Multiemployer Pension Plan Withdrawal Liability: Limitations without Limits

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Congress enacted the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") to provide greater financial security for pension funds. Under the MPPAA, an employer who withdraws from a pension plan is liable to the plan for its share of unfunded, vested benefits. Section 1451 of the MPPAA creates a civil action allowing pension plans to collect the withdrawal liability. The author considers the timing of collection actions, focusing specifically on the statute of limitations provisions in section 1451. The author asserts that delays in collecting withdrawal liability often impose significant burdens on employers. He argues that courts have construed the statute of limitations in a manner which deprives employers of the protection from delinquent actions such laws are intended to provide. Finally, the author suggests a construction of the statute that balances pension funds' need to collect withdrawal liability with the inequities that may fall upon employers as a result of delayed collection actions.

INTRODUCTION

Congress passed the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") in an effort to refine the treatment of multiemployer pension plans under the Employee Retirement In-


2. The preamble to the MPPAA states its purpose: "to improve retirement income security under private employer pension plans by strengthening the funding requirements for those plans, to authorize plan preservation measures for financially troubled multiemployer pension plans, and to revise the manner in which the pension plan termination insurance provisions apply to multiemployer plans . . . ." Id.
come Security Act ("ERISA"). Under the MPPAA, an employer who withdraws from a pension plan is liable to the plan for an amount equal to the employer’s share of unfunded vested benefits. The amount of withdrawal liability imposed is often substantial, especially to a firm that is forced to withdraw from a plan due to an economic downturn.

Timing of the collection of withdrawal liability is an important issue for both the collecting pension fund and the withdrawing employer. While pension funds desire payment of withdrawal liability as soon as possible, most employers presumably want to defer payment of withdrawal liability. In some circumstances, however, employers will suffer damages over and above their actual liability to the pension fund because of a significant delay between the withdrawal and the fund’s demand for withdrawal liability. An employer, for example, may discard plan records in the mistaken belief that it is no longer liable for any payments under the plan. When the pension fund subsequently demands withdrawal liability, such an employer would not be in a position to question the validity or accuracy of the fund’s calculations. Alternatively, the firm may be sold to a purchaser who is not aware of the pending liability and who is, therefore, also unable to question the pension fund’s calculations. Moreover, such a purchaser will have paid more for the firm than it was actually worth since the sale price would not have reflected all of the firm’s liabilities. Statutes of limitation were enacted to eliminate problems of this nature.

Section 1451 of the MPPAA creates a civil action allowing certain parties to seek equitable or legal relief under the Act. Disputes over withdrawal liability are specifically assigned to resolution through arbitration. In section 1451(f) of the Act, Congress

4. Id. § 1381. See also H.R. REP. 789, 96th Cong., 2nd Sess. 67, reprinted in 1980 U.S.C.C.A.N. 2918, 2933 (discussing the imposition of withdrawal liability to eliminate the burden on remaining employers).
5. See infra text accompanying notes 33-36.
6. 29 U.S.C. § 1451(a)(1). This provision states that [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.
7. 29 U.S.C. § 1401(a)(1) ("Any dispute between an employer and the plan sponsor
adopted a statute of limitations providing that:

an action under this section may not be brought after the later of —

1. 6 years after the date on which the cause of action arose, or
2. 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action. 8

The operation and application of section 1451(f) depends upon determining the exact time the cause of action arose. Unfortunately, the statute does not offer a method for making that determination. In the first six years of the Act’s existence, courts were able to dodge this issue because no cases fell outside the initial six-year period specified in the statute. Since 1986, however, courts have faced this issue with increasing frequency.

This note examines the limitation-of-action issues that arise in the context of the withdrawal liability provisions of the MPPAA. Specifically, this note analyzes the current demand-default approach that prevails in the courts for adjudicating claims for withdrawal liability as they relate to section 1451(f). This note also considers the various responses available to an employer when a multiemployer pension plan, years after an alleged complete or partial withdrawal by an employer, demands payment of withdrawal liability. The analysis which follows reveals the inadequacy of these responses and the need for a more equitable doctrine for tolling the statute of limitations.

Part I of this note reviews ERISA, the MPPAA, the mechanics of withdrawal liability collection and the problems employers face due to the inequitable application of the statute of limitations in section 1451(f) of the MPPAA. Part II focuses on a statutory anal-

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ysis of section 1451 and on the equitable defenses available to an employer faced with a claim for withdrawal liability. Part III of the note proposes an "as soon as practicable" test for tolling the statute of limitations. This test provides an equitable method for balancing a fund's desire to collect withdrawal liability with the potential inequities that may fall upon an employer.

I. HISTORY AND MECHANICS OF THE MPPAA'S WITHDRAWAL LIABILITY PROVISIONS

A. The Employee Retirement Income Security Act

In 1974, after years of consideration and study,9 Congress passed ERISA.10 As a justification for passing the Act, Congress expressed concern for "the continued well-being and security of millions of employees and their dependents" who relied on pension plans which, "owing to the inadequacy of current minimum standards," were unsound and unstable.11 President Gerald Ford described ERISA as "that massive bill" and heralded it as legislation that would "give more benefits and rights and success in the area of labor-management than almost anything in the history of this country."12

ERISA not only created the Pension Benefit Guaranty Corporation ("PBGC"),13 but also imposed a comprehensive regulatory

11. 29 U.S.C. § 1001(a). Generally, courts cite to the United States Code when referencing ERISA provisions. However, employee benefit practitioners generally cite to the sections of the uncodified Act. For ease of reference, this note will include both citations. See JOHN H. LANGBEIN & BRUCE A. WOLK, Pension and Employee Benefit Law 73 (1990) [hereinafter LANGBEIN & WOLK]. As a further complication of ERISA practice, some ERISA provisions are codified in the Internal Revenue Code and Congress did not correlate these provisions to make the citations easily reconcilable or recognizable. Commentators have criticized the clumsiness of the organization and numbering of ERISA. See id. (noting as an example ERISA § 403(a), which discusses the fiduciary duty of mandatory trusteeship while IRC § 403(a) discusses an unrelated topic, the taxation of annuitized distributions).
12. Remarks on Signing the Employee Retirement Income Security Act of 1974, Pub. Papers 1974, 76, 76-77 (Sept. 2, 1974). In the spirit of Labor Day, Ford extolled the bill as an example of the cooperation possible not only between labor and management, but also between the houses of Congress and the executive branch. Id. at 77. Ford's comments underscore the political realities of ERISA's significance.
13. 29 U.S.C. § 1302(a) (charging the PBGC with the duty of encouraging the "continuation and maintenance" of voluntary private pension plans, providing "timely and unin-
scheme generally preempting all state employee-benefit laws.\textsuperscript{14} Prior to 1980, the PBGC secured benefits under multiemployer plans at its discretion.\textsuperscript{15} When Congress reviewed ERISA's treatment of multiemployer plans in 1980, there were 2,000 covered multiemployer plans with a total of 8 million participants.\textsuperscript{16} In 1982, approximately 2,500 multiemployer plans covering 8.5 million active or retired participants and over 700,000 employers existed.\textsuperscript{17} By 1987, these figures increased to approximately 3,000 multiemployer plans covering 9.7 million participants.\textsuperscript{18}

Employers participating in a multiemployer pension plan contribute to the fund based on a variety of factors such as the number of hours worked, a percentage of compensation or units of production (e.g., tons of coal mined).\textsuperscript{19} Thus, while the plans pay pensions like (and for statutory purposes are classified as) defined benefit plans, the pension plans usually are funded like defined contribution plans.\textsuperscript{20} An attractive feature of multiemployer plans

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\item interrupted payment of pension benefits under covered plans, and maintaining the lowest level of premiums consistent with its statutory obligations).
\item 14. 29 U.S.C. § 1144(a) ("[T]his chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered].") Two major exceptions to preemption are the savings clause and the deemer clause. The savings clause provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). The second exception provides that "[n]either an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company . . . for purposes of any law . . . purporting to regulate insurance companies . . . " 29 U.S.C. § 1144(b)(2)(B).
\item 17. EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-56 (3d ed. 1987).
\item 18. EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 63 (4th ed. 1990).
\item 20. See RUSSELL K. OSGOOD, THE LAW OF PENSION AND PROFIT-SHARING § 9.3.3 (1984) (pointing out that multiemployer pension plans are poorly funded because employers usually determine the fixed amount of their contributions without regard to the defined benefit set in the sponsor's plan); see also LANGBEIN & WOLK, supra note 11, at 50 (quoting Osgoode).  
\end{itemize}
is that they allow employees who work for several employers in the same industry to collect all of their benefits from one fund. This increased pension portability was one of the goals of pension regulation.\(^{21}\)

An employer's obligation to contribute to a multiemployer plan generally ends upon the employer's withdrawal. Under ERISA's original provisions, the remaining employers contributing to the fund were liable for the unfunded benefits owed to the employees of the withdrawn employer.\(^{22}\) These provisions created several problems for those employers still contributing to the pension fund. For example, in a declining industry, withdrawals due to plant closings are common. These withdrawals ultimately exacerbate the financial distress of the remaining employers contributing to the plan.\(^{23}\) ERISA's original termination liability provisions had the added problem of creating an incentive for employers to withdraw from the fund early while unfunded liabilities were relatively low and termination within five years was not expected. As a result, the remaining employers who continued to contribute to the plan were subjected to increased financial pressure. ERISA thus created conditions under which the last remaining employers were liable for contributions owed by former plan participants.

B. The MPPAA: Policy Goals and a Means of Implementation

In the MPPAA, Congress addressed concerns about multiemployer plans and eliminated the PBGC's discretion over whether or not to guaranty multiemployer plans.\(^{24}\) Recognizing the

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21. See H.R. REP. 96-869, supra note 16, at 65, reprinted in 1980 U.S.C.C.A.N. at 2933. "Underlying the policy [of the Act] is the recognition that multiemployer plans, by providing pension portability, and protecting the benefits earned by employees whose employers have withdrawn from a plan, have insured the pensions of millions of American workers." See also LANDBERG AND WOLK, 52 (noting that pension portability was a major unfulfilled goal of ERISA).

