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Trading Places: Employer Strategies to Avoid Mandatory Awards of Interest, Liquidated Damages, and Attorney's Fees under the MPPAA

Craig W. Trepanier

Note

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The Employee Retirement Income Security Act of 1974 ("ERISA")[1] is a comprehensive statute that protects the rights of employees participating in employee benefit plans.[2] Congress amended ERISA through the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"),[3] which established a method for collecting delinquent contributions[4] and withdrawal liability payments[5] from employers[6] participating in multiemployer employee benefit plans.[7] Along with its substantive pro-

1. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 and in scattered sections of titles 5, 18, 26, 31, and 42 U.S.C.).

2. There are two types of employee benefit plans: employee welfare benefit plans, 29 U.S.C. § 1002(1) (1988), and employee pension benefit plans, 29 U.S.C. § 1002(2) (1988).

3. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (codified as amended in scattered sections of titles 26 and 29 U.S.C.).

4. MPPAA, § 306(a), 29 U.S.C. § 1145 (1988). For a further discussion of the delinquent contributions provision, see *infra* note 23.

5. MPPAA, § 104, 29 U.S.C. § 1381 (1988). For a further discussion of withdrawal liability, see *infra* note 24.

6. ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(5) (1988).

For purposes of collecting delinquent contributions or establishing withdrawal liability in the context of multiemployer plans, "all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 1301(b)(1) of this title are considered a single employer." MPPAA, § 302, 29 U.S.C § 1002(37)(B) (1988).

7. ERISA 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

visions, the MPPAA contains a liquidated damages provision stating that in "any *action* . . . by a fiduciary for or on behalf of a plan . . . in which a judgment in favor of the plan is awarded," the court shall award interest, liquidated damages, and attorney's fees "to be paid by the *defendant*."[8]

Courts easily apply the MPPAA's liquidated damages provision in the typical action in which a plan fiduciary files suit seeking delinquent contributions or withdrawal liability payments from a defendant employer. In these cases, courts award interest, liquidated damages, and attorney's fees as a matter of course if the plaintiff fiduciary prevails on the MPPAA claim.[9] Courts have struggled with the provision's wording, however, when a crafty employer beats the fiduciary to the courthouse and files an action seeking an injunction or a declaratory judgment denying liability.[10] In this situation, the parties effectively "trade places," making application of the provision difficult.

This Note addresses whether an award under the MPPAA's liquidated damages provision is mandatory when a defendant fiduciary prevails on a counterclaim for delinquent contributions or withdrawal liability payments in an action brought by an employer.[11] Thus far, only a handful of courts have faced this issue squarely, reaching conflicting results.[12] As more employers use

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requirements as the Secretary may prescribe by regulation." MPPAA, § 207, 29 U.S.C. § 1102(37)(A) (1988).

8. MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2) (1988) (emphasis added). The liquidated damages provision applies to actions in which the plan fiduciary seeks to collect delinquent contributions or withdrawal liability payments. *See infra* note 29 and accompanying text.

9. *See infra* note 70 and accompanying text (noting mandatory nature of awards of interest, liquidated damages, and attorney's fees under the MPPAA's liquidated damages provision).

10. *See infra* text accompanying notes 72-91.

11. The plan fiduciary does not always file a counterclaim in actions brought by an employer, either because no claim exists or because of oversight on the part of the plan's attorney. *E.g.*, Pantry Pride, Inc. v. Retail Clerks Tri-State Pension Fund, 747 F.2d 169, 171 (3d Cir. 1984) (denying defendant fund's motion for affirmative relief because it did not file counterclaim).

In other cases, the plan fiduciary files a counterclaim, but is not entitled to interest, liquidated damages, and attorney's fees because the employer prevails in the suit. *E.g.*, Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, 827 F.2d 491, 495 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

12. *See infra* notes 72-91 and accompanying text. Several courts, including two Courts of Appeals, have summarily awarded interest, liquidated damages, and attorney's fees under the MPPAA to a defendant plan fiduciary who prevailed on a counterclaim. *See infra* note 91 and accompanying text. Because the plaintiff employers in those actions did not argue that the liquidated dam-

the strategic devices of declaratory judgments and injunctions to avoid the crushing blow of the MPPAA's liquidated damages provision, however, our judicial system can expect an increase in litigation surrounding this issue.[13] Further, this Note addresses the broader question of how courts should interpret carelessly worded statutes that make the outcome of litigation dependent on the alignment of parties as plaintiffs or defendants.

Part I of this Note summarizes the general purpose and legislative history of the MPPAA and compares the MPPAA's liquidated damages provision to state and federal statutes that pose similar analytical difficulties. Part II summarizes the various ways courts have interpreted the MPPAA's liquidated damages provision when a defendant plan prevails on a counterclaim for delinquent contributions or withdrawal liability in an action brought by an employer. Part III offers a method for reconciling these decisions in the manner most consistent with the text, general purpose, and policy behind the MPPAA. Part IV proposes that Congress should amend the MPPAA's liquidated damages provision and other carelessly worded statutes and encourages attorneys drafting multiemployer plans to avoid similar errors when creating multiemployer trust agreements. This Note concludes that an award of interest, liquidated damages, and attorney's fees should be mandatory under the MPPAA when a plan fiduciary prevails on a claim for delinquent contributions or withdrawal liability, regardless of which party initiated the action.

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ages provision was inapplicable, however, those decisions do not establish binding precedent on the issue of whether awards are mandatory when the fund is aligned as the defendant. *See* United States v. Ross, 456 U.S. 798, 824 (1982) (holding that the doctrine of stare decisis does not preclude a court from reaching a subsequent inconsistent holding when the reasoning relied on by the subsequent court was not presented to the previous court).

13. As employers withdraw from multiemployer plans at an increasingly frequent rate, they can be expected to take steps to limit their liability. Indeed, employers have terminated thousands of plans since 1980. *Employee Pension Protection Act of 1989: Hearings on S. 685 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 1 (1989). Further, not a single multiemployer plan has been established since the MPPAA's enactment in 1980. *Employee Pension Protection: Hearings on H.R. 1661 Before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 101st Cong., 1st Sess. 14 (1989) (remarks of Rep. Erlenborn). This statistic is consistent with trends observed among all pension plans; terminated plans outnumber new plans at a rate of four to one. *The Pension Benefit Guarantee Corporation: Does the Federal Government Protect Retirement Income?: Hearing Before the Subcomm. on Employment and Housing of the House Comm. on Gov't Operations*, 101st Cong., 2d Sess. 2 (1990) (remarks of Chairman Lantos).

I. BACKGROUND OF THE DISPUTE OVER THE MPPAA's LIQUIDATED DAMAGES PROVISION

A. IMPETUS FOR THE MPPAA

Congress enacted ERISA to protect the interests of participants and beneficiaries of employee benefit plans[14] and to increase significantly the scope and security of private pension plan coverage.[15] To this end, ERISA established a comprehensive scheme that governs the administration of employee welfare benefit and pension plans, including multiemployer plans.[16]

Before 1980, actions by multiemployer plan fiduciaries to collect delinquent contributions were "founded either on state law, the collective bargaining agreement between the parties or the trust agreement forming the foundation for the employee benefit plan."[17] Congress recognized, however, that "sole reliance on widely varying state laws governing suits to collect delinquent contributions [was] both insufficient and unnecessa-

14. Congress stated that the Act's purpose is "to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b) (1988).

15. H.R. REP. No. 807, 93d Cong., 2d. Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682; H.R. REP. No. 533, 93d Cong., 2d Sess. 1-2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4640.

16. Typically, multiemployer plans are organized by industry or region. *Multiemployer Plans—Special Rules*, 1989 Tax Mgmt. (BNA) No. 359-2d, at A-1 (Apr. 10, 1989). An important advantage of multiemployer plans is that they provide portability of benefits for employees among employers who participate in the same plan or in plans that contain a reciprocity agreement. *Id.*

Today, over 870,000 pension and benefit plans provide coverage to over seventy-six million employees. *Pensions at Risk: Can the Department of Labor Effectively Audit Private Retirement Funds?: Hearing Before the Subcomm. on Employment and Housing of the House Comm. on Gov't Operations*, 101st Cong., 1st Sess. 2 (1989) (statement of Chairman Lantos). In addition, "these plans post assets in excess of $1.7 *trillion*, controlling twenty to twenty-five percent of the equity and forty percent of the outstanding corporate bonds in the United States." J. Daniel Plants, Note, *Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy to Prevent Unjust Enrichment*, 89 MICH. L. REV. 2000, 2000 (1991) (footnote omitted).

As of 1985, 1,000 multiemployer plans existed in the United States, covering roughly 5,600,000 participants. *Multiemployer Plans—Special Rules*, 1989 Tax Mgmt. (BNA) No. 359-2d, at A-1 (Apr. 10, 1989). Multiemployer plans alone account for $316 billion in private pension funds. James B. Parks, *Pension Aim: Furthering Labor Goals*, 37 AFL-CIO News, Feb. 17, 1992, at 5. By the end of the century, experts predict that private pension plans will hold over $3 trillion worth of net assets. *Pensions at Risk, supra*, at 13 (testimony of Raymond Maria, Acting Inspector General of the Department of Labor).

