



Notre Dame Law Review

Volume 62 | Issue 3

Article 5

1-1-1987

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Recommended Citation

Jeffrey D. Linton, *Implying a Statutory Right for Employers for the Return of Mistaken Overcontributions to a Multiemployer--Employee Benefit Plan*, 62 Notre Dame L. Rev. 396 (2014).

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Implying a Statutory Right for Employers for the Return of Mistaken Overcontributions to a Multiemployer-Employee Benefit Plan

The Employee Retirement Income Security Act of 1974 (ERISA)¹ seeks to improve the equitable character of employee benefit plans² and to insure their future stability and growth by making them attractive options to employees and employers. The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)³ seeks to improve multiemployer-employee benefit plans by amending ERISA with provisions designed to facilitate the smooth operation of these types of plans. One of the amended provisions, ERISA section 403(c)(2)(A)(ii), allows a benefit trust fund to return mistakenly made overcontributions to employers. Federal courts of appeals, however, disagree over whether that section was intended to grant employers an implied right to compel the plan trustees to return these overpayments.

Part I of this note provides an overview of multiemployer plans and the problem of mistaken overcontributions. Part II outlines the applicable ERISA provisions which fuel the controversy concerning an employer's implied right to compel a refund. Next, Part III discusses the judicial treatment of the implied cause of action argument. Part IV asserts that Congress designed section 403(c)(2)(A)(ii) as a statutory right for employers and suggests possible applications of that right. Finally, Part V concludes that judicial implication of a right to sue under section 403(c)(2)(A)(ii) is necessary to implement Congress' intent to guarantee the equitable character of ERISA toward employers.

I. Multiemployer Plans and the Problem of Mistaken Overcontributions

A multiemployer-employee benefit plan is a plan created by a collective bargaining agreement between one or more employee organizations

¹ Pub. L. No. 93-406, 88 Stat. 829 (nontax provisions codified as amended in 29 U.S.C. §§ 1001-1461 (1982); tax provisions codified as amended in scattered sections of titles 5, 26, 31 and 42 of the U.S. Code) [hereinafter cited as ERISA].

² An employee benefit plan can be either an "employee welfare benefit plan" or an "employee pension benefit plan" or both. See 29 U.S.C. § 1002(3) (1982). An "employee welfare benefit plan" (welfare plan) is one "maintained for the purpose of providing for its participants or their beneficiaries . . . through the purchase of insurance or otherwise medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . ." 29 U.S.C. § 1002(1). An "employee pension benefit plan" (pension plan) is established to provide retirement income for employees or to defer the income of employees until retirement. 29 U.S.C. § 1002(2)(A).

³ Pub. L. No. 96-364, 94 Stat. 1208 (codified in scattered sections of 29 U.S.C. §§ 1001-1461 (1982)) [hereinafter cited as MPPAA]. See generally Cooper, *The Multiemployer Pension Plan Amendments Act of 1980: An Overview*, 12 J. OF PENSION PLAN. & COMPLIANCE 17 (1986) (analyzes main provisions of the MPPAA); Shuttz & Golden, *Current Developments in Employee Benefits: Multiemployer Pension Plan Amendments Act of 1980—Broad Implications for Plan Sponsors*, 6 EMPLOYEE REL. L. J. 494 (1980-81) (brief overview of the MPPAA).

and at least two employers.⁴ The plan allows an employee to move from job to job among contributing employers within a particular industry without the fear of losing benefit credits previously accumulated from a participating employer. In addition to their popularity with labor unions, multiemployer plans also offer key advantages to employers (especially smaller employers) who are forced to recruit experienced, skilled labor from a relatively small pool of applicants within a set geographical area.⁵

Employers contribute to multiemployer plans on behalf of employees covered by the collective bargaining agreement. These contributions are often based on number of hours worked by the employee⁶ and, in some instances, based on the production of the employer.⁷ Occasionally, employers mistakenly overcontribute to the plans in which they participate.⁸ Foreseeing this problem, Congress incorporated a provision in

4 The statute defines a multiemployer plan as a plan:

- (i) to which more than one employer is required to contribute,
- (ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
- (iii) which satisfies such other requirements as the Secretary [of Labor] may prescribe by regulation.

29 U.S.C. § 1002(37)(A) (1982).

5 S. KRASS & R. KESCHNER, *THE PENSION ANSWER BOOK* 385 (3d ed. 1984). Among the advantages of a multiemployer plan are: Lower administrative costs than single employer plans; more favorable investment opportunities available to a large pension trust versus a single employer plan; ability of a large pension trust to more reliably predict what will happen under the plan; ability for small employers to meet requirements outlined by insurance companies and state law concerning minimum number of employees for group annuity contracts; ability to meet conditions for minimum number of participating employees and minimum amount of contributions to take advantage of deposit administration; and ability more easily to recruit experienced labor from the relatively small pool of craftsmen located in the employer's geographical area. 1 PENS. & PROFIT SHARING (P-H) ¶ 5931 (1986). Indeed, for many of these reasons, a small employer may, out of practical necessity, be forced to participate in an industry-wide multiemployer plan. Employers who typically participate in this type of plan include construction, transportation and mining operations which employ unionized workers. S. KRASS & R. KESCHNER, *supra*, at 385.

6 *See, e.g.*, *Service Employees Int'l Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Servs., Inc.*, 504 F. Supp. 197, 198 (D.D.C. 1980) (amount of contribution is to be calculated based on total number of productive hours worked in each month).

7 *See, e.g.*, *Dime Coal Co. v. Combs*, 796 F.2d 394, 395 (11th Cir. 1986) (employer contributions based on the tons of coal produced or purchased and on the hours worked).

8 Many of these mistaken overpayments result from confusion regarding the collective bargaining agreement. *See, e.g.*, *Teamsters Local 639-Employers Health Trust v. Cassidy Trucking, Inc.*, 646 F.2d 865, 866 (4th Cir. 1981) (employer made contributions to trust on behalf of its employees after collective bargaining agreement expired and no new agreement was executed); *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund of Philadelphia & Vicinity*, 618 F. Supp. 943, 945 (D. Del. 1985) (employer party to two separate bargaining agreements, one for truck drivers and the other for maintenance workers, and made pension contributions on behalf of maintenance workers to plan set up under agreement with truck drivers); *Electricians Health, Welfare & Pension Plans v. Gulino*, 594 F. Supp. 1265, 1267-68 (M.D. La. 1984) (employer made contributions to pension fund on behalf of employee who had withdrawn from the union and the collective bargaining agreement); *E.M. Trucks, Inc. v. Central States, Southeast & Southwest Areas Pension Plan*, 517 F. Supp. 1122, 1123 (D. Minn. 1981) (employer continued to make contributions to pension plan on behalf of certain employees whose participation in the plan was terminated by a subsequent collective bargaining agreement).

