Western New England Law Review

Volume 9 9 *(1987)*
Issue 2

Article 1

1-1-1987

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Recommended Citation
Craig A. Raabe, *ADMINISTRATIVE LAW—DECISIONMAKER BIAS AND THE PROCEDURAL DUE PROCESS RIGHTS OF WITHDRAWING EMPLOYERS UNDER THE MPPAA*, 9 W. New Eng. L. Rev. 227 (1987), http://digitalcommons.law.wne.edu/lawreview/vol9/iss2/1

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Volume 9
Issue 2
1987

WESTERN NEW ENGLAND
LAW REVIEW

NOTES

ADMINISTRATIVE LAW—DECISIONMAKER BIAS AND THE PROCEDURAL DUE PROCESS RIGHTS OF WITHDRAWING EMPLOYERS UNDER THE MPPAA

INTRODUCTION

The Court of Appeals for the Third Circuit recently found that a vital provision of the Multiemployer Pension Plan Amendments Act of 1980[1] (MPPAA) violates the fifth amendment due process rights of contributing employers. In *United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan v. Yahn & McDonnell, Inc.*,[2] a federal court of appeals held for the first time that the decisionmaking process for determining an employer's liability payments to a multiemployer pension plan,[3] upon its withdrawal from that plan, denied the employer its right to procedural due process.[4] The United States

1. 29 U.S.C. §§ 1381-1461 (1982).
2. 787 F.2d 128 (3d Cir. 1986), *prob. juris. noted*, 107 S. Ct. 567 (1986).
3. There are four types of private pension plans: (1) union plans; (2) corporate plans; (3) single-employer plans; and (4) multiemployer plans. Note, *MPPAA Withdrawal Liability Assessment: Letting the Fox Guard the Henhouse*, 14 FORDHAM URB. L.J. 211, 215 (1986). 29 U.S.C. § 1301(a)(3) (1982) defines a multiemployer pension plan as a pension plan to which more than one employer contributes and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. Multiemployer plans are attractive to employers both to avoid industrial strife by fostering cooperation among employers, employees and labor organizations, and for tax benefits. *See* Note, *supra* at 219.
4. Although the Court of Appeals for the First Circuit ruled the decisionmaking provisions unconstitutional in Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc., 762 F.2d 1124 (1st Cir. 1984), that decision was vacated in a subsequent hearing by the Court of Appeals for the First Circuit sitting *en banc*

Supreme Court recently noted probable jurisdiction in the *Yahn* case and will render a decision on the constitutionality of the MPPAA's decisionmaking process late in the 1986 term.[5*]

This note examines the constitutionality of the MPPAA's decisionmaking process. It begins with a discussion of the history and statutory structure of the MPPAA. Section II of the note examines the basis for the employers' procedural due process rights and the reasoning in the chronological progression of majority opinions in cases upholding the constitutionality of the MPPAA. The third section analyzes the opinions urging, and in *Yahn*, holding, that the MPPAA's decisionmaking procedures are unconstitutional. The focus of the note then turns to the merits of the competing arguments and a discussion of the appropriate standard for evaluating a claimed violation of the procedural due process right to an impartial decisionmaker. The final section of the note discusses the appropriate remedy for curing the problem of decisionmaker bias. This section analyzes whether the *Yahn* court, after holding the MPPAA to be unconstitutional in part, adequately remedied the constitutional flaw by severing a defective statutory provision.

I. History and Statutory Procedures of the MPPAA

In an attempt to promote the creation and maintenance of private pension plans and to secure pension benefits,[6] Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA).[7] Title IV of ERISA established an insurance program to protect employees and retirees whose pension plans terminated without sufficient funds to pay vested benefits.[8] To achieve this goal, Congress created the Pension Benefit Guaranty Corporation (PBGC)[9] which was to "provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries" of terminated plans.[10]

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

5. United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan v. Yahn & McDonnell, Inc., 107 S. Ct. 567 (1986).

6. *See* H.R. REP. NO. 869, Part I, 96th Cong., 2d Sess. 51 [hereinafter House Report], *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2918, 2919. *See generally* 29 U.S.C. § 1001(a) (1982).

7. 29 U.S.C. §§ 1001-1381 (1982). ERISA applies to all private pension plans.

8. 29 U.S.C. §§ 1301-1381 (1982); *see* H.R. REP. NO. 533, 93d Cong., 2d Sess. 14, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4652.

9. 29 U.S.C. § 1302 (1982).

10. *Id.*

* Editor's Note—On May 18, 1987, the United States Supreme Court affirmed the *Yahn* decision by an equally divided Court. Justice White took no part in the consideration

Under ERISA an employer who withdrew from a pension plan had a contingent liability to that plan.[11] If the plan terminated within five years from the date of the employer's withdrawal, the employer was liable to the PBGC for as much as thirty percent of the company's net worth.[12] Under this system, an employer who withdrew more than five years before the plan's termination escaped liability and the remaining employers were forced to compensate for the lost revenue. As a result of these contingent liability provisions, multiemployer pension plans were faced with a serious threat of widespread withdrawal as employers sought to avoid or limit their liability.[13]

As serious questions arose as to the viability of the PBGC, and faced with the possibility of termination of many of the multiemployer pension plans, Congress ordered a study by the PBGC of the plans.[14] After consideration of the study, Congress passed the Multiemployer Pension Plan Amendments Act of 1980.[15]

Under the MPPAA, an employer who withdraws from a pension plan incurs a mandatory liability to that plan for a portion of its "unfunded vested benefits"[16] as determined under the Act.[17] Upon an employer's withdrawal, the liability, known as withdrawal liability, is calculated by the plan's sponsor.[18] The plan's sponsor is statutorily defined as the trustees,[19] who are selected by the employers and the unions, each side being equally represented.[20] The trustees have a

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of the case. United Retail & Wholesale Employee Teamsters Union Local 115 Pension Plan v. Yahn & McDonnell, Inc., 55 U.S.L.W. 4662 (1987).

11. House Report, *supra* note 6, at 54, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 2922.

12. *Id.*

13. *Id.* at 55, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 2923. The legislative history notes that as employers withdrew to avoid liability, the contributions by the remaining employers, to sustain the plan's solvency, became so great that it was cheaper to withdraw and make the liability payments. *Id.*

14. Pub. L. No. 95-214, 91 Stat. 1501 (1977). For a brief summary of the financial instability of the multiemployer pension plans, as reported in the PBGC study, see Note, *supra* note 3, at 224 n.79.

15. Congress passed the MPPAA without much resistance. For a summary of the congressional voting record on the Act, see Note, *supra* note 3, at 255 n.84.

16. 29 U.S.C. § 1381(a) (1982) establishes the mandatory liability and 29 U.S.C. § 1393(c) (1982) defines "unfunded vested benefits" as "an amount equal to—the value of nonforfeitable benefits under the plan, less the value of the assets of the plan."

17. 29 U.S.C. §§ 1381-1461 (1982).

18. 29 U.S.C. § 1382 (1982).

19. 29 U.S.C. § 1002(16)(B)(iii) (1982). In this section, Congress defined the plan sponsor as the board of trustees in the multiemployer pension plan context. The trustees are appointed pursuant to 29 U.S.C. § 1102(a).

20. 29 U.S.C. § 1103(a) (1982), which requires that the employee benefit plan be held in trust by one or more trustees, is controlled by 29 U.S.C. § 186(c)(5)(B) (1982), which

statutorily-created fiduciary duty to act in the best interest of the plan's participants and beneficiaries.[21]

The determination of withdrawal liability is a two step process: 1) selection of a method of calculation; and 2) calculation of withdrawal liability under the chosen method. The trustees must base their calculation of withdrawal liability under the MPPAA on any one of four separate methods set forth in the Act or by a method authorized by the PBGC.[22] Although the choice of a particular method is occasioned by the withdrawal of a employer, the trustees must uniformly apply the chosen method to all withdrawing employers, including the present employer and any subsequent withdrawing employer.[23] Because of this mandate, the trustees must determine which one of the several methods of calculation permitted by 29 U.S.C. § 1391 is best

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provides for equal representation of both employees and employers in the administration of trust funds. Thus, both the employee organization and the employers collectively, must appoint a minimum of one representative each.

21. 29 U.S.C. § 1102(a)(2) (1982) provides that the plan's trustees owe a fiduciary duty. 29 U.S.C. § 1104(a) (1982) specifies that:

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

If fiduciaries breach their duty, they are personally liable to the plan for any losses the plan incurs as a result of the breach. 29 U.S.C. § 1109(a) (1982).

22. The Act prescribes a presumptive method for the calculation of withdrawal liability. 29 U.S.C. § 1391(b) (1982). A multiemployer plan may, however, be amended to permit calculation of withdrawal liability under one of three methods described in 29 U.S.C. § 1391(c) (1982). The legislative history indicates that Congress prescribed four different methods to account for differing periods and amounts of contribution by employers. For instance, the presumptive method is designed to protect newly entering employers from having to fund liabilities that built up before they began contributing. *See* House Report, *supra* note 6, at 77-82, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS at 2945-50. For a description of the four methods of calculation, see J. MAMORSKY, EMPLOYEE BENEFITS LAW: ERISA AND BEYOND § 9.03[3][c] (1986). A plan may also develop an alternative calculation method, subject to approval by the PBGC. 29 U.S.C. § 1391(c)(5)(A) (1982).

23. 29 U.S.C. § 1394(b) (1982) states:

> All plan rules and amendments authorized under this part [29 USCS §§ 1381 et seq.] shall operate and be applied uniformly with respect to each employer, except that special provisions may be made to take into account the creditworthiness of an employer. The plan sponsor shall give notice to all employers who have an obligation to contribute under the plan and to all employee organizations representing employees covered under the plan of any rules or amendments adopted pursuant to this section.

suited to accommodate not only the present withdrawal, but all future withdrawals from the plan as well. In this regard, and to the extent that their decision focuses on circumstances and considerations not specifically linked to the first employer withdrawing from the plan, the thrust of the trustees' initial determination is largely prospective and based on estimations of future events.

However, once the trustees have chosen a particular calculation method, the actual calculation of withdrawal liability pursuant to the chosen method primarily involves determinations based on legal and factual issues specific to each individual withdrawal from the plan. There are several such determinations. An important one is the decision as to when the employer actually withdrew from the plan. The Act recognizes partial[24] and complete[25] withdrawals. The determination of whether, and when, a withdrawal has been effected turns on sharply contested factual findings and legal conclusions, and has important financial consequences for the employer and the plan.[26]

Another determination that is used in the calculation of withdrawal liability, and that is also specific to each withdrawing employer, is the establishment of actuarial assumptions to facilitate the computation of the unfunded vested benefits. The trustees must decide when the employees covered by the plan are going to retire, how long they will live, and how much income the fund's assets are going

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24. 29 U.S.C. § 1385 (1982).

25. 29 U.S.C. § 1383 (1982).

26. Except for withdrawals by employers engaged in the building and construction, or entertainment industries, whose withdrawals are defined by 29 U.S.C. §§ 1383(b) & (c) (1982), respectively, complete withdrawal "occurs when an employer—(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a) (1982).

The trustees and, in turn, the arbitrators and courts have considerable discretion in deciding the withdrawal date under the statute. *See, e.g.*, UMW 1974 Pension Plan v. Williamson Shaft Contracting Co., 6 Employee Benefits Cas. (BNA) 1593 (1985) (Pritzker, Arb.). In this case an arbitrator ruled that an employer had withdrawn, notwithstanding the employer's argument that he was still making bids for which he would have to contribute, when the employer had not contributed to the plan since 1981 and the number of bids covered by the plan dropped from seventy in 1980 to zero in 1984. *Id.* at 1600. In Pension Benefit Guar. Corp. v. Broadway Maintenance Co., 707 F.2d 647 (2d Cir. 1983), the court stated that only two factors should be considered in setting a withdrawal date: 1) the expectation of plan participants, and 2) the financial implications for the PBGC. *Id.* at 652. The court further stated that the financial interests of the employer are not of importance. *Id.* Thus, under *Broadway Maintenance*, the *Williamson Shaft* withdrawal date reasonably could have been set earlier by establishing that the plan participants no longer expected work once the contributions stopped and the bids began to dramatically decline. The PBGC would have favored an earlier withdrawal date because it would have reduced its potential liability for payment.

to earn in the future.[27] Since these actuarial calculations are "as much an art as science,"[28] the statute affords the plans' trustees considerable discretion in making these actuarial assumptions. The MPPAA requires only that the withdrawal liability be calculated by "actuarial assumptions and methods which, in the aggregate, are reasonable . . . and which, in combination, offer the actuary's best estimate."[29] Thus, as with the determination of employers' withdrawal dates, the choice of actuarial assumptions is based on legal and factual determinations extrapolated from the specific circumstances of the withdrawing employers.