17. Central States, Southeast & Southwest Areas Pension Fund v. Alco Express Co., 522 F. Supp. 919, 922 (E.D. Mich. 1981).

rily costly."[18]

In addition, ERISA's original method of collecting payments when an employer withdrew from a multiemployer plan was woefully inadequate. A withdrawing employer faced a limited and contingent liability that attached only if the plan terminated within five years of the employer's withdrawal.[19] Moreover, "even a withdrawn employer whose former plan did happen to terminate within the five-year period subsequent to the employer's withdrawal faced a withdrawal liability that was limited to 30% of the withdrawn employer's net worth."[20] Commentators and policymakers consistently maintained that the combined effect of ERISA's five-year contingency rule and the thirty percent cap on employer liability actually encouraged employer withdrawals from multiemployer plans.[21]

B. SECTION 306(b) OF THE MPPAA

Largely in response to the problems caused by delinquent contributions and employer withdrawals from multiemployer plans, Congress amended ERISA through the Multiemployer Pension Plan Amendments Act of 1980. Congress was concerned particularly about the need "to alleviate certain problems which tend to discourage the maintenance" of mul-

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18. STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 1ST SESS., THE ERISA IMPROVEMENTS ACT OF 1979: SUMMARY AND ANALYSIS OF CONSIDERATION 45 (Comm. Print 1979), *cited in Alco Express*, 522 F. Supp. at 926.

19. *Multiemployer Plans—Special Rules*, 1989 Tax Mgmt. (BNA) No. 359-2d, at B-401 (Oct. 24, 1988).

20. *Id.*

21. Two commentators summarized the sentiment of Congress prior to adoption of the MPPAA:

> Initially, only single-employer plans were covered by the PBGC's mandatory guaranty program. The effective date of mandatory coverage for multiemployer plans was deferred pending study, although PBGC could pay benefits under a terminated multiemployer plan in its discretion. In the event of termination of a covered multiemployer plan with insufficient assets, the only employers who would be liable to PBGC were those who had remained in the plan until it terminated and those who had withdrawn within the preceding five years. Congress became concerned that, if this remained the law, it would create an incentive to withdraw early when the guarantees became mandatory for multiemployer plans, and would thereby shift an ever-increasing share of the plan's funding to remaining employers.

Israel Goldowitz & Thomas S. Gigot, *The Controlled Group Rule for Purposes of the Withdrawal Liability Provisions of the Employee Retirement Income Security Act*, 90 W. VA. L. REV. 773, 775-76 (1988) (footnote omitted); *see also* Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2271-72 (1993) (summarizing the history of the MPPAA).

tiemployer pension plans.[22] The amendments brought several important changes, including efforts to bolster the integrity of plans by requiring employers to make timely contributions[23] and by instituting a mandatory system of withdrawal liability.[24]

22. MPPAA, § 3(c)(2), 29 U.S.C. § 1001(c) (1988); *see also* H.R. REP. No. 869, 96th Cong., 2d Sess. 65, *reprinted in* 1980 U.S.C.C.A.N. 2918, 2933 ("The basic policy of the Act is that the retirement income security of multiemployer plan participants is best assured by fostering the growth and continuance of multiemployer plans.").

23. Section 306(a) of the MPPAA, entitled "Delinquent Contributions," provides a federal cause of action when an employer fails to make timely contributions to a multiemployer plan:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

MPPAA, § 306(a), 29 U.S.C. § 1145 (1988). This provision transforms an employer's contractual obligation to contribute to a multiemployer pension plan into a statutory requirement. *See* Gilles v. Burton Constr. Co., 736 F.2d 1142, 1143 n.2 (7th Cir. 1984).

Moreover, the MPPAA gives federal courts exclusive jurisdiction to entertain claims for delinquent contributions, MPPAA, § 104, 29 U.S.C § 1451(c) (1988), and limits an employer's defenses in any action to collect delinquent contributions. One senator explained:

> Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law (other than 29 U.S.C. 186).

126 CONG. REC. 23,288 (1980) (remarks of Senator Williams). Courts have interpreted § 1145 in a manner consistent with this legislative history. *See, e.g.*, Benson v. Brower's Moving & Storage, Inc., 907 F.2d 310, 314 (2d Cir.), *cert. denied*, 498 U.S. 982 (1990); Martin v. Benesh & Bruns, Inc., 532 F. Supp. 408, 415-16 (N.D. Ill. 1982).

24. The MPPAA substitutes a mandatory system of withdrawal liability for ERISA's scheme of contingent termination liability. The amount of withdrawal liability equals the employer's proportionate share of the plan's unfunded vested benefits, subject to particular adjustments. MPPAA, § 104, 29 U.S.C. § 1381(b) (1988). "A defined benefit plan has vested, unfunded liability when the assets of the plan are insufficient, on an actuarial basis, to provide the plan beneficiaries with promised pension benefits which are then vested." John R. Woodrum & Timothy B. McBride, *Controlled Group Liability Under the Multiemployer Pension Plan Amendments Act: Liability Without Limit?*, 90 W. VA. L. REV. 731, 731 n.4 (1988). The purpose of the MPPAA's withdrawal liability provision is to reduce the burdens placed on remaining contributing employers when one employer leaves the plan. *Multiemployer Plans—Special Rules*, 1989 Tax Mgmt. (BNA) No. 359-2d, at A-7 (Apr. 10, 1989). Although the purpose of the provision should be commended, "there is some evidence that the existence of withdrawal liability is a deterrent to new entrants into multiemployer agreements." *Id.*

The MPPAA provides that when the plan fiduciary and the employer dispute any aspect of a multiemployer plan, either party may bring an action for legal or equitable relief.[25] The statute permits courts faced with these disputes to make a discretionary award of attorney's fees and costs to the prevailing party.[26] Most courts apply the same standards to an award of attorney's fees under this provision as they apply to fee awards under ERISA's original attorney's fees provision.[27]

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25. A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

MPPAA, § 104, 29 U.S.C. § 1451(a)(1) (1988). Thus, the Act authorizes an employer to bring an action seeking equitable relief, such as a declaratory judgment denying liability, or an injunction to prevent the collection of delinquent contributions or withdrawal liability.

26. "In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party." MPPAA, § 104, 29 U.S.C. § 1451(e) (1988).

In the context of disputes over delinquent contributions or withdrawal liability, the most significant function of this provision is to authorize an award of attorney's fees to a prevailing *employer*. *See, e.g.*, Anita Foundations, Inc. v. ILGWU Nat'l Retirement Fund, 902 F.2d 185, 191 (2d Cir. 1990) (granting fees to prevailing employer). Courts are reluctant, however, to exercise their discretionary power to award fees to a prevailing employer. *See* Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, 827 F.2d 491, 500 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988); Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp., 813 F.2d 760, 767 (6th Cir. 1987); Dorn's Transp., Inc. v. Teamsters Pension Trust Fund, 799 F.2d 45, 49-51 (3d Cir. 1986).

27. ERISA's original attorney's fees provision, as amended by the MPPAA, states: "In any action under this subchapter (other than an action [for delinquent contributions]) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." MPPAA, § 306(b), 29 U.S.C. § 1132(g)(1) (1988).

Many courts apply the same standards to both this provision and the MPPAA's discretionary fees provision, § 104. *E.g.*, *Anita Foundations*, 902 F.2d at 188. Other courts, however, have struggled to determine what standards should apply when making a discretionary award of attorney's fees under ERISA's original attorney's fees provision. For a summary of the conflicting standards applied to awards of attorney's fees under this provision, see Mark H. Berlind, Note, *Attorney's Fees Under ERISA: When is an Award Appropriate?*, 71 CORNELL L. REV. 1037 (1986).

In actions to collect delinquent contributions or withdrawal liability, most courts justify an award of attorney's fees to prevailing employers on the basis of MPPAA § 104. Some courts, however, have awarded attorney's fees to a prevailing employer under ERISA's original attorney's fees provision. *E.g.*, Sapper v. Lenco Blade, Inc., 704 F.2d 1069, 1072-73 (9th Cir. 1983). Instead, courts should award fees under § 104 of the MPPAA, which was intended to govern

The MPPAA also contains a liquidated damages provision[28] that governs actions to collect both delinquent contributions and withdrawal liability payments.[29] Section 306(b) of the MPPAA provides:

> In any *action* under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the *defendant*, and
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> (E) such other legal or equitable relief as the court deems appropriate.[30]

The mandatory language of the provision stands in sharp contrast to the discretionary standard for awarding attorney's fees found in ERISA's original attorney's fees provision, which now applies to actions other than those for delinquent contributions or withdrawal liability payments.[31]

Despite Congress's desire to make mandatory an award of interest, liquidated damages, and attorney's fees whenever a plan fiduciary succeeds in a collection proceeding, the literal

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actions for delinquent contributions or withdrawal liability payments. Jefferson Tile Co. v. Colorado Tile, Marble & Terazzo Workers Health, Welfare & Pension Funds, 797 F. Supp. 857, 861 (D. Colo. 1992).

28. MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2) (1988).

29. According to its literal wording, the provision applies only to actions "to enforce section 1145" (regarding delinquent contributions). MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2) (1988). The MPPAA, however, also provides that an employer who fails to make interim payments of withdrawal liability pending arbitration or in accordance with the final decision of the arbitrator is treated as being delinquent in making contributions to the plan. *See* MPPAA, § 104, 29 U.S.C. § 1451(b) (1988); MPPAA, § 104, 29 U.S.C. § 1401(d) (1988).

Courts have interpreted these provisions to mean that interest, liquidated damages, and attorney's fees should be awarded in any successful action to collect delinquent contributions *or* withdrawal liability. *E.g.*, Robbins v. B & B Lines, Inc., 830 F.2d 648, 649-50 (7th Cir. 1987); Lads Trucking Co. v. Board of Trustees, 777 F.2d 1371, 1374 (9th Cir. 1985); Jefferson Tile Co. v. Colorado Tile, Marble & Terazzo Workers Health, Welfare & Pension Funds, 797 F. Supp. 857, 861 (D. Colo. 1992); Trustees of Amalgamated Ins. Fund v. Sheldon Hall Clothing, Inc., 683 F. Supp. 986, 992-93 (E.D. Pa.), *aff'd*, 862 F.2d 1020 (1988), *and cert. denied*, 490 U.S. 1082 (1989).

30. MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2) (1988).

31. *See supra* note 27.

terms of the statute limit these awards to actions in which the fiduciary is designated as the plaintiff. This form of careless drafting, which ignores the variety of positions from which a party can prevail, is not unique to the MPPAA and is found commonly in both state and federal statutes.[32]

C. Sloppy Drafting: Statutes That Tie the Outcome of Litigation to the Alignment of Parties

Modern rules of civil procedure cannot guarantee the alignment of particular parties to civil litigation as either plaintiff or defendant. As the Supreme Court recognized, "[d]enomination as a civil defendant or plaintiff . . . is often happenstance based on which party filed first or on the nature of the suit."[33] In many contexts, a party faced with a pending action uses the devices of declaratory judgments and injunctions to secure a more convenient venue or to obtain choice of law rules that could not be obtained if the other party sued first.[34] These devices, along with interpleader actions, "may invert expected designations of plaintiff and defendant."[35]

Nonetheless, the meaning of many statutes depends either explicitly or implicitly on the characterization of particular parties as plaintiffs or defendants. This phenomenon is especially common among statutes that employ the term "action" or similar words,[36] and among attorney's fee-shifting statutes that limit awards to prevailing "plaintiffs."[37]

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32. *See infra* notes 43-63 and accompanying text.

33. Green v. Bock Laundry Machine Co., 490 U.S. 504, 510 (1989).

34. *See, e.g.*, Northwest Airlines, Inc. v. American Airlines, Inc., 989 F.2d 1002 (8th Cir. 1993).

35. *Green*, 490 U.S. at 510 n.7.

36. *See infra* notes 38-50 and accompanying text.

37. Many federal attorney's fee-shifting statutes implicitly or explicitly limit fee awards to prevailing plaintiffs. *See, e.g.*, Bank Holding Company Act Amendments of 1970, § 106(e), 12 U.S.C. § 1975 (1988); Electronic Communications Privacy Act of 1986, § 103, 18 U.S.C. § 2520(b)(3) (1988); Age Discrimination in Employment Act of 1967, § 7(b), 29 U.S.C. § 626(b) (1988); Omnibus Crime Control and Safe Streets Act of 1968, § 809, 42 U.S.C. § 3789d(c)(4)(B) (1988); Atomic Energy Act of 1954, § 154, 42 U.S.C. § 2184 (1988); Interstate Commerce Act, 49 U.S.C. § 11705(d)(3) (1988); Interstate Commerce Act, 49 U.S.C. § 11710(b) (1988); Hazardous Liquid Pipeline Safety Act of 1979, § 215(e), 49 U.S.C. app. § 2014(e) (1988); Natural Gas Pipeline Safety Act of 1968, § 19(e), 49 U.S.C. app. § 1686(e) (1988).

1. Statutes That Apply Only to "Actions" Brought by Particular Parties

Traditionally, the term "action" refers to the lawsuit or judicial proceeding itself.[38] "Once an action is commenced by the filing of a complaint, all subsequent proceedings are part of the action."[39] Hence, in ordinary usage, the term "action" is distinguished from a "cause of action,"[40] a "claim,"[41] or a "counter-

38. [The term action] in its usual legal sense means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law. The legal and formal demand of one's right from another person or party made and insisted on in a court of justice. . . . It includes all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court.

BLACK'S LAW DICTIONARY 28 (6th ed. 1990) (citations omitted).

In *People v. Colborne*, 20 How. Prac. 378 (N.Y. Sup. Ct. 1861), the court eloquently stated:

> Bracton, I think, embodies the whole idea of an action much better, in the Latin expression, "trunus actus, trium personarum," which seems to include not only the act of a plaintiff, who makes a lawful demand, and the act of a defendant, in opposition; but also, the act of a court in passing judgment between the parties. This is full and comprehensive, and I think, best expresses our notion of a legal action in the ordinary understanding of the term.

Id. at 380 (emphasis omitted).

More recently, the Ninth Circuit noted that "although few if any courts have ever defined 'legal action,' literally thousands of cases have used the term to refer to litigation. . . . In common usage, the term 'legal action' is used to refer to litigation or judicial proceedings." S & M Investment Co. v. Tahoe Regional Planning Agency, 911 F.2d 324, 327 (9th Cir. 1990) (citations omitted), *cert. denied*, 498 U.S. 1087 (1991).

39. Smith, Kline & French Laboratories v. A. H. Robbins Co., 61 F.R.D. 24, 29 (E.D. Penn. 1973) (citing Stahl v. Paramount Pictures, 167 F. Supp. 836 (S.D.N.Y. 1958)). Moreover, in Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105, 108 (2d Cir.), *cert. denied*, 345 U.S. 964 (1953), the court held that within the rule providing for voluntary dismissal of an "action," the term denotes the entire controversy, not merely a "claim," which has traditionally been termed a "cause of action." *But see* Leroux v. Lomas & Nettleton Co., 626 F. Supp. 962, 965-66 (D. Mass. 1986) (criticizing *Harvey*).

40. "An 'action' is a pending proceeding to determine the rights and liabilities of the parties whereas a 'cause of action' is defined as 'a legal wrong for which an "action" may be, but has not been, brought in court.'" Proctor v. Gissendaner, 579 F.2d 876, 879 n.5 (5th Cir. 1978) (citing McDowell v. Henderson Mining Co., 160 So. 2d 486, 488 (Ala. 1963)).

41. A claim has been defined as "[a] cause of action. Means by or through which claimant obtains possession or enjoyment of privilege or thing." BLACK'S LAW DICTIONARY 247 (6th ed. 1990). Under the Federal Rules of Civil Procedure, an "action" is distinguished from a "claim":

> The Federal Rules and the cases which construe them thus make a clear distinction between a "claim" and an "action". Therefore, when Rule 41(a) refers to dismissal of an "action", there is no reason to suppose that the term is intended to include the separate claims which

claim,"[42] which are simply elements of the composite action.

Accordingly, courts have denied relief to parties aligned as defendants when the underlying statute was limited to parties who brought the action. For example, section 153(p) of the Railway Labor Act provides that in a suit to enforce a determination of the Railway Labor Board, the prevailing petitioner "shall be allowed a reasonable attorney's fee."[43] One court has denied relief to a petitioner seeking enforcement by way of a counterclaim, on the theory that the suit was an action brought by the Railway to *review* the awards, not an action brought by the petitioner to *enforce* the awards.[44] Courts also have applied a similar approach to the automatic stay provision of the Bankruptcy Code.[45]

Other courts, however, have treated an action as a claim or have regarded a counterclaim as the initiation of a separate lawsuit.[46] As a result, courts have interpreted statutes referring to

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make up an action. When dismissal of a claim is intended, as in Rule 41(b), that concept is spelled out in plain language.

Smith, Kline & French Laboratories, 61 F.R.D. at 29.

42. A counterclaim is a "claim presented by a defendant in opposition to or deduction from the claim of the plaintiff." BLACK'S LAW DICTIONARY 349 (6th ed. 1990).

43. 45 U.S.C. § 153(p) (1988).

44. REA Express, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks, 1975 WL 1078, at *1 (D.C.N.Y. Feb. 5, 1975). The court held that for purposes of awarding attorney's fees under the Railway Labor Act, a petition for review action brought by a railroad cannot be converted into an enforcement action by way of a counterclaim. The court concluded: "While the union has counterclaimed under paragraph (p), I do not believe that a paragraph (q) proceeding can be converted into a paragraph (p) proceeding by the expedient of a counterclaim." *Id.* Accordingly, the court denied the defendant attorney's fees. *Id.*

45. The automatic stay provision of the Bankruptcy Code operates to stay a judicial, administrative, or other proceeding "against the debtor." 11 U.S.C. § 362(a)(1) (1988). "[W]hether a proceeding is against the debtor within the meaning of [the statute] is determined from an examination of the posture of the case at the initial proceeding." Freeman v. Commissioner, 799 F.2d 1091, 1092-93 (5th Cir. 1986) (per curiam). Thus, the Fifth Circuit held that a bankruptcy petition did not operate to stay the bankrupt's petition in Tax Court for redetermination of tax liability, despite the very real possibility that redetermination might reduce the size of the bankrupt's estate. *Id.* at 1093.