Other mistaken overcontributions result from mere clerical error on the part of the employer. *See, e.g.*, *Ethridge v. Masonry Contractors, Inc.*, 536 F. Supp. 365, 367 (N.D. Ga. 1982) (computer calculated amount of contributions for employees without regard to whether they were union members or had worked within the jurisdiction of the local); *Service Employees Int'l Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Servs., Inc.*, 504 F. Supp. 197, 198 (D.D.C. 1980) (payroll clerk failed to exclude nonproductive compensated hours in calculating basis of hours worked for contributions to health and welfare plan).

ERISA to allow employers to recover these mistaken payments. Seemingly conflicting sections of ERISA, however, make it difficult for an employer to invoke this provision.

II. Applicable ERISA Provisions

Congress enacted ERISA primarily to assure workers with many years of service that their promised benefits would not be lost due to mismanagement or fraud,⁹ overly-rigorous vesting requirements,¹⁰ or failure of the employer or the benefit plan.¹¹ The stated policy of ERISA is to insure the equitable character and financial soundness of employee benefit plans by requiring minimum standards for vesting of accrued benefits, funding, termination insurance, disclosure and reporting, and standards of conduct for fiduciaries.¹²

A. *Exclusive Purpose Rule of Section 403(c)*

In accord with the perceived problems which led to the enactment of ERISA and the policies of the Act, ERISA section 403(c)(1)¹³ provides that the "assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."¹⁴ This same section, however, contains an exception to this "exclusive purpose" rule. The exception operates in favor of an employer who overcontributes to a multiemployer plan. Section 403(c)(2)(A)(ii)¹⁵ states that in the instance of a contribution made by mistake of fact or law, section 403(c)(1) *shall not prohibit* the return of such contribution to the employer within six months after the plan administrator determines that the contribution was mistakenly made

9 See 119 CONG. REC. 147 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 207, 208 [hereinafter cited as LEGISLATIVE HISTORY OF ERISA] (statement of Sen. Ribicoff):

[M]isuse, manipulation, and poor management of pension trust funds are all too frequent. One financially ailing company tried to borrow over a million dollars from a subsidiary's pension pool for use as operating capital. Another company has a policy of investing more than half of its pension fund's assets in the company's own common stock and in the real estate of a company subsidiary. And yet another firm routinely dips into its pension funds for cash to make acquisitions.

10 119 CONG. REC. 7418 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 210, 213 (statement of Sen. Bentsen) (examples given of unreasonable vesting requirements). ERISA developed minimum vesting standards under which employees receive nonforfeitable rights to pension benefits after a prescribed number of years of service. Employers may choose one of three alternative vesting schedules, all of which guarantee that an employee will have at least 50% of her benefits vested after ten years of service and 100% vested after 15 years of service. 29 U.S.C. § 1053(a)(2) (1982). See generally B. COLEMAN, PRIMER ON EMPLOYEE RETIREMENT INCOME SECURITY ACT 21-25 (1985); S. KRASS & R. KESCHNER, *supra* note 5, at 67-79.

11 119 CONG. REC. 147 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 208 (statement of Sen. Ribicoff) (example given of workers of shut-down automaker who received only 15% of what the company owed them for pension); 119 CONG. REC. 7418 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 210, 214 (statement of Sen. Bentsen) (same).

12 29 U.S.C. § 1001 (1982).

13 29 U.S.C. § 1103(c)(1) (1982).

14 *Id.*

15 29 U.S.C. § 1103(c)(2)(A)(ii) (1982).

by the employer.¹⁶ Despite this express statutory provision, two other sections of ERISA have made it difficult for employers to secure refunds of mistaken overpayments.

B. *Fiduciary Duties of Plan Administrator Under Section 404(a)(1)*

ERISA classifies the plan administrator¹⁷ as a fiduciary¹⁸ subject to the Act's provisions detailing fiduciary duties.¹⁹ Specifically, section 404(a)(1) requires the fiduciary to discharge her duties solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries.²⁰ A "prudent man"²¹ standard governs this exercise of duty. However, the legislative

16 *Id.* This subsection was amended by the MPPAA, *supra* note 3, Pub. L. No. 96-364, § 410, 94 Stat. at 1308. Originally, ERISA provided that "[i]n the case of a contribution which is made by an employer by a mistake of fact, [§ 403(c)(1)] shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution." ERISA, *supra* note 1, Pub. L. No. 93-406, § 403, 88 Stat. at 876.

Congress amended this section due to the belief that, for a multiemployer plan, the requirement that a contribution be made by mistake of fact in order to be returned was too narrow. Thus, Congress created the special subsection for multiemployer plans authorizing the return of contributions made because of mistake of fact or mistake of law. See JOINT EXPLANATION OF S.1076: MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980, 126 CONG. REC. 20,208 (1980). See also *infra* note 96. Sections 403(c)(1) and (2)(A) now read:

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

(i) made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

29 U.S.C. § 1103(c) (1982).

17 ERISA defines the "plan administrator" as:

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

29 U.S.C. § 1002(16)(A) (1982).

18 The plan administrator is a fiduciary because he/she exercises discretionary authority and control regarding the management of the plan and its assets. See 29 U.S.C. § 1002(21)(A) (1982).

19 Part 4 of Subtitle B of Title I covers fiduciary responsibilities. ERISA, *supra* note 1, Pub. L. No. 93-406, §§ 401-414, 88 Stat. at 874-890; 29 U.S.C. §§ 1101-1114 (1982).

20 29 U.S.C. § 1104(a)(1)(A) (1982). This section states that it is subject to 29 U.S.C. § 1103(c); however, trustees are cautious and point to § 1104(a)(1)(A) when refusing to refund mistaken contributions. See, e.g., *Dime Coal Co. v. Combs*, 796 F.2d 394, 395 (11th Cir. 1986); *Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia & Vicinity*, 549 F. Supp. 307, 308 (E.D. Pa. 1982).

