Contributions to Collectively Bargained Pension Funds Regulated by Erisa: The Employer's Right to Arbitration of Delinquency Claims

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Disputes between management and unions over allegedly delinquent contributions to pension funds generally must be submitted to arbitration under the labor contract which established the pension plan. A third-party trustee of the pension fund also has standing under the labor contract and ERISA to enforce the contract's pension provisions. The author critically examines *Schneider Moving & Storage Company v. Robbins*, in which the U.S. Supreme Court held that the trustee could seek court interpretation of the particular contract's pension provisions without exhausting the contract's mandatory arbitration clause.

I. INTRODUCTION

The Employee Retirement Income Security Act of 1974 (ERISA) provides statutory protection for private pension rights and for suits in court to enforce those rights. An employer's obligation to maintain a pension plan is often created by a collective bargaining or other form of agreement which provides for binding arbitration of all disputes arising under the contract. Pursuant to that arrangement, a claim about contractual pension rights is an arbitrable dispute. Under national labor and arbitration policy, a party who has the right to arbitrate a contract claim may be barred from maintaining a preemptive court suit for judicial resolution of that
Suits to enforce pension obligations may allege violations of ERISA and violations of the contract which created the pension plan. When these mixed-claim suits are brought against an employer by employees (or by the union on their behalf), they often raise labor contract disputes subject to mandatory arbitration. In such cases the lower courts generally grant employer requests to dismiss or to stay the suit pending arbitration of the contractual claim. The lower courts are divided, however, when a pension plan trustee charges an employer with delinquent contributions, and sues under both ERISA and the pension provisions of a collective bargaining agreement which requires mandatory arbitration of all contractual disputes.

In *Schneider Moving & Storage Company v. Robbins*, the United States Supreme Court affirmed the lower court’s decision permitting a trustee to maintain a mixed-claim lawsuit for delinquent contributions. The Supreme Court’s holding rested on the parties’ lack of contractual intent to exhaust the grievance and arbitration provisions of their collective bargaining agreement as a prerequisite to a trustee’s suit to enforce the agreement’s pension provisions. This article does not challenge the Court’s ultimate holding, but is critical of several assumptions on which the holding is based. In view of that holding the Court refused to determine whether a trustee would be legally bound by a requirement to exhaust arbitration. This article criticizes the Court’s failure to decide that statutory question.

II. THE STATUTORY SCHEME: CONVERGENCE OF LABOR AND PENSION LEGISLATION

A. Collective Bargaining of Pension Plans

An employee benefit plan may provide for various benefits, such as medical, death, and retirement. These plans (“pension” plans) are a mutually advantageous method of compensating employees. For example, contributions may be deductible from employer gross income. Employees may recognize no taxable income until benefits are paid upon retirement or other termination of employment. Private pension plans, therefore, are often established independently by the employer. Because pension plans are a mandatory subject of bargaining, they are often included in bargaining agreements.

A labor contract which includes pension provisions probably
also includes arbitration provisions. Studies have shown that the majority of collective labor agreements contain provisions requiring binding arbitration of unsettled grievances involving disputes arising under the agreement. A "standard" (i.e. broad) grievance/arbitration provision encompasses all disputes between the employer and the union or an employee, involving application or interpretation of the agreement. The more common agreement provides that only the union may invoke the grievance/arbitration procedures. Many agreements also give the employer the right to invoke those procedures.

Only parties who have the right and duty to grieve and arbitrate their contractual claims are barred from suing directly in court on a dispute under a collective bargaining agreement. As stated above, often as a matter of industrial practice, only the union is contractually bound to invoke grievance and arbitration procedures. This should not suggest an employer propensity to disdain mandatory arbitration in favor of reserving the courts as a contract forum. A collective bargaining agreement is predominately a charter of employment rights secured by the employer's contractual promises to the employees' bargaining representative. As a result, the typical contract dispute is one initiated by a union which claims that the employer took action in violation of a right in the parties' labor contract. The employer typically responds that no such right is contained in a contract which explicitly or implicitly reserved management's prerogative to take the challenged action.

This means that under most collective bargaining agreements the union has both the right to submit most rejected contractual grievances to binding arbitration, and the duty to forego bringing a lawsuit based on those arbitrable claims. As a corollary, under most agreements the employer has the duty to participate in binding arbitration of union contract claims which are arbitrable, and the right

3. A 1979 study indicated that 96% of collective bargaining agreements contain some form of grievance/arbitration provision. Most of these also included no-strike (92%) and no-lockout (87%) provisions. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 15, 78-79 (1979).


6. The right to grievance arbitration as the exclusive procedure for resolving contract disputes generally bars employees from bringing suit under the collective bargaining agreement (Republic Steel Corp. v. Maddox, 379 U.S. 650 (1960)), unless the union arbitrarily refused to invoke grievance/arbitration procedures in violation of its duty of fair representation (Vaca v. Sipes, 386 U.S. 171 (1967)).
not to participate in a lawsuit based on those claims. An overview of national labor and pension legislation shows that these arbitration principles have equal application to labor-management conflicts involving contractual pension disputes.

B. National Labor Policy of Encouraging Compliance with Agreements to Arbitrate All Contractual Disputes, Including Pension Disputes

The inaccessibility, in most instances, of the courts to contract disputants in a collective bargaining relationship flows from entrenched national labor policies defined by the United States Supreme Court in the Lincoln Mills case in 1957 and in the Steelworkers Trilogy of cases in 1960.

1. Lincoln Mills

In Textile Workers Union v. Lincoln Mills, the Court construed a key provision of the Labor Management Relations Act (Taft-Hartley Act) of 1947 (LMRA) which amended the National Labor Relations Act (NLRA). Section 301 of the LMRA vests jurisdiction in federal courts over suits for violation of contracts between a union and an employer in industries affecting commerce. The Court held in Lincoln Mills that this section authorizes the federal courts to distill from the federal labor laws a body of federal labor-contract law, including arbitration law. Thus, the Court held that under federal labor laws and policy, a promise to arbitrate disputes in a labor contract is specifically enforceable. This construction of section 301 was necessary, the Court determined, to give effect to Congress' intention to provide for peaceful resolution of disputes arising during the term of the labor contract, "since plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."

7. When the agreement allows the employer as well to invoke grievance/arbitration procedures, the union/employer rights and duties described above apply to both parties, and thus the employer also is precluded from bringing a lawsuit on the arbitrable claim.
10. Id. at §§ 151-97.
11. Id. at § 185(a).
12. The Court subsequently held that although section 301 left the state courts with concurrent jurisdiction to enforce labor contracts, they must apply principles of federal law developed under the Lincoln Mills case. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Local 174 Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962).
With this exchange, it is assumed that the union will be encouraged to relinquish the strike if it knows in advance that employers can be held to their promise to resolve contract disputes through arbitration. An employer's promise to arbitrate labor contract claims is obviously valuable to both employee and public interests. Accordingly, a collective bargaining agreement containing that promise but lacking a no-strike provision is deemed to include an implied union/employee obligation not to strike if the claim is arbitrable. The lockout is the counterpart of the strike. Therefore, a contractual commitment to make arbitration the final step in the grievance procedure may also prohibit an employer from locking out over arbitrable disputes.