46. *E.g.*, Butler Township Area Water & Sewer Auth. v. Salvatore, 467 F. Supp. 1100, 1101 (W.D. Pa. 1979) ("For some purposes the assertion of a Counterclaim amounts to the institution of a lawsuit in which the defendant becomes a plaintiff and the plaintiff becomes a defendant.").

Indeed, the term "action" has a flexible meaning which depends on the context in which it is used. One scholar has noted that the term "action" may include the action's "mirror-image":

Statutes and even the Constitution in many analogous areas have been

"actions" or "suits" to include claims and counterclaims.[47] For instance, the Seventh Circuit has held that the policy behind section 153(p) of the Railway Labor Act "applies without regard to whether the request for court-ordered compliance is made by way of a separate action or by means of a counterclaim to a petition for review."[48] Similarly, the Supreme Court has held that a defendant may be entitled to a jury trial on a legal counterclaim[49] although the Seventh Amendment preserves the right to a jury in "suits."[50]

2. Statutes That Limit Relief to "Plaintiffs" or "Defendants"

Difficulties of interpretation also arise when a statute explicitly refers to a "plaintiff" or a "defendant." Typically, the

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interpreted to include within the term "action" the true action's hypothetical mirror-image. For example, in determining whether or not an action arises under federal law so as to satisfy federal subject matter jurisdiction, a declaratory judgment action is treated as a hypothetical action for mandatory relief. Similarly, in determining whether the amount in controversy requirement was satisfied in an action by an insurance company to set aside a workmen's compensation award, the Court looked to the amount of the claim the defendant employee was expected to assert in a hypothetical action for an increased award. In determining right to jury trial in an action for declaratory relief, it appears that the Court looks to a hypothetical action for mandatory relief and asks whether that action would be legal or equitable. In light of these analogies, it does not strain the term "action" to have it include a hypothetical mirror-image action brought by the defendant in the true action.

Michael J. Waggoner, *Section 1404(a), "Where It Might Have Been Brought": Brought By Whom?*, 1988 B.Y.U. L. REV. 67, 79 (1988) (footnotes omitted).

47. *See* National Iranian Oil Co. v. Ashland Oil Co., 716 F. Supp. 268, 272 (S.D. Miss. 1989) (holding that the phrase "action against a foreign state" referred "not only to a direct claim against a foreign sovereign but also to a counterclaim against it"); Bank of U.S. v. Frost, 255 N.Y.S. 763, 766, (N.Y. Mun. Ct. 1932) (holding that statute prescribing time and manner of prosecuting "action" on claim against banks in liquidation applied to "counterclaim" filed by defendant in action brought by bank).

48. Burlington Northern Inc. v. American Ry. Supervisors Assoc., 527 F.2d 216, 222 (7th Cir. 1975). In *Burlington*, the plaintiff Railroad brought an action to set aside awards granted by the Railroad Adjustment Board under § 3(q) of the Act, 45 U.S.C. § 153(q), which does not provide for attorney's fees. *Id.* After succeeding on its counterclaim under section 153(p), the defendant union petitioned for attorney's fees. *Id.* Despite the plaintiff's argument that because the suit was brought by the Railroad it was an "action for review of the awards" and not an enforcement suit which permits attorney's fees, *see supra* note 44 and accompanying text, the court granted the defendant attorney's fees. *Id.* The court emphasized that "if the Railroad [plaintiff] were correct, it could always avoid attorneys' fees . . . by racing to the courthouse and filing a petition for review." *Id.* at 223.

49. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

50. U.S. CONST. amend. VII.

plaintiff is the party seeking affirmative relief from the court. Many statutes, therefore, limit awards to plaintiffs. It is also common for defendants, however, to seek affirmative relief by way of counterclaims.

When interpreting statutes that limit awards to prevailing plaintiffs, some courts apply a liberal interpretation to the word "plaintiff." For instance, section 16 of the Clayton Act[51] provides that in an action for injunctive relief brought under the antitrust laws, the court shall award attorney's fees in any action "in which the *plaintiff* substantially prevails."[52] Nonetheless, courts have held that "an award will lie in favor of a defendant who successfully prosecutes a counterclaim sounding in antitrust."[53] In construing a Connecticut statute that provides attorney's fees to prevailing plaintiffs, another court awarded fees to a defendant who prevailed on a counterclaim by characterizing the defendant as the "plaintiff in the . . . counterclaim."[54]

Other courts have been more literal when interpreting statutes confining fee awards to plaintiffs. The Fair Labor Standards Act of 1938[55] provides that "[t]he court . . . shall, in addition to any judgment awarded to the *plaintiff or plaintiffs*, allow a reasonable attorney's fee to be paid by the *defendant*."[56] Based on this language, the Fifth Circuit denied attorney's fees

51. 15 U.S.C. § 26 (1988).

52. *Id.* (emphasis added).

53. SYUFY Enter. v. American Multicinema, Inc., 602 F. Supp. 1466, 1468 (N.D. Cal. 1983); North Am. Soccer League v. National Football League, 505 F. Supp. 659, 691 (S.D.N.Y. 1980), *aff'd in part, rev'd in part on other grounds*, 670 F.2d 1249 (2d Cir.), *and cert. denied*, 459 U.S. 1074 (1982); Clapper v. Original Tractor Cab Co., 165 F. Supp. 565, 583 (S.D. Ind. 1958), *aff'd in part, rev'd in part on other grounds*, 270 F.2d 616 (7th Cir. 1959), *and cert. denied*, 361 U.S. 967 (1960).

54. Bailey Employment Sys., Inc. v. Hahn, 545 F. Supp. 62, 73 (D. Conn. 1982), *aff'd*, 723 F.2d 895 (2d Cir. 1983). The statute provided that "[i]n any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees . . . ." CONN. GEN. STAT. ANN. § 42-110g(d) (West 1992).

Courts commonly use the terms "counterclaim plaintiff" and "counterclaim defendant" to refer to the defendant and plaintiff, respectively, in an action in which the defendant brings a counterclaim. *See, e.g.*, Reazin v. Blue Cross & Blue Shield of Kan., Inc., 663 F. Supp. 1360, 1390 (D. Kan. 1987), *aff'd*, 899 F.2d 951 (10th Cir.), *and cert. denied*, 497 U.S. 1005 (1990); Alexander v. National Farmers' Org., 614 F. Supp. 745, 750 (W.D. Mo. 1985), *aff'd in part, rev'd in part sub nom.* National Farmers' Org. v. Associated Milk Producers, 850 F.2d 1286 (8th Cir. 1988), *and cert. denied*, 489 U.S. 1081 (1989).

55. 29 U.S.C. §§ 201-219 (1988).

56. 29 U.S.C. § 216(b) (1988) (emphasis added).

to a successful defendant-intervenor in a declaratory judgment action filed by an employer.[57] Relying on the usual meaning of the term "plaintiff," the court emphasized that "without a specific congressional provision, a litigant may not recover attorney's fees."[58]

In *Green v. Bock Laundry Machine Co.*,[59] the Supreme Court took a middle ground when construing wording tied to the alignment of parties. Before its amendment in 1990, Federal Rule of Evidence 609(a) provided that evidence of a witness's prior felony convictions must be admitted if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the *defendant*."[60] To avoid the absurd result that would arise if the rule afforded protection to civil defendants, but not to civil plaintiffs,[61] the Supreme Court concluded that the word "defendant" in the rule must refer only to *criminal* defendants.[62] Significantly, the Court rejected a more expansive definition of "defendant" that would have included all parties in both civil and criminal cases.[63]

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57. San Antonio Metro. Transit Auth. v. McLaughlin, 876 F.2d 441, 444 (5th Cir. 1989). The Fifth Circuit dismissed the defendant's argument that denying an award of fees would handicap the purpose of the Fair Labor Standards Act. *Id.* The dissenting opinion, however, persuasively argued:

> The attorneys' fees provision of § 216(b) obviously contemplates that, in virtually all cases, employees who allege a violation of the FLSA will be aligned as plaintiffs and employers will participate as defendants. The explicit denial of attorneys' fees to "defendants" was meant, ostensibly, to preclude recovery of fees by employers from employees . . . .

Id. at 446-47 (Garza, J., dissenting).

58. *Id.* at 446.

59. 490 U.S. 504 (1989). In *Green*, the plaintiff obtained a work-release for employment at a car wash while in custody at a county prison. *Id.* at 506. While at work, the plaintiff's arm was torn off when he reached inside a large dryer. *Id.* Subsequently, the plaintiff filed a products liability suit against the manufacturer of the dryer, Bock Laundry Company. *Id.* Despite the plaintiff's pre-trial motion to exclude evidence of his prior convictions, the trial court permitted the defendant to impeach the plaintiff's testimony with such evidence. *Id.* The Court of Appeals felt bound by the plain language of Federal Rule of Evidence 609(a) and affirmed the decision of the district court. *Id.* at 506-07.

60. FED. R. EVID. 609(a) (1988) (amended 1990) (emphasis added).

61. Under the "strict language" of the rule, "impeachment detrimental to a civil plaintiff always would have to be admitted." *Green*, 490 U.S. at 509-10.