21 29 U.S.C. § 1104 (a) (1982). The statute provides in relevant part:

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

history indicates that Congress intended this standard to be interpreted in light of the special purpose of employee benefit plans.²² This strict fiduciary duty requirement, when combined with the permissive nature of the language used in section 403(c)(2)(A)(ii)—that section 403(c)(1) “shall not prohibit” the return of overpayments mistakenly made by employers—has often precluded the voluntary return of such payments from the plan to the employer.²³ Since a refund would not be in the interest of participants and beneficiaries, trustees are reluctant to make the refund for fear of breaching the fiduciary standard.

C. *Civil Enforcement Mechanisms Provided in Section 502*

ERISA section 502 presents a second obstacle to an employer attempting to secure a refund of mistaken overpayments. Section 502(a) expressly grants the right to initiate a private cause of action to enforce ERISA provisions only to plan participants,²⁴ beneficiaries,²⁵ fiduciaries,²⁶ and the Secretary of Labor.²⁷ Under ERISA, employers have no express authority to bring a private suit to compel compliance with an ERISA provision.

Further, section 502(e)(1) states that federal district courts “shall

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

22 JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE [hereinafter cited as CONFERENCE REP.], H.R. REP. NO. 1280, 93d Cong., 2d Sess. 307, reprinted in 3 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 4277, 4569 and 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5083.

23 See *supra* note 20.

24 29 U.S.C. § 1002(7) (1982).

25 29 U.S.C. § 1002(8) (1982).

26 29 U.S.C. § 1002(21)(A) (1982). In some limited circumstances, an employer is regarded as a fiduciary. See, e.g., *Great Lakes Steel v. Degendorf*, 716 F.2d 1101, 1103 (6th Cir. 1983) (employer was named as administrator of its single employer benefit plan and, thus, was its fiduciary); *U.S. Steel Corp. v. Pennsylvania Human Relations Comm'n*, 669 F.2d 124, 126 (3d Cir. 1982) (employer had sole authority to determine and alter the terms of its employee health benefit plan). In this instance, an employer could arguably bring suit under § 502(a)(3). See *infra* note 27. However, when an employer merely makes contributions to a multiemployer-employee benefit plan, she is not considered a fiduciary and thus cannot invoke § 502(a)(3).

27 29 U.S.C. § 1132(a) (1982). This section provides:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or,

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

have exclusive jurisdiction of civil actions under this subchapter brought by the *Secretary* or by a *participant, beneficiary, or fiduciary*.²⁸ The section does not mention suits by employers. Thus, section 502(e)(1) fails to expressly provide federal courts with subject matter jurisdiction to hear any claim brought under this subchapter of ERISA. Consequently, employers participating in multiemployer benefit plans are forced to allege that section 403(c)(2)(A)(ii) grants employers an implied statutory right to bring a cause of action against the trust fund to compel the return of mistakenly made overpayments in accordance with the intent of that section.²⁹

III. Judicial Treatment of the Implied Cause of Action Argument

Recently, circuit courts of appeals have directly confronted the issue of whether section 403(c)(2)(A)(ii) should be read to give employers an implied statutory right to sue for refund of mistaken overpayments.³⁰ The federal courts remain split. The courts have attempted to interpret the applicable provisions based on the plain meaning and legislative history of the statute. In addition, they have relied on Supreme Court authority regarding implied statutory rights.

A. Plain Meaning and Congressional Intent

In Award Service, Inc. v. Northern California Retail Clerks Union and Food

²⁸ 29 U.S.C. § 1132(e)(1) (1982) (emphasis added).

²⁹ See *infra* note 30.

³⁰ The Sixth, Ninth and Eleventh Circuits have considered this issue. See *infra* notes 31-85 and accompanying text. Although not directly addressing the implied cause of action argument, the Fourth Circuit commented on this issue in a case it remanded to the district court. In *Teamsters Local 639—Employers Health Trust v. Cassidy Trucking, Inc.*, 646 F.2d 865 (4th Cir. 1981), the court (interpreting the original section 403(c)(2)) indicated that the section was not intended to grant an automatic recovery to employers but that a refund should be made if consistent with traditional equitable principles. *Id.* at 868.

Some district courts have also considered this question. See *Dumac Forestry Servs., Inc. v. I.B.E.W.*, 637 F. Supp. 529, 533 (N.D.N.Y. 1986) (general equitable principles determine whether employer is entitled to refund or setoff); *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund of Philadelphia & Vicinity*, 618 F. Supp. 943, 950 (D. Del. 1985) (Congress did not intend to create a right of action for employers to recover mistaken contributions); *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Philadelphia Fruit Exch.*, 603 F. Supp. 877, 880 (E.D. Pa. 1985) (section may reasonably be read to permit, not require, the return of overpaid contributions); *Electricians Health, Welfare and Pension Plans v. Gulino*, 594 F. Supp. 1265, 1271-72 (M.D. La. 1984) (contribution may be returned only if plan administrator determines that it was made by a mistake of fact or law); *Hardy v. National Kinney of Cal., Inc.*, 571 F. Supp. 1214, 1215 (N.D. Cal. 1983) (employer unable to reach trust assets for refund absent a determination by the trust that a mistaken contribution occurred); *Crown Cork and Seal Co. v. Teamsters Pension Fund of Philadelphia & Vicinity*, 549 F. Supp. 307, 311 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983) (no basis from which to infer an implied right of action for restitution by an employer); *Martin v. Keldorn*, 546 F. Supp. 889, 894 (N.D. Ill. 1982) (section to permit, but not require, offset of overpayments against underpayments which occur because of mistake of fact or law); *Ethridge v. Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D. Ga. 1982) (employer entitled to return of an overpayment where, within six months of its discovery, it demands the return of the overpayment); *E.M. Trucks, Inc. v. Central States, Southeast & Southwest Areas Pension Plan*, 517 F. Supp. 1122, 1125 (D. Minn. 1981) (section requires funds to return mistakenly made contributions in circumstances where equity so requires); *Service Employees Int'l Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Servs., Inc.*, 504 F. Supp. 197, 198 (D.D.C. 1980) (employer entitled to offset excess contributions for one year).

Employers Joint Pension Trust Fund,³¹ the Ninth Circuit recognized that, while section 403 did not expressly provide a right of action for a refund of mistakenly made contributions, such a right is properly implied under that section.³² Focusing on section 403(c)(2)(A)(ii) itself,³³ the court determined that, once the circumstances prescribed in the section are met, the trust fund should refund the overpayment to the employer.³⁴ The majority felt that this finding supported the congressional intent behind section 403(c)(2)(A)(ii), clearly designed for the benefit of an employer contributing to a multiemployer plan.³⁵ The court noted that without the implied remedy, an employer could secure the return of mistaken contributions only at the discretion of the plan trustee.³⁶ ERISA's strict fiduciary standard³⁷ might persuade the trustee to refuse such refunds.