22. Withdrawing employers did have to provide a bond securing liability in case the plan terminated within five years of the employer's withdrawal. H.R. REP. 96-869, supra note 16, at 54, reprinted in 1980 U.S.C.C.A.N. at 2922. Employers who withdraw from a plan during the five years which precede the termination of the plan remain liable for up to 30 percent of the net worth of unfunded guaranteed benefits. Id. Beyond the five-year bonded period, the withdrawn employer had no liability for the unfunded benefits. Id. See also 29 U.S.C. § 1144(b)(2).


24. 29 U.S.C. § 1322a. Congress replaced "the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program [intended to] enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs with reasonable limits." Id. § 1001a.
concerns of multiemployer critics, Congress observed that "with-
drawals of contributing employers from a multiemployer pension
plan frequently result in substantially increased funding obligations
for employers who continue to contribute to the plan, adversely
affecting the plan, its participants and beneficiaries, and labor-man-
agement relations . . ."25 Consequently, in one of the most sig-
nificant provisions of the MPPAA, Congress imposed liability on
withdrawing employers in order "to relieve the funding burden on
remaining employers and to eliminate the incentive to pull out of a
plan which would result if liability were imposed only on a mass
withdrawal by all employers."26 The MPPAA also imposes liabili-
ty for partial withdrawal when an employer makes lower contri-
butions due to a decline in business.27 Perceiving the greatest
threat against multiemployer plans to be "the protracted decline in
covered employment experienced by some plans," the MPPAA was
designed to insulate plans through withdrawal liability and by
eliminating incentives for employers to leave plans early.28

To collect amounts owed by an employer, plan sponsors must
first notify the withdrawn employer of the amount owed, devise a
schedule for payment, and demand payment according to the
schedule.29 The employer then has 90 days in which it may raise
specific objections and request the plan sponsor to review its origi-
nal findings, point out "any inaccuracy in the determination of the
amount of the unfunded benefit allocable to the employer" and
provide "any additional relevant information to the plan spon-
or."30 Both parties have 60 days after the initial notification and
demand, or 120 days after the plan sponsor’s response to the re-
quest for further review, to initiate arbitration proceedings to re-
solve their dispute.31 Finally, within 30 days of an arbitration

25. 29 U.S.C. § 1001a(a)(4)(A). Congress also found that "in a declining industry, the
incidence of employer withdrawals is higher and the adverse effects . . . are exacerbat-
ed." Id. § 1001a(a)(4)(B).
27. Partial withdrawals occur if, in a given plan year, "(1) there is a 70-percent con-
tribution decline, or (2) there is a partial cessation of the employer's contribution obliga-
"(1) permanently ceases to have an obligation to contribute under the plan, or (2) perma-
nently ceases all covered operations under the plan." Id. § 1383(a). Special exceptions ex-
ist for the building and construction industry, id. § 1383(b), and the entertainment indus-
try, id. § 1383(c).
30. Id. § 1399(b)(2)(A).
31. Id. § 1401(e). Alternatively, the parties may together initiate an arbitration proceed-
award, either party can bring an action in district court pursuant to section 1451 to "enforce, vacate, or modify" the arbitrator's award.32

II. STATUTORY AND EQUITABLE APPROACHES TO LIMITATION OF WITHDRAWAL LIABILITY COLLECTION ACTIONS

Limiting legal claims based on the passage of time dates to the law of Moses.33 In 1540, England under King Henry VIII adopted laws which limited possessory actions in real property based on the passage of a term of years.34 Personal actions such as torts were limited only by the maxim *actio personalis moritur cum persona.*35 The apparent reason for the subsequent development of statutes of limitation was the need to protect defendants "against loss of witnesses and evidence and to protect [their] acts in reasonable reliance on plaintiff's inaction."36 It remains to be seen whether the statute of limitation applicable to withdrawal liability cases furthers these original goals.

Before the powers of courts of law and equity merged, statutes of limitation did not apply in the separate equity courts. Unfettered by mechanical statutes of limitation, equity courts developed limitation-of-action doctrines that focused on the fairness to the particular parties as determined by the facts and circumstances unique to the specific case.37 The application of equitable limitation of action doctrines to withdrawal liability collection actions is complicated and may be no more adequate a protection for employers than the statute of limitation.

32. Id. § 1401(b)(2).
33. See Deut. 15:1 (New American Standard Bible) ("At the end of every seven years you shall grant a remission of debts.").
34. WILLIAM D. FERGUSON, THE STATUTES OF LIMITATION SAVING STATUTES 7 (1978). Prior to this date, an historical event, such as the coronation of a sovereign, would be designated as the cut off date. Id.
35. Id. at 9 ("A personal action dies with the person.") (citing Cyclopedic Law Dictionary (2d ed. 1922)).
36. Id. at 43.
37. See Note, Developments in the Law — Statutes of Limitation, 63 Harv. L. Rev. 1177, 1183 (1950) (courts have generally disregarded contract terms which lengthen the statutory terms in order to avoid due process conflicts and relieve the court of state claims).
A. A Starting Point: The D.C. Circuit's Interpretation of Section 1451(f)

The controversy over the statute of limitation provisions of section 1451(f) centers on two competing theories. Plan contributors argue that the limitation period should begin to run from the moment the employer completely withdraws from the plan.38 This interpretation has the advantage from an employer's perspective of accelerating the point at which the employer's liability associated with its withdrawal terminates. The PBGC and plan sponsors take the position that the limitation period does not begin until the employer fails to pay the demanded withdrawal liability.39 This interpretation has the effect of significantly extending the limitation period. At least in theory, a plan sponsor could delay indefinitely before making the initial notice and demand of the assessed withdrawal liability. The latter interpretation makes it unlikely and perhaps even inconceivable that a fund's right to impose withdrawal liability will lapse.

The handful of courts that have interpreted section 1451(f) have adopted the position urged by the PBGC and plan sponsors.40 In Joyce v. Clyde Sandoz Masonry, the court analyzed the statutory language of section 1451(f) and concluded that “failure to pay the sum demanded adversely affected the plan, thus giving rise

39. See, e.g., id. Note that in this case, the PBGC exercised its right to intervene in an action under 29 U.S.C. § 1451.
to a cause of action." Sandoz involved a masonry contractor obligated by a collective bargaining agreement that expired on June 30, 1981 to contribute to the Bricklayers and Trowel Trades International Pension Fund. After unsuccessful negotiations with the union, the employer implemented the final bargaining offer to the union. This offer did not include an obligation to contribute to the pension fund. Sandoz continued to file monthly reports to the Fund after his obligation to make contributions expired, presumably reporting that the company had no obligations in the given month. After approximately four years, Sandoz ceased filing reports with the Fund. In December 1986, Sandoz Masonry dissolved.

The pension fund apparently ignored the possibility that Sandoz had withdrawn from the pension plan. The fund took no action to impose withdrawal liability until July 13, 1987 when it notified Sandoz of his liability, demanded payment as required by the MPPAA and filed a collection action in the United States District Court. Sandoz Masonry, since reorganized as Griffith Masonry, did not make the demanded withdrawal liability payment. The District Court ruled against the fund, holding that section 1451(f)’s six-year limitation period ran from June 30, 1981, the date of Sandoz’s complete withdrawal from the plan, and that the fund’s rights had lapsed.

In reversing the District Court’s interpretation, the Court of Appeals for the District of Columbia first examined the language of section 1451(a) which provides for an action by a plan fiduciary “who is adversely affected by the act or omission of any party under this subtitle.” In defining when the cause of action arose, the court sought to determine what act or omission by Sandoz adversely affected the fund. The D.C. Circuit held that the Fund was not adversely affected until “the plan [had] not received payments which [were] due and owing.” This conclusion plays a prominent role in the court’s remaining assumptions.

In reaching its decision, the court relied upon the distinction between the existence of withdrawal liability and the ability of a

41. Sandoz, 871 F.2d at 1122.
42. Id. at 1121.
43. Id.
44. Id.
45. Id. at 1121-22.
47. Sandoz, 871 F.2d at 1122.
fund to receive payment of the liability. The court cited portions of section 1401(b)(1) which provide that:

If no arbitration proceeding has been initiated . . . the amounts demanded by the plan sponsor under section 1399(b)(1) . . . shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.\(^{48}\)

As further support for its holding, the court focused on section 1399(c)(5) which allows a pension fund, in the event of a default by an employer, to "require immediate payment of the outstanding amount of an employer's withdrawal liability."\(^{49}\) According to the court, under both of the above cited sections, the fund's notice and demand create the employer's obligation to pay withdrawal liability and the employer's subsequent failure to make the demanded payments created the fund's right to sue. From that analysis, the court derived the general axiom, "the failure to pay gives rise to a cause of action."\(^{50}\)

The second distinction between collection and withdrawal liability noted by the court focuses on the circumstances defining withdrawal and those necessary for a cause of action. Within the statutory scheme, the date of withdrawal triggers the calculation of unfunded liability. The plan however, is not owed anything by virtue of the mere withdrawal, according to the court. It is only as a result of the fund's subsequent actions to collect that an employer incurs a debt to the fund.\(^{51}\)

The actual date of withdrawal may only have significance after a post hoc determination that a withdrawal did in fact occur. As the Sandoz court noted, determining the existence of a withdrawal is much more cumbersome in practice than it appears to be on paper.\(^{52}\) For example, under the special withdrawal provisions relevant to the building and construction industry, an employer withdraws from a fund when the employer "ceases to have an obligation to contribute under the plan [and] resumes such work within 5

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48. 29 U.S.C. § 1401(b)(1) ("Plan sponsor" and "fund" are synonymous for purposes of this Note).
49. Id. § 1399(c)(5).
50. Sandoz, 871 F.2d at 1123.
51. Id.
52. Id.
years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of resumption. In the court’s opinion, “[t]o conclude that an event requiring such a post hoc (and belated) determination triggers the limitations bar would create, at the least, an unwieldy statutory collection mechanism.”

