan Stabilization Act of 1981"\(^{124}\) and the "Multiemployer Retirement Income Protection Act of 1982."\(^{125}\)

The stated purpose of S.1748 was to exempt certain fixed contribution multiemployer pension plans from Title IV of ERISA. The proposed legislation would remove employers who have negotiated only contribution rates in their collective bargaining agreements prior to April 29, 1980, from the withdrawal and plan termination insurance provisions of ERISA. The provisions of the Act still would apply to

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123. §4211(e), 29 U.S.C. §1391(e).
employers who have negotiated benefit levels in their collective bargaining agreements. In effect, the bill was an attempt to alleviate the impact of MPPAA’s withdrawal liability rules by making employers responsible only for terms to which they had agreed in their collective bargaining agreements.

Similarly, the “Multiemployer Retirement Income Protection Act of 1982” would amend ERISA’s provisions on withdrawal liability funding, premium rates, and asset sales. More importantly, this bill would prevent poorly funded plans from increasing unfunded vested benefits. Plans would not be permitted to increase unfunded vested benefits “by providing for retrospective benefit increases or granting past service credits, unless they have a ‘vested benefits funding ratio’ of .7 to one or better.”126 The requirement of a .7 ratio would apply for five years following the bill’s enactment and after that period, the ratio would change to .9 to one.127 These special rules on funding ratios are particularly significant in light of the previous discussion on the trustees’ duties and the potential changes in the bargaining with respect to benefit increases. If H.R. 7233 were to be enacted, the authority of both the trustees and the bargaining representatives to grant benefit increases would be limited if the plan did not have the requisite funding ratio.

Whether any amendment to MPPAA will be enacted is difficult to predict. However, the extensive support for major revision of the statute is strong evidence of the fact that MPPAA has engendered many problems and has created many doubts about the wisdom of its provisions.

**CONCLUSION**

This article has concentrated on examining the effects of MPPAA’s withdrawal liability provisions on the ability of trustees to set benefit levels and to make investment decisions, as well as the changes that are occurring between the parties to collective bargaining agreements both during the term of the agreement and at the time of negotiations.

Events subsequent to MPPAA’s enactment reveal that it is much more difficult today to persuade employers to agree to increases in benefit levels than it was prior to MPPAA. Divisions between the employer and union trustees are occurring more frequently, and existing conflicts between the parties to the collective bargaining agreement have been fueled by MPPAA. Perhaps, the most unfortunate of MPPAA’s effects is that it has made multiemployer defined benefit plans unattractive to employers. Therefore, it is more difficult for unions to attract new employers as contributors to such plans. Similarly, employers are propos-

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126. BPR No. 414, at 1409 (Oct. 11, 1982).
127. The funding ratio is the ratio of a plan’s assets to its vested benefits.
ing to terminate well-funded defined benefit plans in favor of the establishment of defined contribution plans—thus avoiding MPPAA coverage. Ultimately, the participants will be the penalized parties because the security of their benefits is guaranteed, in the final analysis, only by the continued expansion of the plan's contribution base.

Finally, by encouraging disagreements and divisions between unions and employers, MPPAA does not result in the furthering of industrial peace which has always been the cornerstone of labor legislation. Many of these developments were anticipated prior to the Act's passage, and much concern was voiced at that time. Unfortunately, many of the predictions have proven correct. Congress, in its attempt to protect and to preserve multiemployer plans, may have sown the seeds for their eventual destruction.