In contrast, the Sixth Circuit, in *Whitworth Brothers Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*,³⁸ and the Eleventh Circuit, in *Dime Coal Co. v. Combs*,³⁹ found no remedy for an employer implicit in section 403(c)(2)(A)(ii) or in its legislative history.⁴⁰ In *Whitworth Bros.*, the Sixth Circuit focused on the permissive language of the statute and its legislative history. The majority characterized the words "shall not prohibit" as displaying an intent to allow, but not require, the trustees to return the overpayments if they desired.⁴¹ The court felt that this language reflected Congress' overall intent to benefit employees

31 763 F.2d 1066 (9th Cir. 1985), cert. denied, 106 S. Ct. 850 (1986).

32 *Id.* at 1068. The court felt that such a right of action for the employer was properly implied by § 403(c) under the standards set out in *Cort v. Ash*, 422 U.S. 68 (1975), for determining whether a private remedy is implicit in a statute not expressly providing one. See *infra* notes 57-67 and accompanying text.

33 In *Award Serv.*, the employer failed to indicate whether its claim arose under part (i) (applicable to nonmultiemployer plans) or part (ii) (applicable to multiemployer plans) of § 403(c)(2)(A). Since it involved a multiemployer plan, however, the court correctly proceeded under part (ii). 763 F.2d at 1069 n.3. The arguments for and against an implied right of action under § 403(c)(2)(A) would seemingly apply with equal force to part (i) as they do to part (ii), qualified only by the differences contained within the two parts. Part (i) provides that contributions made by a *mistake of fact* may be returned *within one year after they were paid*. Part (ii), on the other hand, states that contributions made by a *mistake of fact or of law* may be returned *within six months after the plan administrator determines that the payment was made by such a mistake*. 29 U.S.C. § 1103(c)(2)(A) (1982). See *supra* note 16.

34 763 F.2d at 1070-71. The court indicated that the employer must also establish that the equities of the situation (e.g., financial stability of the plan) favor restitution. *Id.* at 1069. See *infra* text accompanying notes 105-108.

35 *Id.* at 1068. Part (ii) of § 403(c)(2)(A) was added by the MPPAA. See *supra* note 16. The legislative history states that this part was added because Congress believed that "for a multiemployer plan the requirement that a contribution be made due to mistake of fact in order to be returned to the employer is too narrow." JOINT EXPLANATION OF S.1076: MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980, 126 CONG. REC. 20,208 (1980). See *infra* note 96.

36 *Award Serv.*, 763 F.2d at 1068.

37 See *supra* notes 17-23 and accompanying text.

38 794 F.2d 221 (6th Cir.), cert. denied, 107 S. Ct. 645 (1986).

39 796 F.2d 394 (11th Cir. 1986).

40 *Whitworth Bros.*, 794 F.2d at 230-33; *Dime Coal*, 796 F.2d at 398.

41 *Whitworth Bros.*, 794 F.2d at 230-31 (quoting *Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia & Vicinity*, 549 F. Supp. 307, 311-12 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983)). The court read the section as "stat[ing] merely that fiduciaries are not prohibited from returning to an employer contributions made by mistake of fact or law." *Id.* at 231. The court felt that, had Congress used the word "may" as opposed to "shall not prohibit," an argument may exist that the trustees are to take steps to return the contributions. *Id.*

and their beneficiaries, not employers.⁴² Thus, while the court recognized that an employer *may* benefit from section 403(c)(2)(A)(ii), it refused to read the section as creating a federal remedy for employers.⁴³

This broad view threatens the positive effect section 403(c)(2)(a)(ii) could have for employers. By looking exclusively at the broad policies and intent of ERISA, and refusing to acknowledge the intent behind the particular provision at issue, courts are misinterpreting the intended effect of that particular provision. Congress designed section 403(c)(1) to prevent plan assets from reverting to the benefit of contributing employers. However, Congress provided a caveat in section 403(c)(2)(A)(ii), intending that plan trustees refund mistakenly paid contributions to employers in a limited factual context.⁴⁴

Courts have also struggled with the problem of whether they have subject matter jurisdiction over a suit brought by an employer in light of section 502 of ERISA.⁴⁵ Courts disagree over whether Congress intended the listing of parties and actions expressly authorized in the section to be exhaustive. In *Award Service*, the Ninth Circuit recognized jurisdiction under section 502(e)(1) despite the failure of the section to expressly authorize a civil action by an employer.⁴⁶ The court allowed the employer to bring an action to enforce the terms of section 403(c)(2)(A)(ii) because the employer alleged specific and personal injury.⁴⁷ In an earlier case, the Ninth Circuit asserted that it had found nothing in the legislative history to suggest that Congress intended to prohibit employers from suing to enforce the application of specific provisions of ERISA.⁴⁸ The legislative history does not specify either that the list of parties is exhaustive or that employers were intentionally omitted from the civil enforcement section.⁴⁹

Other courts have refused to extend section 502 to provide subject matter jurisdiction for entertaining an employer's ERISA claim.⁵⁰ Specifically, the Sixth Circuit in *Whitworth Bros.* and the Eleventh Circuit in *Dime Coal* found no jurisdiction under section 502 over an employer's claim for a refund of mistaken overpayments.⁵¹ The opinions asserted

42 *Id.* at 233.

43 *Id.*

44 *Award Serv.*, 763 F.2d at 1070-71.

45 *See supra* notes 24-29 and accompanying text.

46 *Award Serv.*, 763 F.2d at 1067-68.

47 *Id.* at 1068. The court cited to its decision in *Fentron Indus. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1304-05 (9th Cir. 1985), where it addressed this issue. 763 F.2d at 1068 & 1068 n.1.

48 *Fentron*, 674 F.2d at 1305.

49 *Id.* *See* CONFERENCE REP., H.R. REP. NO. 1280, 93d Cong., 2d Sess. 326-27, *reprinted in* 3 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 4277, 4593-94 and 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5106-07.