After the trustees calculate an employer's withdrawal liability, the plan must notify the employer of the liability and the proposed payment schedule, and demand payment.[30] Within ninety days after the employer receives notice of the withdrawal liability, it may ask the trustees to review their decision.[31] Following "reasonable review" of matters presented by the employer, the plan must notify the employer of its final decision.[32] If there is still a dispute between the parties, either party may initiate arbitration.[33]

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27. There are three basic actuarial assumptions used for computing unfunded vested benefits. Eberhard Foods, Inc. v. Retail Store Employees Unions Joint Pension Fund, 6 Employee Benefits Cas. (BNA) 1961, 1969 (1985) (Glover, Arb.). The assumptions address: 1) mortality rates; 2) retirement ages; and 3) future interest rates for the plan's investments. *Id.* The first two figures are specific to each withdrawing employer, and help to determine the amount and timing of benefits due the employees of the withdrawing employer. The interest rate is also employer-specific and helps to project the future assets of the plan from the time of the withdrawal.

The selection of these assumptions directly controls the withdrawal liability of the employer. Different assumptions produce different results. In Hertz Corp. v. Commission Drivers Local 182 Pension Fund, 4 Employee Benefits Cas. (BNA) 1367 (1983) (Mittelman, Arb.), an arbitrator upheld an assessed withdrawal liability of $416,000.00. The plan's assumed interest rate for investment returns was deemed reasonable, even though a calculation of withdrawal liability for the same company using rates promulgated by the PBGC was $321,672.00. *Id.* at 1385. Thus, the legal and factual determinations made by the trustees in establishing their actuarial assumptions can alter the withdrawal liability by tens of thousands of dollars. See *infra* note 216 for another example of the trustees' discretion in calculating withdrawal liability.

28. Note, *Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980*, 71 GEO. L.J. 161, 167 (1982).

29. 29 U.S.C. § 1393(a)(1) (1982).

30. 29 U.S.C. § 1399(b)(1) (1982).

31. 29 U.S.C. § 1399(b)(2)(A) (1982). The employer has three possibilities for review under this section: (1) ask the trustees to review a specific matter related to the liability or schedule of payment; (2) identify an inaccuracy in the determination of unfunded vested benefits; (3) furnish additional relevant information to the trustees.

32. 29 U.S.C. § 1399 (b)(2)(B) (1982).

33. 29 U.S.C. § 1401(a) (1982). Under this section either party may initiate arbitration within sixty days after the earlier of the date the employer is notified of the trustees'

During arbitration, all findings of the trustees, including findings on withdrawal liability, are presumed correct.[34] This presumption can be overcome only by showing, by a preponderance of the evidence, that the plan's determination was unreasonable or clearly erroneous.[35] If not satisfied after arbitration, either party may bring an action to "enforce, vacate or modify" the arbitrator's findings.[36] In this action, the court will presume the arbitrator's findings to be correct and may overturn them only if shown to be "clearly erroneous" by a preponderance of the evidence.[37]

II. JUDICIAL TREATMENT OF PROCEDURAL DUE PROCESS CHALLENGES

Since its enactment, employers have mounted a series of constitutional assaults on the MPPAA.[38] One such challenge attacks the Act's provisions for decisionmaking by the plan's trustees. More specifically, the employers argue that the trustees' involvement in determining withdrawal liability infringes the employers' procedural due process rights to an impartial decisionmaker. To date, six circuits have considered this claim, and all but one have upheld the constitutionality of the MPPAA.[39]

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review decision, or 120 days after the employer's request for review. The parties may jointly initiate arbitration within 180 days after the plan demands payment of the withdrawal liability from the employer. Arbitration under this section is to be conducted under fair and equitable procedures promulgated by the PBGC.

34. 29 U.S.C. § 1401(a)(3)(A) (1982).

35. *Id.* If a party contests the determination of unfunded vested benefits, that determination is presumed correct during arbitration and the presumption may be overcome only with a showing, by a preponderance of the evidence, that the determination was based on unreasonable actuarial assumptions or methods, or that the plan's actuary made a significant error.

36. 29 U.S.C. § 1401(b) (1982). After arbitration is completed, either party may bring an action in the United States District Court to contest the findings.

37. 29 U.S.C. § 1401(c) (1982). This section is similar to 29 U.S.C. 1401(a) in that the arbitrator's findings must be presumed correct by the district court. However, the deference to the previous findings is greater at this stage as the presumption can be overcome only by "a *clear* preponderance of the evidence." 29 U.S.C. § 1401(c) (1982) (emphasis added).

38. *See, e.g.*, Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984). In this case an employer challenged the retroactive application of the MPPAA. Congress passed the Act on September 26, 1980, but applied it retroactively to April 29, 1980. In *R.A. Gray*, the Court found that the retroactive application did not violate due process. *Id.* at 728-34. In Connolly v. Pension Benefit Guar. Corp., 106 S. Ct. 1018 (1986), the trustees of a pension plan claimed that the MPPAA violates the fifth amendment by taking property without just compensation. The trustees claimed, *inter alia*, that the statutory scheme of the MPPAA destroys contractual rights between the employers and employees. *Id.* at 1025. The Court rejected the trustees' arguments. *Id.* at 1024-28.

39. United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan

Each of the six circuits that reviewed the decisionmaking process of the MPPAA assumed that the employer had a constitutional right to some sort of procedural due process protection; the disagreement among the courts centers on the extent of the protection. Sections II (B) and II (C) explore those differences in detail. Prior to that discussion, however, the note examines an issue that the courts did not fully address, the threshold issue of whether the employers are entitled to *any* due process protection.

A. *The Threshold Requirement for Procedural Due Process Protection*

The threshold question in determining the procedural due process rights of withdrawing employers under the MPPAA is whether the trustees' role in calculating withdrawal liability is adjudicative or legislative.[40] If the trustees' role is adjudicative, then the employers enjoy the "trial-type requirements" of procedural due process.[41] However, if the trustees are acting legislatively, as rulemakers, the withdrawing employers may not have the protection of the fifth amendment due process rights.[42]

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v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986) (unconstitutional), *prob. juris. noted*, 107 S. Ct. 567 (1986); Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc., 762 F.2d 1137 (1st Cir. 1985); Board of Trustees of the W. Conference of Teamsters Pension Fund, Inc. v. Thompson Bldg. Materials, Inc. 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502 (D.C. Cir. 1984); Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843 (2d Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984); Republic Indus., Inc. v. Teamsters Joint Council No. 83 Pension Fund, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

40. The courts which have addressed constitutional challenges to the MPPAA's decisionmaking scheme on procedural due process grounds have failed to address adequately this issue. In *Fulton*, 762 F.2d 1137, the Court of Appeals for the First Circuit summarily stated that the trustees' role was not adjudicative, but ministerial because they must apply one of four calculation methods provided in the statute. *Id.* at 1141-42. The Court of Appeals for the Third Circuit in *Yahn*, 787 F.2d 128, offered similar conclusory statements and even contradicted itself in describing the trustees' role. The court's discussion of the issue, appearing only in footnotes, at one point rejected the First Circuit Court of Appeals' contention that the trustees' role was ministerial, *id.* at 141 n.18, but later in the opinion argued that the trustees' role was not adjudicative to support its reasoning for severing a portion of the statute. *Id.* at 143 n.23. The court did not analyze the calculation procedure to determine the nature of the trustees' role, but only stated conclusions about the process. *See also Standard Dye*, 725 F.2d at 855; *Republic*, 718 F.2d at 640 n.13.

41. L. MODJESKA, ADMINISTRATIVE LAW: PRACTICE AND PROCEDURE § 4.10 (1982). *See also* J. STEIN, G. MITCHELL & B. MEZINES, ADMINISTRATIVE LAW § 33.01[2] (1986) (informal and formal adjudications are governed by the requirements of due process and formal adjudications require full trial type hearings).

42. C. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 7.1 (1985) ("[I]t has been

The decisionmaking process of the MPPAA is a hybrid, and not exclusively adjudicative or legislative. Two of the classic distinctions between adjudication and rulemaking—the time frame and subject matter of the decision—cut in different directions. Under temporal dimensions, "a rule prescribes *future* patterns of conduct; a decision determines liabilities upon the basis of present or past facts."[43] Looking at whether the decisionmaking process and decision affect particular individuals or individuals in the abstract, the established doctrine is that "[r]ulemaking affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely affected; adjudication operates concretely upon individuals in their individual capacity."[44]

An examination of the MPPAA's decisionmaking process for determining withdrawal liability reveals elements of both adjudication and rulemaking. The first decision, the selection of a particular method for calculating withdrawal liability under 29 U.S.C. § 1391, is a rulemaking process. It is future-oriented and concerns all employers, subsequent withdrawing employers as well as the specific withdrawing employer.[45] The determination concerns "individuals in the abstract,"[46] and may affect employers unknown at the time the policy is implemented. In contrast, however, the second step of the process, decisions on the termination date and adoption of the specific actuarial assumptions, focus on the particular withdrawing employer and are specific to the employer in its "individual capacity."[47] The date of termination is dependent on historical facts concerning the employers' conduct and status. The actuarial assumptions are based on specific information about the actual employees of the withdrawing employer—their ages and work histories, for example—for use in estab-

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long accepted that due process does not apply to rulemaking."). *See also* B. SCHWARTZ, ADMINISTRATIVE LAW § 4.8 (2d ed. 1984) ("Agencies engaged in rulemaking are, as a general proposition, no more subject to constitutional procedural requirements than is the legislature engaged in enacting a statute.").

43. B. SCHWARTZ, *supra* note 42, at § 4.2 (emphasis in original). *See also* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 398 (1979) ("Rulemaking consists in the promulgation of generally applicable requirements or standards governing future conduct. Adjudication consists in determining the legal consequences of past events in a particular controversy between specific parties.").

44. B. SCHWARTZ, *supra* note 42, at § 4.2. *See also* K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.01 (3d ed. 1972) ("[R]ulemaking should be defined as the 'issuance of regulations or making of determinations which are addressed to indicated but unnamed and unspecified persons or situations.' " (citing Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259, 265 (1938))).

45. *See supra* notes 23 & 43 and accompanying text.

46. *See supra* note 44 and accompanying text.

47. *See supra* notes 24-29 & 44 and accompanying text.

lishing mortality rates and retirement ages.[48]

The MPPAA's decisionmaking process for calculation of withdrawal liability is in part adjudicative and in part legislative. Because the adjudicative aspects are the centerpiece of the employer challenges and figure so prominently in the imposition of significant liability,[49] the courts should regard the MPPAA's decisionmaking process as adjudicatory. The threshold decision then entitles the employers to protection of their fifth amendment procedural due process rights before they can be deprived of their property.

As mentioned above, all of the courts which addressed the constitutionality of the MPPAA's decisionmaking procedure assumed some protection for the employers, but none of the courts fully explicated the basis for that protection. The courts assumed that some due process was due, and then evaluated whether the protection for the employers under the decisionmaking scheme of the MPPAA was constitutionally sufficient. The note now turns to an examination of those decisions.

B. *Opinions Sustaining the MPPAA's Decisionmaking Process*

1. *Republic Industries, Inc. v. Teamsters Joint Council No. 83 Pension Fund*[50]

The constitutional challenge to the decisionmaking process of the MPPAA first arose as a secondary issue in this case, whose primary attack was on the Act's retroactive application.[51] The Fourth Circuit Court of Appeals' discussion of the employer's decisionmaker bias

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48. *See supra* notes 27 & 43 and accompanying text. Another factor—the interest rate assumption—is also future-oriented to a certain degree because the future economic climate must be predicted. However, this future-oriented evaluation is specific to each withdrawing employer at the time of its withdrawal from the plan.

49. *See supra* notes 27 & 216.

50. 718 F.2d 628 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Republic Industries was the successor in interest to Johnson Motor Lines, Inc. (a motor carrier of freight). After operating at a loss, forcing it to close a terminal, Republic terminated Johnson's operations and ceased contributing to Johnson's pension plan. The trustees assessed Johnson a withdrawal liability of $189,107.00. Following some debate as to whether Johnson should receive special treatment as a trucking business under 29 U.S.C. § 1383(d) (1982) (this section is a special provision controlling the amount and terms of withdrawal liability payments for employers primarily engaged in the trucking business), the trustees concluded that Johnson was not in the trucking business and, thereafter, demanded payment. Republic refused to make the payments as successor in interest, and filed suit challenging the constitutionality of the MPPAA. *Republic*, 718 F.2d at 633.

51. *See id.* at 631. The court held that the retroactive application was constitutional as Congress chose an equitable and rational solution to help ensure the financial stability of multiemployer pension plans.

claim was brief.[52] Republic claimed that an "institutional bias"[53] on the part of the trustees, compounded by the presumption of correctness which attached to their findings, deprived it of its due process right to a fair and impartial decisionmaker.[54] The trustees' bias, according to Republic, was manifested in large withdrawal liability which ensured the solvency of the plan.[55] The large liability enabled employees and retirees to receive their benefits and reduce the financial liability of the other employers supporting the plan.