62. *Id.* at 521. Even Justice Scalia, the Court's most ardent textualist, conceded that "[t]he word 'defendant' in Rule 609(a)(1) cannot rationally (or perhaps even constitutionally) mean to provide the benefit of prejudice-weighing to civil defendants and not civil plaintiffs." *Id.* at 528 (Scalia, J., concurring).

63. *Id.* at 521. The dissenters advocated this position. *Id.* at 530 (Blackmun, J., dissenting). The majority's rejection of this view suggests that courts should be reluctant to interpret the word "plaintiff" to refer to both plaintiffs

D. The Fees Act: Congressional Awareness of the Problem that Arises When Statutes Tie the Outcome of Litigation to the Alignment of Parties

When drafting the Civil Rights Attorney's Fees Awards Act of 1976 ("Fees Act"),[64] Congress recognized the problems inherent in statutory language that ties the outcome of litigation to the alignment of parties. The legislative history of the Fees Act demonstrates Congress's intent that parties deprived of their civil rights "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[65] Congress recognized, however, that persons asserting a civil rights claim will not always be aligned as plaintiffs in the litigation: "In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties *seeking to enforce such rights* may be the defendants and/or defendant-intervenors."[66] In part for this reason, Congress chose to employ the term "prevailing party" instead of "prevailing plaintiff."[67]

Consequently, courts have followed Congress's intent by awarding attorney's fees under the Fees Act to defendants who prevail on a counterclaim to enforce their civil rights.[68] In con-

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and defendants. The Court's decision, however, also implies that the terms "plaintiff" and "defendant" are flexible.

64. 42 U.S.C. § 1988 (1988).

65. S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912 (quoting Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968)). Most courts have adopted this presumption, which virtually guarantees that prevailing plaintiffs in civil rights actions will be awarded attorney's fees. *See* Peter N. Cubita et al., *Awards of Attorney's Fees in the Federal Courts*, 56 St. John's L. Rev. 277, 324-25 (1982).

66. S. Rep. No. 1011, *supra* note 65, at 4 n.4, *reprinted in* 1976 U.S.C.C.A.N. at 5912 (emphasis added). One commentator noted: "There of course are situations, such as when an affirmative action plan is challenged, that the defendant or a defendant-intervenor might be best characterized as the civil rights party. Significantly, Congress was aware of this possible procedural anomaly when it enacted the Fees Act." E. Richard Larson, Federal Court Awards of Attorney's Fees 42 (1981).

67. *See* 42 U.S.C. § 1988 (1988).

68. *E.g.*, Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980) ("[A]lthough technically defendants, the Loyalists constituted effective plaintiffs on the counterclaim, and they championed the principles protected by the Constitution."); Kingsville Indep. Sch. Dist. v. Cooper, 611 F.2d 1109, 1114 (5th Cir. 1980); Department of Educ. v. Valenzuela, 524 F. Supp. 261, 264 (D. Haw. 1981); Baker v. City of Detroit, 504 F. Supp. 841, 850 (E.D. Mich. 1980), *aff'd sub nom.* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983); *see also*

trast to the Fees Act, Congress drafted the MPPAA in a manner which, when read literally, limits awards of interest, liquidated damages, and attorney's fees to prevailing funds only when they are aligned as *plaintiffs*.[69]

II. JUDICIAL INTERPRETATION OF SECTION 306(b) OF THE MPPAA WHEN A PLAN FIDUCIARY PREVAILS ON A COUNTERCLAIM FOR DELINQUENT CONTRIBUTIONS OR WITHDRAWAL LIABILITY

In the typical case, the fiduciary of a multiemployer plan brings an action against an employer alleging that the employer's contributions are delinquent or that the employer has failed to make its withdrawal liability payments to the plan. If courts enter judgment in the plan's favor, they uniformly award interest, liquidated damages, and attorney's fees to the plan under the MPPAA's mandatory language.[70] A more difficult question arises when the employer sues first by seeking a declaratory judgment denying liability or an injunction to prevent collection of further contributions. The few courts that have confronted the issue have taken conflicting approaches to this question.[71]

Prate v. Freedman, 583 F.2d 42, 46 n.2 (2d Cir. 1978) ("It may well be that defendants may on occasion be characterized as 'private attorneys general' who are entitled to the more favorable Supreme Court standard" for awarding attorney's fees.); *cf.* Commissioner's Court v. United States, 683 F.2d 435, 439-40 (D.C. Cir. 1982) (granting attorney's fees to defendant-intervenors under fee-shifting provision of Voting Rights Act).

69. MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2) (1988).

70. *See* Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 547 (1988); Connors v. Beth Energy Mines, Inc., 920 F.2d 205, 212 (3d Cir. 1990); Sheet Metal Workers Health & Welfare Trust Fund v. Big D Service Co., 876 F.2d 852, 854 (10th Cir. 1989); Carpenters Amended & Restated Health Benefit Fund v. John W. Ryan Constr. Co., 767 F.2d 1170, 1175-76 (5th Cir. 1985); Plumbers' Pension Fund v. Domas Mechanical Contractors, Inc., 778 F.2d 1266, 1271 (7th Cir. 1985); Lads Trucking Co. v. Board of Trustees, 777 F.2d 1371, 1373 (9th Cir. 1985); O'Hare v. General Marine Transp. Corp., 740 F.2d 160, 171 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985); *see also* Operating Engineers Pension Trusts v. B & E Backhoe, Inc., 911 F.2d 1347, 1355-56 (9th Cir. 1990) (rejecting a "de minimis" rule that would deny an award of interest, liquidated damages, and attorney's fees when the fund recovers only an insubstantial amount).

71. *See infra* notes 72-91 and accompanying text.

A. *Niagara of Wisconsin Paper Corp. v. Paper Industry Union-Management Pension Fund*: Denying Relief Under Section 306(b) of the MPPAA

In *Niagara of Wisconsin Paper Corp. v. Paper Industry Union-Management Pension Fund*,[72] an employer brought an action against a multiemployer pension fund, seeking damages and injunctive relief, to prevent the fund from collecting the employer's outstanding withdrawal liability.[73] The fund filed a counterclaim seeking interest and penalties arising from the employer's alleged failure to pay its contribution.[74]

The United States District Court for the District of Minnesota granted summary judgment to the defendant fund.[75] The fund then moved for attorney's fees pursuant to section 306(b) of the MPPAA.[76] In opposing the fund's motion, the employer noted that the literal language of section 306(b) makes an award of attorney's fees mandatory only in an action brought by the fund.[77] The employer contended that because the fund had not brought the action, an award of attorney's fees would be improper.[78]

In response, the fund emphasized that the plaintiff employer brought the action "solely in an effort to beat the Fund to the courthouse."[79] The fund argued that the underlying purpose of section 306(b) would be "unjustifiably thwarted . . . if employers could forestall mandatory awards merely by bringing preemptive actions."[80]

The district court rejected the fund's position and denied an award of attorney's fees under section 306(b):

> While the Fund's argument is appealing, the plain language of the statute is clear. Section [306(b)] applies only when an action is

72. 603 F. Supp. 1423 (D. Minn. 1984), *aff'd*, 800 F.2d 742 (8th Cir. 1986).
73. *Niagara*, 603 F. Supp. at 1425.
74. *Id.*
75. *Id.*
76. *Id.* at 1429. The fund also sought attorney's fees based on ERISA's discretionary fees provision, 29 U.S.C. § 1132(g)(1), and § 104 of the MPPAA, 29 U.S.C. § 1451(e). *Niagara*, 603 F. Supp. at 1429.

The fund did not seek an award of interest and liquidated damages pursuant to section 306(b) in addition to its motion for attorney's fees. Presumably, this is because the collective bargaining agreement itself contained a provision granting the fund interest and liquidated damages if it prevailed in an action to collect withdrawal liability payments.

77. *See id.* at 1429-30.
78. *See id.*
79. *Id.* at 1429.
80. *Id.* at 1430.

> brought by a fiduciary to collect unpaid contributions. The Fund has cited no authority to support its broad application of the statute. Accordingly, the court will not interpret the language of the statute expansively when the wording is unambiguous.[81]

Although the court granted fees to the fund on other grounds,[82] the court's interpretation of section 306(b) significantly limits the scope of the MPPAA's liquidated damages provision.

B. *Flying Tiger Line, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*: Granting Relief Under Section 306(b) of the MPPAA

In *Flying Tiger Line, Inc. v. Central States, Southeast & Southwest Areas Pension Fund*,[83] the employer brought an action seeking declaratory and injunctive relief.[84] As in *Niagara*, the defendant fund filed a counterclaim for withdrawal liability payments under the MPPAA.[85] After the district court granted the fund's motion for summary judgment, the fund brought a motion for attorney's fees under section 306(b) of the MPPAA.[86]

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81. *Id.* The court relied on M & R Inv. Co. v. Fitzsimmons, 685 F.2d 283 (9th Cir. 1982), for the proposition that § 306(b) should be interpreted literally. *Niagara*, 603 F. Supp. at 1429.