50 *See infra* text accompanying notes 51-53. *See also* *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund of Philadelphia & Vicinity*, 618 F. Supp. 943, 947 (D. Del. 1985) (action cannot be maintained under this section because employers are not among the potential plaintiffs listed in the statute); *Hardy v. National Kinney of Cal., Inc.*, 571 F. Supp. 1214, 1215 (N.D. Cal. 1983) (section exhaustively enumerated those parties empowered to bring civil actions); *Crown Cork & Seal Co. v. Teamsters Pension Fund of Philadelphia & Vicinity*, 549 F. Supp. 307, 311 (E.D. Pa. 1982), *aff'd mem.*, 720 F.2d 661 (3d Cir. 1983) (section clearly restricts categories of individuals empowered to bring a civil action, none of which includes employers).

51 *Whitworth Bros.*, 794 F.2d at 228; *Dime Coal*, 796 F.2d at 396.

that only Congress has the power to extend the subject matter jurisdiction of the federal judiciary. Consequently, courts should not infer jurisdiction without clear congressional guidance.⁵² They concluded that since the legislative history of section 502 sheds no light on whether Congress did or did not intend for employers to sue, courts should interpret section 502(e)(1) as a strict, exclusive grant of jurisdiction.⁵³

Nevertheless, all three circuits agree that federal courts have jurisdiction to consider the issue of an implied right of action pursuant to standard federal question jurisdiction of the district courts.⁵⁴ The employer may assert the claim of an implied right of action because it "arises under" a federal law.⁵⁵ Due to the uncertainty with which federal courts view their ability to hear an employer's claim under ERISA section 502(e)(1),⁵⁶ employers should avoid invoking that section in their claims for relief. Instead, an employer should plead 28 U.S.C. section 1331 and allege the existence of a federal question as the basis for the court's subject matter jurisdiction over the claim of an implied right under section 403(c)(2)(A)(ii).

B. *Authority for Recognizing Implied Statutory Rights*

The Supreme Court decision of *Cort v. Ash*⁵⁷ set out the relevant factors for determining whether a private remedy is implicit in a statute not expressly providing a remedy. The Court identified four factors to be considered: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether the legislative intent reveals any indication either to create such a remedy or to deny one; (3) whether the implication of such a remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law such that it would be inappropriate to infer a federal law cause of action.⁵⁸ Implying a right of action for an employer under section 403(c)(2)(A)(ii) is consistent with these standards.

Applying these factors, the Ninth Circuit in *Award Service* first concluded that an employer is the intended beneficiary of section 403(c)(2)(A)(ii).⁵⁹ Despite the overall goals and policies of ERISA,⁶⁰

52 *Whitworth Bros.*, 794 F.2d at 226 (quoting *Pressroom Unions Printers League Income Sec. Fund v. Continental Assurance Co.*, 700 F.2d 889, 892 (2d Cir.), cert. denied, 464 U.S. 845 (1983)).

53 *Id.* See *supra* note 49 and accompanying text.

54 *Award Serv.*, 763 F.2d at 1068; *Whitworth Bros.*, 794 F.2d at 228 n.11; *Dime Coal*, 796 F.2d at 396. 29 U.S.C. § 1331 grants original jurisdiction to the district courts for "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1982).

See also *Airco Indus. Gases v. Teamsters Health & Welfare Pension Fund of Philadelphia & Vicinity*, 618 F. Supp. 943, 948 (D. Del. 1985) (court had jurisdiction under § 1331 to determine whether employer's cause of action existed); *Crown Cork and Seal*, 549 F. Supp. at 310 (federal question jurisdiction exists to decide whether employer has a cause of action for restitution); *E.M. Trucks, Inc. v. Central States, Southeast & Southwest Areas Pension Plan*, 517 F. Supp. 1122, 1124 (D. Minn. 1981) (federal question jurisdiction exists under § 1331).

55 See *supra* note 54.

56 See *supra* notes 45-53 and accompanying text.

57 422 U.S. 66 (1975).

58 *Id.* at 78.

59 *Award Serv.*, 763 F.2d at 1068. See *supra* notes 31-37 and accompanying text.

60 See *supra* notes 9-12 and accompanying text.

Congress designed section 403(c)(2) for the benefit of employers who mistakenly overcontribute to a benefit plan.⁶¹ Second, the court noted that by specifically providing the limited exception to the exclusive purpose rule of section 403(c)(1), Congress displayed its intent to create a private remedy for employers when the particular factual context of section 403(c)(2)(A)(ii) is met. Without this remedy, an employer could secure the return of overpayments only at the discretion of the plan trustees, thereby diluting a major effect section 403(c)(2)(A)(ii) was designed to have for employers.⁶² Third, the majority recognized that implying a private right for employers furthers the legislative scheme of ERISA "to improve the equitable character of private plans while encouraging their future growth and development."⁶³ Equitable considerations militate in favor of the employer when the specific situation envisioned in section 403(c)(2)(A)(ii) arises.⁶⁴ Finally, the court asserted that ERISA's total preemption of state law in the field of employee benefit plans⁶⁵ precludes the cause of action from being considered one traditionally relegated to state law.⁶⁶ The fact that an employer has no recourse to state law actions of restitution or unjust enrichment provides further support for implying a right under ERISA.⁶⁷

The Sixth and Eleventh Circuits cited a Supreme Court case as authority for disfavoring assertions of implied rights under ERISA.⁶⁸ In *Massachusetts Mutual Life Insurance Co. v. Russell*,⁶⁹ a beneficiary sought to imply in ERISA a cause of action for extra-contractual damages caused by improper and untimely processing of benefit claims.⁷⁰ The Supreme Court rejected this claim, stating that it was "reluctant to 'fine-tune' an

61 See *supra* note 35 and accompanying text. But see *supra* text accompanying notes 38-44.

62 *Award Serv.*, 763 F.2d at 1068. See *supra* text accompanying notes 36-37.

63 *Award Serv.*, 763 F.2d at 1068. See Williams, *Foreword to 1 LEGISLATIVE HISTORY OF ERISA*, *supra* note 9, at III. See also 119 CONG. REC. 130 (1973), reprinted in 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 90 (statement of Sen. Williams) (vastly increased costs would work against best interests of all parties to a plan); 119 CONG. REC. 7417 (1973), reprinted in 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 210 (statement of Sen. Bentsen) (ERISA to ensure minimum standards of equity); 119 CONG. REC. 147 (1973), reprinted in 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 208 (statement of Sen. Ribicoff) (concern is over misuse of funds by corporations).