In the court’s view, triggering the limitations period at the moment an employer defaults “most ensures that plans will be able to collect the sums that employers owe them.” This approach is ultimately justified by the D.C. Circuit on the ground that it comports with one of the more important goals of the Act, i.e., “providing means for recovery and ensuring the financial viability of the funds.” The court broadly interpreted the Act as “disfavor[ing] impediments to collection.”

Other courts have followed the D.C. Circuit’s decision in Sandoz. The Southern District of New York adopted Sandoz’s “well-reasoned and thorough” conclusions. The Northern District of Illinois has also applied the Sandoz reasoning on two reported, albeit unpublished, occasions. Notwithstanding this acceptance of the Sandoz analysis, careful scrutiny of the demand-default approach reveals analytical flaws which justify an alternate interpretation. Assessing the deficiencies of the D.C. Circuit’s approach requires a more generalized discussion of the standards of statutory interpretation.

B. Standards of Legislative Interpretation

The power of the legislature under the federal system greatly troubled the Founding Fathers. Unfortunately, however, the

54. Sandoz, 871 F.2d at 1124.
55. Id. at 1126.
56. Id.
57. Id. (discussing the general policies of ERISA).
60. See THE FEDERALIST No. 47 (James Madison) (advocating separate and distinct
broad power to legislate can only be exercised through the awkward medium of written text. Justice Frankfurter lamented that "unlike mathematical symbols, the phrasing of a document especially a complicated enactment, seldom attains more than approximate precision . . . . A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts."  

Interpretation is required any time a statute is applied, regardless of whether a dispute exists over the particular application. Statutory interpretation is a particularly nettlesome area for the judiciary because there is a danger of encroaching upon the power reserved for the legislature. In an effort to protect the integrity of the political balance between the branches of government and to clothe its decisions with legitimacy, the judiciary relies on certain established techniques for interpreting statutes. While courts commonly resort to these doctrines and techniques of interpretation, they rarely explain the justification for relying on one technique rather than another.

1. Plain Meaning and Textualism

Typically, courts resort first to the "plain meaning" of the language of the statutes they are interpreting. Unfortunately, some courts hesitate to acknowledge that determining the plain meaning of a statute is, in fact, a form of interpretation. The

branches of government as essential for liberty).  
63. See id. ("[C]onsistent with a system of separation of powers, it is . . . the function of the legislature to make the laws but for the courts to finally and authoritatively interpret what the law says.").  
64. See Dewsnup v. Timm, 60 U.S.L.W. 4111, 4115 (1992) (Scalia, J., Dissenting) ("By disregarding well-established and oft-repeated principles of statutory construction, it renders those principles less secure and the certainty they are designed to achieve less attainable.").  
65. See Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.").  
66. See, e.g., id. ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise . . . .")
very act of deciding whether or not a statute or regulation applies in a given instance is an act of interpretation based on plain meaning. While the Sandoz court did not seem to think it was indulging in any extraordinary interpretive gymnastics by basing its interpretation on the plain language of the statute, the approach taken by the court is fraught with hidden complexities.

The “plain meaning” of words is not necessarily plain, but rather is the product of “culture and context.” As Learned Hand noted, “[w]ords are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used...” A plain meaning approach may wrongfully attribute intrinsic meaning to words. Claiming to focus exclusively on the text of a law, a judge interpreting an act based on plain meaning either resorts to a subjective understanding of the words or refers to outside sources such as dictionaries. In either case, a plain-meaning approach may lead to an interpretation different from that intended by the legislature or understood by the public.

Often labelled as textualism, literal or plain-meaning interpretation is a highly favored method of determining the meaning of legislation advocated by both courts and academics. Textualism

67. 2A SUTHERLAND, supra note 62, § 45.03 (discussing the interpretation function).
69. NLRB v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941).
70. See 2A SUTHERLAND, supra note 62, § 45.02 (noting that since not all words have a single intrinsic meaning, a plain meaning approach to interpretation may not suffice and other interpretive aids may be needed to discern legislative intent).
71. 2A SUTHERLAND, supra note 62, § 46.02 (noting that a judge “cannot help using what he [or she] has learned about customary language usage and common understanding associated with the relevant text”).
72. Id.
73. See, e.g., Public Citizen v. United States Dep’t of Justice, 491 U.S. 440, 469 (1989) (Kennedy, J., concurring in the judgment) (advising that courts “accord proper respect to the finality and binding effect of legislative enactments”); Mallard v. United States Dist. Court, 490 U.S. 296, 301-03 (1989) (noting that a statute which allows the court to “request” an attorney to represent an indigent does not enable the court to “require” such representation as would a stronger directive such as “assign” or “appoint”); Frank H. Easterbrook, Statute’s Domains, 50 U. CHI. L. REV. 533, 544-51 (1983) (advocating the view that a statute does not apply unless it clearly supports the court’s decision or power to act). But see, e.g., Public Citizen, 491 U.S. at 454 (“Where the literal reading of a statutory term would ‘compel an odd result,’ we must search for other evidence of congressional intent to lend the term its proper scope.” (citation omitted)); Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (concluding that courts may
comports with society's need for definitive statements of the law enabling citizens to order their daily affairs.\textsuperscript{74} Where the words of the statute are clear and have only one conceivable or reasonable meaning, proponents can easily justify using a textualist approach.

The Constitution does not require the degree of specificity that proponents of textualism advocate. According to the Supreme Court, "no more than a reasonable degree of certainty can be demanded."\textsuperscript{75} The Court has recognized that "few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions."\textsuperscript{76}

Even textualism may distort the "precise" intended meaning of a law. Legislators are as prone as any other writers to grammatical errors which confuse meaning — perhaps they are even more vulnerable to grammatical problems.\textsuperscript{77} Irrelevant parts of the statute may be construed to distort the meaning of the passage being interpreted. Furthermore, judges' interpretations may proceed from assumptions not explicitly supported by the statutory language. The subtle danger of purporting to rely on text alone is that rather than overtly introducing background norms which provide context for the statute, textualists covertly inject norms and as a result, obscure the determinative assumptions underlying their decisions.\textsuperscript{78}

Despite the \textit{Sandoz} court's elaborate analysis of various MPPAA sections impliedly suggesting the demand-default interpretation, much of the analysis was predicated on the assumption that the fund was adversely affected when it was not paid the sums owed to it under the withdrawal liability calculation.\textsuperscript{79} For exam-
ple, the court observed: "[so] long as the employer does not default in payment, the plan is not harmed by the withdrawal . . . . Withdrawal, in and of itself, does not visit any adverse effect upon the plan that gives rise to the cause of action." If the weight of the court's conclusion hinged on an assumption superficially justified by the statement "the statute, it seems to us, . . . ," that assumption calls for closer scrutiny.

Using a purely textual approach, the court's conclusion seems correct. Any reasonable person would probably agree that when a creditor is not paid a debt, the creditor is adversely affected by the debtor's default. In the context of section 1451(f), nothing suggests that this obvious adverse effect is necessarily the adverse effect relevant under the terms of the statute. The court's analysis is not consistent with the broader implications of withdrawal liability in the MPPAA.

Under the Sandoz court's reasoning, a fund is only hurt by a withdrawal if the withdrawal is accompanied by a default. Consider, however, the implication of the court's approach given circumstances different from the Sandoz case. If the Bricklayers and Trowel Trades International Pension Fund had not discovered Sandoz's withdrawal (a plausible scenario under the circumstances), and had not demanded the withdrawal liability payment, the court's reasoning suggests that the Fund would not have been adversely affected. Yet, the Fund would be liable for the benefits attributable to Sandoz's employees.

Whether or not Congress intended default on a withdrawal payment to be the event marking the start of the limitations period is not clear. But characterizing default as the triggering event is like forecasting the rain by looking at puddles rather than clouds. In assessing the security of multiemployer plans, Congress traced financial instability to employer withdrawal. Upon withdrawal, an employer's contributions to the plan cease, compromising the plan's future solvency. The court's focus on default as the triggering event ignores the causal relationship between withdrawal and

80. Id.
81. Id. at 1122 (emphasis added).
82. See supra text accompanying note 80.
83. See generally H.R. REP. 96-869, supra note 16 (discussing in various sections the burdens on remaining participants as employers withdraw from the plan).
84. See supra text accompanying notes 24-28.
instability which motivated Congress to act.

Falling into the trap described in Professor Sunstein's criticism of textualism, the Sandoz court chose between two facially permissible interpretations without providing a rationale for its decision. While the absence of an explanation for the court's conclusion does not necessarily mean that its decision was unprincipled, the oversight or omission may be a signal that the court actually indulged in an undisclosed value judgment motivated by "policy intuitions of a legislative character." 86

2. Structuralism

In opposition to the fund's textualist position, Sandoz argued for a structuralist approach. Interpretations which create confusion or render other provisions of the same act inoperative, redundant or meaningless are less favored than interpretations which empower all sections with meaning and significance. 87 Norms of statutory construction demand structurally consistent interpretations where possible. 88 In a critical discussion of canons of statutory interpretation, Professor Sunstein praises structural approaches: "Such approaches promote fidelity to congressional instructions and at the same time help to make sense of complex regulatory enactments." 89 Sunstein would reject interpretations that render provisions meaningless as well as those that only "work against" the underlying provisions. 90 However, structuralism, like textualism, is subject to implicit value judgments.