In *Fitzsimmons*, an investment company brought an action for breach of a loan agreement contract by certain pension fund trustees. *Fitzsimmons*, 685 F.2d at 285. The district court granted summary judgment to the defendant fund, *id.*, but denied an award of attorney's fees to the fund under ERISA's discretionary fees provision, 29 U.S.C. § 1132(g)(1). *Id.* at 288.

The court of appeals affirmed the district court's denial of attorney's fees, because § 1132(g)(1) refers solely to actions by a participant, beneficiary, or fiduciary of an ERISA plan:

> The district court properly ruled that this action by M & R was not "by" a participant, beneficiary, or fiduciary, and therefore found that the attorneys' fees section does not apply. There is no ambiguity in the wording of the [provision]. Perhaps if Congress had considered the situation we are faced with, it might have written the statute differently. However, it did not, and it is not within our power to amend the clear language of the statute.

Id.

82. *Niagara*, 603 F. Supp. at 1430. The district court granted an award of attorney's fees to the fund under § 104 of the MPPAA, 29 U.S.C. § 1451(e). *Id.* For the text of this provision, see *supra* note 26. When deciding whether to award fees under § 104, the court took note that Niagara brought the action "to preempt a suit by the Fund under [section 306(b)]. An award of attorney's fees would have been mandatory under that section." *Niagara*, 603 F. Supp. at 1430. To avoid these unnecessary machinations, the court should have held that section 306(b) applies regardless of whether the fund or the employer brought the action.

83. 715 F. Supp. 1284 (D. Del. 1989).

84. *Id.* at 1286.

85. *Id.*

86. *Id.*

In response, the employer argued that "because this action was brought by Tiger seeking declaratory judgment and not by the Fund, any award is precluded by the language of section [306(b)]."[87] Unlike the district court in *Niagara*, however, the United States District Court for the District of Delaware rejected the employer's argument and awarded attorney's fees to the defendant fund.[88] In the court's words, the employer's argument "exalts form over substance."[89] Conceding that the literal wording of section 306(b) refers to an action by a fiduciary, the court nonetheless concluded that for purposes of interpreting section 306(b), a counterclaim by a pension fund for withdrawal liability is an "action" to enforce delinquent contributions.[90] The court, however, failed to recognize that section 306(b) also provides explicitly that the *defendant* shall pay the attorney's fees. Despite this oversight, several other courts have followed the court's reasoning in *Flying Tiger*.[91]

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87. *Id.* at 1287.

88. *Id.* at 1290.

89. *Id.* at 1287.

90. *Id.*

91. *See, e.g.*, Malden Mills Indus. v. ILGWU Nat'l Retirement Fund, 766 F. Supp. 1202, 1218 (D. Mass. 1991) ("Although the literal wording of section [306(b)] refers to an 'action' by a fiduciary, various courts have interpreted this to include a counterclaim by a pension fund for withdrawal liability or delinquent contributions under section 1145.").

Other courts, without addressing the apparent limitations of the scope of section 306(b), have summarily awarded interest, liquidated damages, and attorney's fees to defendant funds who have prevailed on counterclaims under the MPPAA. *See* Penn Elastic Co. v. United Retail & Wholesale Employees Union, 792 F.2d 45, 47-48 (3d Cir. 1986) (relied on by the court in *Flying Tiger*); Lads Trucking Co. v. Board of Trustees, 777 F.2d 1371, 1376 (9th Cir. 1985); Jefferson Tile Co. v. Colorado Tile, Marble & Terazzo Workers Health, Welfare & Pension Funds, 797 F. Supp. 857, 861 (D. Colo. 1992); RXDC, Inc. v. Oil, Chem. & Atomic Workers Union-Indus. Pension Fund, 781 F. Supp. 1516, 1525 (D. Colo. 1992); Philadelphia Journal, Inc. v. Teamsters Pension Trust Fund, No. 87-7637, 1989 WL 45865, at *6 (E.D. Pa. May 2, 1989), *aff'd*, 891 F.2d 282 (3d Cir. 1989); Banner Indus. v. Central States, Southeast & Southwest Areas Pension Fund, 663 F. Supp. 1292, 1300 (N.D. Ill. 1987); H.C. Elliot, Inc. v. Carpenters Pension Trust Fund, 663 F. Supp. 1016, 1027 (N.D. Cal. 1987), *aff'd*, 859 F.2d 808 (9th Cir. 1988), *and cert. denied*, 490 U.S. 1036 (1989); Coronet Dodge, Inc. v. Speckmann, 553 F. Supp. 518, 523 (E.D. Mo. 1982); *see also* Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund, 789 F.2d 691, 697-98 (9th Cir. 1986) (holding that in employer's action to vacate an arbitrator's assessment of withdrawal liability, an award of attorney's fees to the defendant fund would be mandatory if the fund prevailed on remand). These decisions, however, do not require subsequent courts to award interest, liquidated damages, and attorney's fees to defendant plans who prevail on a MPPAA claim. *See supra* note 12.

For unspecified reasons, some pension funds have failed to seek interest,

III. COURTS SHOULD INTERPRET SECTION 306(b) IN A MANNER CONSISTENT WITH THE PURPOSE OF ERISA AND THE MPPAA

The *Niagara* and *Flying Tiger* decisions demonstrate that courts have struggled to determine whether 306(b) mandates an award of interest, liquidated damages, and attorney's fees when a multiemployer plan prevails on a counterclaim for delinquent contributions or withdrawal liability payments in a lawsuit brought by an employer. In order to effectuate the general purpose of ERISA and the MPPAA, courts should hold that an award of interest, liquidated damages, and attorney's fees is mandatory, regardless of the alignment of the parties. This approach is consistent with the purpose of section 306(b), conforms with the method used by courts when defining the word "action," and would discourage the plan from initiating parallel litigation to obtain such an award.[92]

A. THE TEXT OF SECTION 306(b)

The primary indicator of legislative intent is the language of the statute itself, and the plain text of legislation normally is dispositive of congressional intent.[93] Applying this maxim, as

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liquidated damages, and attorney's fees once they have prevailed on a counterclaim for withdrawal liability. *See* D.E.W., Inc. v. Local 93, Laborers' Int'l Union of N. Am., 957 F.2d 196 (5th Cir. 1992); Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoremen's Ass'n Pension Trust Fund, 880 F.2d 1531 (2d Cir. 1989) (in employer's action for declaratory judgment, no discussion of attorney's fees even though defendant fund prevailed on counterclaim for withdrawal liability).

92. Two theorists on statutory interpretation have offered a method for constructing statutes, based on the premise that "one can determine what is right in specific cases, even without a universal theory of what is right." William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323 (1990). Eskridge and Frickey argue that no single theory of statutory interpretation can resolve all hard cases in a satisfactory manner. *Id.* at 325. Instead, the authors believe that a number of factors are relevant when attempting to interpret a statute:

> Our model holds that an interpreter will look at a broad range of evidence—text, historical evidence, and the text's evolution—and thus form a preliminary view of the statute. The interpreter then develops that preliminary view by testing various possible interpretations against the multiple criteria of fidelity to the text, historical accuracy, and conformity to contemporary circumstances and values.

Id. at 352. These factors, although somewhat fluid, provide a useful framework for interpreting the MPPAA's liquidated damages provision.

93. *See* Board of Governors of the Federal Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373 (1986) ("The 'plain purpose' of legislation . . . is determined in the first instance with reference to the plain language of the statute itself."); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982) ("Our

did the court in *Niagara*, courts reasonably could hold that only prevailing plaintiff funds are entitled to interest, liquidated damages, and attorney's fees under section 306(b). Indeed, when a statute appears straightforward, courts normally should not strain to alter its meaning.[94]

Courts can reject the strict textualist interpretation adopted by the court in *Niagara*, however, and still remain faithful to the text of section 306(b). When interpreting similar statutes, numerous courts have treated a counterclaim brought by a defendant as an "action."[95] These courts have found the term "action" elastic enough to encompass both the notion of a lawsuit itself *and* the concept of a cause of action brought by way of a claim or counterclaim.[96] Moreover, the confusion over the definition of "action" counters any argument that employers have a vested "reliance interest" in the statute based on its apparent meaning.[97]

Thus, courts should hold that section 306(b) applies to a defendant fund's counterclaim for delinquent contributions or withdrawal liability. Treating a prevailing defendant as a "plaintiff on the counterclaim"[98] also satisfies section 306(b)'s command that the defendant shall pay the attorney's fees.[99] Indeed, in *Green v. Bock Laundry Machine Co.*,[100] the Supreme Court deviated from the typical meaning of the word "defendant" when faced with an absurd result.[101]

B. Congressional Intent Behind Section 306(b)

The Supreme Court has established that courts may look beyond the text of a statute to determine whether Congress ac-

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task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.' ") (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 477 U.S. 102, 108 (1980)).

94. As two scholars have argued, "[c]itizens ought to be able to open up the statute books and have a good idea of their rights and obligations. When the statute seems plainly to say one thing, courts should be reluctant to alter that directive." Eskridge & Frickey, *supra* note 92, at 339.

95. *See supra* notes 46-50 and accompanying text.

96. *See supra* notes 46-50 and accompanying text.

97. Congress, however, should amend the MPPAA so that employers can "open up the statute books and have a good idea of their rights and obligations." *See* Eskridge and Frickey, *supra* note 92, at 339.

98. *See supra* note 54 and accompanying text.

99. MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2) (1988).

100. 490 U.S. 504 (1989).

101. *Id.* at 521.

tually intended a contrary meaning.[102] In recent decisions, the Supreme Court has reaffirmed that courts, when faced with ambiguity, may properly refer to legislative history when interpreting a statute.[103] Because of the ambiguities inherent in the text of section 306(b), courts should look to the legislative history of the provision to divine congressional intent.

A survey of the MPPAA's legislative history provides compelling evidence that Congress did not intend to deny an award under section 306(b) to prevailing pension funds simply because they are aligned as defendants.[104] Rather, section 306(b) was intended to remedy the problems inherent in multiemployer plans.[105] Congress recognized that the failure of employers to make contributions to multiemployer plans imposes significant direct and indirect costs on such plans.[106]

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102. "It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute . . . ." Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983). To determine legislative intent, courts examine the legislative history of a statute. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982).

103. *E.g.*, Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2485 n.4 (1991). One commentator observed:

> [A]lthough the Court still refers to the "plain meaning" rule, the rule has effectively been laid to rest. No occasion for statutory construction now exists when the Court will *not* look at the legislative history. When the plain meaning rhetoric is invoked, it becomes a device not for ignoring legislative history but for shifting onto legislative history the burden of proving that the words do not mean what they appear to say.

Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983) (citations omitted). This observation on the Court's jurisprudence seems equally pertinent today.

104. A justifiable argument, however, is that the legislative history of the Civil Rights Fees Act demonstrates that Congress is fully cognizant of how to draft legislation that permits courts to award relief to both plaintiffs and defendants. *See supra* note 66 and accompanying text (noting that Congress accounted for party alignment when drafting the Fees Act). Nonetheless, a more logical interpretation of § 306(b) is that its wording was merely an oversight.

105. *See supra* notes 22-24 and accompanying text.

106. A Senate Committee made the following observations:

> Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been . . . received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.
>
> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of

Accordingly, Congress did not intend to permit employers to escape the mandatory assessment of interest, liquidated damages, and attorney's fees under section 306(b) through the strategic use of declaratory judgments and injunctions. If brought for the purpose of avoiding damages under section 306(b), such suits would impose little cost on employers while forcing pension funds to litigate the issues of delinquent contributions or withdrawal liability. In fact, an employer's failed attempt to avoid payments to the plan provides the *most* appropriate occasion for a court to award interest, liquidated damages, and attorney's fees. Such lawsuits impose significant administrative and legal costs on the fund that might be avoided through mutual resolution of the dispute.[107]

In addition, the Supreme Court has repeatedly held that remedial statutes should be construed broadly.[108] As pointed out by the court in *Flying Tiger*, an overly strict reading of section 306(b) "exalts form over substance."[109] The wording of section 306(b) simply recognizes that in a vast majority of cases, plan

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delinquencies in the form of lower benefits and higher contribution rates. . . . The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.

STAFF OF SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., S. 1076, THE MULTIEMPLOYER PENSION PLAN AMENDMENTS OF 1980: SUMMARY AND ANALYSIS OF CONSIDERATION 43-44 (Comm. Print 1980), *quoted in* Central States, Southeast & Southwest Areas Pension Fund v. Alco Express Co., 522 F. Supp. 919, 927-28 (E.D. Mich. 1981).

107. *See infra* note 117 and accompanying text.

108. Peyton v. Rowe, 391 U.S. 54, 65 (1968); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967).

The Supreme Court, however, has also cautioned against supplanting the clear language of a statute in favor of a purely "purposivist" approach:

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

Board of Governors of the Fed. Reserve System v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986).

This warning to the courts is particularly appropriate when Congress has carefully balanced complex and competing interests when drafting a particular statute. In contrast, the context of the MPPAA amendments makes it clear that Congress was primarily, if not exclusively, concerned with the interests of multiemployer plans when enacting the MPPAA. *See* Woodrum & McBride, *supra* note 24, at 733 n.12.

109. Flying Tiger Line, Inc. v. Central States, Southeast & Southwest Areas Pension Fund, 715 F. Supp. 1284, 1287 (D. Del. 1989).

fiduciaries seeking delinquent contributions or withdrawal liability payments will be aligned as plaintiffs.[110] A narrow reading of the statute defies congressional intent to the detriment of plan participants and their dependents who must rely on employer contributions to guarantee the security of their retirement income.

A liberal interpretation of the statute also is consistent with the interpretation courts have given section 306(b)'s phrase a "judgment in favor of the plan."[111] Technically, section 306(b) makes an award of interest, liquidated damages, and attorney's fees mandatory only when the court awards "a judgment in favor of the plan."[112] This language theoretically permits an employer to escape liability under section 306(b) after the plan has filed suit simply by paying its contributions to the plan. Several courts have concluded, however, that allowing an employer to escape the mandatory imposition of liquidated damages through such a strategy would frustrate the purpose of 306(b).[113]

Holding that an award of interest, liquidated damages, and

110. In Dorn's Transp., Inc. v. Teamsters Pension Trust Fund, 799 F.2d 45 (3d Cir. 1986), the employer prevailed in its declaratory judgment action denying withdrawal liability. *Id.* at 46. The employer then moved for a discretionary award of attorney's fees under 29 U.S.C. § 1451(e). *Id.* at 47. In support of its motion, the employer drew an analogy to the Fees Act and argued that prevailing plaintiffs should ordinarily recover attorney's fees under § 104. *Id.* at 47-48. The court rejected the employer's argument, holding:

> [T]he policies favoring a liberal standard for awarding fees to civil rights *plaintiffs* do not support such a standard for *employers* who bring suits under MPPAA. Rather, for the purposes of fee awards, the position of plaintiff-employers under MPPAA is more analogous to that of prevailing civil rights *defendants*.

Id. at 48. The court emphasized that employers "are not acting as instruments for carrying out the congressional policy of strengthening plans." *Id.* at 49. In addition, "attorneys' fees are not necessary to encourage employers to resist withdrawal liability." *Id.* Thus, the court concluded that the procedural posture of the case did not alter "the alignment of interests." *Id.* at 50. The court's reasoning is equally applicable to awards of interest, liquidated damages, and attorney's fees under § 306(b).

111. MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2) (1988).

112. *See* MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2) (1988).

113. In Carpenters Amended & Restated Health Benefit Fund v. Ryan Construction Co., 767 F.2d 1170 (5th Cir. 1985), a group of multiemployer benefit plans brought an action against an employer to recover unpaid contributions, interest, and attorney's fees. *Id.* at 1171. Before judgment was entered, the employer paid the delinquent contributions to the plans. *Id.* The employer contended that because it had paid the delinquent contributions prior to judgment, the court had not awarded "a judgment in favor of the plan." *Id.* at 1173. The Fifth Circuit rejected this strict textualist argument, holding that the purposes of § 306(b) would be frustrated if an employer could escape the mandatory

attorney's fees is mandatory when a defendant fund prevails on a counterclaim for delinquent contributions or withdrawal liability payments also is consistent with the line of cases limiting an award of attorney's fees and costs to those expenses related solely to *claims* for delinquent contributions or withdrawal liability. Literally, section 306(b) states that the court must award a prevailing fund its "reasonable attorney's fees and costs of the action."[114] If the term "action" refers to the lawsuit itself, an absurd result follows: a fund would be entitled to an award of attorney's fees expended for the entire case, including fees arising from issues unrelated to withdrawal liability or delinquent contributions.

Of course, courts have awarded attorney's fees to multiemployer plans only for those expenses incurred litigating the particular issues of withdrawal liability or delinquent contributions.[115] Thus, judicial treatment of section 306(b), which equates the term "action" to actual claims for delinquent contributions or withdrawal liability, further supports an interpretation that awards interest, liquidated damages, and attorney's fees to prevailing defendant plans on counterclaims brought under the MPPAA.

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penalties imposed by § 306(b) before final judgment was entered. *Id.* at 1174-75.

Other courts have come to the same conclusion. *E.g.*, Gilles v. Burton Constr. Co., 736 F.2d 1142, 1146 n.6 (7th Cir. 1984); Jefferson Tile Co. v. Colorado Tile, Marble & Terrazzo Workers Health, Welfare & Pension Funds, 797 F. Supp. 857, 859-60 (D. Colo. 1992); Carpenters Health & Welfare Fund v. Building Tech, Inc., 747 F. Supp. 288, 298 (E.D. Pa. 1990); Trustees of the Glaziers Local 963 Pension, Welfare & Apprentice Funds v. Walker & Laberge Co., 619 F. Supp. 1402, 1406 (D. Md. 1985); Bennett v. Machined Metals Co., 591 F. Supp 600, 606 (E.D. Pa. 1984). *But see* Michigan Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc., 933 F.2d 376, 388-89 (6th Cir.) (declining to make an award under section 306(b) when the employer settled before judgment), *cert. denied*, 112 S. Ct. 585 (1991).