2. The Steelworkers Trilogy

In the Steelworkers Trilogy, the Supreme Court elevated the role of labor arbitration. The Court announced a national policy of judicial self-restraint when the parties have mutually selected an arbitrator to resolve their contractual disputes. The three decisions established ground rules to guide courts which are called upon to enforce a mandatory arbitration commitment in a labor contract, or to enforce a labor arbitration award.

The decisions held that the declaration in section 203(d) of the LMRA is evidence of congressional intent to create a national policy favoring arbitration. That section states that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . ." A court called upon to compel arbitration should eschew any temptation, in the guise of pretermitting frivolous reliance on the contract, to decide the substantive merit of the contractual grievance. The court's province is to determine whether, under the parties' contract, there is a mandatory duty to arbitrate the particular claim. If the duty exists and the claim is arbitrable, the merit of the claim is for the arbitrator to decide. For, "it was his

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judgment and all that it connotes that was bargained for.”

Secondly, section 301 and national labor policy require that labor contracts be construed in a manner most hospitable to arbitration. The Supreme Court held that a standard and mandatory arbitration clause in a collective bargaining agreement creates a presumption of arbitrability. In labor arbitration “[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.” More than an ordinary contract, a labor contract is a working arrangement between labor and management encompassing implicit understandings and plant practices. It is this feature of a labor contract that informs the parties’ selection of a labor arbitrator possessing specialized knowledge and experience which “[t]he ablest judge cannot be expected to bring. . . .”

Finally, the Court held that the national labor policy, established by Congress in section 301 and other Taft-Hartley amendments, favors judicial deference to the determinations of an arbitrator selected by the parties. The court should not undertake a merits review of the award to determine its correctness. Judicial inquiry should be limited to a determination of whether the arbitrator exceeded the authority granted by the parties’ agreement. Under this constraint the court should sustain the award as long as “it draws its essence from the collective bargaining agreement.”

3. The Taft-Hartley Regulation of Pensions

The Taft-Hartley amendments include a provision which imposes some regulation on pension plans resulting from collective bargaining. The provision does not cover a bargained plan which provides for unilateral administration by employer representatives or an independent trustee. These plans generally impose no obligations on the union beyond those flowing from its duties as the employees’ exclusive bargaining representative, such as the duty of fair representation of all unit employees. Rather, section 302(c)(5) of the

20. Id. at 582.
LMRA, addresses pension plans which are jointly administered by the employer and the union. These "Taft-Hartley" plans provide for employer and union representation on a board of trustees, obligating the union trustees to act primarily in the interests of the plan. After enactment of section 302(c)(5), however, the parties remain free to negotiate a unilaterally administered plan outside of that section's constraints. Either form of plan may be contained within the parties' collective bargaining agreement, or incorporated within the agreement by reference to a plan embodied in separate documents.

Thus, a labor agreement may directly, or indirectly by incorporation, provide for binding grievance arbitration of disputes over application and interpretation of the agreement, including its pension plan provisions. Where the parties have agreed on a Taft-Hartley plan, however, section 302(c)(5) imposes a unique form of statutory arbitration. That section requires arbitration by an impartial umpire of any plan administration decision on which the union-employer trustees are deadlocked.

4. Pension Dispute Resolution Prior to Enactment of ERISA

Prior to enactment of ERISA, the courts generally applied Steelworkers Trilogy to encourage Taft-Hartley deadlock arbitration and deference to awards of the impartial umpires. ERISA's elaborate statutory requirements, described below, have put in question the propriety of enforcing deadlock arbitration in all circumstances. One reason for this is the Department of Labor's (DOL's) regulations limiting the use of deadlock arbitration. The DOL's position is that arbitrators who resolve some categories of pension plan disputes are fiduciaries, in certain circumstances, for the purposes of ERISA. The extent to which ERISA limits deadlock arbitration has not been definitively resolved.

23. These jointly administered plans involve monies paid to the union as trustee and, accordingly, were statutorily created to exempt union-management plan administration from the statutory proscription of employer payments to union officials. (LMRA § 302(a)-(b), 29 U.S.C. § 186(a)-(b) (1982)). See Arroyo v. U.S., 359 U.S. 419, 425-26 (1959). Only pension plans satisfying the requirements of section 302(c)(5) may benefit from this exemption. Parties not desiring a jointly administered pension plan may still negotiate a plan to be unilaterally administered.
24. See supra note 23.
The focus here is on ERISA's impact on grievance arbitration to resolve disputes under collectively bargained pension plans. As stated above, a bargained plan may be either a jointly administered Taft-Hartley plan or a unilaterally administered plan. In either case the bargaining agreement may provide for mandatory grievance arbitration of pension disputes arising under the agreement. Before passage of ERISA, arbitrators and the courts treated arbitrable pension disputes like other controversies arising under collective bargaining agreements. After an "examination of pre-ERISA judicial and arbitration decisions on pension dispute arbitrability," one commentator concluded that "[a]ll disputes . . . (at least in the years following the Steelworkers Trilogy decisions) were subject to binding arbitration unless such disputes were found to be explicitly exempt from contractual arbitration coverage." Even where the parties' agreement did not appear to contemplate grievance arbitration of pension disputes, "[a]rbitrability was generally upheld if the pension claim was found to affect a contractually based guarantee or to derive from a pension plan mentioned in the contract." The pension disputes arbitrated could involve matters of funding, vesting, eligibility, payments of benefits, or investment of plan assets. These disputes could also involve related matters pertaining to the administration of a plan or disposition of a plan's assets.

Accordingly, prior to ERISA the federal and state courts generally dismissed or stayed employee or union contractual pension suits if the complainant had not exhausted the contract's mandatory grievance arbitration provisions, or if a final award had been rendered. The contract was the basis of the pension right claimed. It was, therefore, "proper to require compliance with the predetermined grievance provisions for settlement of disputes arising under the contract and to hold the complaining party bound by the remedy that was negotiated under the contract."

27. Surviving ERISA, supra note 25, at 276-77.
28. Id. at 277-78.
29. Id.
31. Id. at 220. Of course, where the collective bargaining agreement does not mandate arbitration of disputes arising from the agreement's pension provisions, the union may bring a contract suit under section 301 to enforce those provisions. In some circumstances an employee as well may sue on the contract under that section, since that section authorizes employee suits when a collective bargaining agreement creates substantive rights directly enforceable by individual employees. Smith v. Evening News Ass'n, 371 U.S. 195 (1962).
It was settled law that a third-party trustee of a collectively-bargained pension plan may have standing to bring suit against an employer to enforce the labor contract's pension provisions as a non-signatory third party beneficiary. Far from settled, however, was the seldom raised question of whether a direct section 301 trustee's suit was barred when the contract called for mandatory arbitration of all contractual disputes. Some lower courts held that the trustee was not bound by the arbitration clause absent an indication in the contract that the clause was applicable to the trustee as well. A contrary view held that an arbitration clause in a collective bargaining agreement applies to a third party beneficiary, such as a pension plan trustee, unless the agreement indicates an intent to exclude the third party from the duty to arbitrate.