The Sandoz court's demand-default interpretation of section 1451(f)(1) makes section 1451(f)(2) merely redundant. Section 1451(f)(2), by its terms and position in the statute, is intended to

85. See supra text accompany notes 68, 78.
87. See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 741-42 (1989) (rejecting one proposed construction on the grounds that it would render superfluous exceptions in another definition); Sunstein, supra note 68, at 425 (explaining that under a structural approach, "[a]n interpretation that would make sense of the statute as a whole should be adopted").
88. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). But see, e.g., Jordan v. LeBlanc & Broussard Ford, Inc., 332 So. 2d 534, 537 (La. App. 1976) ("Where words and clauses which have inadvertently crept into statutes are clearly repugnant to legislative intent, such words and clauses may be disregarded.").
89. Sunstein, supra note 68, at 425.
90. Id.
extend the time-bar in the event that unusual circumstances or fraud conceal the withdrawal event. The demand-default interpretation delays the start of the limitations period until after the fund takes affirmative steps to collect the withdrawal liability without regard to the period which elapsed between the withdrawal and its discovery. Except in cases of gross incompetence, it is difficult to conceive of a scenario in which, after demanding payment, a fund would stand by for six years allowing an employer to continue to default on an amount due without initiating some action to recover. Yet, under the Sandoz rule, it would only be in such cases that the period for action by the fund would run out.

The Sandoz court responded to the structural argument by asserting that section 1451(f)(2) would operate in other types of cases arising under the multiemployer pension plan subtitle even if its construction of the limitations period rendered that section inoperative in the case before it. In cases involving “employer withdrawals, transfers of plan assets, reorganizations of plans, and benefits after termination of plans,” section 1451(f)(2) might retain meaning. This response to the structuralist argument is unpersuasive. Admittedly, when choosing between an interpretation that will sometimes render a provision meaningless and one which will always render a provision meaningless, the former is preferable to the latter. Similarly, when the choice is between a decision that treats sections of a statute inconsistently at times and one that treats the provisions consistently in all circumstances, the latter decision should prevail. The Sandoz court failed to explain its decision in a manner which countered the weight of this argument. Apparently, the court again injected an undiscussed normative judgment into its analysis.

3. Legislative Intent

Among the interpretive techniques available to justify the demand-default approach, the Sandoz court emphasized least the method which arguably had the most significant impact on its decision — legislative intent. The court’s views regarding the

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93. Id. (listing these examples to emphasize that the subtitle “extends to matters far beyond collection of withdrawal liability”).
meaning of the text and structural consistency are best understood in the context of its reading of Congress' intent in enacting the MPPAA and the statute of limitations. Where the words and context are not dispositive, courts often turn for guidance to the drafters' purpose in enacting the statute.  

Inquiries into purpose are not as popular today as they were in the 1950's and 1960's when legal realists dominated the academic field and condemned the mechanical presumptions of textualism and structuralism.  

Regard for Congress' intent is mandated by the separation of powers doctrine.  

Even where courts follow the rule that "statutes in derogation of the common law are to be strictly construed," interpretations should not defeat the clearly expressed legislative intent of the enactment's scope and purpose.

Congress' intent, however, is often unclear. In *Fishgold v. Sullivan Drydock & Repair Corp.* Judges Hand and Chase reached different conclusions about the interpretation of "discharge" under the Selective Training and Service Act of 1940, as amended in 1944. According to the relevant passage, returning veterans were entitled to "a position of like seniority, status, and pay" unless changed circumstances made those benefits "impossible or unreasonable" for the employer to provide. The Act also provided job security to the extent that the returning veteran could "not be discharged from such position without cause within one year after such restoration." The split between Hand and Chase centered on the meaning of "discharge." The plaintiff, Fishgold, had been temporarily laid-off on three occasions within one year after his return to employment; he sued claiming that these short

94. SUTHERLAND, supra note 62, § 48.01.  
95. See Sunstein, supra note 68, at 426.  
96. 2A SUTHERLAND, supra note 62, § 46.03 (explaining that the separation of powers doctrine prohibits the judiciary from acting as the lawmaking body by implementing its own will.)  
97. Jamison v. Encarnacion, 281 U.S. 635, 640 (1930); see also Isbrandtsen Co., Inc. v. Johnson, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").  
98. 154 F.2d 785 (2d Cir.), aff'd, 328 U.S. 275 (1946).  
100. Selective Training Act § 8(b), 54 Stat. at 890.  
101. Id. § 8(c), 54 Stat. at 890.
term layoffs constituted discharges under section 8(c) of the Act. In laying off Fishgold, Sullivan Drydock preferred non-veteran employees with greater seniority than the plaintiff. Fishgold made no allegation that Sullivan Drydock violated the seniority, status or pay requirements of section 8(b).

In defining "discharge," Judge Hand and the majority measured Congress' intent against pre-existing employment law. Hand argued that the discharge protection afforded veterans employed in non-union shops the same kind of protection as their brothers working under collective bargaining agreements. Hand's interpretation was consistent with the apparent overall intent of the Act "that the veteran was to be assured of his job, . . . but that the job to which he was 'restored' . . . was to be subject to the same conditions to which the old job had been subject."

In contrast, Chase argued that Congress wanted to assure veterans of "an actual job with actual pay on which they could live at least for a year." Chase's interpretation is much more pragmatic than Hand's, as it imputes to Congress the simple but eminently practical end of assuring the veterans' economic vitality for one year through a guaranteed job. In contrast, Hand seemed to impute to Congress the more limited goal of changing a legal term of employment contracts — granting veterans in non-union shops the same job protection commonly afforded all employees in union shops. Professor LaRue suggests that whether a judge prefers a pragmatic, result-oriented approach like Chase's to a legalistic, rule-oriented approach like Hand's may depend upon the judge's personal experience. Judges who come to the bench after service in politics or public affairs will, according to Professor LaRue, "naturally tend to inquire into the social policy behind a statute rather than into the way the statute changes the prior law." Among contemporary judges, the Chase approach will be dominant. As long as there is room for a substantial dichotomy

102. Fishgold, 154 F.2d at 787.
103. Id.
105. Fishgold, 154 F.2d at 788.
106. Id.
107. Id. at 792 (Chase, J., dissenting).
108. See LaRue, supra note 104, at 751.
109. Id. at 752.
110. Id. (noting that "most judges are selected for distinguished service in political
among jurists, however, subjective norms will continue to encroach into judicial interpretation. Like the other previously discussed techniques, interpretation based on legislative purpose permits the courts to interpose critical subjective judgments into their analyses.111

Assessing legislative purpose is often more difficult than the other methods of statutory construction. Whereas textualism and structuralism focus on a defined and discrete body of material, the range of speeches, committee reports and position papers courts can consult to determine legislative intent is virtually bewildering. Further complications arise when courts attempt to unravel congressional intent by examining statements made by individual members. The comments of a bill's most vocal proponent may not reflect the views of the majority of the legislature. Moreover, statements attributed to individual members of Congress may actually be the positions advocated by special interest groups packaged in the form of speeches and comments and supplied to the members to deliver or insert in the Congressional Record.112

Justice Scalia, cognizant of both the distortions created by legislative history and the complexity it injects into the law, is leading a one-man assault from the high Court against purpose inquiries. According to Justice Scalia, the case against such inquiries is simple and obvious. Construing a treaty he asserted:

[t]he critical question . . . is [W]hether [giving effect to "the intent of the . . . parties"] is more reliably and predictably achieved by a rule of construction which credits, when it is clear, the contracting sovereigns' carefully

matters and public affairs" and observing that our judges tend to come to the bench with a "pragmatic judicial philosophy").

111. See supra text accompanying notes 65-78, 87-90.

112. Sunstein, supra note 68, at 429. Sunstein quotes Rep. Heckler acknowledging that the Congressional Record masks the fact that some views are not asserted during the debate the statements may appear to affect.

Mr. Speaker, having received unanimous consent to extend my remarks in the RECORD, I would like to indicate that I am not really speaking these words . . . . As a matter of fact, I am back in my office typing this out on my own hot little typewriter . . . . Such is the pretense of the House that it would have been easy to just quietly include these remarks in the RECORD, issue a brave press release, and convince thousands of cheering constituents that I was in there fighting every step of the way, influencing the course of history in the heat of the debate.

framed and solemnly ratified expression of those intentions and expectations, or rather one which sets judges in various jurisdictions at large to ignore that clear expression and discern a "genuine" contrary intent elsewhere. To ask that question is to answer it.\footnote{113. United States v. Stuart, 489 U.S. 353, 371 (1989) (Scalia, J., concurring) (interpreting the Convention Respecting Double Taxation, Mar. 4, 1942, United States-Canada, art. XIX, XXI, 56 Stat. 1405-06). See also Union Bank v. Wolos, 112 S. Ct. 527, 534 (1991) (Scalia, J., concurring) (complaining about lawyers and judges, specifically including the court of appeals, who make and entertain arguments over applying statutes in a manner contrary to the "plain text"). For cases reflecting Justice Scalia's concern about complexity in the law, see Mistretta v. United States, 488 U.S. 361, 415-16 (1989) (Scalia, J., dissenting) (discussing the federal sentencing guidelines); Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 170 (1987) (Scalia, J., concurring) (calling for a state statute of limitation or no limitation period when a federal statute does not explicitly include a time-bar).}

When parties' (whether they are sovereigns negotiating a treaty or legislators drafting laws) intentions and expectations are not clear from the text of their documents, a court may have to rely on extraneous information to construe them. With respect to these situations, Justice Scalia condemns the use of certain traditional sources for defining intent. For example, a key issue in \textit{Green v. Bock Laundry Machine Co.},\footnote{114. 490 U.S. 504 (1989) (holding superseded by amendment to \textit{FED. R. EVID.} 609 which became effective in 1990).} was the definition of "defendant" as it was used in Federal Rule of Evidence 609. The majority spent four-fifths of its analysis tracing the history of the rule from the 1942 Model Code of Evidence through a 1970 statute, committee and subcommittee reports and congressional debates.\footnote{115. \textit{Id.} at 527-28 (Scalia, J., concurring).} Justice Scalia, concurring in the judgment, argued that this analysis had no probative value; he saw "no reason to believe that any more than a handful of the Members of Congress who enacted Rule 609 were aware of its interesting evolution from the 1942 Model Code . . . ."\footnote{116. \textit{Id.} at 528. Scalia asserts that "[t]he meaning of terms on the statute books ought [not] be determined . . . on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress . . . ." \textit{Id.}} He maintained that courts should determine meaning through two inquiries. First, courts should ask which interpretation is "most in accord with context and ordinary usage, and thus most likely to have been understood by the \textit{whole} Congress."\footnote{117. \textit{Id.} (emphasis supplied).} Second, courts should consider which interpretation is "most com-
patible with the surrounding body of law into which the provision
must be integrated — a compatibility which by a benign fiction,
we assume Congress always has in mind.118

Justice Scalia overstates his case.119 Legislative history can
offer important insights about a law and may be decisive in some
instances. Scalia’s arguments, however, point out the potential for
subjectivity in construction.120 The legislature’s purpose in enacting
the MPPAA should not have been dispositive of the limitations
issue in Sandoz. While the court stated succinctly Congress’ goal
— “to ensure the financial integrity of multiemployer pension
funds” — it appears to have ignored the fact that Congress applied
a time-bar to the withdrawal liability provisions which suggests that
its members anticipated some circumstances under which a party’s
rights would lapse. Adopting an interpretation which eliminates all
practical significance of a Congressional enactment no more fur-
thers the legislature’s purpose than ignoring Congress’ directions
altogether.