Relying on the Supreme Court's holding in *Mathews v. Eldridge*,[56] the Fourth Circuit Court of Appeals rejected Republic's arguments. In *Mathews*, the Court discussed the procedures constitutionally required before termination of social security benefits.[57] The Court established a balancing test to determine the necessity of a hearing before the termination of the benefits. The test considers the following three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the private interest and the probable value of additional safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burden of additional safeguards.[58]

Although the court in *Republic* did not articulate and, arguably, did not in fact consider the *Mathews* interests,[59] it rejected Republic's

52. *Id.* at 639-41.

53. The court noted that the allegations of trustee bias were simply "generalized assumptions of possible interest." *Id.* at 640 n.13. Republic claimed the bias was a result of the fiduciary duty which the trustees owed to the plan under 29 U.S.C. § 1104 (1982). *Republic*, 718 F.2d. at 640.

54. *Id.* at 640-41.

55. *Id.* at 640.

56. 424 U.S. 319 (1976). In this case, Eldridge had been receiving Social Security disability benefits beginning in 1968. After a review of medical reports and a questionnaire filled out by Eldridge, the state agency monitoring his condition determined that Eldridge's disability had ceased in 1972. The Social Security Administration accepted the agency's findings and discontinued the benefits. Eldridge filed an action claiming a right to an evidentiary hearing prior to the termination of welfare benefits.

57. *Id.* at 323.

58. *Id.* at 335. In applying this test in the *Mathews* case, the Court balanced: (1) the private interest of "uninterrupted receipt" of welfare benefits "pending final administrative decision of his claim;" (2) the risk of erroneous deprivation in a process using medical assessments by the recipient's doctor, a detailed questionnaire completed by the recipient, with the assistance of the local social security office, if necessary, and full access by the recipient to all information relied on by the state agency; and (3) the public interest of the "administrative burden" and other "societal costs" associated with a constitutional right to an evidentiary hearing prior to termination of welfare benefits. The Court decided that the existing process was sufficient for due process purposes. *Id.* at 340-47.

59. Because the *Republic* court did not articulate the interests to be balanced under the *Mathews* test and did not overtly conduct a balancing analysis, the court may not have applied the *Mathews* test.

arguments. The *Republic* court found no inherent bias on the part of the trustees, stating that their fiduciary status, in and of itself, was not a "per se" violation of due process.[60] The Court of Appeals for the Fourth Circuit went on to say that the trustees were necessary in the decisionmaking process because of their expertise in the area.[61]

The court also noted that the trustees did not have "unbridled discretion" in their decisionmaking. The statute required the trustees to use one of four prescribed methods in computing withdrawal liability[62] and to apply their chosen method uniformly to future withdrawal liability assessments, which would affect their employer if it later withdrew.[63] Finally, the court in *Republic* rejected the argument that the presumption of correctness compounded any partiality in the trustees' determinations, stating that the findings were subject to arbitrational and judicial review.[64] In the opinion of Chief Judge Winter, the presumption merely shifted the burden of proof to the challenger.[65]

2. *Textile Workers Pension Fund v. Standard Dye & Finishing, Co.*[66]

In the *Standard Dye* cases,[67] the Court of Appeals for the Second Circuit addressed the employer's due process right to a fair and impartial hearing,[68] again as a secondary issue to the primary challenge to the retroactive application of the MPPAA.[69] The court in *Standard Dye* reviewed the employer's due process claim using the *Mathews* balancing test, and, unlike the *Republic* court,[70] articulated the interests

60. *Republic*, 718 F.2d at 640.

61. *Id.*

62. *See supra* note 22 and accompanying text for discussion of the methods.

63. *Republic*, 718 F.2d at 640-41. *See supra* note 23 and accompanying text.

64. *Id.* at 641.

65. *Id.* In support of this view, the court cited an *amicus* brief which listed cases in which the employer prevailed in arbitration. *Id.* at n.14.

66. 725 F.2d 843 (2d Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984). Standard Dye & Finishing Co. processed and distributed dye and textiles. Beginning in 1961, it contributed to a pension fund pursuant to a collective bargaining agreement with the Textile Workers Union of America. In 1980, Standard Dye was forced to liquidate its assets of one million dollars as the costs of business became too great to pass on to consumers. After liquidation, the plan notified Standard Dye that it calculated a withdrawal liability of $817,398.00. Standard Dye refused to pay and the plan filed this action.

67. The other case consolidated with *Standard Dye* was Sibley, Lindsay & Curr Co. v. Bakery, Confectionery and Tobacco Workers Int'l Union, 566 F. Supp. 32 (W.D.N.Y. 1983), *cert. denied*, 467 U.S. 1259 (1984). After going out of business in 1980, Sibley began making withdrawal payments, but later challenged the MPPAA's constitutionality.

68. *Standard Dye*, 725 F.2d at 854-55.

69. *Id.* at 845.

70. *See supra* note 59 and accompanying text.

to be balanced.[71] The court determined that no hearing was required prior to the payment of the assessed withdrawal liability.[72]

Judge Cardamone's opinion then examined the rationality of involving the plan's trustees in the decisionmaking process and attaching a presumption of correctness to their findings. The court rejected the notion of inherent trustee bias and distinguished the case of *Ward v. Monroeville*,[73] on which the employer had relied. In *Ward*, a mayor served as a trier of certain ordinance and traffic offenses, and the fines from convictions generated substantial income to the village.[74] The Court found that this structure violated the procedural due process right to a fair and impartial hearing.[75]

The court in *Standard Dye* distinguished its case from *Ward* on the basis that the trustees were required by law to serve the fund impartially and were restricted in their discretion to determine withdrawal liability.[76] The court also rejected the employer's argument that the presumption in favor of the trustees' findings was unconstitutional, citing *Republic's* reasoning that the findings were subject to review by an arbitrator and, if necessary, the courts.[77]

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71. *Standard Dye*, 725 F.2d at 854. Under the *Mathews* test the court articulated the following interests to be balanced: (1) private interest—the court classified the private interest as the employers' bank account, as payment deprives the employer of the use of the liability payment funds; (2) risk of erroneous deprivation—the court stated any erroneous deprivation due to improper liability assessment would be temporary, as the employer would be refunded monies improperly appropriated to the fund. Also, the probable value of the additional safeguard of a full hearing prior to payment was minimal as the employer could provide the plan with information or point out inaccuracies in the trustees' determination; and (3) public interests—the public interest is that of protecting multiemployer pension plans and the employees and retirees protected by those plans. *See supra* note 58.

72. The court determined from the balancing test that a hearing prior to payment of withdrawal liability was unnecessary and that the review of the trustees' findings was sufficient to protect the employers' due process interests.

73. 409 U.S. 57 (1972).

74. *Id.* at 58.

75. *Id.* at 60. In reaching this conclusion, the opinion cited Tumey v. Ohio, 273 U.S. 510 (1927), in which the Court held that it violated due process to have a judge decide a case if he had a "direct, personal or substantial pecuniary interest" in the outcome of that case. *Id.* at 523. In *Ward* the Court held that the judge had such an interest and, therefore, could not provide the impartiality required by the procedural due process clause of the fourteenth amendment.

76. *Standard Dye*, 725 F.2d at 855. In describing the trustees as impartial, the court ignored 29 U.S.C. § 1104(a) (1982). This section requires that the fiduciaries of the fund (the trustees) discharge their duties *solely* in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries. 29 U.S.C. §§ 1002(7) & (8) (1982) defines participants as employees or former employees and defines beneficiaries as persons designated by employees.

77. *Standard Dye*, 725 F.2d at 855. *See Republic*, 718 F.2d at 641-42 ("We reject Republic's [the employer's] argument that such review is essentially meaningless.").

3. *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*[78]

In the due process section of the *Washington Star* decision,[79] the Court of Appeals for the District of Columbia Circuit cited *Republic* and largely reiterated the Court of Appeals for the Fourth Circuit's reasoning. The court stated that although the trustees have a fiduciary duty to the plan's participants and beneficiaries, they harbor no inherent bias.[80] The court did add its own elaboration that the spirit of the legislative history of the MPPAA required the trustees to act neutrally and reasonably and thus guaranteed a fair and impartial review.[81] The court dismissed Washington Star's argument that the presumption of correctness was unconstitutional by reasoning that the presumption did not insulate the trustees, but required them to provide evidence to support their findings if the employer introduced contrary evidence.[82]

4. *Board of Trustees of the Western Conference of Teamsters Pension Trust Fund v. Thompson Building Materials, Inc.*[83]

In *Thompson Building*, the Court of Appeals for the Ninth Circuit reviewed a broad constitutional attack on the MPPAA.[84] In deal-

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78. 729 F.2d 1502 (D.C. Cir. 1984). Pursuant to a collective bargaining agreement, the Washington Star contributed to the International Typographical Union Negotiated Pension Plan. In 1981, however, financial difficulties forced the Star to cease its operations and dismiss all of its employees. The plan notified the Star of its assessed withdrawal liability of $525,987.00, which the Star did not dispute. The Star made the first two required quarterly payments, but then withheld the third payment and filed this action challenging the MPPAA's constitutionality.

79. Again, the *Washington Star* case was primarily a challenge to the retroactive application of the MPPAA. *Id.* at 1508. However, in addition to the decisionmaking process of the Act, the Star also attacked the MPPAA on the basis that it violated the Contract Clause of the Constitution by superceding the collective bargaining agreement which provided for payment of benefits. The court rejected this argument stating that Congress was within its power to pass legislation adjusting economic benefits and burdens, and the incidental upset expectations of employers were subject to Congress' exercise of this power. *Id.*

80. *Id.* at 1511.

81. *Id.*

82. *Id.*

83. 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985). Thompson had contributed to a pension plan as required by a collective bargaining agreement. In 1980, the union notified Thompson that it would no longer represent Thompson's employees so Thompson ceased contributing. The plan then notified Thompson that it owed $103,156.52 as a withdrawal liability. Thompson demanded arbitration, but did not follow the procedures to initiate it. Thompson also did not pay the liability and the plan initiated this action.

84. Thompson claimed that the MPPAA was unconstitutional in that it: (1) impaired contractual relations; (2) denied the right to an impartial tribunal; (3) denied the right to a meaningful hearing; (4) denied access to the courts; and (5) constituted a taking without just compensation. The court rejected all of these challenges. *Id.* at 1399.

ing with the procedural due process challenge, the court followed the reasoning of the Courts of Appeals for the Second, Fourth and District of Columbia Circuits and upheld the Act's constitutionality.[85] The Ninth Circuit Court of Appeals found the trustees' duties to be mostly ministerial, reducing the effect of any bias, and determined that any bias was outweighed by the expertise the trustees brought to the decisionmaking process.[86] The Ninth Circuit Court of Appeals also agreed with the other three circuits that the presumption of correctness of the trustees' findings was rational and that the statute appropriately cabined the trustees' discretion in making their determinations.[87]

5. *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*[88]

There are actually two *Fulton* cases. In the initial *Fulton* case (*Fulton I*), a panel of the Court of Appeals for the First Circuit found that the presumption afforded the trustees' findings violated the employer's due process right.[89] After *en banc* review,[90] the First Circuit Court of Appeals vacated the panel's opinion and entered a decision upholding the constitutionality of the MPPAA (*Fulton II*).[91]

Fulton II was a direct attack on the MPPAA's decisionmaking process, rather than a broad challenge to the Act with the procedural due process claim raised only as a subsidiary issue. In *Fulton II*, the employer's argument, simply stated, was that the trustees' determination of withdrawal liability was a violation of procedural due process because the trustees were naturally inclined to maximize liability in order to increase the plan's assets.[92] Fulton argued that the presump-

85. *Id.* at 1403.

86. *Id.*

87. *Id.*

88. 762 F.2d 1137 (1st Cir. 1985). Fulton initiated this case after it refused to pay its assessed withdrawal liability. Fulton was a heavy equipment hauler and railroad car unloader. In 1980, the City of Cambridge, Massachusetts acquired Fulton's land by eminent domain. After an unsuccessful search for a new location, Fulton ceased operations. Fulton withdrew from the pension plan to which it had been contributing pursuant to collective bargaining agreements. The plan assessed Fulton's withdrawal liability at $468,637.00, which Fulton refused to pay.

89. Keith Fulton & Sons, Inc. v. New England Teasmsters & Trucking Indus. Pension Fund, Inc., 762 F.2d 1124, 1135 (1st Cir. 1984). This successful, albeit short-lived, constitutional challenge to the MPPAA is discussed in the next section of this note.

90. The First Circuit Court of Appeals agreed to review the case *en banc* because the panel's determination that the MPPAA was partly unconstitutional was a departure from all previous holdings on the issue. *Fulton*, 762 F.2d 1137, 1138-39.

91. *Id.* at 1139.