C. ERISA's Complementary Arbitration Policies

The various pension matters which could be the subject of private contract, and hence trigger arbitrable contract disputes, also became matters of statutory requirement in 1974, under ERISA. That statute provides minimum standards for reporting and disclosure, participation and vesting, funding, and fiduciary responsibility in developing and operating pension plans.

1. Federal Court Jurisdiction Under ERISA

Even more pertinent here, ERISA section 502 confers jurisdiction in the federal courts to enforce both the standards required by ERISA and the terms of pension plans covered by ERISA, in-


35. Id. at §§ 201-11, 29 U.S.C. §§ 1051-61.

36. Id. at §§ 301-06, 29 U.S.C. §§ 1081-86.

37. Id. at §§ 401-14, 29 U.S.C. §§ 1101-14.

38. Id. at § 502(e)(1), 29 U.S.C. § 1132(e)(1).
cluding collectively bargained plans. Civil actions under section 502 may be brought in federal court by either the Secretary of Labor, a participant (employee covered by the plan), a beneficiary (person designated to receive a plan benefit), a fiduciary (e.g., an administrator, officer, trustee, or custodian of the plan), or by a plan as an entity. Moreover, participants and beneficiaries may bring a contract suit in federal or state court to enforce their rights under the terms of a plan. However, if a participant or beneficiary asserts both a statutory right to pension benefits under ERISA and a right to benefits under a collective bargaining agreement, section 502 requires the suit be brought in federal court.

Several features of section 502 are noteworthy. The lower courts have held that a union is not authorized to bring a section 502 suit in its own interest to enforce employee pension rights under ERISA or a contractual pension plan. However, when the plan is part of a collective bargaining agreement, the union still may sue the employer under LMRA section 301 in federal or state court to enforce the agreement’s pension provision. Nor does ERISA section 502 affect the section 301 authorization of employee contract suits in federal or state court when the collective bargaining agreement creates substantive pension rights directly enforceable by individual employees. Hence, as to collectively-bargained pension plans, section 301 and section 502 overlap with regard to suits by employees to enforce pension rights under a labor contract. Likewise, section 502 does not affect the standing which section 301 accords trustees of bargained pension plans to sue an employer for enforcement of contractual pension rights. Thus, sections 301 and 502 also overlap here, since the latter provides jurisdiction for a plan fiduciary’s suit to enforce the pension provisions of a labor agreement.

39. Id. at § 502(a)(1)(B), (e), 29 U.S.C. § 1132(a)(1)(B), (e).
41. See supra note 31.
42. Id.
44. See supra note 32 and accompanying text.
In light of the above, ERISA section 502 authorizes various parties to invoke the courts' jurisdiction to enforce pension plan terms and to obtain relief for denial of benefits or breach of fiduciary responsibility. ERISA broadly defines a fiduciary as any person who exercises discretionary authority or control of the management, administration, or assets of a pension plan. The standards for fiduciary responsibility are multi-faceted. They include administering the plan "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provision of [ERISA]." Under section 410(a), any delegation of a fiduciary responsibility is expressly voided. As a result of these provisions, claims concerning plan administration, possibly including even benefit denial claims which previously were only contractual claims, may now be considered a breach of fiduciary responsibility. Arguably, use of an arbitrator to resolve such claims is inconsistent with section 410(a), particularly in view of ERISA's declared policy "to protect . . . the interests of participants . . . by providing for appropriate remedies, sanctions, and ready access to the federal courts."

2. Judicial Deference to Pension Arbitration

A benefit denial suit filed by an employee or union may invoke ERISA, but clearly must be based on the contractual terms of a pension plan which requires exhaustion of the plan's internal procedures, including arbitration. Since ERISA, the courts generally have dismissed such suits pursuant to the national labor policy requiring exhaustion of contractual arbitral remedies. As one court has stated:

Congressional intent as to what procedure must be followed by a claimant before he may maintain a suit in a court of law was made evident . . . [in the legislative history] . . . where it is stated that all suits by the employee to recover benefits under ERISA must follow the same procedures as actions brought under [section] 301 . . . of the [LMRA].

According to Republic Steel Corp. v. Maddox, before an employee can assert his rights under LMRA [section] 301 in court, he must follow the administrative procedures outlined in the contract. Thus, a claimant under ERISA must exhaust his administrative procedures, as is required under LMRA [section]

47. Id. at § 410(a), 29 U.S.C. §§ 1109, 1110(a).
48. Id. at § 2(b), 29 U.S.C. § 1001(b).
The preservation of this national labor policy becomes more involved when a suit is based both on denial of a right under the contract's pension provisions, and on a fiduciary breach of a right protected under ERISA. In some instances, the courts have examined such "mixed-claims" to determine whether they are based primarily on a violation of fiduciary duty, or a violation of the contract. If the latter, the court may dismiss the suit for failure to exhaust grievance arbitration procedures. On the other hand, where both arbitrable contract pension claims and violation of ERISA rights are alleged, some courts have stayed the suit involving statutory issues until arbitration of the contract benefit claim is completed.

As the above suggests, the course which the courts will follow is not sharply defined. After ERISA's enactment, the early commentary generally urged that pension benefit claims disputes remained subject to mandatory arbitration under collective bargaining agreements, with statutory pension issues reserved to the courts. The rejection of a provision in the Senate version of ERISA was, in effect, a congressional reaffirmance of contractually mandated arbitration of pension claims. The Senate version would have required pension plans to provide for optional (but not mandatory) arbitration procedures for benefit claims. Omission of this provision ensured that judicial deference to arbitration would not be precluded. As indicated above, the Conference Report voiced a congressional intent to adhere to the national labor policy of exhausting mandatory grievance arbitration as developed in litigation under LMRA section 301.

Six years after ERISA was passed, one commentator concluded


50. Challenger v. Local 1, Bridge, Structural and Ornamental Ironworkers, 619 F.2d 645 (7th Cir. 1980); Delaney, 749 F.2d at 19.


52. See generally Donaldson, supra note 30.


54. See supra note 49.
there was a growing judicial recognition that ERISA preserved the
rule of arbitrating pension benefit claims when mandated by either a
collective bargaining contract or the parties’ supplemental plan
agreement, while reserving statutory pension issues to the courts.\textsuperscript{56} A
more recent commentator concluded that:

[A] review of cases is clearly not dispositive of how the courts
will treat pension arbitrability issues involving benefit or fiduci-
ary claims. . . . [T]he net effect at present appears to be that
the court will continue to defer to arbitration all pension issues
except those involving independent statutory claims of breach of
fiduciary responsibility. . . . \textsuperscript{56}

A description of the statutory regime bearing on arbitration of
pension plan disputes would not be complete without inclusion of the
amendments to ERISA enacted in the Multiemployer Pension Plan
Amendments Act of 1980 (MPPAA).\textsuperscript{57} The amendments address
pension plans which are funded by more than one employer pursu-
ant to a collective bargaining agreement. MPPAA was designed, in
part, to financially strengthen multiemployer pension plans by dis-
couraging employers from withdrawing and leaving a plan with
unfunded liabilities. Where withdrawal nevertheless occurs, MP-
PAA requires payments generally related to the liability left behind
by imposing, where appropriate, a withdrawal liability calculated by
the plan’s trustees.