64 See *Award Serv.*, 763 F.2d at 1068 & 1070-71.

65 See 29 U.S.C. § 1144(a) (1982).

66 *Award Serv.*, 763 F.2d at 1068. Through its preemption of state law, ERISA sought to provide a uniform body of law applicable to all employee benefit plans. See 120 CONG. REC. 29,197 (1974), reprinted in 3 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 4670 (statement of Rep. Dent) (preemption provision eliminates threat of conflicting and inconsistent state and local law); 120 CONG. REC. 29,942 (1974), reprinted in 3 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 4770-71 (statement of Sen. Javits) (interests of uniformity required displacement of state law in the field of employee benefit programs).

67 The Sixth Circuit has indicated that preemption of state law does not give rise to an implied statutory right; but, rather, indicates that an employer may be entitled to relief under federal common law which supplements ERISA. See *Whitworth Bros.*, 794 F.2d at 236. See also *infra* notes 79-85 and accompanying text.

68 *Whitworth Bros.*, 794 F.2d at 232; *Dime Coal*, 796 F.2d at 398-99.

69 105 S. Ct. 3085 (1985).

70 In *Massachusetts Mut.*, the benefit plan terminated the plaintiff's disability payments. The plaintiff requested a review of that decision. Subsequently, the plan administrator reinstated her benefits and all retroactive benefits were paid to the plaintiff in full. The plaintiff sued for extra-contractual damages arising out of the improper refusal to pay the benefits. *Id.* at 3087-88. The Supreme Court found no express authority for such an award in ERISA. *Id.* at 3092. The Court also refused to imply a private cause of action for extra-contractual damages. *Id.* at 3094.

enforcement scheme crafted with such evident care as the one in ERISA."⁷¹ The Court felt that the six civil enforcement provisions of section 502(a)⁷² indicated that Congress did not want courts to imply remedies not expressly mentioned.⁷³ According to the Court, such an implication is improper given "ERISA's interlocking, interrelated, and interdependent remedial scheme"⁷⁴

The Sixth and Eleventh Circuits improperly relied on *Massachusetts Mutual* for their refusal to find an implied statutory right under section 403(c)(2)(A)(ii). The claimant in *Massachusetts Mutual* sought damages above those already expressly provided for in ERISA.⁷⁵ In contrast, an employer asserting a right to the return of mistaken overpayments seeks merely to enforce a right specifically provided for in the statute. Thus, unlike the situation in *Massachusetts Mutual*, an employer's action under section 403(c) is not an attempt to *rise above* "ERISA's interlocking, interrelated, and interdependent remedial scheme"⁷⁶ Instead, the employer attempts to enforce compliance with a provision already clearly within the remedial scheme of ERISA,⁷⁷ yet lacking an express remedy to carry out its purpose.⁷⁸

C. *Federal Common Law as Providing a Right for the Return of Overpayments*

Although it refused to find an implied right of action for the employer, the Sixth Circuit indicated that an employer may be entitled to the return of mistaken contributions pursuant to federal common law.⁷⁹ The court noted that ERISA's preemption provision,⁸⁰ combined with the legislative history, exhibits a congressional intent that federal courts develop a body of federal common law in the employee benefits area.⁸¹ Since an employer's right to the return of overcontributions is not expressly provided for in the statute, the court concluded that such a right could only be recognized by federal courts as an aspect of the federal common law.⁸²

⁷¹ *Id.* at 3093.

⁷² *See supra* note 27.

⁷³ 105 S. Ct. at 3093.

⁷⁴ *Id.*

⁷⁵ *See supra* note 70 and accompanying text.

⁷⁶ 105 S. Ct. at 3093. *See supra* text accompanying notes 72-75.

⁷⁷ *See supra* notes 15-16 & 31-36 and accompanying text.

⁷⁸ *See Award Serv., Inc. v. Northern Cal. Retail Clerks Union & Food Employers Joint Pension Trust Fund*, 774 F.2d 1391 (9th Cir. 1985) (*Award Serv. II*). After the decision in *Massachusetts Mut.*, the pension trust involved in *Award Serv.* filed a motion for recall of the mandate of *Award Serv. Award Serv. II*, 774 F.2d at 1391. In *Award Serv. II*, the Ninth Circuit denied the motion and reaffirmed that it was appropriate, and not inconsistent with *Massachusetts Mut.*, to imply a remedy in favor of the employer under § 403(c)(2)(A)(ii). *Award Serv. II*, 774 F.2d at 1392.

⁷⁹ *Whitworth Bros.*, 794 F.2d at 236.

⁸⁰ *See supra* notes 65-67 and accompanying text.

⁸¹ *Whitworth Bros.*, 794 F.2d at 233-36. Senator Javits stated that "[i]t [was] also intended that a body of Federal substantive law [would] be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 CONG. REC. 29,942 (1974), reprinted in 3 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 4771 (statement of Sen. Javits).

⁸² *Whitworth Bros.*, 794 F.2d at 236. The case was remanded to the district court. Thus, the Sixth Circuit did not decide if such a right would be recognized and, if so, what factors would be relevant to this determination. *Id.*

In contrast, the Eleventh Circuit held that no federal common law right to recovery of mistaken contributions existed for the employer.⁸³ The court adhered to a Supreme Court warning that "the presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."⁸⁴ Thus, the Eleventh Circuit again revealed its reluctance to entertain any ERISA claim not expressly provided for in section 502(a).⁸⁵

IV. Congress Intended to Provide an Implied Right For Employers

By specifically providing section 403(c)(2)(A)(ii),⁸⁶ Congress revealed its intent to grant employers an admittedly narrow avenue for relief. When the factual context set out in that section arises,⁸⁷ ERISA contemplates that the plan administrator will refund the mistaken contributions. To ensure this result, Congress expressly provided that, in making such refunds, plan fiduciaries are exempted from their strict fiduciary duties owed to plan participants and beneficiaries.⁸⁸ Thus, the plain meaning of these ERISA provisions exhibits a congressional intent that employers are to receive a refund of payments which are mistakenly made to the plan.⁸⁹ Section 403(c)(1) seeks to prevent an employer from profiting from an employee benefit plan through misuse or abuse of its funds.⁹⁰ The section should not be read to suggest that plan trustees may not be required to return to employers contributions mistakenly paid into the plan.

The legislative histories of ERISA, and of the MPPAA in particular, further show a congressional intent to give employers a right to a return of overcontributions.⁹¹ Part (ii) of section 403(c)(2)(A) was specifically added to ERISA by the MPPAA⁹² due to Congress' belief that the original right provided in that section was too narrow for employers participating in multiemployer plans.⁹³ The amendment extended the right of recovery to include payments made by mistake of law as well as mistake of fact and removed the one-year limitation period.⁹⁴ Interpreting this section as an indication that Congress merely intended to allow the administrator to return the payments at his discretion⁹⁵ frustrates the rationale behind broadening the factual context allowing for recovery. No language in the legislative history suggests that the plan administrator is

⁸³ *Dime Coal*, 796 F.2d at 399 n.7. The court stated, however, that the issue was not well presented nor seriously pursued on appeal by the employer. *Id.*

⁸⁴ *Id.* (quoting *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981)).