92. *Id.*

tion of correctness afforded the findings compounded this violation.[93]

The First Circuit Court of Appeals began its analysis by stating three principles which would inform its review of the MPPAA. First, citing a principle from *Usery v. Turner Elkhorn Mining Co.*,[94] the court stated that:

> [i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.[95]

In addition to the view that the MPPAA should receive deferential treatment,[96] the court identified the *Mathews* balancing test as the appropriate standard for determining the constitutional sufficiency of the decisionmaking process under the MPPAA.[97] Finally, the court stated its consciousness of the fact that "due process is flexible and calls for such procedural protection as the particular situation demands."[98]

The First Circuit Court of Appeals' review centered not on whether there might be a fairer decisionmaking process, but whether Congress' prescribed method was "fair enough."[99] In keeping with this standard, the majority in *Fulton II* conceded that the trustees acted with an inherent bias and that the statutory presumption, in fact, compounded this bias.[100] However, the court held that the partiality of the decisionmaking process did not exceed the limits of due process.[101]

The First Circuit Court of Appeals departed from the reasoning of other courts by finding that the trustees harbored an inherent bias against the employers.[102] After conceding the existence of bias, the

93. *Id.*

94. 428 U.S. 1 (1976).

95. *Fulton II*, 762 F.2d 1137, 1140 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)) (citations omitted).

96. *See supra* notes 94-95 and accompanying text.

97. *Fulton II*, 762 F.2d 1137, 1140.

98. *Id.* (citing *Republic*, 718 F.2d at 640 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

99. *Id.*

100. *Id.*

101. *Id.* The court simply held that Congress acted within its discretion.

102. No inherent bias was found in Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 729 F.2d 1502, 1511 (D.C. Cir. 1984); Textile Workers Pension Fund v. Standard Dye & Finishing Co., 725 F.2d 843, 855 (2d Cir. 1984), *cert. denied*, 467 U.S. 1259 (1984); Republic Indus., Inc. v. Teamsters Joint Council No. 83 Pension Fund, 718 F.2d 628, 640-41 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). *But*

majority in *Fulton II* discounted this inherent bias for several reasons. First, the court looked to the requirement that the method chosen for calculating liability must be applied uniformly to subsequent withdrawing employers.[103] This requirement, the court reasoned, would dissuade the trustees from applying a method that resulted in high withdrawal liabilities, for fear that the method would subsequently be applied to the employer that appointed them.[104]

Second, the court claimed that the trustees' fiduciary obligation to the plan did not necessarily mean that they would assess the highest possible liability.[105] Their fiduciary duty in fact prohibited such action, because high assessments would discourage future participation in the plan by other employers and thereby undermine the strength of the entire system.[106]

The court also found the *Ward* holding inapplicable. In the First Circuit Court of Appeals' view the trustees were acting not as adjudicators as in *Ward*, but as administrators.[107] The majority stated that the trustees did not have unbridled discretion, but rather had to make their calculations according to the detailed provisions of the statute, which reduced the influence of any inherent bias.[108]

The Court of Appeals for the First Circuit also rejected Fulton's argument that the presumption afforded the trustees' decisions violated procedural due process. The majority accepted the plan's argument that placing the burden of proof on the employer was a necessary corollary of allowing a number of different methods for calculating liability.[109] The court cited a House Report illustrating this view: "These rules are necessary in order to ensure the enforcability [sic] of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actua-

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see Board of Trustees of the W. Conference of Teamsters Pension Fund, Inc. v. Thompson Bldg. Materials, Inc., 749 F.2d 1396, 1403 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (alluded to existence of inherent bias).

103. *Fulton II*, 762 F.2d 1137, 1142. *See supra* note 23 and accompanying text.

104. *Fulton II*, 762 F.2d 1137, 1142. The employee organization and the employers collectively must be represented equally on the board of trustees. Therefore, one half of the trustees are appointed by the employers. *See supra* notes 19 & 20.

105. *Fulton II*, 762 F.2d 1137, 1142.

106. *Id.* at 1142-43.

107. *Id.* at 1141-42. The *Fulton II* court agreed with the *Republic* court that the trustees' task was "ministerial." *Id.*

108. *Id.* at 1141.

109. *Id.* at 1143-44.

rial determination."[110] Thus, without the presumptions, the statute would encourage employers to initiate litigation to determine whether the method chosen was one of the many reasonable methods permitted by the Act.[111]

To illustrate its conclusion that the presumptions were valid, the court stated that Congress itself could have chosen to require the use of the calculation method that produced the highest withdrawal liability, rather than to permit the choice of several reasonable methods.[112] Since Congress had the constitutional authority to require this method, it *a fortiori* had the authority to allow trustees to choose a method and to afford their choice a presumption of reasonableness.[113]

In summary, while *Fulton II* was in accord with the Second, Fourth, Ninth and District of Columbia Circuit Courts of Appeals in upholding the constitutionality of the MPPAA, the First Circuit Court of Appeals qualified its endorsement of the propriety of the Act. Where the other circuits expounded on the neutrality of the trustees,[114] the *Fulton II* court recognized the trustees' bias but minimized its effect and legal significance.

The majority in *Fulton II* twice expressed the view that while they did not believe the statute exceeded the requirements of procedural due process, they also did not believe that Congress had chosen the "best"[115] or "fairest"[116] process for determining withdrawal liability. This uneasiness with Congress' legislative scheme was expressed

110. *Id.* at 1143 (citing H.R. REP. NO. 869, 96th Cong., 2nd Sess. 67, 86, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 2935, 2954).

111. *See Fulton II*, 762 F.2d 1137, 1143.

112. *Id.* at 1143-44.

113. *Id.* This part of the court's opinion confuses substantive due process with procedural due process. See *infra* notes 154-55 and accompanying text for a discussion of the *Fulton II* court's confusion of these types of due process.

114. *See supra* note 102 and accompanying text.

115. *Fulton II*, 762 F.2d 1137, 1144. The court stated:

> Our rejection of Fulton's argument does not mean that we believe Congress picked the *best* method for ascertaining an employer's withdrawal liability . . . . Finding the best method, however, is not our function; under the due process precedents which guide us, we must only find that Congress acted rationally in designing the procedure for calculating withdrawal liability.

Id. (emphasis in original).

Again, the court confused substantive and procedural due process analysis here. See *infra* notes 154-55 and accompanying text for a discussion of this confusion.

116. *Fulton II*, 762 F.2d 1137, 1146 ("Although we concede that Congress may not have prescribed the fairest plan for assessing withdrawal liability, our review of the statute in light of the standard of due process convinces us that the provisions of 29 U.S.C. § 1401(a)(3) are not constitutionally deficient.").

emphatically in the opinions of the majority in *Fulton I*,[117] Judge Aldrich's dissent in *Fulton II*,[118] and finally in *Yahn*,[119] holding the decisionmaking process of the MPPAA unconstitutional.

C. *Opinions Invalidating the MPPAA's Decisionmaking Process*

1. *Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Industry Pension Fund, Inc.*[120]

Fulton I was a sweeping constitutional challenge to the MPPAA and, as in all of the cases challenging the MPPAA which preceded it, the procedural due process claim was one of the subsidiary issues.[121] In *Fulton I*, the employer claimed that the presumption of correctness afforded the trustees' findings, in combination with "the lack of precision in the actuarial art and the fact that the trustees have a fiduciary duty to the fund," led to the assessment of the highest possible withdrawal liability.[122] Fulton argued, and the panel agreed, that this procedure violated the employers' fifth amendment right to due process.[123]

The First Circuit Court of Appeals panel in *Fulton I*[124] began its analysis of the procedural due process claim with a discussion of the presumption of correctness afforded the trustees' findings. The court noted the "rather unique" nature of this scheme and drew comparisons to normal civil and criminal suits in which the party desiring a change in the status quo must prove the "existence of liability" and the

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117. Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc. 762 F.2d 1124 (1st Cir. 1984). The *Fulton II* opinion vacated this decision. *Fulton II*, 762 F.2d 1137, 1146.

118. *Id.* at 1146-51 (Aldrich, J., dissenting).

119. United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986), *prob. juris. noted*, 107 S. Ct. 567 (1986).

120. 762 F.2d 1124 (1st Cir. 1984). See *supra* note 88 for a discussion of the facts surrounding Fulton's withdrawal.

121. *Id.* at 1127-37. Fulton challenged the MPPAA on the following grounds: (1) it violated substantive due process rights; more specifically, it violated the contract clause and did not pass constitutional muster under a "rational basis" test; (2) it denied the seventh amendment right of trial by jury; (3) it denied the fifth amendment right of access to the courts; (4) it violated procedural due process in the presumption of correctness afforded the trustees' findings; (5) it constituted a deprivation of property without a prompt hearing; (6) it constituted an unconstitutional taking of property, and; (7) its retroactive application was unconstitutional.

122. *Id.* at 1133.

123. *Id.*

124. Senior District Judge Pettine, of the District of Rhode Island, sitting by designation, wrote the *Fulton I* decision.

"extent of that liability" by at least a preponderance of the evidence.[125] By contrast, under the MPPAA, once the existence of liability is established, the burden of proof is shifted from the party trying to change the status quo (i.e., the plan trying to take something from the employer) to the employer, who must prove by a preponderance of the evidence that the extent of liability is unreasonable or erroneous.[126] If the arbitrator then agrees with the plan as to the extent of liability, the employer must prove in court, by a clear preponderance of the evidence, that the finding was "clearly erroneous."[127] The statute's effect then, is to permit the trustees to select any liability that is not "clearly erroneous," a range of possibilities that spans tens of thousands of dollars.[128]

These presumptions were especially troubling to the panel because the trustees are not neutral and detached.[129] Analogizing the fiduciary duty owed by the trustees to the plan, to the role of the mayor in *Ward v. Monroeville*,[130] the court stated:

> Consistently picking the highest possible figure for withdrawal liability would best fulfill their fiduciary duties to the fund and the covered employees, besides fulfilling any fiduciary duties which may or may not exist vis-a-vis non-withdrawing employers . . . . Withdrawal liability . . . gives the trustees not only a chance to punish the withdrawing employer but also a chance to deter further withdrawals through the imposition of the highest possible liability.[131]

In the light of these defects in the scheme, the panel of the Court of Appeals for the First Circuit held the MPPAA's decisionmaking process for establishing withdrawal liability unconstitutional.

In rejecting the validity and necessity of trustees' involvement and the presumption that attached to trustees' decisions, the court summarized its view of due process: "Fair procedures are rarely as economical as summary ones. However, society's interest in fundamental fairness is greater than its interest in reducing the legal fees

125. *Fulton I*, 762 F.2d 1124, 1133-34.

126. *See id.*; 29 U.S.C. § 1401(a)(3)(B) (1982).

127. *See Fulton I*, 762 F.2d 1124, 1134; 29 U.S.C. § 1401(a)(3)(A) (1982).

128. *Fulton I*, 762 F.2d 1124, 1134. In *Yahn*, the court stated that the trustees, in deciding Fulton's withdrawal liability, set a discount rate at 7.5%, but noted that a discount rate of 14.5% also would have been reasonable. *Yahn*, 787 F.2d at 140. The court stated that the difference in money between the withdrawal liabilities using these two discount rates was "considerable." *Id. See also supra* note 27 & *infra* note 216.

129. *See Fulton I*, 762 F.2d 1124, 1134.

130. 409 U.S. 57 (1972). *See supra* notes 73-75 and accompanying text for discussion of the facts and holding in *Ward*.

131. *Fulton I*, 762 F.2d 1124, 1134.

paid by pension funds."[132] To cure the constitutional defect in the MPPAA, the court severed from the statute the clause providing for the presumptions. The court cited numerous authorities for this action,[133] and the Court of Appeals for the Third Circuit later used this procedure in *Yahn*.[134]

2. Judge Aldrich's Dissent in *Fulton II*[135]

When the Court of Appeals for the First Circuit upheld the MPPAA in *Fulton II*, Judge Aldrich filed a dissenting opinion. He began his opinion with a discussion of the factual background of the case to highlight the inequities created by the MPPAA. Judge Aldrich pointed out that Fulton became a withdrawing employer after being forced out of business when the city took land vital to the company's existence by eminent domain.[136] Thus, through no fault of its own, Fulton was forced out of business and forced to make liability payments.[137]

Judge Aldrich then expanded on the inherent bias of the plans' trustees. He explained that the bias was based both on a fiduciary duty, as the majority conceded,[138] and on the trustees' personal circumstances. Judge Aldrich said:

> [T]he trustees have personal interests in their decision beyond avoiding being charged for misfeasance. If, as the court suggests, they look ahead to possible future withdrawals on their own part, obviously the more solvent they make the fund today, at the withdrawing employer's expense, the smaller the possible deficit they will be personally responsible for in the future. Even if they do not contemplate future withdrawal, augmenting the fund's assets today could avert possible future pressure on them to increase contributions to meet unfunded liability.[139]

Judge Aldrich also attacked the argument that the trustees would

132. *Id.* at 1135.

133. The First Circuit Court of Appeals cited Buckley v. Valeo, 424 U.S. 1 (1976), for the authority to sever 29 U.S.C. § 1401(a)(3) from the MPPAA. *Buckley* provided that, " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.' " *Buckley*, 424 U.S. at 108 (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

134. *Yahn*, 787 F.2d at 143.