If the withdrawal liability is disputed and cannot be settled, the
dispute must be arbitrated.\textsuperscript{58} In that proceeding, the arbitrator must
accord certain rebuttable presumptions to the trustees’ calculations.
The arbitrator’s award may be challenged in a federal district court,
but its factual findings and conclusions are presumed correct unless
shown erroneous by a clear preponderance of the evidence.\textsuperscript{58} This is
a narrow judicial review. It appears, however, to permit greater judi-
cial scrutiny than may be given conventional labor arbitration
awards under the Steelworkers Trilogy, where awards do not reflect
such statutory tipping of the arbitrator’s scales. Nevertheless, the

\textsuperscript{55. Surviving ERISA, supra note 25, at 296-326.}
\textsuperscript{56. Gilman & Gilman, The Arbitration of Pension Disputes Involving ERISA and
MPPAA 184, 188, Proceedings of the Twelfth Annual Conference, Society of Professionals in
Dispute Resolution (SPIDR), San Francisco, California, 1984. See also Civil Actions Under
ERISA Section 502(a): When Should Courts Require that Claimants Exhaust Arbitral or
Intrafund Remedies?, 71 CORNELL L. REV. 952 (1986).}
\textsuperscript{57. Multiemployer Pension Plan Amendment Act of 1980 § 4221, Pub. L. No. 96-364,
\textsuperscript{58. 29 U.S.C. § 1401(a)(1) (1982).}
\textsuperscript{59. Id. at § 1401(a)(3), (b)(2), (c).}
constitutionality of the limited judicial review of withdrawal liability awards provided by MPPAA is an unresolved issue. Moreover, when a withdrawal liability dispute is anchored in statutory issues, some lower courts have held that arbitration is not necessary prior to initiation of a MPPAA lawsuit, because any legal issues resolved by an arbitrator would be reviewed *de novo* if challenged.

The above issues raised by MPPAA go beyond the scope of this article. It will be suggested, however, that MPPAA's inclusion of statutory arbitration of withdrawal liability evidences a congressional approval of arbitration of pension plan disputes ignored by the Supreme Court in *Schneider*.

III. POST-ERISA SUITS BY TRUSTEES AGAINST AN EMPLOYER FOR DELINQUENT CONTRIBUTIONS TO A PENSION FUND

A. Conflicting Views Whether Exhaustion of Compulsory Arbitration Provisions Is Required

Apart from claims that pension benefits are being improperly denied, another common claim is that an employer has defaulted on a contractual obligation to contribute to a pension fund. Delinquent contributions may cause underfunding and threaten the integrity of the trust fund established by a pension plan. When the delinquency occurs in a collectively-bargained pension plan, contractual remedies against the employer under LMRA section 301 are available to the employees and the union. Contractual remedies under section 301 are available to a third-party trustee as well. ERISA added to the trustee's collection rights by providing in section 502 for trustee suits to enforce the terms of a plan. Moreover, ERISA's broad fiduciary standards obligate the independent trustee to monitor contributions and to seek collection of them.

This trustee responsibility is critical primarily when a plan is a multiemployer plan funded by many companies. Typically, an employer becomes a contributor through a collective bargaining contract which refers to and incorporates the trust agreements under which the multiemployer plan operates. A claim that the employer is delin-

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62. *See infra* note 32.
quent in payments is, therefore, usually a dispute arising under the labor contract. When the contract provides for binding arbitration of all contractual disputes, the question is whether or not arbitration is a prerequisite to suing the employer for collection of alleged delinquent contributions on behalf of the plan. ERISA has not altered the duty of employees and unions to exhaust those arbitral remedies.\(^6\)

When the trustee brings a collection suit, however, the question of exhausting arbitration procedures takes on different dimensions. Often the trust agreements expressly authorize the trustee to initiate appropriate legal action for collection. Moreover, prior to ERISA the few lower court decisions had taken conflicting views on whether a nonsignatory trustee to the collective bargaining agreement was, even though a third-party beneficiary, bound by the agreement's mandatory arbitration provisions.\(^6\) The enactment of MPPAA added another dimension by specifying that an "employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of the collectively bargained agreement shall . . . make such contributions. . . ."\(^6\) Arguably, this makes a trustee's suit for delinquent contributions both a statutory and a contract claim.

The federal appellate courts, after enactment of ERISA, did not definitively examine the question of arbitration in trustee suits for delinquent contributions until four years prior to the Supreme Court's decision in Schneider. In the respective suits against employers by trustees seeking collection and other relief, the federal courts' jurisdiction was invoked under LMRA section 301 and ERISA section 502. In each suit, the employers' defenses were essentially the same. They argued that the alleged delinquencies reflected union-management disputes as to the meaning of the collective bargaining agreement concerning, for example, the plan's coverage of some employee groups. The merit of the trustees' collection claims thus turned on an interpretation of the contract, which the employers asserted is a matter for the arbitrator and not the court, under national labor policy. The employers' position was first accepted by the Seventh Circuit, and the Fourth Circuit followed that lead.\(^6\)

The employers' position was initially also accepted by three-

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64. See supra notes 49-56 and accompanying text.
65. See supra notes 33 and 45.
judge panels of the Eighth Circuit. Then, in a change of views, the Eighth Circuit rejected the employers' position in a divided *en banc* decision by the entire court in the *Schneider* case which the Supreme Court affirmed on appeal.68 The Eighth Circuit in *Schneider* held that a trustee could directly sue the employer under ERISA section 502 for delinquent contributions, even though the delinquency depended on interpretation of a collective bargaining agreement which required the parties to arbitrate contractual disputes. That view was followed by the Fifth and, later, the Third Circuits.69

The Supreme Court's determination to take review in *Schneider* presumably would resolve a statutory question to which the lower courts had given conflicting answers. Lower court decisions had attempted to reconcile the terms and spirit of ERISA with a strong national labor policy of faithful adherence to union-management agreements in arbitrating disputes over the interpretation and application of collective bargaining agreements. The attempted reconciliation included the lower courts' examination of principles established by the Supreme Court in analogous contexts. In *Alexander v. Gardner-Denver* and other cases,70 the Court has rejected employer assertions that judicial resolution of an employee's statutory claim improperly requires the court to resolve a labor contract dis-