⁸⁵ See *supra* notes 24-27 & 66-72 and accompanying text. *But see supra* notes 75-78 and accompanying text.

⁸⁶ See *supra* notes 15-16 & 33-35 and accompanying text.

⁸⁷ See *supra* note 16.

⁸⁸ See *supra* notes 17-23 and accompanying text.

⁸⁹ See *supra* notes 31-44 and accompanying text.

⁹⁰ See *supra* note 9 and accompanying text.

⁹¹ See *infra* note 96 and accompanying text.

⁹² See *supra* note 16.

⁹³ See *supra* note 35.

⁹⁴ See *supra* note 16.

⁹⁵ See *supra* notes 38-43 and accompanying text.

to exercise discretion over whether to return contributions pursuant to section 403(c)(2)(A)(ii).⁹⁶ The legislative history more appropriately reveals that Congress designed that section for the benefit of employers who have mistakenly made contributions to a benefit plan. Congress conceivably foresaw that employers would invoke the section to recover the overpayment.

Finding an implied right for an employer to recover overpayments made to a multiemployer benefit plan does not violate the broad principles of ERISA.⁹⁷ Indeed, it furthers the policy of encouraging the growth and maintenance of multiemployer plans.⁹⁸ Congress was well aware of the negative impact increased expenses and burdens would have on employers who maintain these voluntary plans.⁹⁹ Accordingly, ERISA and the MPPAA seek to guarantee that participants and benefi-

96 The legislative history to the 1974 provision concerning this section states, in relevant part:

An employer's contributions can be returned within one year after they are made to the plan, if made as a mistake of fact. (For example, an employer may have made an arithmetical error in calculating the amounts that were to be contributed to the plan.) Also, if an employer contributes to a plan on the condition that the plan is tax-qualified or on the condition that a current tax deduction is allowed for the contribution and it is later determined that the plan is not qualified (or the deduction is not allowed), the contribution can be returned if the plan provides for it. In this case, the contribution can be returned within one year after the disallowance of qualification or deduction.

CONFERENCE REP., H.R. REP. NO. 1280, 93d Cong., 2d Sess. 303 (1974), *reprinted in* 3 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 4277, 4570 and 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5083.

The legislative history of the MPPAA in regard to the return of mistaken overcontributions provides:

U. Mistaken Contributions

Present Law

Under present law, employer contributions to pension plans are generally not allowed to be returned to the employer. However, a contribution made because of a mistake of fact is permitted to be returned if it is returned within one year after the date it is made.

Reason for Change

The Committees believe that for a multiemployer plan the requirement that a contribution be made due to mistake of fact in order to be returned is too narrow. Accordingly, the Committees have concluded that a contribution made due to mistake of fact or mistake of law should be eligible for return to the employer if specified conditions are met.

Explanation of Provision

Under the bill, in the case of a contribution to a multiemployer plan which was made because of a mistake of law or fact, the contribution may be returned without penalty within six months after the date the plan administrator determines that the contribution resulted from a mistake of law or fact. For this purpose, a mistake of law relating to plan qualification under the Code is not considered a mistake of law.

JOINT EXPLANATION OF S.1076: MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980, 126 CONG. REC. 20,208 (1980).

97 See *supra* notes 9-12 and accompanying text; *infra* notes 98-100 and accompanying text.

98 29 U.S.C. § 1001a(c)(2) (1982). This section states that one of the policies of the MPPAA is "to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans." *Id.* See 126 CONG. REC. 20,177 (1980) (statement of Sen. Javits) (one purpose of the MPPAA was to eliminate problems that impede growth and maintenance of multiemployer plans).

99 119 CONG. REC. 130 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 90 (statement of Sen. Williams) (vastly increased costs would work against the best interests of all parties); H.R. REP. NO. 533, 93d Cong., 1st Sess. 1 (1973), *reprinted in* 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 2348, 2348 and 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4639 (committee recognized voluntary nature of employee retirement plans); S. REP. NO. 383, 93d Cong., 1st Sess. 1, *reprinted in* 1 LEGISLATIVE HISTORY OF ERISA, *supra* note 9, at 1069, 1069 and 1974 U.S. CODE CONG. & ADMIN. NEWS 4890, 4890 (committee recognized that participation in a plan is voluntary by employers and carefully minimized additional costs to employers).

ciaries will receive the benefits that they deserve without overly burdening participating employers. More specifically, Congress provided section 403(c)(2)(A)(ii) to ensure that the Act treated contributing employers fairly. While recognizing a need to guarantee adequate funding of benefit plans, ERISA also recognized a need to assure employers that they would be treated equitably so as to keep them involved in the plan.¹⁰⁰ Congress thus intended to provide a right for employers to secure the return of mistaken contributions in a situation where it would be inequitable for the trust fund to keep them.

This implied right to sue does not adversely affect the rights of participants or beneficiaries. Implying a right for employers to sue merely means that participants and beneficiaries are not entitled to funds to which they had no right in the first place. Allowing employers to assert section 403(c)(2)(A)(ii) will not impact upon the civil enforcement mechanisms of section 502.¹⁰¹ The parties listed in that section¹⁰² may still bring a wide variety of suits pursuant to section 502(a).¹⁰³ Employers may simply use section 403(c)(2)(A)(ii) to enforce a right expressly provided for in the Act.¹⁰⁴ Recognizing this remedy will not lead to a rash of suits by employers under other ERISA provisions which were not designed to benefit employers.

A. Possible Applications of the Implied Right

Keeping in mind ERISA's concern over the stability of benefit plan funds,¹⁰⁵ however, courts should not automatically order a straight refund if the plan's funds are tied up in investments or are insufficient for making the refund.¹⁰⁶ As the Ninth Circuit indicated, an employer would be required to establish that the equities of the situation favor restitution.¹⁰⁷ A primary consideration is the financial stability of the plan.¹⁰⁸

Courts should attempt to develop a solution which is workable for the plan. Section 403(c)(2)(A)(ii) requires the plan administrator to return mistaken overpayments within six months after he determines that they were mistakenly made.¹⁰⁹ Courts could construe this date of deter-

100 See *supra* note 63 and accompanying text. Indeed, commentators have suggested that employers consider alternatives to multiemployer benefit plans due to their inequitable effect on employers. See, e.g., Kladder & Durose, *Considerations in Negotiating Alternatives to Participation in Multiemployer Pension Plans*, 12 J. OF PENSION PLAN. & COMPLIANCE 271 (1986).