135. *Fulton II*, 762 F.2d 1137, 1146-51 (Aldrich, J., dissenting).

136. *Id.* at 1147. See *supra* note 88 for full discussion of the facts in *Fulton*.

137. *Fulton II*, 762 F.2d 1137, 1147 (Aldrich, J., dissenting).

138. *See id.* at 1142.

139. *Id.* at 1148 (Aldrich, J., dissenting).

not set high withdrawal liability for fear of scaring off potential contributing employers. In his view, increasing the fund's solvency through high withdrawal liability payments makes the plan more, not less, attractive to potential employers.[140] To the extent that this is accurate, the trustees have an incentive, and not a disincentive, to impose high withdrawal rates.

Judge Aldrich also made an issue of the flaw in the majority's reasoning process in the portion of the decision discussing the trustees' purported lack of discretion.[141] The majority stated that the trustees primarily were performing a ministerial role in applying the calculation methods, and hence their discretion was narrow.[142] However, the opinion later argued that the trustees' decisions must be afforded a presumption of correctness in order to avoid litigation because of the wide range of possible results from the various actuarial methods.[143] Judge Aldrich pointed out that the trustees' role should not be considered ministerial because their employment of different actuarial methods had such wide ranging results, as conceded by the majority.[144]

Finally, Judge Aldrich challenged the argument that because Congress could have passed an act that required the highest withdrawal liability, the flexible statutory scheme was constitutional.[145] He stated that if Congress had so acted and satisfied the standard of reasonableness, its action would have been the decision of a majority of impartial legislators.[146] However, according to Judge Aldrich, the delegation of that type of discretion to biased decisionmakers is fundamentally different and improper.[147]

In his conclusion, Judge Aldrich recommended a cure for the defective decisionmaking procedure of the MPPAA. Judge Aldrich recommended that Congress amend the Act and substitute an impartial decisionmaker to calculate withdrawal liability.[148] Pending such action, he would eliminate the presumption in favor of the trustees.[149] While failing to convince a majority of the First Circuit Court of Appeals, Judge Aldrich's arguments and proposals found a more sympathetic ear in the Court of Appeals for the Third Circuit. The Court of

140. *Id.* at 1150.
141. *See id.* at 1149.
142. *Id.* at 1142.
143. *See id.* at 1143.
144. *Id.* at 1149 (Aldrich, J., dissenting).
145. *Id.* at 1151.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*

Appeals for the Third Circuit in *Yahn* ruled that the withdrawal liability decisionmaking process was unconstitutional and severed the presumption provisions from the statute.[150]

3. *United Retail & Wholesale Employees Teamsters Union Local 155 Pension Plan v. Yahn & McDonnell, Inc.*[151]

Yahn raised three questions involving the MPPAA, one of which was the constitutionality of the decisionmaking process for determining withdrawal liability.[152] In discussing the procedural due process challenge to the MPPAA, the court extensively analyzed the reasoning of the First Circuit Court of Appeals in *Fulton II* and adopted much of the reasoning in Judge Aldrich's dissent.[153]

The Third Circuit Court of Appeals began its analysis by defining the appropriate standard of review for this type of procedural due process claim. It sharply criticized the *Fulton II* court for invoking the *Turner Elkhorn* principle that legislative acts adjusting economic benefits and burdens will not be overturned unless it can be shown that Congress acted arbitrarily or irrationally.[154] The *Yahn* court pointed out that *Turner Elkhorn* is applicable to substantive due process claims, not procedural due process claims.[155] While the *Turner Elk-*

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150. *Yahn*, 787 F.2d at 130.

151. 787 F.2d 128 (3d Cir. 1986), *prob. juris. noted*, 107 S. Ct. 567 (1986). Yahn & McDonnell, Inc. began contributing to the Local 115 pension fund in 1980. In 1981, Yahn ceased operations and withdrew from the plan. The plan assessed Yahn a withdrawal liability of $458,000.00 Yahn requested and received a review of the assessment, but it was not altered. Pending arbitration, the plan brought an action demanding payment of the withdrawal liability by Yahn.

152. *Id.* at 129. Yahn also questioned whether the MPPAA authorized a right of action to collect withdrawal liability payments pending arbitration. The third question concerning the MPPAA was whether the MPPAA required an award of attorney's fees, liquidated damages, and costs upon entry of a judgment in favor of the plan for delinquent payments.

153. *See id.* at 135-42.

154. *Id.* at 137. In *Turner Elkhorn*, the Court upheld a federal law that contained an "irrebuttable presumption" of total disability for miners seeking compensation who had been diagnosed as extremely ill with pneumoconiosis as a result of their coal mining. *Turner Elkhorn*, 428 U.S. at 22-24. The constitutional challenge in *Turner Elkhorn* involved a substantive provision of the statute rather than a procedural one. The Supreme Court stated that since there was a rational relation between the fact presumed and the ultimate fact proved, the presumption was valid. *Id.* at 28.

155. *Yahn*, 787 F.2d at 137. The *Yahn* court was correct in pointing out that this substantive analysis is inapplicable to procedural due process claims. Professor Tribe has stated the well-settled view that substantive and procedural due process analyses are distinct from each other. He has pointed out that the government can decide what substantive benefits to provide to the people, but there is a separate inquiry into the fairness of the procedure for the withdrawal of those benefits. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 506 (1978). *See also*, Easterbrook, *Substance and Due Process*, 1982 SUP. CT.

horn test may determine whether Congress chose a reasonable substantive rule, it does not determine whether the procedure is adequate or fair.[156]

The majority in *Yahn* also drew a distinction between two types of procedural due process claims: those arising from insufficient procedural safeguards, and those arising from decisionmaker bias.[157] Based on this distinction, the court determined that reliance on the *Mathews* balancing test was also inappropriate.[158] The Court of Appeals for the Third Circuit pointed out that the *Mathews* Court did not discuss the procedural due process right to an unbiased decisionmaker and on subsequent occasions the Supreme Court has not invoked the balancing test in such cases.[159] The court stated:

> [T]he *Mathews* balancing test is not the proper inquiry. If someone is deprived of his right to an impartial tribunal, then he is denied his constitutional right to due process, regardless of the magnitude of the individual and state interests at stake, the risk of error and the likely value of additional safeguards (the factors to be balanced under *Mathews*).[160]

Having eliminated the previous methods for reviewing this procedural due process challenge to the MPPAA, the Court of Appeals for the Third Circuit began its own review. The court recognized the trustees' inherent bias, as in *Fulton II*, and rejected the argument that the bias was discounted by "allegiance" to withdrawing employers and a fiduciary duty to the fund.[161] Citing *NLRB v. Amax Coal Co.*,[162] the

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REV. 85, 88 (while review of substantive law is most often done under lenient standards, procedural review affords very little deference to the legislature); *In re* Gault, 387 U.S. 1, 71 (1966) (Harlan, J., concurring in part, dissenting in part) ("The substantive-procedural dichotomy is . . . an indispensible tool of analysis. . . . Its premise is ultimately that courts may not substitute for the judgments of legislators their own understanding of the public welfare, but must instead concern themselves with the validity under the Constitution of the methods which the legislature has selected.").

156. *See Yahn,* 787 F.2d at 137 (citing Schweiker v. McClure, 456 U.S. 188 (1982); Mathews v. Eldridge, 424 U.S. 319 (1976)).

157. *Id.* at 137.

158. *Id.*

159. *Id.* at 137-38.

160. *Id.* at 138.

161. *See id.* To support its rejection of the argument that the bias was discounted, the *Yahn* court suggested that the Supreme Court would regard the trustees in this case as biased, in view of other cases in which the Supreme Court found no bias. One such case is Friedman v. Rogers, 440 U.S. 1 (1979) (rejecting optometrist's claim that Texas Optometry Disciplining Board was biased because the plaintiff failed to show the possibility of personal interest of the board members that would preclude a fair hearing). *See also,* Schweiker v. McClure, 456 U.S. 188 (1982) (upholding Medicare program in which final decision by approved insurance carrier, denying payment of patient's insurance benefits, was conducted

court argued that the trustees owed an "exclusive" duty to the plan,[163] and were personally liable to the plan for any breach of that duty.[164] This combination of statutory duty and personal interest created a procedure arguably less impartial than the one used in *Ward*, where the mayor maximized the village's assets and only indirectly his own.[165]

The court discounted the *Fulton II* argument that the trustees may not always assess the highest possible withdrawal liability for fear of discouraging participation. The court stated, "The due process right to an unbiased decisionmaker is not satisfied by speculation that countervailing concerns may restrain clearly biased parties from excessively harsh judgments."[166] The court emphasized that the procedural due process right to an impartial decisionmaker is not a flexible right to be balanced against other interests or the possibility that the decision will not be excessively unfair.[167]

The majority in *Yahn* then discussed the discretion of the trustees in making their withdrawal liability determination. While stating that a lack of discretion would negate the effects of the inherent bias, the court found the trustees to have "wide and significant discretion."[168] The court cited the facts of *Fulton II* in which the trustees had chosen a discount rate of 7.5%, but expert testimony established that 14.5% would also have been a reasonable rate and thus a permissible choice.[169] Given the significant differences in these two reasonable and permissible choices, the court found the trustees to have wide discretion. The Court of Appeals for the Third Circuit also argued that the trustees have such significant discretion that, by manipulating

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by an officer appointed by the approved carrier). The *Yahn* court surmised that the trustees' bias was greater than the bias of the decisionmakers in *Friedman* or *Schweiker*, thus their partiality exceeded the limits of procedural due process. *Yahn*, 787 F.2d at 139.

162. 453 U.S. 322 (1981). In *Amax Coal*, the Court held that trustees of a multiemployer pension fund established under the Labor Management Relations Act, 29 U.S.C. §§ 141-87 (1982), had an "unwavering duty of complete loyalty to the beneficiary of the trust." *Id.* at 329.

163. *Yahn*, 787 F.2d at 139.

164. *Id.* The court based this argument on 29 U.S.C. § 1109(a) (1982) which provides that: "Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach . . . ." *Id.*

165. *Yahn*, 787 F.2d at 139. See *supra* notes 73-75 and accompanying text for discussion of *Ward*.

166. *Yahn*, 787 F.2d at 139.

167. *See id.* at 141.

168. *Id.* at 140.

169. *Id.*

their calculations, they may determine that an employer has no liability or substantial liability.[170] The *Yahn* court stated that these possibilities contradict the notion that the trustees act in a "ministerial capacity."[171] Thus, according to the court, the trustees exercised wide discretion, increasing the problem of their inherent bias.[172]

The court considered whether arbitration, with a presumption of correctness afforded to the trustees' findings, could successfully eliminate the trustees' bias, and held that it could not.[173] In citing *Goodman v. Laborers' International Union*,[174] the court stated, "where an initial hearing is tainted by bias, arbitration cannot provide the requisite fair hearing if the arbitration proceeding is not *de novo*."[175] While the presumptions may be a rational means of "promoting uniformity and discouraging litigation," the *Yahn* court held that they do not conform to the standards of procedural due process.[176]

The Court of Appeals for the Third Circuit discussed the severability of the presumption provisions of the MPPAA, and concluded that a *de novo* review of the trustees' findings would be sufficient to meet procedural due process requirements.[177] In a very brief discussion, the majority opinion cited cases from the Seventh and Ninth Circuit Courts of Appeals that held *de novo* review eliminates the ill effects of bias in the decisionmaking process.[178] The court distin-

170. *Id.* at 141.

171. *Id.*

172. *Id.*

173. *Id.*

174. 742 F.2d 780 (3d Cir. 1984). Goodman was charged in a union disciplinary proceeding for exceeding his authority as the local's business manager. The trial level of the internal union disciplinary process barred Goodman from holding elective office for five years. Goodman claimed the members of the trial board were biased against him and appealed to the union's concededly unbiased Executive Board, which affirmed the trial board's finding. On the facts of the case, the Court of Appeals for the Third Circuit held that the Executive Board's review did not constitute an independent determination of the dispute.

175. *Yahn*, 787 F.2d at 141.

176. *Id.*

177. *Id.* at 142-44. The *Yahn* court followed the same reasoning as the First Circuit Court of Appeals in *Fulton I* for severing the presumption provision of the statute. *See supra* note 133 for discussion of that authority.

178. The Third Circuit Court of Appeals cited Perry v. Milk Drivers' and Dairy Employees' Union Local 302, 656 F.2d 536 (9th Cir. 1981) and Rosario v. Amalgamated Ladies' Garment Cutters' Union Local 10, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980). In *Perry*, the court held that in that particular case involving the review of a one year suspension from union activity and a $225 fine imposed on the plaintiff for unauthorized picketing, *de novo* review by a Teamsters Joint Council cured any defects caused by the bias of the Local 302 trial panel. *Perry*, 656 F.2d at 539. In *Rosario*, the appellees were also suspended from the union for one year by the Local after an altercation in a manager's office. *Rosario*, 605 F.2d at 1235. After three tainted hearings, the court

guished the holding in *Ward* which provided that a state could not cure its constitutionally defective procedure by eventually offering the complainant an "impartial adjudication."[179]

In summary, the Third Circuit Court of Appeals in *Yahn*, adopting most of the reasoning of *Fulton I* and Judge Aldrich's dissent in *Fulton II,* found the MPPAA's decisionmaking process for assessing withdrawal liability to be violative of the fifth amendment right to due process. To remedy the constitutional defect, the court severed the provision affording a presumption of correctness to the biased findings of the trustees.[180] The focus of this note now shifts to whether the Court of Appeals for the Third Circuit was correct in holding the MPPAA's decisionmaking process unconstitutional and then severing the presumption clause from the statute.