C. Equitable Limitation of Action Doctrines

As long as the Sandoz decision remains the interpretive stan-
dard for the section 1451(f) statute of limitations, defendants must
advance equitable defenses to bar collection actions. The two prin-
ciple affirmative defenses against delay are laches and equitable
estoppel. However, an employer is unlikely to succeed against a
claim for withdrawal liability asserting either defense.

1. Laches

English chancery courts of the eighteenth century created the
doctrine of laches. First described in a hypothetical in Booth v.
Earl of Warrington,121 laches is a formal statement of the princi-

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118. Id.
119. See Sunstein, supra note 68, at 430 (criticizing Scalia’s extreme position).
120. See supra text accompanying notes 95-111.
121. 2 Eng. Rep. 111 (1714). The court offered the following hypothetical:

A fraudulently stated that B had procured a beneficial marriage for C, and
obtained from C a bond for 1000 guineas in favour of B for his services. The
bond was paid, but nine years later C discovered the whole matter to be a
fraudulent misstatement by A, and that A had really received the money. A
was ordered to repay C the whole of the money with interest and costs.

Id. See also G.W. KEETON, AN INTRODUCTION TO EQUITY 73 (2d ed. 1948) (citing
Booth).
ple that an equity court will refuse "its aid to stale demands, where
the party slept upon his right, and acquiesced for a great length of
time." American courts have described the doctrine of laches as "an equitable doctrine intended to prevent one who has not been
diligent in asserting a known right from recovering at the expense
of one who has been prejudiced by the delay." The application of a statute of limitation is distinguishable from
laches on the ground that the mere passage of time under a statute
of limitation may bar an action while under laches, the delay is not
dispositive. Where laches is raised, the court must inquire into the
effect of the delay. Specifically, a defendant asserting the laches defense must demonstrate that she suffered actual harm or
prejudice from the plaintiff's delay in bringing the action and that
the delay was unreasonable. For example, if a company had
withdrawn from a pension plan but had not been notified of its
withdrawal liability until after the company had changed hands, the
subsequent owner, unaware of the liability, would be disadvantaged
because the terms of the sale agreement would not have reflected
the withdrawal liability.

Several issues arise when a defendant asserts laches as a de-
fense to a fund's demand for withdrawal liability. A court must
determine whether or not the facts show that the fund's delay in
notifying the defendant of its withdrawal liability harmed the de-
fendant. If the alleged harm resulted from a buyer's or seller's pur-
ported reliance on the absence of notice as evidence of a lack of
withdrawal liability, the court will have to determine whether the
employer's reliance on the fund's silence was reasonable and in
good faith. However, before a court can reach these particular

"[n]othing can call forth [a court of equity] into activity, but conscience, good faith, and
reasonable diligence; where these are wanting, the court is passive, and does nothing." Id.
See also R.E. MCGARRY & P.V. BAKER, SNELL'S PRINCIPLES OF EQUITY 37 (1966)
(quotin Smith).
123. Aronovitch v. Levy, 56 N.W.2d 570, 574 (Minn. 1953).
(S.D.N.Y. 1964). See also Niner v. Hanson, 142 A.2d 798, 803 (Md. 1958) ("[T]his is well
settled that the mere lapse of time will not bar the suit, but that there must be a showing
of prejudice to the opposite party by reason of the delay, or circumstances making it
inequitable to entertain the suit.").
125. See Brentwood Fin. Corp. v. Western Conference of Teamsters Pension Trust Fund,
902 F.2d 1456 (9th Cir. 1990) (noting that because Funds are not permitted to charge
interest for pre-notice delays, the employer was not financially burdened by the delay).
126. The principle that a party "who comes into equity must come with clean hands"
factual inquiries, it must resolve the broader question of whether laches is a bar in the face of an unexpired statute of limitation.

The United States Supreme Court in Holmberg v. Armbricht expressed the general rule that a "Congressional statute of limitation is definitive." According to the court, "if Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. Appended to this doctrine is a high regard for the flexibility of equity rules. For example, courts may invoke equitable principles to extend the limitations period in certain circumstances. "[W]here a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered ..." Moreover, the Court declared that "[i]t is evident that the equitable rule is read into every federal statute of limitation."

Having afforded equitable protection to plaintiffs whose actions would otherwise commence outside the terms defined by Congressionally enacted statutes of limitation, it is by no means clear whether defendants may claim comparable equitable protection within the limitations period created by federal statute. Courts have concluded that while equity principles may justify extending the period of time for actions initiated within a statute of limitation, compliance with the statutory period is by definition, never inequitable. In most of the withdrawal liability cases in which defendants asserted laches as defense, courts have adopted the latter position.

bars any relief in equity to a party that has not acted legally and in good faith. GEORGE L. CLARK, PRINCIPLES OF EQUITY 34 (1937).

128. Id.
129. Id. at 396 ("Equity eschews mechanical rules; it depends on flexibility.").
130. Id. at 397 (quoting Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1875)).
131. Id. at 397 (emphasis added).
132. E.g., United States v. RePass, 688 F.2d 154, 158 (2d Cir. 1982) ("Laches is not a defense to an action filed within the applicable statute of limitations.") (citing United States v. Mack, 295 U.S. 480, 489 (1935)).
133. See, e.g., Combs v. Western Coal Corp., 611 F. Supp. 917, 920 (D.D.C. 1985) (concluding that laches is unavailable as a defense if the § 1451(f) limitations period has not expired) (citing RePass, 688 F.2d at 158).
Nevertheless, the issue of laches in the context of withdrawal liability cases remains open to controversy largely because of an unequivocal Tenth Circuit decision holding that "[t]he defense of laches is available in a suit to collect a claim for withdrawal liability." As if its position was not clear, the court noted two contrary decisions in district courts from different circuits and caustically observed, "[I]n this circuit, however, laches and a statute of limitations are not mutually exclusive, even when the statute has been made specifically applicable to the claim and the claim was brought within the statutory period." One is left wondering, in the face of this decisive language, which side is correct?

The authority cited by the Tenth Circuit is unpersuasive. The first case on which Centric relies is *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks*.

In *Levy Bros.*, the Second Circuit considered whether a one-year delay between an employer's going out of business and the fund's initial notice of withdrawal liability constituted a delay sufficient to merit barring the fund's claim under the doctrine of laches. The court concluded "that [the plan sponsor's] delay was so unreasonable as to support a defense of laches." The *Levy Bros.* court reached this conclusion after considering three factors: first, the claim had been brought well within the statutory period prescribed by 29 U.S.C. § 1451(f); second, the plan's task was intricate and complicated because of the statute; and third, Congress intended to help plans collect withdrawal liability. The Tenth Circuit undoubtedly concluded that *Levy Bros.* supports application of the laches defense because the opinion did not foreclose that possibility entirely. The *Levy Bros.* court rejected laches on the basis of the facts before it but did not reject laches as a matter of law. While this interpretation of *Levy Bros.* is plausible, it is equally plausible that the court, lacking facts sufficient to resolve the issue, chose not to address the

135. *Id.* at 1519 n.4 (citing *Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F.2d 466, 472 (10th Cir. 1979), cert. denied, 449 U.S. 901 (1980)).
136. *Id.* at 1519 (citing *ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 887 (2d Cir. 1988)).
138. *Id.*
139. *Id.*
140. *See Centric*, 901 F.2d at 1519.
broader legal question of whether laches is an appropriate defense against a claim for withdrawal liability.

Even if Levy Bros. would permit a laches defense, the factors on which the Second Circuit relied in reaching that decision are not those of a traditional laches inquiry. The first factor, filing a claim within the statutory period, could, depending on the weight accorded that time frame, practically preclude a laches defense.\textsuperscript{141} Second, the court's consideration of Congress' intent in creating the claim also focuses the court's equity inquiry on the statute rather than on the parties. Finally, the equity inquiry is deficient because the court did not inquire into the effect of the plaintiff's delay on the defendant. Levy Bros. does not explicitly endorse the proposition to which the Tenth Circuit appended it and the posture of the court in Levy Bros. is at best weak support for the Tenth Circuit's conclusion.