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70. Alexander v. Gardner-Denver, 415 U.S. 36 (1974). The referenced Supreme Court cases involved employee claims against employers grounded both in collective bargaining contracts and in individual rights conferred by statutory or constitutional provisions. Thus, in *Gardner-Denver*, the Court held that a union/employee obligation to arbitrate a claim that the employer violated an anti-discrimination provision in the parties' labor agreement did not bar the employee from bringing suit under Title VII of the Civil Rights Act of 1964. Indeed, the actual holding was that the employee could go to court under Title VII for a *de novo* determination of his discrimination claim, even though contractual arbitration had been conducted and had resulted in an adverse award which dismissed the claim. The Court later held that, under *Gardner-Denver*, the same was true of an employee wage claim filed in court and based on the Fair Labor Standards Act, even though the claim was subject to mandatory arbitration under the wage provisions of the parties' labor contract (*Barrentine v. Arkansas Freight Systems*, 450 U.S. 728 (1981)); and, also true of an employee claim in court that his discharge by a public employer abridged his constitutional rights of free speech and association in violation of 42 U.S.C. § 1983, even though the issue of just cause for discharge was subject to mandatory arbitration under the parties' labor contract (*McDonald v. City of West Branch Michigan*, 104 S. Ct. 1799 (1984)). The lower courts have applied or not applied *Gardner-Denver* in various circumstances where there was an overlap of arbitrable contractual rights and individual statutory rights. *See Fowler, Arbitration, the Trilogy, and Individual Rights: Development Since Alexander v. Gardner-Denver*, 36 LAa. L.J. 173, 180-81 (1985); Scheinholtz and Miscimarra, *supra* note 26, at 62-63.
pute which the employer is contractually entitled to resolve in grievance arbitration.

In *Schneider*, for example, the Eighth Circuit's holding rested in part on *Gardner-Denver* and related Supreme Court decisions which, said the Eighth Circuit, "reemphasized that certain statutory labor rights . . . are not subject to waiver under a grievance-arbitration clause." Moreover, the Eighth Circuit found support for its holding in the Supreme Court decision in *Lewis v. Benedict Coal Corp.* In *Lewis* the trustee sued under the collective bargaining agreement for delinquent contributions. The employer's defense relied on the union's own breach of the agreement. The employer asserted that under established principles of contract law, a third-party beneficiary (the trustee) was subject to the defenses which the promisor (the employer) could invoke if sued by the promisee (the union). The Eighth Circuit noted that the Supreme Court rejected that argument in *Lewis* on the ground that a collective bargaining agreement is not a typical third-party beneficiary contract. By contrast, *Lewis* was distinguished by federal courts which held that the trustee was subject to collectively bargained arbitration obligations. In the view of those courts, *Lewis* held only that a trustee is not subject to the employer's substantive defenses against the union when those defenses defeat the rights of beneficiaries. "Requiring arbitration . . . will not subvert any rights. It will merely change the initial forum to the preferred forum as a matter of national labor policy and the selected forum by the terms of the agreement itself."

There was, therefore, a well-defined conflict among the federal courts which the Supreme Court in *Schneider* was called upon to resolve.

71. 700 F.2d at 441 (citing *Gardner-Denver* and *Barrentine*); see supra note 70.


73. 700 F.2d at 436-37, 439. The Eighth Circuit also relied on *NLRB v. Amax Coal Co.* 453 U.S. 322 (1981), where the union called a strike to force the employer to continue contributing to a multiemployer trust fund and to abandon a decision to establish a plan managed by trustees selected by the employer. The employer charged that this was an unfair labor practice by the union on the theory that trustees selected by an employer are collective bargaining representatives and the union was improperly coercing the employer in its selection of those representatives. The Supreme Court rejected this theory, emphasizing the independence of a trustee and a trustee's primary obligation to plan beneficiaries, and the separateness of a pension fund from both the union and the employer.

B. Schneider and the Unresolved Conflict

The Supreme Court held that exhaustion of the contracting parties’ arbitration procedures is not a prerequisite to a trustee suit for delinquent contributions. In contrast to the lower courts, the Supreme Court in Schneider gave scant consideration to reconciling ERISA and national labor and arbitration policies. Furthermore, the Court ignored the parties’ conflicting arguments over the applicability of the Court’s prior decisions, in Gardner-Denver and its progeny, which permit judicial resolution of a statutory claim even though the underlying dispute is also an arbitrable contractual claim. Instead, the Court made an analysis which is both truncated and simplistic.

Justice Powell’s unanimous opinion curtailed the Court’s inquiry at the outset by construing the Eighth Circuit’s decision as based exclusively on “a narrow question of contract interpretation.” According to Justice Powell:

The en banc court considered only whether the parties to the collective bargaining agreements and the trust agreements intended to require the arbitration of disputes between the trustees and the employer before the trustees could exercise their contractual right to sue in federal court. Because of its resolution, the Court of Appeals did not reach respondent’s argument that requiring the trustees to submit their disputes with the employer to the applicable arbitration procedure was prohibited as a matter of law [i.e., national pension policy]. If we agree with the Court of Appeals that the parties did not provide for such an arrangement, we also need not address that argument.

The Supreme Court’s analysis of the parties’ trust and collective bargaining agreements led to the conclusion that the parties did not intend to make the exhaustion of mandatory arbitration provisions a condition of the trustee’s contractual right to seek judicial enforcement of the pension provisions. Because of this conclusion, the Court held that it had “no occasion to determine . . . [the] legality” of an exhaustion requirement.

The Court’s interpretation of the parties’ agreement was probably inevitable in light of a threshold determination by Justice Powell

75. See supra note 70.
76. 104 S. Ct. at 1847.
77. Id.
78. Id. at 1847, 1851 n.23.
which dealt the employers' case a crippling blow. Justice Powell held that the presumption of arbitrability established by the *Steel-workers Trilogy* is not applicable to disputes between the employer and pension fund trustees "even if those disputes raise questions of interpretation under the collective bargaining agreements." The succinct predicate given for this holding is that the function of labor arbitration is to displace strikes and lockouts. Since trustees have no recourse to these weapons, "requiring them to arbitrate disputes with the employer would promote labor peace only indirectly, if at all."

Once the Court held that the labor presumption of arbitrability did not apply, it took only three short steps to find that the labor agreements had "no intent . . . to require arbitration of disputes between the trustees and the employers."

First, the pension agreements specified that the trustees had authority to initiate any legal proceeding to collect delinquent contributions. This authority was unconditional. Moreover, the Court noted, the grievance/ arbitration provisions in the parties' agreements referred only to disputes between signatories, i.e., between the employers and the union and employees.

Secondly, the Court reasoned, this intent to limit access to the arbitral process to signatories is not overridden by the third-party beneficiary rule. That rule would subject the trustees to the exhaustion-of-arbitration defense to the same extent that the union would be subject to the defense, had it gone to court alleging delinquent contributions. The rule is not applicable if it would defeat the intent of the contracting parties, and, the Court added, under *Lewis* a "mechanical application of the rule" is improper with regard to "the trust beneficiaries of collective bargaining agreement."

Thirdly, in the absence of provisions authorizing the trustee to invoke the arbitration process, the trustee may have to rely on the union to arbitrate the pension dispute with the employer. That, the Court stated, was implausible. The trustee and a reluctant union may have conflicting views on the pension agreement provisions.