III. Judicial Concepts of Decisionmaker Bias

A. *The Standard of Review*

In analyzing claims of decisionmaker bias under the statutory scheme of the MPPAA the courts have employed a number of standards of review. The court in *Fulton II* invoked the principle from *Turner Elkhorn*, a case involving a substantive due process challenge.[181] However, since it is well settled that the rationality test for determining substantive due process rights is not directly applicable to procedural due process claims,[182] the court in *Fulton II* was mistaken in applying this test.

Several courts invoked the *Mathews* balancing test to determine the sufficiency of the procedural framework.[183] Although applicable

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held that a *de novo* review cured the defects caused by bias in the first three hearings. *Id.* at 1244.

179. *Yahn*, 787 F.2d at 143 n.23. In this footnote, the court stated that the *Ward* facts involved the neutrality of an adjudicative setting. Although it offered little reasoning for its conclusion, the court stated that the trustees' role was less than adjudicative. Because of this distinction, the Court of Appeals for the Third Circuit stated that the *Ward* holding was not controlling. See *supra* discussion in section II (A) of this note for an examination of the trustees' role as adjudicators and *infra* notes 235-39 and accompanying text for a discussion of the propriety of the court's finding that the *Ward* holding was not controlling.

180. *Yahn,* 787 F.2d at 143-44.

181. See *supra* note 154 for a discussion of the facts and holding in *Turner Elkhorn*.

182. *See supra* note 155.

183. Only the Courts of Appeals for the Ninth Circuit in *Thompson*, the panel of the First Circuit in *Fulton I*, and the Third Circuit in *Yahn* did not balance the interests articulated in *Mathews*. However, of the other courts which did proclaim to invoke the *Mathews* balancing test, only the Court of Appeals for the Second Circuit in *Standard Dye* enumerated the particular interests to be balanced in the *Mathews* test.

to the evaluation of some, and perhaps most, procedural due process cases, this test is not appropriate for determining the fairness of the MPPAA procedures for calculating withdrawal liability.[184] As argued by the *Yahn* court, the *Mathews* balancing test is not appropriate for evaluating an allegation of decisionmaker bias.[185] The *Mathews* test seeks to balance the interests of the individual in an accurate decisionmaking process against the interests of the government in the efficient resolution to challenges to government action. It assumes that certain procedural safeguards may not always be necessary to protect individual interests in light of the limited risk of erroneous deprivation and the burden imposed on government efficiency. For example, the Supreme Court has held in certain circumstances that due process mandates a hearing prior to deprivation of certain property interests.[186] However, where the deprivation involves the summary suspension of a driver's license for refusal to submit to a breath-analysis test upon arrest for operating a motor vehicle under the influence of intoxicating liquor, the Court has held that the modest interest of continued possession and use of a driver's license is outweighed by the government interest in removing potentially hazardous drivers from the highways.[187] A hearing *after* the suspension is sufficient to protect the individual's procedural due process right in that circumstance.[188]

Thus, while *Mathews* is applicable for the purpose of determining the necessity, form, and appropriate time for a hearing, it is not applicable for determining the fairness of a prescribed hearing, including the existence of bias in a decisionmaking process. Moreover, the *Yahn* court correctly pointed out that since the Supreme Court decided *Mathews* in 1976, it has not used the balancing analysis for resolving cases

184. Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472 (1986) ("The word 'fairness' did not appear in the balancing test . . . ." "Balancing can lead to the anomalous result that an individual will have a clear due process right to no due process.").

185. *Yahn*, 787 F.2d at 137-38. *See* Redish & Marshall, *supra* note 184, at 474. The authors state that the balancing approach's "inadequacy lies in its inability to take into account the traditional concerns of procedural justice that the framers most certainly intended . . . ." They further claim that the "*Mathews* balancing test threatens to undermine wholly the viability of the guarantee" to procedural due process. *Id. See also Developments in the Law of Zoning*, 91 HARV. L. REV. 1427, 1524 (1978) ("This balancing approach normally centers on whether a prior hearing is necessary . . . ."); Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975) (recommending courts decide if procedures are consistent with basic notions of decency and fair dealing instead of balancing).

186. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264-71 (1970) (procedural due process requires a pre-termination hearing prior to deprivation of welfare benefits).

187. *See* Mackey v. Montrym, 443 U.S. 1, 10-19 (1978).

188. *Id.*

of alleged decisionmaker bias.[189]

The only MPPAA case to articulate and evaluate the balanced interests, *Standard Dye,* illustrates the distinction between appropriate and inappropriate uses of the *Mathews* test. In *Standard Dye*, the court balanced the private interests, the risk of erroneous deprivation and the government's interests and determined that "the legislative scheme employed by Congress for the collection of employer withdrawal liability was rational . . . ."[190] However, the court did not discuss decisionmaker bias in its balancing analysis; that discussion occurred in a subsequent section,[191] where the court examined the "fairness" of the decisionmaking process and found no unfairness.[192]

Having eliminated the applicability and usefulness of the *Turner Elkhorn* and *Mathews*[193] tests in this procedural due process context, the remaining standard for this type of case is the principle drawn from *Morrissey v. Brewer*[194] that "due process is flexible and calls for such procedural protection as the particular situation demands."[195]

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189. *Yahn*, 787 F.2d at 138.

190. *Standard Dye*, 725 F.2d at 854. See *supra* note 71 for a discussion of the interests balanced.

191. *See Standard Dye*, 725 F.2d at 854-55. The Court of Appeals for the Second Circuit used the *Mathews* test in a section which it called "Denial of the Due Process Rights to a Prepayment Hearing." *Id.* at 854. It was the next section of the court's analysis, called "Denial of Access to the Courts and Trial by Jury," that addressed the issue of decisionmaker bias. *Id.* at 854-55.

192. *Id.* at 855 ("[W]e perceive no unfairness in Congress' decision to place the initial determination of withdrawal liability on the trustees and to provide that the Fund's determination is presumptively correct.").

193. While the *Mathews* balancing test is inapplicable in this circumstance, even where it is applicable, noted constitutional scholars have questioned its utility. Professor Gerald Gunther has termed the test "not a wholly informative one." G. GUNTHER, CONSTITUTIONAL LAW 584 (11th ed. 1985). Professor Laurence Tribe has stated that, "there are serious problems in striking the balance called for by decisions like *Eldridge*." L. TRIBE, supra note 155, at 542. According to Professor Jerry Mashaw, "The failing of *Eldridge* is its focus on questions of technique rather than on questions of value. That focus, it is argued, generates an inquiry that is incomplete because unresponsive to the full range of concerns embodied in the due process clause." Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976). The balancing approach is problematic and imprecise as courts must allocate arbitrary weights to intangible concepts. Perhaps this is why many of the courts that claimed to use the *Mathews* standard failed to identify the factors used in the application of the test.

194. 408 U.S. 471 (1972).

195. *Id.* at 481. The flexible approach of *Morrissey* remains good law after the *Mathews* decision. Indeed, the *Mathews* balancing test can be viewed as a particular application of the *Morrissey* flexibility principle. Because *Mathews* applies only to the determination of what type of hearing, if any, is necessary, *Morrissey* remains in effect for resolution of other due process questions. The Supreme Court has, in fact, cited *Mathews* and *Morrissey* together in support of the proposition that due process is flexible and depen-

The application of this broad standard to a particular situation requires an understanding of the specific due process right and the specific context in which it arises.

The right to an impartial decisionmaker has developed in a long series of cases, beginning with quasi-criminal adjudications. In *Tumey v. Ohio*,[196] the Supreme Court stated that it was a violation of due process for a judge to try a case in which he had "a direct, personal, substantial, pecuniary interest" in the outcome.[197] The Court further stated that any procedure with a "possible temptation" to inject bias was violative of due process.[198] This right to an impartial decisionmaker, according to Supreme Court precedent and legal scholarship, is elemental and essential. In *Morrissey*, the Court noted that a " 'neutral and detached' hearing body" was a "minimum" require-

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dent on the particular situation. *See, e.g.*, Ford v. Wainwright, 106 S. Ct. 2595 (1986); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985).

196. 273 U.S. 510 (1927). In *Tumey* the petitioner challenged the constitutionality of an Ohio statute that required rural mayors to try cases involving offenses against state prohibition. The statute provided for the payment of a fee and costs to the mayor if, and only if, he convicted the defendant.

197. *Id.* at 523. The Court has termed this notion "actual bias," *In re* Murchison, 349 U.S. 133, 136 (1955), and has reiterated it in a number of contexts. In Withrow v. Larkin, 421 U.S. 35 (1975), the Court invalidated a Wisconsin statute that gave an examining board comprised entirely of licensed doctors, the power to reprimand unlicensed doctors. The Court held that the examining board's pecuniary interest in reducing the number of licensed doctors, thereby reducing their competition, created actual bias. *Id.* at 47.

The Court delineated another example of actual bias in Mayberry v. Pennsylvania, 400 U.S. 455 (1971). In *Mayberry*, a criminal defendant was sentenced by a judge whom the defendant had defamed and embarrassed during the trial. The fact that the judge had been previously subjected to personal abuse and criticism by the defendant constituted actual bias, and it violated procedural due process to permit the judge to sentence that defendant. *Id.* at 465-66.

For other examples of actual bias, see, *e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973) (optometry review board, comprised of practicing optometrists, could profit by revoking other optometrists' licenses); *In re* Murchison, 349 U.S. 133 (1975) (judge who served as one man grand jury cannot later adjudge witness from grand jury proceeding in contempt); *cf.* Marshall v. Jerrico, 446 U.S. 238 (1980) (statute under which determinations and assessment of penalties for violations of child labor laws are made by regional administrators of Department of Labor, and money from penalties is returned to the Department, did not violate due process because administrators act in prosecutorial capacity and are subject to review by administrative law judges).

198. *Tumey*, 273 U.S. at 532. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that it violated due process for a decisionmaker in a hearing for welfare eligibility to have participated in the determination under review. *Id.* at 271. In Offutt v. United States, 348 U.S. 11 (1954), a lawyer was convicted and sentenced for contempt by the same judge. In holding that the contempt proceedings must be tried by a different judge the Court stated that, "justice must satisfy the appearance of justice." *Id.* at 14. This concept has been called "apparent bias." Note, *Graham v. Scissor-Tail, Inc.: Unconscionability of Presumptively Biased Arbitration Clauses Within Adhesion Contracts*, 70 CALIF. L. REV. 1014, 1021 n.40 (1982).

ment of due process.[199] In his article *Some Kind of Hearing*, the late Judge Henry J. Friendly stated that "an unbiased tribunal is a necessary element in every case where a hearing is required . . . ."[200]

Under this approach, procedural due process challenges involving decisionmaker bias are not to be reviewed under a rational basis test,[201] or a balancing test,[202] to determine whether the partiality of a procedure is tolerable. Rather, the "particular situation" of a possibly

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199. *Morrissey*, 408 U.S. at 488-89. The Supreme Court restated the proposition that the right to an impartial decisionmaker is an elemental and essential right earlier in the same month that the Third Circuit Court of Appeals decided *Yahn*. In Chicago Teachers Union, Local 1 v. Hudson, 106 S. Ct. 1066 (1986), a case involving proportionate share payments by non-union teachers to the teachers' union, the Court held that a prompt and impartial hearing was "necessary" when a non-union teacher challenged the amount of the proportionate share payment. *Id.* at 1076. The Court also stated in *Goldberg*, 397 U.S. at 271, that "an impartial decisionmaker is essential." *Cf.* Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (procedure for expelling medical student for academic insufficiency is constitutional where academic evaluation and initial determination of course of action for student is made by same decisionmaking body); Goss v. Lopez, 419 U.S. 565 (1975) (suspension procedure for high school students in which principal levies charges and conducts review is constitutional as long as notice and hearing on charges follows as soon as practicable after suspension).

Although not dealing primarily with decisionmaker bias, these cases show that decisionmakers with an appearance of bias, stemming from their involvement in the decision under review, may in some circumstances participate in the decisionmaking process without violating due process. To reconcile these cases with *Goldberg*, where the Court found previous participation in a determination under review to be violative of the due process right to an impartial decisionmaker, one must limit *Goss* and *Horowitz* to their educational setting.

200. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975). Of the eleven "Elements of a Fair Hearing" listed "roughly in order of priority" by Judge Friendly, the right to an impartial decisionmaker was first. *Id.* at 1278. *See also* Redish & Marshall, *supra* note 184. The Redish and Marshall article lends substantial support to the proposition that the procedural due process right to an impartial decisionmaker is elemental and essential. The authors state that "the participation of an independent adjudicator is . . . an essential safeguard." *Id.* at 475. They further claim that the other due process rights of hearing and notice, while important, are of little value without an impartial decisionmaker. In highlighting the overarching importance of an impartial decisionmaker, Redish and Marshall declare:

> Even though the Supreme Court has often stated that the core rights of due process are notice and hearing . . . under certain circumstances the values of due process might arguably be safeguarded absent those specific procedural protections. None of the core values of due process, however, can be fulfilled without the participation of an independent adjudicator.

Id. at 475-76 (footnote omitted).

Other legal literature concurs in this assessment. *See, e.g.*, R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS, § 9.2.1 (1985) ("neutrality is viewed as a due process imperative"); *Developments in the Law of Zoning*, *supra* note 185, at 1525-26 ("[A] common requirement of all due process hearings, 'central to the very notion of procedural fairness and regularity'. . . is an impartial decisionmaker.").

201. *See supra* note 155 and accompanying text.

202. *See supra* notes 184-92 and accompanying text.

biased hearing requires the "procedural protection" of an impartial decisionmaker.[203] This approach requires a working definition of bias. The note's discussion now addresses that issue.

B. *Standards of Bias*

The Supreme Court has described two types of bias; actual bias, where the decisionmaker has a personal or financial stake in the outcome,[204] and apparent bias, where the decisionmaker is in a position, or has some interest, that may not amount to actual bias, but can be perceived as adverse to the interests of a party to the determination.[205] As fiduciaries of the plan under the Multiemployer Pension Plan Amendments Act of 1980,[206] the trustees are tainted by both actual and apparent bias. The fiduciary duty to the plan, and its incumbent duty to act solely in the interests of the participants, prevents the trust-

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203. *See supra* note 195 and accompanying text. *See also* Rubin, *Due Process and the Administrative State,* 72 CALIF. L. REV. 1044, 1139 (1984) (purpose of due process is to establish uniform standards of fair adjudication, not degrees of fairness that can be exchanged for injury).

204. *See supra* note 197 and accompanying text. The Court has not enumerated specific guidelines for determining the existence of actual bias. In *In re* Murchison, 349 U.S. 133 (1955), the Court stated the settled rule that a judge cannot try cases in which he has a personal interest in the outcome, and that "[t]hat interest cannot be defined with precision. Circumstances and relationships must be considered." *Id.* at 136.

The Redish & Marshall article enumerates three situations which pose a danger of partiality. The first two are identical to those set forth by the Supreme Court; that is, a financial interest in the outcome of the case, and a personal bias toward a party. Redish & Marshall, *supra* note 184, at 492. The authors also state that the decisionmaker must not be "predisposed toward a certain position that a party maintains in the case." *Id.* The authors point out that this type of bias is easy to eliminate by simply finding a disinterested adjudicator; thus, it should never be tolerated. *Id.* at 502. Redish and Marshall go on to say that it is difficult to determine how much temptation exists; thus, in reality, we must accept some bias. *Id.* at 492. However, if it is possible to remove it, we must do so no matter how slight the potential bias may be. *Id.*

205. *See supra* note 198. The Redish and Marshall article suggests that the appearance of fairness is just as essential as actual fairness for the purposes of the procedural due process right to an impartial decisionmaker. The authors state:

> Of all the values informing the due process guarantee, the perception-of-fairness value most clearly dictates use of a truly independent adjudicator. Whether or not it can be proven that a particular decisionmaker allows her personal interests to sway her resolution of a dispute, the perception-of-fairness value demands that she be enjoined from deciding the case if she has some identifiable *potential* bias. Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors.

Redish & Marshall, *supra* note 184, at 483. Thus, both Supreme Court precedent and legal literature suggest that the procedural due process right to an impartial decisionmaker extends beyond actual bias to protect against even apparent bias.

206. *See supra* note 21.

ees from exhibiting the requisite appearance of fairness.[207] Their actual financial stake in the outcome creates actual bias. They are potentially personally liable to the plan if they breach their fiduciary duties.[208] If the trustees were to assess withdrawal liabilities that did not create sufficient funds to meet the unfunded vested liabilities, they could be found to have violated their fiduciary duty to act in the best interest of the plan's participants and beneficiaries. In such a case, the trustees would be personally liable for the plan's losses.[209] This financial exposure, although attenuated, should be regarded as actual bias sufficient to violate the due process right to an impartial decisionmaker.[210]

There is also another source of personal bias against the withdrawing employer.[211] One half of the trustees for each plan are representatives or employees of employers that contribute to the plan. As

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207. *See* United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 139 (3d Cir. 1986), *prob. juris. noted*, 107 S. Ct. 567 (1986); Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, Inc., 762 F.2d 1124, 1134 (1st Cir. 1984).

In *Fulton II* the court stated that although the trustees were fiduciaries and they had to act in the best interests of the plan, that did not necessarily mean they were biased against the employers. *Fulton II*, 762 F.2d 1137, 1142. The plan argued that the trustees could not assess the highest possible withdrawal liability because it would discourage other employers from joining the plan and could adversely effect their own employer if it were to withdraw. *See supra* note 104 and accompanying text. However, trustees might forego such long term goals in favor of short term results through the more substantial goal of increasing the plan's present assets by assessing high withdrawal liabilities. Therefore, notwithstanding the possibility that the trustees could choose to foster long term goals for the plan by assessing low withdrawal liabilities, the possibility that the trustees could choose to act in the interest of increasing the plan's present assets by assessing the highest possible withdrawal liabilities, in order to protect the current contributing employers, violates the appearance of fairness requirement of the right to an impartial decisionmaker. *See supra* notes 198 & 205 and accompanying text. It also can be argued that this fiduciary duty creates actual bias. *See infra* notes 208-10 and accompanying text.

208. *See Yahn,* 787 F.2d at 139 (citing Massachusetts Mut. Life Ins. Co. v. Russell, 105 S. Ct. 3085 (1985)). *See also supra* note 164.

209. *See supra* note 164.

210. *See supra* note 197 and accompanying text. Professor Redish and Mr. Marshall state that "any financial temptation, regardless of how indirect or insubstantial" is sufficient to establish bias. Redish & Marshall, *supra* note 184, at 496.

211. It is also arguable that a trustee could have a personal bias against the plan. Although the trustees are required by 29 U.S.C. § 1104(a)(2) (1982) to act "solely in the interest of the participants and beneficiaries," if a withdrawing employer appointed one of the trustees and that trustee feels allegiant to the employer, he could be personally biased against the plan. 29 U.S.C. § 1106(b)(2) (1982) provides that a plan fiduciary shall not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries . . . ." 29 U.S.C. § 1108(b)(10) (1982) states that the provisions of § 1106 shall not apply to any transaction "required or permitted" under the MPPAA, such as the calculation of withdrawal liability. Thus, trustees appointed by withdrawing employers are not

such, they may have a personal interest in protecting their own future retirement benefits and protecting their employer from financial strain. They may also have a personal interest in protecting their jobs as trustees.[212] By assessing high withdrawal liabilities on the withdrawing employers, they increase the plan's assets and its probability of remaining solvent, thus protecting their own future benefits and their jobs as trustees. High withdrawal liabilities also decrease the financial burden on the remaining and future employers of having to satisfy withdrawn employers' unfunded vested benefits. All of these factors create a personal bias against the withdrawing employers which precludes the trustees from being impartial decisionmakers. Therefore, the trustees' participation in the calculation of withdrawal liability violates the withdrawing employers' due process rights.[213]

C. *Decisionmaker Discretion*

Following its determination that bias existed, the court in *Yahn* considered whether a lack of discretion in the decisionmaking process nullified the bias. The Third Circuit Court of Appeals in *Yahn* stated that, "[i]f the trustees had no discretion, their bias would obviously be insignificant."[214] This conclusion is inconsistent with the principle that the right to an impartial hearing is elemental and essential. Even if the trustees cannot exercise discretion in making their determinations of withdrawal liability, their inherent bias defeats the necessary appearance of impartiality to protect the procedural due process right to an impartial decisionmaker.[215]

While the absence of discretion in the trustees' role would not eliminate the problem of trustee bias, it would reduce the concern over actual bias and transform the case into an example of apparent bias. Therefore, it is important to consider the scope of the discretion available to the trustees. Under the MPPAA, the trustees may select one of several methods for calculating withdrawal liability and then make

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required to recuse themselves from determinations of withdrawal liability and may be biased against the plan.

212. 29 U.S.C. § 1108(c)(2) (1982) permits trustees to receive benefits or reasonable compensation for their services.

213. *See supra* notes 197 & 204. This personal interest also can be categorized as a predisposition in favor of the plan. The trustees are predisposed to assess high withdrawal liabilities to increase the plan's assets in order to protect themselves and other participants, as well as their employers, if their employers contribute to the plan. This is violative of the third category of actual bias described in the Redish & Marshall article. *See supra* note 204.

214. *Yahn,* 787 F.2d at 140.

215. *See supra* notes 198 & 205.

a number of actuarial assumptions in implementing that method.[216] This discretion is not contested by proponents of the MPPAA and, in fact, the *Fulton II* court, in its rationale for support of the presumption, conceded the discretion.[217] Depending on the particular method chosen and the actuarial assumptions made, withdrawal liabilities differing by tens of thousands of dollars may be assessed.[218] Thus, the trustees' ability to choose among the methods and assumptions is not insignificant to a withdrawing employer. The choices can have dramatically different fiscal consequences depending on which method and assumptions are used. While any amount of discretion, no matter how narrow, is sufficient for the trustees potentially to inject their biases, the trustees have more than *de minimis* discretion.[219] Therefore, because the trustees can exercise "wide and significant discretion" in the calculation of withdrawal liability,[220] the decisionmaking provisions of the MPPAA are unconstitutional.

D. *Review of Biased Decisions*

In accordance with the principle that there is a constitutional right to an impartial hearing, the *Yahn* court held that the arbitration clause of the MPPAA did not cure the constitutional defect in the statute.[221] The Third Circuit Court of Appeals for the had previously addressed the issue of the review of biased decisions in *Goodman v.*

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216. *See* 29 U.S.C. §§ 1391 & 1393 (1982); *supra* notes 22-29 and accompanying text. The MPPAA requires that the actuarial assumptions used in the calculation of withdrawal liability only be reasonable in the aggregate. *See supra* note 29 and accompanying text. In Penn Textile Corp. v. Textile Workers Pension Fund, 3 Employee Benefits Cas. (BNA) 1609 (1982) (Pritzker, Arb.), an arbitrator upheld an interest rate assumption of six percent as reasonable in the calculation of withdrawal liability. *Id.* at 1624. The withdrawal liability using this interest rate was $188,000.00. *Id.* at 1617. The employer offered evidence that insurance companies used interest rates between thirteen percent and fifteen percent, and at fifteen percent the withdrawal liability would be $128,000.00. *Id.* The employer also stated that the then current PBGC interest rate assumption was eleven percent, which would lead to a withdrawal liability of $134,500.00. *Id.* Finally the employer offered evidence that the interest rate the PBGC used for single employers was 9 1/4%, which would result in a withdrawal liability of $148,500.00. *Id.* Despite this evidence, the discretion afforded the trustees in deciding the rate to use enabled the arbitrator to uphold their finding where an interest rate resulting in a withdrawal liability $60,000.00 less than the amount imposed would also have been reasonable.

217. *Fulton II*, 762 F.2d 1137, 1142.

218. *See supra* note 216.

219. *See id.*

220. United Retail & Wholesale Employees Teamsters Union Local 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 140 (3d Cir. 1986), *prob. juris. noted*, 107 S. Ct. 567 (1986).

221. *Id.* at 141; 29 U.S.C. § 1401(a) (1982).

Laborers' International Union.[222] Stating that it was uncertain whether *de novo* review could cure a tainted hearing,[223] the court held that such *de novo* review could certainly not redress the problem of a tainted hearing compounded by a presumption of correctness.[224] Because under the statutory scheme of the MPPAA, the arbitrator was required to afford a presumption of correctness to the trustees' findings, the trustees' bias could be injected into the final determination, thereby violating the right to an impartial decisionmaker.[225] Thus, the Third Circuit Court of Appeals properly concluded that the presumption clause of the MPPAA was in violation of the fifth amendment right to procedural due process. Having ruled the decisionmaking process of the MPPAA to be unconstitutional, the court had essentially disabled the operation of the statute. The court's next step was to try to revitalize it.

IV. THE APPROPRIATE REMEDY FOR DECISIONMAKER BIAS

The previous discussion has delineated the principle that the procedural due process right to an impartial decisionmaker is elemental and essential, and that right applies to withdrawing employers under the MPPAA because of the adjudicative nature of the decisionmaking process. According to this principle, the appropriate remedy for a procedure tainted with decisionmaker bias is to eliminate that decisionmaker from the process.