The second authority cited by the Tenth Circuit, Central States Pension Fund v. Lloyd Sztanyo Trust,\textsuperscript{142} is even less supportive of the court's position than Levy Bros. The court in Sztanyo Trust declined to strike the laches defense on a motion for summary judgment "because it was not clear how laches was being applied by the defendants or whether the defense was indeed patently defective."\textsuperscript{143} Although the court cited a case as authority for the proposition that laches may be an appropriate defense to a legal claim,\textsuperscript{144} the cited case was irrelevant to the question at hand because it did not involve a statute of limitation.\textsuperscript{145}

The quality of Jaspan v. Certified Industries, Inc.,\textsuperscript{146} as authority for the Centric decision is similar to Levy Bros. Like Levy Bros., the Jaspan court found no genuine issue of fact which would support a laches defense. Thus, the Jaspan decision supports the Tenth Circuit only to the extent that the court did not rule that laches was unavailable as a matter of law.\textsuperscript{147}

The Tenth Circuit referred to additional authority similar to those cases already discussed.\textsuperscript{148} Both Wyoming Laborers Health

\begin{footnotes}
141. \textit{See supra} text accompanying note 132.
143. \textit{Id.}
144. \textit{Id.} (citing Harris v. Beynon, 570 F. Supp. 690, 692 (N.D. Ill. 1983)).
147. \textit{Id.}
148. \textit{Centric}, 901 F.2d at 1519.
\end{footnotes}
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& Welfare Plan v. Morgen & Oswoode Constr. Co.\textsuperscript{149} and Iron Workers Fund v. A & P Steel, Inc.,\textsuperscript{150} upheld decisions by district courts rejecting laches defenses because the defendants failed to establish “that the plaintiff had full knowledge of the facts and unreasonably delayed assertion of its rights, which caused prejudice to the defendant.”\textsuperscript{151} That the authority cited in Centric tacitly approved the laches defense is dubious since none of the cases rejected the defendant’s laches claim on the basis of the equities.

The two contrary decisions derisively answered in Centric\textsuperscript{152} reach the same result as the other cited authority, but take the legal analysis just discussed a step further. Robbins v. Pepsi-Cola Metro. Bottling Co.,\textsuperscript{153} involved a two-year delay between the employer’s withdrawal from a multiemployer pension plan and the plan’s notice of withdrawal liability. Under the circumstances, the delay probably was not unreasonable for the purpose of finding laches. The court noted that “Pepsi’s alleged partial withdrawal in 1981 occurred roughly one year after the MPPAA was enacted. Given the complicated nature of the Fund’s claim against the entire group alleged to be a “controlled group” as defined in 29 U.S.C. § 13101(b)(1), some delay in implementing the new statute was to be expected.”\textsuperscript{154} Moreover, a definitive decision on the reasonableness of the delay was not necessary in Robbins because the defendant failed to establish any prejudice resulting from the allegedly unreasonable delay. Had the Robbins court ended its treatment of laches with these factual conclusions, its opinion would be indistinguishable from the cases cited in Centric as favorable authority. Robbins went further, however, affirming the position first taken in Combs v. Western Coal Corp.\textsuperscript{155} that a defendant in a case for collection of withdrawal liability cannot rely on laches when the statute of limitation has not expired.\textsuperscript{156}

The Combs court rejected the laches defense because, as a matter of law, laches is not a bar to an action brought within an

\textsuperscript{149} 850 F.2d 613 (10th Cir. 1988).
\textsuperscript{150} 812 F.2d 1518 (10th Cir. 1987).
\textsuperscript{151} Id. at 1529. The Morgen & Oswoode court refused to attribute knowledge to the Union because “it [could not] be assumed that the Union’s interest in pursuing the matter was identical to that of the Trustees.” Morgen & Oswoode, 850 F.2d at 624.
\textsuperscript{152} See supra text accompanying note 135.
\textsuperscript{153} 636 F. Supp. 641, 681 (N.D. Ill. 1986).
\textsuperscript{154} Id. at 681 n.6.
\textsuperscript{156} Robbins, 636 F. Supp. at 681 n.6.
applicable unexpired statute of limitation. The court relied on United States v. Repass and United States v. Mack, the latter case referring to early Supreme Court jurisprudence on the subject of laches set forth in Cross v. Allen. In Cross, the Court considered whether certain acts by a principal debtor kept alive a lien on his deceased wife's property. After determining on the basis of common law doctrines that a statute of limitation would not have barred the claim, the Court addressed laches.

The question of laches and staleness of claim virtually falls with that of the defense of the statute of limitations. So long as the demands secured were not barred by the statute of limitations there could be no laches in prosecuting a suit upon the mortgages to enforce those demands.

Notwithstanding the Tenth Circuit's apparent certaintly of its position, the authority it cites in Centric varies from moderately persuasive to downright irrelevant. The decision asserts that "[l]aches is just as applicable to a delay in re-initiating litigation as it is to a delay in initiating litigation," and cites the Restatement (Second) of Judgments to support this proposition. Notwithstanding the court's reference to it, the Restatement adds nothing to the Centric decision because the Restatement is completely silent on the single germane point in the case — how laches is applied in the initial litigation. Another case cited in Centric, In re Whitney-Forbes, Inc., applied laches to initial litigation. The decision however, is inapposite because it did not involve a statute of limitations question. Similarly, Coleman v. Black is not on point because the case did not involve a conflict between a statute of limitations and a laches defense. Thus, while the Tenth

158. 688 F.2d 154 (2d Cir. 1982). See also supra text accompanying note 132.
160. 141 U.S. 528, 537 (1891).
161. Id.
163. See RESTATEMENT (SECOND) OF JUDGMENTS § 20, comment n (1982) (The Restatement notes that in some instances, laches would make a second proceeding unfair, but it does not discuss the laches defense asserted with respect to the initial litigation).
164. 770 F.2d 692 (7th Cir. 1985).
165. Id. at 698. In Whitney-Forbes, a bankruptcy trustee sought to have the court vacate a ten-year old bankruptcy court order approving the sale of a patent owned by the debtor.
166. 663 F. Supp. 1315, 1329 (D.N.D. 1987) (holding that borrowers were barred by la-
Circuit's opinion appears, on its face, to support availability of the laches defense, upon closer examination, the decision is not persuasive.

In theory, protecting defendants from unreasonable prejudicial delays, as the court did in *Centric*, is no more radical than protecting plaintiffs from the bar of the statutory period when claims are hidden through fraud — as the Supreme Court did in *Holmberg v. Armbrecht*. In both cases, the courts constructed judicial standards which altered the content of Congressionally created rights. It is not clear why the equities in favor of plaintiffs justify judicial intervention while defendants generally have not merited such protection. As a matter of practice, applying equitable principles to limit withdrawal liability actions is particularly appropriate because, as currently interpreted, the unique operation of the section 1451(f) statute of limitations, unequivocally favors plaintiffs. *Centric* at least leaves open some possibility that in a truly unique setting, laches will bar a claim for withdrawal liability.

As a final comment on *Centric* (a decision which appears to stand alone in barring a withdrawal liability claim for unreasonable delay prior to the exhaustion of Congress' mandated time-period), the case involved unique facts that may have carried significant weight in shaping the court's holding. The Centric Corporation received notice on April 7, 1983 that it owed the fund $372,775 for withdrawal liability. *Centric* at least leaves open some possibility that in a truly unique setting, laches will bar a claim for withdrawal liability.


169. *Id.* at 1516. It is not clear why Centric objected to the Act. A number of constitutional challenges to the MPPAA have been rejected by the courts. See *Terson Co. v. Bakery Drivers & Salesmen Local 194*, 739 F.2d 118, 121 (3d Cir. 1984). The *Terson* court held that (a) the withdrawal liability provisions are a rational means to achieve the valid objectives of the MPPAA; (b) the Act does not violate the Fifth Amendment takings clause; (c) the Act is not unconstitutionally vague in adopting "actuarial assumptions;" and (d) the Seventh Amendment right to a jury trial and procedural due process are not violated by the arbitration requirement). See also *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1277 (7th Cir. 1983) (holding that the withdrawal liability and mandatory arbitration provisions are not unconstitutionally vague and do not violate the due process clause, the takings clause, freedom of contract, or the right to a jury trial), cert. denied, 467 U.S. 1259 (1984); Republic Indus. v. Teamsters Joint Council No. 83 of Virginia
constitutionally valid, it did not incur any withdrawal liability because the alleged withdrawal qualified for a special exception.\textsuperscript{170} The constitutional challenge was dismissed on a motion for summary judgment in April 1985, while the applicability of the statutory exception remained subject to litigation.\textsuperscript{171} After Centric filed for bankruptcy in July 1985, the withdrawal liability litigation was terminated without prejudice.\textsuperscript{172} Rather than renew its claim in district court, the fund elected to pursue collection through a claim in bankruptcy court; Centric objected to the bankruptcy claim.\textsuperscript{173} At this juncture, the facts are complicated by the failure of the fund’s trustees to comply with local rules requiring them to request a hearing to answer Centric’s objection. Two years later, acting on Centric’s objection, the bankruptcy court resolved the claims of the creditors by distributing all of the corporation’s assets to secured creditors only.\textsuperscript{174}

At some unspecified point during these events, the fund’s trustees changed legal counsel. On January 29, 1988, the fund sought to reopen the proceedings to answer Centric’s objections to the earlier claim.\textsuperscript{175} Although the district court granted the trustees’ motion, the bankruptcy court denied the request. The bankruptcy court noted that the alleged creditor’s actions were the result of

\textsuperscript{170} Centric, 901 F.2d at 1516. Centric claimed exemption under the labor dispute exception. “Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because ... (2) an employer suspends contributions under the plan during a labor dispute involving its employees.” 29 U.S.C. § 1398(2). See Combs v. Adkins & Adkins Coal Co., 597 F. Supp. 122, 126 (D.D.C. 1984) (explaining that the exception “does not give an employer the unrestricted ability to permanently cease contributions to a pension plan,” but insulates employers from withdrawal liability for temporary interruptions caused by labor disputes).

\textsuperscript{171} Centric, 901 F.2d at 1516.

\textsuperscript{172} Id.

\textsuperscript{173} Id.

\textsuperscript{174} Id.