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79. *Id.* at 1849.
80. *Id.*
81. *Id.*
82. *Id.* at 1849 n.11. Justice Powell's emphasis on limiting application of an arbitration clause to contract signatories fails to mention the Court's past holdings where such clauses have been applied to nonsignatories. See *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) (successor corporation); *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965) (individual employee). See also *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923, 939 (3d Cir. 1985).
which the trustee seeks to enforce. The Court rejected the argument that the union would be constrained by its duty of fair representation. That duty is owed to employees in the bargaining unit. There "is simply no evidence that the Union owes any statutory or contractual duty of fair representation to the trustees." 83

The impact of Schneider seems fairly predictable. It impliedly but tentatively establishes that a third-party trustee of a collectively-bargained pension plan may be bound by the parties' arbitration agreement when that agreement expressly applies to the trustee. Otherwise, Schneider definitively establishes the trustee is not bound by the arbitration requirement. In that event, the trustee may seek judicial interpretation and direct enforcement of the parties' pension plan agreement. A judicial remedy, however, is not available to the parties, because they are contractually committed to having an arbitrator interpret the pension agreement.

The Court stated that there was no need in Schneider to determine the legality of an arbitration provision which expressly covers a contractual pension issue raised by a trustee. That statement necessitates treating as tentative, and therefore as dictum, the Court's implied holding that the provision is binding on the trustee. The uncertainty of enforceability which Schneider creates is surely unsettling to employers who have successfully negotiated arbitration provisions covering pension claims by a trustee, 84 or who contemplate negotiating that arbitration requirement.

Even more unsettling is the starting premise from which the Court examined a pension trustee's obligation to arbitrate. In effect, the Court presumed that the parties do not intend to utilize arbitration for pension issues raised by a trustee, except to the extent their agreements specifically call for arbitration of those issues. This presumption of nonarbitrability is based on the Court's assumption that trustee/employer disputes do not trigger union/employer confrontation. This assumption, even if sound, is a dubious ground for abandoning the labor presumption of arbitrability in order to defeat the employer's contractual right to arbitrate the interpretation of pension provisions. As one commentary stated:

[R]easoning that excludes pension disputes from issues which are presumptively arbitrable simply because disputes between trustees and employers cannot lead to strikes, lockouts, or

83. 104 S. Ct. at 1851.
other excesses of economic power is disturbing.

What this reasoning forebodes for the arbitrability of all pension issues . . . is unclear. At a minimum, the decision raises serious questions about the viability of pension arbitration, and perhaps by extension arbitration in general, under conditions which the Court sees as not potentially contributing to labor strife.85

This criticism of the Court’s decision in Schneider is both cogent and justified.

IV. SCHNEIDER: ANATOMY OF A DECISION NOT TO DECIDE

A. Judicial Ducking of Issues

The opinion in Schneider narrowed its inquiry by making untenable characterizations of the lower court’s holding. The Eighth Circuit did not consider “only” whether the parties intended to include trustee/employer pension disputes within the duty to arbitrate matters of contract interpretation. Nor did the Eighth Circuit merely “consult . . . the ‘national pension policy’ to ascertain the parties’ contractual intent.”86 Justice Powell based these characterizations on a statement made at the close of the Eighth Circuit’s ten-page majority opinion. The statement that it would be “quite a different case” if the parties’ agreements required arbitration of questions of contract interpretation before a trustee could sue, was in a three paragraph postscript to the opinion.87 That postscript merely acknowledged that the court would have to reconcile explicit contractual intent with national pension policy if the parties “provided in express words that trustee claims could not come to court before questions of contract interpretation had been settled by arbitration.”88 The absence of that commitment was determined merely by quoting provisions from the parties’ agreements without any mention of national pension policy or an analysis of contractual intent based on that policy.89

Without regard to the terms and intent of the parties’ agreements, the Eighth Circuit majority opinion had already made its dispositive holding on the basis of a “national pension policy” which requires that “trustees are given a direct right of access of the

85. Gilman & Gilman, supra note 56, at 192.
86. 104 S. Ct. at 1847 n.5.
87. Id. at 1847 (quoting Schneider, 700 F.2d at 442).
88. Schneider, 700 F.2d at 442.
89. Id. at 442-43.
That holding included a re-examination of previous decisions in which the court, following the lead of the Seventh Circuit, held in similar circumstances that under national pension policy a trustee was required to exhaust mandatory arbitration procedures. The Eighth Circuit majority decided that the court's previous decisions were not correctly decided and overruled them. Obviously the court was not reaching back to determine that in similar circumstances its previous decisions misconstrued contractual intent. The court concluded that its previous decisions misconstrued what the national pension policy mandates.

The majority opinion's closing comments contrast circumstances where the parties expressly provide for arbitration of trustee/employer disputes. Those comments merely suggest that, in those circumstances, the mandates of national pension policy must be balanced against the parties' freedom to contractually establish pension plans which explicitly provide for arbitrable methods of resolving all pension disputes arising under their contracts. That balancing was not necessary in view of the parties' agreements.

The Eighth Circuit's dissenting opinion recognized that the majority's holding did not depend merely on the parties' intent to limit arbitration of pension disputes to those raised by signatories to the agreements. The dissent assumed without qualification that the majority holding was critically based on the majority's re-examination and, in the dissent's view, misconstruction of national pension policy. The dissent found particular fault with the majority's reasoning that requiring trustee exhaustion of arbitration procedures would compromise the independence of trustees in violation of that policy. Commentary after the Eighth Circuit's decision similarly construed the majority opinion. Furthermore, in the Supreme Court proceedings, the parties, including the trustees, argued that the Eighth Circuit's decision was based on a particular construction of national pension policy.

In short, the Supreme Court in *Schneider* was called upon to decide which of the lower courts' conflicting views properly defined

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90. *Id.* at 442.
91. *Id.* at 438-39, 443.
92. *Id.* at 442.
93. *Id.* at 443-45.
94. *Id.* at 444.
the imperatives of national pension policy which bear on provisions that require arbitration of contractual pension claims. Depending on those imperatives, the particular terms and intent of the parties' agreements may or may not be dispositive. If, for example, requiring trustee exhaustion of arbitration procedures unduly compromises trustee independence mandated by national pension policy, then it is immaterial whether the parties impliedly intended that requirement by operation of the labor presumption that all issues of contract interpretation are arbitrable, or expressly imposed that exhaustion requirement in the contract's arbitration provisions. In either instance the requirement would impermissibly compromise trustee independence. In each instance, therefore, a determination of the imperatives of national labor policy is critical.

B. Presumption of Arbitrability: A Lame Duck for Employers

1. The Reasons for the Presumption

Schneider's cursory rejection of the presumption of arbitrability which normally attaches to all questions of labor contract interpretation, is equally perplexing. Justice Powell makes the dispositive assumption that trustee/employer disputes regarding the meaning of contractual pension provisions cannot breach industrial peace. However, he makes this assumption by drawing a weak analogy. Justice Powell thus equates those disputes with controversies between union and employer trustees who participate in administration of a Taft-Hartley pension plan, and relies on the Court’s statements in NLRB v. Amax Coal Co. as support. The Court in Amax stated that disputes between union and employer appointed trustees over administration of a Taft-Hartley pension plan cannot lead to exercises of economic pressure. Justice Powell concludes that "the same observation applies to disputes between the trustee and the employer," and, in that context, use of economic weapons would "serve little purpose."