101 See *supra* notes 24-29 & 68-78 and accompanying text.

102 See *supra* notes 24-29 and accompanying text.

103 See *supra* note 27.

104 See *supra* text accompanying notes 75-78.

105 See *supra* notes 9-12 and accompanying text.

106 *Award Serv.*, 763 F.2d at 1069.

107 *Id.* See *supra* note 34.

108 *Award Serv.*, 763 F.2d at 1069.

109 29 U.S.C. § 1103(c)(2)(A)(ii) (1982). Some courts have held that an employer is not entitled to a refund unless the plan administrator affirmatively determines that the overcontributions were made by mistake of fact or law. See, e.g., *Hardy v. National Kinney of Cal.*, 571 F. Supp. 1214, 1215 (N.D. Cal. 1983) (§ 403(c)(2)(A)(ii) created no exception to an employer's inability to reach trust assets absent a determination by the trust that there had been a mistaken contribution); *Electricians Health, Welfare & Pension Plans, v. Gulino*, 594 F. Supp. 1265, 1271 (M.D. La. 1984) (narrow reading of § 403(c)(2)(A) led to conclusion that contribution may be returned only after plan administrator has determined that the contribution was mistakenly made). *But see, e.g., Ethridge v. Masonry*

mination as the date the judgment was handed down, thereby giving the plan six months after the court's judgment to structure the refund. As a second option, a court might allow the employer to reduce future contributions until the amount owed to the employer is met through the reduced contributions.¹¹⁰

Due to the uncertainty with which federal courts have been dealing with an employer's rights under section 403(c)(2)(A)(ii), employers should consider the possibility of attempting to negotiate a refund provision within the trust instrument itself. Courts have been willing to enforce the terms of the trust instrument if not inconsistent with applicable ERISA provisions.¹¹¹ Thus, employers could bargain for a refund remedy to be incorporated in the trust agreement where the facts of the overpayment are consistent with section 403(c)(2)(A)(ii).

V. Conclusion

Multiemployer-employee benefit plans are popular and successful tools for providing health and pension benefits to union employees. They also provide practical and desirable options to industry employers, allowing them to attract well-qualified workers. ERISA and the MPPAA have sought to strengthen and promote increased participation in these plans by making them more stable and equitable—for employers as well as employees. To help ensure continued participation on the part of employers, Congress enacted section 403(c)(2)(A)(ii) to grant employers an avenue for securing the return of contributions mistakenly made to a multiemployer plan. Further, ERISA relieves plan fiduciaries from their strict fiduciary duties for the express purpose of making these refunds to

Contractors, Inc., 536 F. Supp. 365, 368 (N.D. Ga. 1982) (if § 403(c)(2)(A) required finding of mistake by plan administrator, employers would be without legal recourse).

That part of § 403(c)(2)(A)(ii), regarding the language that the refund of overcontributions may be made "after the plan administrator determines that the contribution was made by such a mistake," should not be read so narrowly. When added by the MPPAA, part (ii) was designed to broaden the relief available to employers in a multiemployer plan. *See supra* notes 16 & 35 and accompanying text. Thus, that language was intended to allow for a broader recovery than that available to an employer in a single employer plan which must be made "within one year after the payment of the contribution." *Compare* 29 U.S.C. § 1103(c)(2)(A)(ii) with 29 U.S.C. § 1103(c)(2)(A)(i). *See also supra* notes 33 & 96.

110 Some courts have addressed a similar type of arrangement in the form of a setoff in cases where the employer has mistakenly overcontributed but also owes payments to the plan. *See, e.g.*, *Dumac Forestry Servs., Inc. v. I.B.E.W.*, 637 F. Supp. 529, 534 (N.D.N.Y. 1986) (employer entitled to setoff amount erroneously paid against future payments); *Ethridge v. Masonry Contractors, Inc.*, 536 F. Supp. 365, 368 (N.D. Ga. 1982) (employer entitled to use amount of overpayments *only* as a setoff against underpayments found by auditor); *Service Employees Int'l Union Local 82 Labor-Management Trust Fund v. Baucom Janitorial Servs., Inc.*, 504 F. Supp. 197, 198 (D.D.C. 1980) (employer entitled to setoff of excess contributions made by mistake). *But see, e.g.*, *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Philadelphia Fruit Exch.*, 603 F. Supp. 877, 881 (E.D. Pa. 1985) (fact that employer may be entitled to refund of mistaken overpayments does not establish that employer may setoff amount from delinquent contributions).

111 *See, e.g.*, *Crews v. Central States, Southeast & Southwest Areas Pension Fund*, 788 F.2d 332, 336 (6th Cir. 1986) (willing parties may provide in the agreement more restrictive terms with such provisions constituting the law to be applied between the parties); *Blackmar v. Lichtenstein*, 603 F.2d 1306, 1309 (8th Cir. 1979) (legislative history demonstrates trust instrument to be followed unless inconsistent with fiduciary requirements set out in ERISA); *Electricians Health, Welfare & Pension Plans v. Gulino*, 594 F. Supp. 1265, 1279 (M.D. La. 1984) (parties may provide more restrictive terms in the agreement to be applied as the law between them).

employers. However, since employers are not expressly authorized to maintain a suit under ERISA, they cannot force plan trustees to return these overpayments. Trustees refuse voluntarily to issue refunds because of the strict fiduciary standard which governs their actions.

To further the equitable goal of ERISA and to ensure the future stability and growth of multiemployer plans, federal courts must implement the congressional intent behind section 403(c)(2)(A)(ii) by granting to employers an implied statutory right to compel the return of mistaken overpayments. Without this right, refunds would be made only at the discretion of the plan trustees who have no incentive to return the contributions. Employers would thus have no recourse to recover funds which rightfully belong to them, and would be reluctant to participate in multiemployer plans. Such a breakdown is precisely what ERISA and the MPPAA seek to prevent. Thus, in furtherance of the spirit and letter of ERISA, federal courts should imply a private remedy for employers in cases meeting the specific factual framework envisioned in section 403(c)(2)(A)(ii).

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