\textsuperscript{175} Id.
"admitted . . . simple oversight and neglect." Moreover, the court found that granting the motion would a) further delay and disrupt an already complicated and confusing case; b) deplete an estate that was already unable to satisfy unsecured creditors; and c) suggest that schedules and deadlines were not important in bankruptcy proceedings. 176

Given these facts, the unreasonableness of the delay and the prejudice to the creditors and the corporation that could have resulted from granting the fund's motion is clear. It is unlikely that such compelling evidence of the elements of laches will often be available. The peculiar facts of Centric may explain why the Tenth Circuit went to such great lengths to string together enough authority to support its decision. The court was apparently unwilling to scrap a final reorganization plan for the benefit of a pension plan that sat on its rights.

2. Equitable Estoppel

Equitable estoppel, like laches, can be traced to the English chancery courts. The principle of equitable estoppel holds that "a person who makes an unambiguous representation, by words, or conduct, or by silence, of an existing fact, and causes another party to act to his detriment in reliance on the representation will not be permitted subsequently to act inconsistently with that representation." 177 Lord Coke invoked equitable estoppel when "a man's own act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth." 178 Coke's description overstates the impact of estoppel; one may continue to tell the truth, even though barred from asserting a legal right or claim which would be unjust in light of previous deeds. 179 According to the Supreme Court,

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176. Id.
177. Harold G. Hanbury and Ronald H. Maudsly, Modern Equity 848 (Jill E. Martin ed., 13th ed. 1989) (footnotes omitted). The authors recount Robertson v. Minister of Pensions, 1 K.B. 227 (1949), to illustrate the doctrine. Id. at 849. In Robertson, a military officer relied on a statement by the War Office acknowledging that his disability resulted from military service and failed to get an independent medical opinion of his condition. The court held that because of the officer's reliance, the Minister of Pensions could not subsequently deny the officer's eligibility when the officer "was no longer in a position to supply the necessary evidence." Id.
178. George T. Bispham, The Principles of Equity 250 (Joseph D. McCoy ed., 11th ed. 1931) (noting in 1931 that the doctrine of equitable estoppel was one of "comparatively modern growth" that has "developed largely within recent years").
179. Id. at 250-51.
"[t]he vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."\(^{180}\)

American courts currently apply a four factor test to determine the propriety of invoking estoppel:

(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury.\(^{181}\)

Underpinning this four part test is the traditional rule of equity that "something more than simple silence must be shown to support an estoppel."\(^{182}\) Consistent with the focus of modern definitions of equitable estoppel on the conduct of parties involved,\(^{183}\) parties have satisfied this rule by showing that a silent party had a duty to speak.\(^{184}\) Giving "conduct" the broadest possible meaning extends courts' discretion to modify rigid rules so that the rules are most consistent with principles of justice and fair dealing.\(^{185}\)

The use of estoppel in pension-related cases has produced mixed results for employers. Defendants have asserted equitable estoppel as a defense in a number of withdrawal liability cases, frequently in tandem with a laches claim.\(^{186}\) Equitable estoppel is generally rejected by the courts in a paragraph or less, often the same paragraph in which the laches defense is dismissed. For example, in one case, a district court disposed of an estoppel argu-

\(^{180}\) Dickerson v. Colgrove, 100 U.S. 578, 580 (1879).

\(^{181}\) Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960), cert. denied, 364 U.S. 882 (1960).

\(^{182}\) Studiengesellschaft Kohle v. Dart Indus., 726 F.2d 724, 729 (Fed. Cir. 1984).

\(^{183}\) 3 S. SYMONS, POMEROY'S EQUITY JURISPRUDENCE § 802 at 180 (5th ed. 1941) ("Equitable estoppel in the modern sense arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything.").


\(^{185}\) Id.

\(^{186}\) See, e.g., Wyoming Laborers Health & Welfare Plan v. Morgen & Osooods Constr. Co., 850 F.2d 613, 624 (10th Cir. 1988) (rejecting this combined defense because it refused to infer an intentional delay merely from the plaintiff's failure to assert its rights).
ment with the remark that it was an "interesting' problem." The court of appeals found that response too cavalier and remanded the case for specific findings of fact as to the elements of estoppel.

Some courts, however, examined estoppel arguments made in pension cases more closely. At times, those courts were reluctant to apply principles of equity out of concern for the actuarial soundness of the plans. However, competing policies have been advanced to justify the opposite result. For example, one court, expressing the need to raise the ethical standards of pension fund administration, estopped a fund from denying a pension to an employee previously assured that he would qualify.

In another case, a court ordered a pension fund to credit an employee with the three years of service he needed to qualify for his pension because the fund's trustees failed to notify the employee that his employer missed three years of contributions the employer should have made on the employee's behalf. The court held that the pension's trustees had a fiduciary duty to "notify pensioners when their employer jeopardizes their eligibility." As a result of the

187. See Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund, 789 F.2d 691, 697 (9th Cir. 1986) (referring to the District Court order).
188. Id. The dispute centered on the date of Woodward's withdrawal. Woodward contended that it withdrew before the effective date of the MPPAA and, therefore, avoided withdrawal liability. Id. at 693. The Union argued that Woodward's withdrawal occurred after the effective date. Id. Furthermore, the Union asserted, even if Woodward withdrew before the effective date, Woodward was estopped from denying liability because it continued to make contributions to the fund after the date of its purported withdrawal and after the MPPAA took effect. Id. at 697. Regardless of the facts that may eventually have been found on remand, the case is noteworthy because the court refused to reject the estoppel argument out of hand.
189. Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976) (rejecting estoppel argument which was based on an assurance by a union official and fund trustee that plaintiff's husband was covered by the plan); see also Nachwalter v. Christie, 805 F.2d 956, 959-60 (11th Cir. 1986) (refusing to apply estoppel doctrine to enforce oral modifications of a benefit plan because, in part, of the effect enforcement of such modifications could have on funds available for other plan participants).
192. Id. at 600. ("'We do emphasize, however, that it is the duty of the trustees to verify on a regular basis the eligibility of those for whom contributions are being made."") (quoting Phillips v. Kennedy, 42 F.2d 52, 55 n.8 (8th Cir. 1976))); see also Aitken v. IP & GCU-Employer Retirement Fund, 604 F.2d 1261, 1270 (9th Cir. 1979) (finding that a fiduciary has a duty to notify plan participants of ineligibility within a
trustees' breach of fiduciary duty, the fund was estopped from denying the employee's eligibility.\footnote{Rosen, 637 F.2d at 600. See also Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1096 (9th Cir. 1985) (considering the employee's estoppel argument but finding that the facts did not satisfy the elements of the doctrine).}

For employers contesting claims for withdrawal liability, equitable estoppel is an inadequate defense. An employer attempting to assert equitable estoppel would argue that the fund's delay in demanding payment constituted silence upon which the employer could rely to conclude that such liability did not exist. The delay would be "more than simple silence" because the fund's trustees have a duty to speak, i.e. to demand payment.\footnote{See supra text accompanying notes 181-82.} ERISA imposes specific fiduciary duties on pension fund administrators and trustees. These duties require pension fiduciaries to act on behalf of the participants "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 . . . ."\footnote{29 U.S.C. § 1104(a)(1)(B). The fiduciary standards adopted by Congress were reportedly intended "to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breach of trust." 120 CONG. REC. 29,932 (1974) (comments of Sen. Williams, Chair of the Senate Committee on Labor and Public Welfare), reprinted in 1974 U.S.C.C.A.N. 5177, 5186. See supra text accompanying notes 94-120 for a discussion of caveats against using legislative history as an interpretive tool.}

Failure to promptly collect withdrawal liability is arguably a violation of the plan's fiduciary duty. Although Congress did not explicitly address this question, incorporation of the common law of trusts into ERISA\footnote{Central States Pension Fund v. Central Transport, Inc., 472 U.S. 559, 570 (1985).} implies this construction. Under the common law of trusts, trustees are expected to preserve and maintain trust assets and to "use reasonable diligence to discover the location of the trust property and take possession of it without unreasonable delay."\footnote{GEORGE G. BOGERT & GEORGE T. BOGERT, LAW OF TRUSTS AND TRUSTEES §§ 582-83 (2d ed. 1960).} Accordingly, under ERISA, a trustee must act "to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries."\footnote{Id. § 571.} At least one court has questioned a fund's prudence in failing to properly investigate potential liability.\footnote{See Diduck v. Kaszycki & Sons Contractors, Inc. 874 F.2d 912, 918 (2d Cir.
The fund's duty to act might also be established by an interesting argument which avoids the common law of trusts and focuses instead on the section 1106(a)(1)(B) proscription against trustees "causing the plan to engage in a transaction, if . . . such transaction constitutes a direct or indirect . . . extension of credit" to a contributing employer. Failure to collect a liability owed is an indirect extension of credit to the employer. Moreover, the credit is extended at terms highly favorable to the employer because a fund cannot collect interest on the withdrawal liability.

To comply with their fiduciary duties, fund trustees must act as a prudent person would act. Courts measure "prudence" according to an objective standard which requires that they determine "whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." Assuming the ignorant failure to collect withdrawal liability qualifies as a transaction, the employer trying to establish that a trustee breached its duty must still prove that under the circumstances, a prudent trustee would have acted differently.

The likelihood of a successful estoppel defense is significantly decreased by the difficulty of meeting this requirement.