In Amax, however, the Court stressed that the trust obligation of the union and employer designated trustees is to participate in administration of the pension plan in conformity with the bargained pension agreement. Furthermore, section 302 of Taft-Hartley imposes compulsory arbitration when the trustees deadlock over ad-

98. 104 S. Ct. at 1849 n.13.
ministration. Under that scheme, *Amax* reasoned, union or employer use of economic weapons to break the deadlock is precluded. But in other contexts the parties' resort to economic pressure, while perhaps unlikely, is not necessarily proscribed by statute. Indeed, in *Amax* the Court recognized the legitimacy of a union strike to pressure an employer to continue contributing to an established plan—a nonadministration issue. Union pressure would appear to be equally legitimate when, as in *Schneider*, trustees initiate a claim that the employer is delinquent under the parties' agreement.

Of course, when the agreement includes a mutual bargain to use grievance arbitration to interpret the agreement's pension provisions, the parties may be constrained under the *Steelworkers Trilogy* from the usual economic pressures to resolve the dispute. Allowing the trustee to bypass an arbitration forum deprives the employer of that contractual benefit. At the same time, however, it leaves the employer under the contractual constraint against economic pressure.

Moreover, Justice Powell takes a myopic view of the labor presumption of arbitrability. The *Steelworkers Trilogy* rooted the presumption in the labor statutes' explicit encouragement of negotiating methods of peacefully resolving disputes and adhering to the method selected in labor agreements. However, the right to avoid the costs of defending a suit in a judicial forum is incidental to selecting binding grievance arbitration. The avoidance of industrial unrest is, therefore, not the exclusive basis for encouraging labor arbitration.


Avoidance of various costs of litigation is historically the stated basis for both negotiating and enforcing arbitration provisions in commercial contracts. In a line of cases decided almost contemporaneously with *Schneider*, the Supreme Court expanded the policy basis for enforcing agreements to arbitrate ordinary commercial con-

101. *See supra* notes 6-7 and accompanying text. The Supreme Court has recognized that an employer has an incentive to negotiate arbitration provisions in a labor agreement as a means of "saving the expenses and aggravation associated with a lawsuit." *Gardner-Denver*, 415 U.S. at 55. In *Schneider*, Justice Powell ignores this employer interest and, curiously, stresses the expense of arbitrating trustee-employer disputes. 104 S. Ct. at 1851.
tract disputes. Using primarily the Federal Arbitration Act, which covers contracts involving transactions in interstate commerce or the maritime industry, the Court held that Congress has established a national policy favoring arbitration and requiring parties to honor arbitration agreements. Moreover, the Court held that this policy constitutes federal substantive law, which is applicable in both federal and state courts. The gist of that policy, the Court emphasized, is to place an arbitration agreement "upon the same footing as other contracts, where it belongs."

Furthermore, the Court's recent decisions applying the Federal Arbitration Act recognize that the national policy favoring arbitration consists of interrelated congressional mandates to give full play to both labor and commercial agreements in arbitrating contractual disputes. That statute is not directly applicable to labor arbitration in the federal sector. However, "it should not be overlooked as a guide for the courts in fashioning the body of [federal] law for labor arbitration."

The Supreme Court has distilled from the Federal Arbitration Act principles which bear on issues raised when, as in Schneider, a suit is filed invoking both ERISA and seeking interpretation of pension provisions in a labor agreement which commits the parties to arbitrating claims arising under the agreement. In Moses H. Cone Memorial Hospital v. Mercury Construction Corp., the federal district court refused to order arbitration under the Federal Arbitration Act. The court's refusal was based on an earlier and pending state court suit where one of the parties was raising the same issue of arbitrability. The Supreme Court held that the refusal to order arbitration was an abuse of discretion, even though the order would result in bifurcated proceedings in state and federal courts. The federal court's failure to order arbitration "frustrated the [Federal Arbitration Act's] policy of rapid and unobstructed enforcement of

104. Id. at 15-16.
105. Recent decisions by the Supreme Court indicate that under various congressional enactments there are common reasons for negotiating and enforcing labor and commercial agreements to arbitrate. See Bendixsen, Enforcing the Duty to Arbitrate Claims Arising Under a Collective Bargaining Agreement Rejected in Bankruptcy: Preserving the Parties' Bargain and National Labor Policy, 8 INDUS. REL. L.J. 401, 405-07, 438-42 (1986).
arbitration agreements.” Bifurcated proceedings occurred “because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement.”

The conclusion reached in Cone was deemed dispositive in Dean Witter Reynolds, Inc. v. Byrd. There, an investor filed a federal court suit against Dean Witter alleging violation of federal securities laws. The investor also sought monetary recovery under state law for breach of the parties’ investment contract, which provided for arbitration of disputes under the contract. The district court, affirmed by the Ninth Circuit, denied Dean Witter’s request for an order compelling arbitration of the pendant contract claims. Arbitration was denied on the ground that those claims were intertwined factually and legally with the federal security law claims, which only the district court could decide. The Supreme Court reversed. Citing Cone, the Court held that the Federal Arbitration Act “requires district courts to compel arbitration of pendant arbitrable claims when one of the parties files a motion to compel, even where the result would be the [possible] inefficient maintenance of separate proceedings in different forums.”

The Court distinguished cases barring arbitration, for example, of security and antitrust violations, since Dean Witter sought arbitration of claims under only the investment contract. Even though “piecemeal” litigation would result, “we [must] rigorously enforce agreements to arbitrate . . . to [protect] . . . the contractual rights of the parties and their rights under the [Federal] Arbitration Act.”

The Court rejected the argument that arbitration should be denied because the arbitrator’s findings would have collateral estoppel, or “preclusive,” effect in the court suit on federal securities claims. It held that the trial court would be free to determine the extent to which the arbitrator’s findings would be given preclusive effect consistent with federal interests. Accordingly, “there is no reason to require that the district courts decline to compel arbitration, or manipulate the order of the bifurcated proceedings, simply to avoid an infringement of federal interests.”