114. MPPAA, § 306(b), 29 U.S.C. § 1132(g)(2)(D) (1988).

115. *E.g.*, Malden Mills Indus. v. ILGWU Nat'l Retirement Fund, 780 F. Supp. 68, 71 (D. Mass. 1991) (holding that "the Fund's recovery of fees and costs under [§ 306(b)] should be limited to those fees relating solely to the delinquent contribution claim"). This approach implicitly recognizes that the term "action" in section 306(b) actually means a "cause of action" or "claim." *But see* Local 445 Welfare Fund v. Wein, 855 F.2d 62, 64-65 (2d Cir. 1988) (per curiam) (upholding award of attorney's fees to the fund in declaratory judgment action even though liability was based solely on state fraudulent conveyance statute, not on the MPPAA); O'Hare v. General Marine Transp. Corp., 740 F.2d 160, 171 (2d Cir. 1984) (upholding award of attorney's fees to the fund for expenses incurred opposing the employer's counterclaim under the MPPAA because the counterclaim grew out of the fund's declaratory judgment action), *cert. denied*, 469 U.S. 1212 (1985).

C. Public Policy Considerations

If courts award liquidated damages under section 306(b) only when funds are aligned as plaintiffs, employers will have an incentive to seek injunctions or to file declaratory judgment actions whenever they withdraw from multiemployer plans or make late payments to such plans.[116] In contrast, courts will promote judicial economy by holding that awards of interest, liquidated damages, and attorney's fees to the prevailing fund are mandatory regardless of which party brings the action. Such an interpretation will encourage employers to settle disputes without resorting to litigation, thereby avoiding section 306(b) awards against them.[117] Moreover, when an employer does sue for an injunction or a declaratory judgment denying liability, the defendant fund will have no incentive to file a parallel lawsuit in order to receive an award under section 306(b).[118] For these

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116. The mere prospect that an employer may avoid a mandatory assessment of interest, liquidated damages, and attorney's fees, even if the defendant fund ultimately prevails, may be a sufficient inducement to bring such an action.

117. Section 306(b) provides a strong incentive not to litigate a plan's assessment of delinquent contributions or withdrawal liability:

> The Act's requirement that a court must award a plan mandatory attorney fees and liquidated damages is, perhaps, the coup de grace, providing a plan with a weapon of enormous consequence. An employer willing to absorb the litigation costs associated with challenging a questionable assessment will often reconsider when apprised that an adverse decision will automatically include the additional cost of the plan's attorneys fees. Indeed, the one-sided attorney's fees weapon is sufficiently intimidating that many employers will forgo challenging a plan's assessment, unless the amount at stake is substantial.

Woodrum & McBride, *supra* note 24, at 736 (footnotes omitted).

118. In *Niagara*, for instance, the fund argued that "the court's discretion should be exercised in its favor because it responded to Niagara's suit in the cheapest, most direct manner by foregoing a second parallel suit based on [section 306(b)], even though an award of attorney's fees would have been mandatory under that section." Niagara of Wis. Paper Corp. v. Paper Indus. Union-Management Pension Fund, 603 F. Supp. 1423, 1430 (D. Minn. 1984).

Indeed, although an employer has sued first, the defendant fund sometimes may be permitted to bring its own simultaneous action to recover delinquent contributions or withdrawal liability payments in lieu of filing a counterclaim in the first action:

> The law is that in the absence of a Statute or Rule of Court otherwise providing, the defendant has the option of interposing a counterclaim or bringing a separate action against the Plaintiff. In the situation where the defendant does not interpose a counterclaim, although he is entitled to do so, he is not precluded thereby from subsequently maintaining an action against the Plaintiff on the cause of action which could have been set up as a counterclaim.

Chapin & Chapin, Inc. v. McShane Contracting Co., 374 F. Supp. 1191, 1194-95 (W.D. Pa. 1974). In most situations, however, the fund will be required to file a

reasons, courts should interpret section 306(b) consistently so that an award of interest, liquidated damages, and attorney's fees is mandatory if the fund prevails, even when the employer brought the action.[119]

IV. CONGRESS AND ATTORNEYS SHOULD TAKE NON-JUDICIAL ACTION TO RESOLVE THE AMBIGUITY SURROUNDING SECTION 306(b) OF THE MPPAA AND OTHER CARELESSLY WORDED STATUTES

Congress can resolve the ambiguity surrounding section 306(b) by amending ERISA to clarify that an award of interest, liquidated damages, and attorney's fees is mandatory when a fund prevails on a *claim or counterclaim* for delinquent contributions or withdrawal liability. Congress also should clarify that attorney's fees should be paid by the *employer*, not by the defendant.[120] These simple amendments would eliminate the confusion surrounding section 306(b), by making it clear that an award of interest, liquidated damages, and attorney's fees does not depend on the alignment of the employer and the fund in the litigation.

Congress and state legislatures also should amend other

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counterclaim in the first action. *See* FED. R. CIV. P. 13(a) (requiring the defendant to assert any transactionally related counterclaims).

119. Any reduction in the federal caseload would be desirable. *See* Larry Kramer, *"The One-Eyed are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 LAW & CONTEMP. PROBS., 73, 73 (1991) (arguing that "[a] broad consensus exists today on the need to reduce the federal caseload").

120. As amended, section 306(b), 29 U.S.C. § 1132(g)(2) should read:

> In any *claim or counterclaim* under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the *employer*, and
>
> (E) such other legal or equitable relief as the court deems appropriate.

These changes would also clarify that a prevailing pension fund is entitled to attorney's fees and costs stemming only from the delinquent contributions or withdrawal liability claims.

legislation which ties the outcome of litigation to the alignment of parties. A successful amendment would remove all references to "plaintiffs" and "defendants," describing instead the characteristics of the particular parties entitled to relief.[121] In the alternative, following the model of the Fees Act,[122] Congress and state legislatures should amend fee-shifting statutes which employ "prevailing plaintiff" language to permit fee awards to the "prevailing party" instead.[123] Congress and state legislatures also should define by statute the circumstances in which statutes of limitations referring to "actions" will apply to counterclaims.[124] These amendments will prevent the harsh results that may arise from a literal interpretation of such statutes. Moreover, amending existing law would reduce needless litigation over statutory ambiguities that presently exist.

Regardless of whether Congress acts, attorneys drafting multiemployer plans should take independent steps to circumvent the difficulty surrounding section 306(b). Practicing attorneys should ensure that multiemployer collective bargaining agreements or trust agreements contain their own carefully worded provisions governing interest, liquidated damages, and attorney's fees in the event of employer delinquencies or withdrawals. Absent congressional action, pension funds could enforce these agreements as a matter of contract law and thus avoid the unjust results that stem from a strict interpretation of

121. Numerous fee-shifting statutes describe the parties entitled to attorney's fees by their characteristics and not by their alignment as either "plaintiffs" or "defendants." For example, the Handicapped Children's Protection Act of 1986 provides that "[i]n any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the *parents or guardian of a handicapped child or youth* who is the prevailing party." 20 U.S.C. § 1415(e)(4)(B) (1988) (emphasis added). This choice of terminology avoids the vexing problems that arise when the aggrieved party is not aligned as the plaintiff. *See, e.g.*, Barlow-Gresham Union High Sch. Dist. No. 2 v. Mitchell, 940 F.2d 1280, 1286 (9th Cir. 1991) (awarding fees in a school district's action for injunction to prevailing defendant on defendant's counterclaim under the act).

122. *See supra* notes 64-68 and accompanying text.

123. This solution would permit courts to make fee awards to parties enforcing the substantive rights protected by a particular statute, whether aligned as plaintiffs or defendants. However, the proposal would also permit courts to award attorney's fees to the party accused of violating the statute. For this reason, the solution discussed in *supra* note 121 is preferable.

124. For example, the Illinois statutes of limitations contain a provision that governs when and how the statutes of limitations apply to causes of action brought by way of a counterclaim. ILL. ANN. STAT. ch. 735, para. 5/13-207 (West's Smith-Hurd 1992).

section 306(b).[125]

CONCLUSION

Congress designed the MPPAA to ensure that employers make good on their promises to contribute to multiemployer plans. The amendments attempt to accomplish this goal by imposing liability on employers who are delinquent in their contributions or who fail to make withdrawal liability payments upon withdrawal from such plans. The MPPAA's most effective mechanism for enforcing these substantive provisions is section 306(b), which makes an award of interest, liquidated damages, and attorney's fees mandatory in any action brought by a plan fiduciary in which the plan prevails.

Some employers have sought to avoid imposition of these penalties by strategically bringing preemptive actions seeking injunctions or declaratory judgments denying liability under the MPPAA. When confronted with this situation, courts should award interest, liquidated damages, and attorney's fees to the plan if the plan prevails on a counterclaim for delinquent contributions or withdrawal liability. This approach fulfills the broad remedial purposes of the MPPAA, is consistent with decisions resolving similar ambiguities in the wording of section 306(b), and promotes judicial economy. Congress also should amend federal pension law to clarify that an award of interest, liquidated damages, and attorney's fees to a prevailing plan under section 306(b) is mandatory whether the employer or the plan initiates the action. Further, Congress and state legislatures should recognize that the ambiguities posed by section 306(b) are not limited to the MPPAA and should be eliminated from other legislation as well.

125. *See* Bugher v. Feightner, 722 F.2d 1356, 1358 (7th Cir. 1983) (stating that union may enforce employer's contractual duty under the terms of the collective-bargaining agreement), *cert. denied*, 469 U.S. 822 (1984).