As previously noted, a duty to speak can elevate mere silence

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1989) (holding that trustees breached fiduciary duty by failing to collect contributions owed the fund for non-union Polish workers on the Trump Tower project).
201. See Central Transport, 472 U.S. at 573 (reasoning that prohibition on use of plan assets by participating employers "create[s] a trustee responsibility for assuring full and prompt collection of contributions owed to the plan"); see also Katsaros v. Cody, 744 F.2d 270, 280 (2d Cir.) (finding fund trustees directly liable for failure to recover an abated loan of over $20,000 plus interest), cert. denied, 469 U.S. 1072 (1984).
202. See supra text accompanying note 195.
204. Plan beneficiaries might also sue fund trustees who fail to collect withdrawal liability. In such a case, the employer could be joined as a co-defendant and would be liable for the debt. See McMahon v. McDowell, 794 F.2d 100, 109-10 (3d Cir. 1986) (holding that beneficiaries may sue an employer after first demonstrating that trustees have breached their fiduciary duties) (citing Strable v. New Jersey Brewery Employees Welfare Trust Fund, 732 F.2d 325, 336-38 (3d Cir. 1984), cert. denied, 479 U.S. 971 (1986)); see also 4 AUSTIN W. SCOTT, THE LAW OF TRUSTS § 282.1 (3d ed. 1967). Scott explains that where a "trustee holds in trust a contract right against a third person and the trustee improperly refuses to bring an action to enforce the contract, the beneficiaries can maintain a suit . . . against the trustee joining the obligor as co-defendant." Id. Note, however, that a trustee may abandon a claim where a suit would be futile and there is no other method for enforcing the claim. Id.
to conduct sufficient to support estoppel.\(^\text{205}\) That fund trustees are charged with duties to act is indisputable. Whether or not employers can assert those duties to convert trustees' silence during the period a demand for payment is delayed into conduct is not clear.\(^\text{206}\) If it is the litigants' relationship that motivates courts to lower the conduct standard such that "mere silence can trigger estoppel," a plan's delay would remain mere silence as to the employer and estoppel grounded on the employer's reliance on that silence would fail.\(^\text{207}\)

The most recent developments in the law of equitable estoppel have involved the increasing availability of the defense against the government.\(^\text{208}\) Traditionally, courts rejected equitable estoppel when asserted against the government because of the "firmly embedded" principle of sovereign immunity.\(^\text{209}\) Only in cases of "affirmative misconduct," as contrasted with a mere failure to inform, has the government been subject to estoppel.\(^\text{210}\) American courts have taken the position that "[m]en must turn square corners when they deal with the government"\(^\text{211}\) and that courts must "observe the conditions defined by Congress for charging the public treasury."\(^\text{212}\)

At first blush, none of these limitations on estoppel is relevant to a claim for withdrawal liability brought by a private pension

\(^{205}\) See supra text accompanying notes 181-82.

\(^{206}\) Fund trustees' duties are owed to participants and beneficiaries, not contributors. See 29 U.S.C. § 1104(a).


\(^{208}\) See Note, Estoppel and the Affirmative Misconduct Requirement — Chien-Shih Wang v. Attorney General 21 CREIGHTON L. REV. 1149, 1151 (1986-87) (explaining that lower federal courts have begun to reject the traditional rule that the government is immune from this defense).

\(^{209}\) Id. at 1149 nn. 1, 7 & 8; see also David K. Thompson, Note, Equitable Estoppel of the Government, 79 COLUM. L. REV. 551 (1979).

\(^{210}\) See, e.g., Immigration and Naturalization Serv. v. Hibi, 414 U.S. 5 (1973) (holding that the government's failure to publicize immigration rights or to have an immigration officer stationed in the Phillipine Islands during World War II was not sufficient to estop the government from denying an alien's naturalization petition).

The Courts' reluctance to apply estoppel against the government is predicated on the concern that "Congress's legislative authority should not be readily subordinated to the action of a wayward or unknowledgeable administrative official." Schuster v. Commissioner, 312 F.2d 311, 317 (9th Cir. 1962).


plan against a private employer. However, to further insure against the unlikely possibility that an employer could assert a successful estoppel argument, the plan might advance a couple of theories. These two creative theories would tie the government to the case in such a way that an employer arguing equitable estoppel against the plan would be required to meet the higher standard of conduct applicable for an estoppel defense against the government.

First, the PBGC is authorized under section 1451 to intervene in any action under that section. If the PBGC were to intervene, its presence in the case arguably would force defendant employers to meet the higher affirmative conduct standard. Second, even if the PBGC does not formally intervene, the plaintiff could argue that the court should apply the higher, affirmative misconduct standard because the defendant seeks to thwart Congress' conditions for paying withdrawal liability. If successful, the defendant would expose the public treasury to increased liability because the government, through the PBGC, is a quasi-insurer of the pension plan.

III. A PROPOSAL FOR INTERPRETING SECTION 1451(f)

The failure of equitable defenses to provide any effective protection for employers necessitates a re-examination of section 1451(f). Courts must apply an alternative interpretation that balances the interests of pension plans, which Congress clearly intended to protect, and employers' interests which, out of fairness, also deserve consideration. While the Sandoz court considered a variety of interpretive issues before settling on the demand-default interpretation, the analysis was tainted by questionable judgments. Accepting the D.C. Circuit's assumptions about the importance of having employers pay withdrawal liability under any and all circumstances, the demand-default approach is unassailable. On its face, however, this assumption is of questionable merit. The fact that Congress applied a statute of limitations to a plan sponsor's actions to collect withdrawal liability supports the assumption that Congress also intended to place some limitation on a plan's right to payment. Between the positions argued by the parties in Sandoz, there is a compromise interpretation that is both consistent with the substantive concerns highlighted by the court and offers meaningful protection to employers.

213. 29 U.S.C. § 1451(g).
The statute of limitations should run from the earliest point following a partial or complete withdrawal at which it is practicable for the plan sponsor to give the employer notice of the amount of the withdrawal liability and to demand payment. The requirement that a plan seek to collect the withdrawal liability as soon as practicable after the employer’s withdrawal is already codified in the MPPAA.\(^{214}\) Presumably employee organizations, covered employees, plan participants and plan beneficiaries\(^{215}\) could bring a suit under section 1451 against the plan sponsor for failing to act as soon as practicable if those parties are adversely affected by the delay. In an action by plan participants or beneficiaries, the statute of limitations would presumably run from the “as soon as practicable” date because it is only from that date that the respective plan beneficiaries and other relevant parties would be adversely affected by the plan sponsor’s failure to demand payment.

To hold a plan sponsor to one standard vis à vis the class of plan beneficiaries and to a different standard with respect to the employer is obviously inconsistent. Disparate treatment of employers, plan sponsors and plan beneficiaries is contrary to the apparent relatedness of those parties. Section 1451 lists all of the parties together without distinguishing or elaborating unique status for any of them.\(^{216}\) Had Congress intended different presumptions for different parties, section 1451 was the place to record the differences.

Because plans are not permitted to seek interest on withdrawal payments, there is an incentive for funds to collect the liability quickly.\(^{217}\) In fact, failure to collect funds due and owing the pension plan as soon as practicable may be a violation of plan trustees’ fiduciary duty.\(^{218}\) Each day that a plan fails to collect

\(^{215}\) See supra the text accompanying note 6.
\(^{217}\) See Joyce v. Clyde Sandoz Masonry, 871 F.2d 1119, 1127 (D.C. Cir.), cert. denied, 490 U.S. 918 (1989) (discussing incentives to plan sponsor to act promptly, including the possibility that “interest accrued during the period from complete withdrawal to demand for payment” would be forfeited).
\(^{218}\) See, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 571 (1985) (trustees must “act to ensure that a plan receives all funds to which it is entitled . . . .”); see also Diduck v. Kaszicky & Sons Contractors, Inc., 874 F.2d 912, 919 (2d Cir. 1989) (noting that a longer limitations period applies under ERISA when a breach of fiduciary duty by a fund trustee involves fraud or concealment); Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Fund, 835 F.2d 881 (D.C. Cir. 1987) (discussing trustees’ duties under ERISA to the beneficiaries of a fund).
that money, the plan is adversely affected to a greater or lesser extent depending on the amount of liability owed by the withdrawn employer. The "as soon as practicable" interpretation, therefore, has the advantage of fulfilling the "adversely affected" language on which the Sandoz court relied.

The "as soon as practicable" approach also accounts for the various circumstances that would extend the length of time between the withdrawal event and the point at which the plan sponsor could determine the existence of the withdrawal. The employer should be as aware of the existence of the withdrawal event as the fund; therefore, the subsequent imposition of withdrawal liability should not take the employer by surprise. In contrast, the demand-default approach allows the fund to spring withdrawal liability on employers by seeking payments long after the employers assumed that their obligations to the plan had ceased. Finally, in the event of deception or concealment of the withdrawal, section 1451(f)(2) would extend the limitation period beyond the term of the section 1451(f)(1) "as soon as practicable" test.\textsuperscript{219}

This intermediate approach satisfies textual concerns by drawing guidance from the standards imposed by the statute. It is structurally consistent, giving effect to both sections 1451(f)(1) and 1451(f)(2). The proposed interpretation also does not unreasonably impede the apparent purpose of Congress to hold employers responsible for their own pension liabilities. The "as soon as practicable" test is superior to the demand-default approach because its treatment of employers is less extreme. Absent more decisive evidence of Congressional intent, courts should hesitate to assume a position as prejudicial to the rights of one litigant as the demand-default approach is to employers.

\textbf{IV. CONCLUSION}

Under the prevailing interpretation of the section 1451(f) statute of limitations, employers withdrawing from pension plans can suffer grossly inequitable results. Furthermore, the interpretation fails to provide any incentive for a pension plan sponsor to promptly collect the funds that it is owed from an employer. Because common law equity doctrines will not bar claims for withdrawal liability brought under the Act, employers have no remedies from unfair results when pension plans delay their actions for

\textsuperscript{219} See supra text accompanying notes 91-93.
payment.

Courts should formulate an interpretation of section 1451(f) that reflects the complexity of the liability calculation and sets a defined outside time limit on the period during which the fund can collect. The proposed "as soon as practicable" test meets this criteria. Moreover, incorporating this test into ERISA is mandated by a concern for employers who, as evidenced by their withdrawal, may be facing financial trouble and business downturns. Because the law already offers strong protections for pensions funds, there is no need for an indefinite limitation period.

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