108. Id. at 23.
109. Id. at 20.
111. Id. at 1241.
112. Id. at 1242-43.
113. Id. at 1244. The quoted statement from Dean Witter that a prior award should not have preclusive effect in a subsequent court action is simply irreconcilable with the statement in Schneider that “the outcome of any subsequent judicial proceeding could be predetermined by the outcome of arbitration.” 104 S. Ct. at 1851.
The Supreme Court’s recent decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* may be even more instructive. ¹¹⁴ There, the Court held that antitrust claims are arbitrable, pursuant to the Federal Arbitration Act, when the claims arise in an agreement covered by the Act embodying an international commercial transaction. The Court invoked its earlier decision which upheld the arbitrability of federal securities claims arising in connection with international commercial transactions. ¹¹⁵ The international setting enabled the Court to avoid a ruling on the legitimacy of the *American Safety* doctrine, which precludes arbitration of claims raising statutory antitrust issues. The lower federal courts have cited that doctrine in holding that antitrust claims arising from domestic commercial transactions are of a character inappropriate for enforcement by arbitration. ¹¹⁶ Nonetheless, the Court questioned some aspects of that doctrine. ¹¹⁷ It acknowledged that not “all controversies implicating statutory rights are suitable for arbitration.” ¹¹⁸ However, when that implication exists, “a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.” ¹¹⁹ The Court went on to say that “[h]aving made the bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights in issue.” ¹²⁰ In *Mitsubishi* the Supreme Court reiterated a federal standard which requires that doubts about the arbitrability of claims be resolved in favor of arbitration. That standard, the Court indicated, emanates from the *Steelworkers Trilogy* of labor arbitration decisions as well as from the Federal Arbitration Act. ¹²¹ The Court thus assumed the affinity between national policy regarding enforcement of promises to arbitrate in commercial agreements and a like policy pertaining to labor agreements.

The reaction of the lower federal courts to these recent Supreme Court pronouncements is significant. They have treated them as vir-

¹¹⁵. *Id.* at 3355 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)).
¹¹⁶. 105 S. Ct. at 3355 (citing American Safety Equip. Corp. v. J.P. McQuire & Co., 319 F.2d 821 (2d Cir. 1968)).
¹¹⁷. 105 S. Ct. at 3357.
¹¹⁸. *Id.* at 3355.
¹¹⁹. *Id.*
¹²⁰. *Id.*
¹²¹. *Id.* at 3353-54. The Supreme Court’s recent reaffirmation of the labor presumption of arbitrability is unequivocal. *See supra* note 21.
tually holding that a presumption of arbitration attaches to disputes arising under commercial contracts which provide for compulsory arbitration. This reaction enhances the anomaly that in *Schneider* these pronouncements were ignored in a holding which deprived the employers of a contractual right to compulsory arbitration of questions of contract interpretation. Moreover, this was done in a holding which treated as critical the absence of an express contractual requirement that the particular dispute be arbitrated — a virtual presumption of nonarbitrability. The anomaly grows if, as some have suggested, arbitration of contractual pension issues is a hybrid form of alternative dispute resolution because it involves both labor contract and commercial contract oriented issues. In that event, *Schneider* abruptly refused to apply a presumption of arbitrability in both areas in which the Court has recently reiterated the strength of that presumption. That refusal, furthermore, ignored the fact that the interrelated statutory and contractual dispute arose under a statute (ERISA) in which Congress has embraced compulsory arbitration.

**V. CONCLUSION**

The courts are often called upon to reconcile statutory policies which appear to be in conflict. The judicial function is to resolve the conflict in a manner which advances each policy without frustrating another. In *Schneider* the Supreme Court was confronted with disparate views taken by the lower courts to resolve a clash between national pension policy and national labor policy. Lower courts which sustained the assertions of pension plan trustees concluded that the court's responsibility under ERISA is to protect the statutory and contractual rights of plan beneficiaries. These courts permitted direct lawsuits against employers for delinquent contributions owing under collective bargaining agreements, even though judicial interpretation of disputed terms of such agreements was required. Other courts sustained the assertions of employers that such direct lawsuits violated the compulsory arbitration provisions in the agreements in violation of national labor policy.

124. The Taft-Hartley plan deadlock arbitration (see supra note 25 and accompanying text), and MPPAA withdrawal liability arbitration (see supra notes 58-61 and accompanying text) are examples.
The Supreme Court has developed principles for determining when assertion of a statutory claim warrants direct access to a judicial forum. Those principles address whether such claims should be decided in court, even though ruling on the merits requires the court to interpret a labor agreement providing for arbitration of all matters of contract application and interpretation. Thus, the recognized touchstones for resolving the conflict in Schneider and similar cases include: 1) whether the statutory right has priority to immediate court protection because Congress granted an individual rather than collective right; 2) whether the facts and arguments comprise a familiar judicial setting or, instead, are industry specific and linked to law of the shop considerations common to arbitration; and 3) whether a prior award would be given normal judicial deference if a viable statutory issue remained for a court to decide. Moreover, with regard to such conflicts under the Federal Arbitration Act, the Supreme Court specified that the prospect of bifurcated proceedings does not defeat a contractual right to an arbitral forum. In that context the Court also advanced rather than retreated from the national policy of encouraging both labor and commercial arbitration. Against that background, Schneider's tortured and noncommittal holding in denigration of agreed upon arbitration is difficult to understand.

One feature of that holding has, in particular, become marked by the Supreme Court's continued unwillingness to plumb past experience to articulate the imperatives of national pension policy versus labor policy. Citing possible conflict of interest, the Court in Schneider saw no substance in the employers' argument that a union's duty of fair representation will provide an incentive for a union to initiate meaningful arbitration of trustee/employer contract disputes. The Court has continued to use this reasoning to denigrate the arbitral process regarding pension disputes. Thus, the Court has stated that its holding in Schneider "in large part relied on the proposition that there was no federal policy favoring trustee dependence on a union's use of a grievance and arbitration system..." It surely does not follow, however, that there is no federal policy even worth considering for requiring the trustee to exhaust contractually-mandated arbitration procedures for interpreting contractual pension provisions. All the Court has to do, for example,

125. See supra note 70, discussing Gardner-Denver and other cases.
126. See Fowler, supra note 70, at 181; Surviving ERISA, supra note 25, at 290-92, 314 n.254; Burke v. Latrobe Steel Co., 775 F.2d 88, 91-92 (3d Cir. 1985).
127. See supra note 83 and accompanying text.
is examine the merit of lower court opinions which reason that the 
exhaustion requirement could be limited to requesting the union to 
initiate arbitration of the trustee's contractual claim. "[I]f after the 
trustees have requested arbitration the union does not pursue that 
remedy, or fails to act in the best interests of the fund beneficiaries, 
the trustees are free to seek redress in the courts." 129

It is not suggested here that the above is necessarily the proper 
solution. It is suggested, however, that in this and other respects the 
Supreme Court in Schneider failed to examine issues both ripe and 
calling for resolution. If so, a future resolution seems inevitable, and 
may reveal that Schneider precipitately deprived employers of a con-
tactual entitlement to have an arbitrator interpret their pension 
agreements. 130

129. 700 F.2d at 444 (Henley, J., dissenting). Accord Trustees of Local 478 Trucking, 
721 F.2d at 458-61 (Seitz, C.J., concurring).

130. The trend of the lower court decisions seems to be one of giving narrow application 
to Schneider. This includes implied skepticism with regard to Justice Powell's observations 
concerning the parties' nonuse of economic pressure to resolve pension disputes. See, e.g., Vig-
giano, 750 F.2d at 276; Barrowclough, 752 F.2d at 939; Burke, 775 F.2d at 92.