The *Yahn* court argued that procedural due process could be satisfied by severing the MPPAA's clause providing for a presumption of correctness for the trustees' findings in any subsequent review, thereby minimizing the effect of the trustees' bias in the calculation of with-

222. 742 F.2d 780 (3d Cir. 1984). For a description of this case, see *supra* note 174 and accompanying text.

223. *Goodman*, 742 F.2d at 784-85. Legal scholars contend that instances of pure *de novo* review are rare. "It is more useful to think of de novo review as a decision-making process in which the court accords little deference to the agency's conclusion of law." R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 200, at § 7.4.1. "The theoretical right of review is often illusory, as it is when . . . the court is strongly influenced by the agency's view, or when despite the theoretical right to de novo review the court limits its inquiry to reasonableness." K. DAVIS, *supra* note 44, at § 7.11. In accordance with the understanding that the right to an impartial decisionmaker is essential and undeniable, a *de novo* hearing would not satisfy the requirements of due process because the inevitable deference afforded to the decisionmaker's determination, no matter how small, would permit the decisionmaker's bias to be injected into the final determination, thus denying an impartial hearing.

224. *Goodman*, 742 F.2d at 784-85.

225. Even without the presumption, the requirements of the due process right to an impartial decisionmaker are not satisfied. *See infra* discussion beginning at note 228.

drawal liability.[226] The court cited two cases in support of the proposition that *de novo* review, specifically review by an arbitrator without a presumption in favor of the trustees' findings, would cure any defects caused by the trustees' bias.[227] However, those cases involved matters much less technical than calculating withdrawal liability under the MPPAA and addressed the cure of a single, past wrong, rather than a procedure for the cure of future wrongs.[228] These distinctions are significant and undermine the strength of those cases as authority for *Yahn's* remedial solution.

An analysis of the "particular situation" involved in the MPPAA reveals the inadequacy of the *Yahn* remedy. Even without the arbitrator's presumption of correctness for the trustees' findings, the arbitrator is likely to give deference to those findings,[229] especially in light of the technical nature of the provisions for calculating withdrawal liability.[230] In order for arbitrators or judges to render informed decisions on withdrawal liability under the MPPAA, they would need extensive knowledge of actuarial methods. Since this is not likely to be the case, even with *de novo* review, the arbitrator or judge may be tempted to defer to the actuarial findings of the biased trustees. If such deference is afforded, the employers' procedural due process right to an impartial decisionmaker is violated.[231] Thus, the Third Circuit Court of Ap-

226. *Yahn*, 787 F.2d at 143-44.

227. *See supra* note 178 and accompanying text.

228. Those cases involved union suspensions and minimal fines for unauthorized picketing and fighting. *See supra* note 178. In fact, the court in *Perry* explicitly stated that it held only that the *de novo* review under those particular circumstances cured the prior defects in that particular hearing process. *Perry*, 656 F.2d at 540. Therefore, the *Perry* holding is expressly inapplicable to a process of review under the MPPAA.

The *Rosario* holding is also distinguishable from the MPPAA review scheme adopted by the Court of Appeals for the Third Circuit. In *Rosario*, the court ordered *de novo* review by injunction, which barred the union appeal board from giving any force and effect to the findings in the three previous tainted hearings. *Rosario*, 605 F.2d at 1244. The holding is, therefore, distinguishable because it did not establish a procedure of general applicability for future cases, which is the result when the presumption clause is removed from the MPPAA. Instead, *Rosario* involved the cure of a single, past wrong in that case only. In the opinion of the court, Judge Mansfield stated that there was not "any reason to believe that, absent injunctive relief, the defendants . . . will not in the future resume the foregoing procedures [biased review] in violation of the rights of appellees and other union members." *Id.* at 1245. Thus, because the court did not establish a procedure for review of future due process violations, but limited its holding to *de novo* review of a single, past violation under the specific circumstances of that case, the *Rosario* reasoning should not be applied to establish a procedure of general applicability for all future due process violations under the MPPAA.

229. *See supra* note 223.

230. *See* 29 U.S.C. §§ 1391 & 1393 (1982).

231. *See supra* note 223.

peals in *Yahn* erred in attempting to cure the constitutional defect in the MPPAA by severing the presumption clause and leaving the biased decisionmakers in the process.[232]

The court's reasoning for severing only the presumption provision is further undermined by the recent holding in *Chicago Teachers Union, Local No. 1 v. Hudson*.[233] In *Hudson*, the Supreme Court held that a procedure for challenging proportionate share payments from non-union teachers' salaries did not comport with the due process right to an impartial hearing.[234] The Court said, "[w]e reject the Union's suggestion that the availability of ordinary judicial remedies is sufficient. . . . [W]e presume that the courts remain available as the ultimate protectors of constitutional rights."[235] This case bolsters the notion that it is impermissible to establish a partial decisionmaking process and rely on the courts to correct the defects caused by the procedure's partiality. The right to an impartial hearing is elemental and essential and the *Yahn* court was incorrect and inconsistent in finding the decisionmaking process of the MPPAA unconstitutional, and then preserving the core of the constitutional defect within the statute.

The reasoning used by the *Yahn* court to justify severing the presumption provision and leaving the biased trustees in the decisionmaking process is flawed in another way as well. In severing the presumption clause from the Act, the court was forced to distinguish the holding in *Ward*, which stated that due process required a "neutral and detached judge in the first instance."[236] The *Yahn* court distinguished *Ward* by stating that it only applied to adjudicative procedures and the trustees' role was not adjudicative.[237] However, this statement is in direct conflict with the court's previous reasoning in the case. Earlier in the opinion the majority stated, "[w]e must also reject the suggestion, advanced tangentially by the majority in *Keith*

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232. *Yahn*, 787 F.2d at 143-44.

233. 106 S. Ct. 1066 (1986).

234. *Id.* at 1074-77. The Court found that the union controlled completely the procedure for reviewing proportionate share payment challenges, thus the procedure was not impartial. *Id.* at 1077. Union officials conducted the initial consideration of the claim, and the first two processes for reviewing the initial finding. *Id.* The third step in the review process was review by an arbitrator selected by the union. *Id.*

235. *Id.* at 1076 n.20. The Court stated that the union must provide a prompt, impartial decisionmaker in the first instance. *Id.* at 1076.

236. *Yahn*, 787 F.2d at 143 n.23 (citing *Ward*, 409 U.S. at 61-62).

237. *Id.* The *Yahn* court cited E.E.O.C. v. Sears, Roebuck & Co., 504 F. Supp. 241, 252 n.21 (N.D. Ill. 1980). *Yahn*, 787 F.2d at 143 n.23. The *Yahn* court summarized the district court's holding by stating that the "*Ward* holding that *de novo* trial does not cure earlier tainted hearing is limited to adjudicative setting." *Id.* (emphasis in original).

Fulton, that the trustees' role is not adjudicative in nature . . . . The trustees must frequently make complex legal and factual determinations."[238] This appears to be an irreconcilable inconsistency in the court's reasoning. According to the previous analysis in this note, the trustees' role as decisionmakers is both adjudicative and legislative.[239] Because the adjudicative aspect of the decisionmaking process figures prominently in the calculation of withdrawal liability,[240] the *Yahn* court erred in distinguishing the *Ward* holding to rationalize the severance of the presumption clause. The appropriate remedy for the *Yahn* court to have implemented, would have been to hold the decisionmaking process unconstitutional, as it did, and then eliminate the core of the defective statute by removing the biased trustees from the process.

V. CONCLUSION

In the 1970's the need for legislation to encourage participation in multiemployer pension plans, and to protect the plans' beneficiaries and participants was clearly apparent.[241] Immediately following the MPPAA's enactment, and in the wake of the political reality of its necessity, the courts were highly supportive of its decisionmaking provisions.[242] However, through the chronological progression of cases, the courts slowly became less supportive of the MPPAA's infringement on the due process right to an impartial decisionmaker.[243] While all of the courts failed to establish adequately the basis for the withdrawing employers' constitutional rights, the courts properly recognized the employers' entitlement to some procedural due process protection, even though many of the courts improperly balanced away the protection under those rights. *Yahn* appears to be a logical step in the evolution of judicial treatment of procedural due process claims against the MPPAA involving the right to an impartial hearing. Supreme Court precedent and legal scholarship demonstrate that the right to an impartial decisionmaker is elemental and essential. The Third Circuit Court of Appeals in *Yahn* adopted this view and the court held that the decisionmaking process of the MPPAA was uncon-

238. *Id.* at 141 n.18.

239. *See supra* discussion in section II (A).

240. *See supra* notes 29 & 216.

241. *See supra* note 6 and accompanying text.

242. *See generally* section II (B) of this note. This section describes the courts' acceptance of the MPPAA's decisionmaking provisions for a number of years after its enactment.

243. This is illustrated by the gradual acceptance of the notion that the trustees harbored an inherent bias, and, ultimately, the holding in *Yahn* striking down a portion of the decisionmaking process of the MPPAA.

stitutional. However, it improperly failed to sever the defective provision from the Act by not requiring that the trustees be removed from the decisionmaking process.

If the court had held the statutory provisions mandating the trustees' role in the calculation of withdrawal liability to be unconstitutional, the Act would have essentially been rendered null and void. The uncertainty under this circumstance would undoubtedly have led to an increase in employer withdrawals, and threatened the existence of multiemployer pension plans and the financial security of the plans' participants and beneficiaries. The court's treatment of the MPPAA in *Yahn* might serve as a warning to Congress to amend the Act.

There are several possible ways that Congress could amend the MPPAA to better conform to due process standards. One method is to provide for each plan and its contributing employers to appoint an independent and unbiased actuary to calculate withdrawal liability. In his dissent in *Fulton II*, Judge Aldrich proposed just such a cure.[244] However, the appointment of an independent actuary is not infallible. There may still be an issue of decisionmaker bias if the actuary is hired or paid by either the plan or the employers.

Another method of improving the decisionmaking process of the MPPAA would be to eliminate its adjudicative aspects, thereby minimizing or removing the employers fifth amendment due process protection. This method also faces difficulty in two respects. First, it would be difficult to establish rigid, future-oriented standards for determination of actuarial assumptions and termination dates before any employers withdraw. It is very difficult to predict with accuracy, economic and social conditions over extensive periods of time. Second, the legitimacy of the trustees as rulemakers could be questioned. While the legitimacy of Congress to legislate is beyond question, the delegation of that authority to the trustees would have to be accompanied by "regularized procedures" and be "subject to judicial review."[245]

A third alternative to solving the constitutional problems of the MPPAA's decisionmaking process is for the trustees and employers to appoint a hearing officer who would act in a capacity similar to that of an administrative law judge.[246] The officer would hear disputes and

244. *Fulton II*, 762 F.2d 1137, 1151 (Aldrich, J., dissenting).

245. R. PIERCE, S. SHAPIRO & P. VERKUIL, *supra* note 200, at § 6.4.6.

246. The Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 7521 (1982), provides that an administrative law judge may:

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

recommend decisions concerning withdrawal liability. Again, this scheme is faced with the problem of one side having more influence than the other in the selection and compensation of the hearing officer.

These are only three of many possibilities that could be considered to remedy the unconstitutional decisionmaking process of the MPPAA. While these solutions may also have constitutional difficulties, they provide a basis from which Congress could create a process that meets the procedural due process requirement of an impartial decisionmaker.

The United States Supreme Court must now render a final decision on the constitutionality of the MPPAA's decisionmaking process. If the Court rules in accordance with its precedent and scholarship on the topic, it will hold that the Multiemployer Pension Plan Amendments Act's procedure for determination and review of withdrawal liability denies the elemental and essential due process right to an impartial decisionmaker. The Court will then invalidate both the presumption provisions and, more basically, the trustees' role in the decisionmaking process. Inevitably, Congress will have to address this problem and amend the MPPAA.

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(3) rule on offers of proof and receive relevant evidence;
(4) take depositions or have depositions taken when the ends of justice would be served;
(5) regulate the course of the hearing;
(6) hold conferences for the settlement or simplification of the issues by consent of the parties;
(7) dispose of procedural requests or similar matters;
(8) make or recommend decisions in accordance with section 557 of this title [5 U.S.C.S. § 557]; and
(9) take other action authorized by agency rule consistent with this subchapter [5 U.S.C.S. §§ 551 et seq.].

5 U.S.C. 556(c) (1982). According to Professor Schwartz, an administrative law judge "is not limited to the position of referee between contending parties; his function is to see that facts are clearly and fully developed. He is not required to sit idly by and permit a confused or meaningless record to be made.' " B. SCHWARTZ, *supra* note 42, at § 6.15 (citing Bethlehem Steel Co. v. NLRB, 120 F.2d 641, 652 (D.C. Cir. 1941)). Therefore, a hearing officer acting in the capacity of an administrative law judge could take in all the relevant evidence and hear from witnesses and offer a decision concerning withdrawal liability.