

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	Chapter 11
)	
UAL CORPORATION et al.,)	Case No. 02 B 48191
)	(Jointly Administered)
Debtors.)	
)	Honorable Judge Eugene R. Wedoff
)	
)	Hearing Date: August 26, 2005
)	Hearing Time: 9:30 a.m.

**UNITED RETIRED PILOTS BENEFIT PROTECTION
ASSOCIATION'S RESPONSE FILED IN OPPOSITION TO DEBTORS'
TWENTY-SEVENTH OMNIBUS OBJECTION TO CLAIMS**

The United Retired Pilots Benefit Protection Association ("URPBPA"), through its undersigned attorneys, hereby submits its response in objection to the Debtors' Twenty-Seventh Omnibus Objection to Claims ("Claims Objection" or "Objection") and, in support of its response, states as follows:

I. Introduction

1. United objects to what it refers to as "Qualified Pension Claims," which are contingent claims asserted by defined benefit plan participants for qualified pension benefits that will be lost in the event of the termination of one of United's plans. Because United has not yet filed a plan of reorganization and because the Pilot Plan has not been (and may not be) terminated, United's objection, at least with respect to claims filed by participants in the Pilot Plan, is premature. There is no reason to determine, at this time, whether retired pilots have valid claims against United for their *possible* loss of qualified pension benefits resulting from the *possible* termination of the Pilot Plan. But even if it were appropriate to decide the issue at this

time, the PBGC's failure to strictly adhere to ERISA's procedures for the allocation of its recovery from United with respect to the claims it has filed in these proceedings creates a unique situation in which retired pilots, who may not ordinarily be able to pursue individual claims for qualified pension benefits, may do so in this case. United's "Qualified Pension Claims" objection should either be continued until after the upcoming involuntary pension termination trial or, in the alternative, it should be denied.

II. Relevant Factual Background

2. On December 9, 2002, UAL Corporation and its related companies ("United") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On that same day, United filed a first-day motion seeking authorization from this Court to continue making pension and other benefits-related payments to United's employees and retirees. That motion was granted and United has continued to make pension payments to its retired pilots, surviving spouses and their dependents (collectively referred to herein as "retired pilots") under the United Air Lines Pilot Defined Benefit Pension Plan (the "Pilot Plan").

3. As stated in United's Claims Objection, the Pilot Plan provides two distinct types of pension benefits: tax-qualified pension benefits and non-tax qualified benefits. United's obligation to pay qualified and non-qualified pension benefits to its retired pilots arose in connection with various collective bargaining agreements and, under the language of those agreements, these benefits became contractually vested at retirement for each of United's retired pilots. See Bidlack v. Wheelabrator Corp., 993 F.2d 603, 607 (7th Cir. 1993) *citing* Litton Financial Printing Division v. NLRB, 501 U.S. at 207, 111 S. Ct. at 2226 (1991) ("Rights which accrued or vested under the [collective bargaining] agreement will, as a general rule, survive

termination of the agreement.”) United retired pilots who are eligible to receive benefits from United’s non-qualified pension plan receive two checks every month, one check for tax-qualified benefits, and a second check from United’s non-qualified pension program.

4. On February 27, 2003, this Court entered an order [Docket No. 1608] setting May 12, 2003 as the date by which proofs of claim were required to be filed by United’s private creditors and June 9, 2003 as the date by which government units were required to file their proofs of claim.

5. After the February 27, 2003 order was entered, thousands of retired pilots, many of whom are represented by URPBPA, filed proofs of claim asserting claims related to the qualified and non-qualified pension benefits (and other benefits) United is contractually obligated to pay. The pension-related claims are and always have been contingent claims because the claims will only mature in the event the Pilot Plan is actually terminated.

6. On April 24, 2003, United filed its Motion to Approve Stipulation and Agreed Order Permitting the Pension Benefit Guarantee Corporation to File Consolidated Claims Under One Case Number [Docket No. 2195]. The stipulation and order attached to the motion was entered on May 8, 2003 [Docket No. 2418] and, on that same day, the PBGC filed three separate claims against United with respect to the Pilot Plan. These proofs of claim asserted claims (against each of the Debtors in United’s controlled group) for unpaid pension insurance premiums, unpaid minimum funding contributions and unfunded benefit liabilities (*see* Claim Nos. 34508, 34513 and 34518).

7. On December 30, 2004, the PBGC filed a lawsuit seeking the “involuntary termination” of the qualified portion of the Pilot Plan under 29 U.S.C. § 1342(c). The

lawsuit is currently pending before this Court as an adversary proceeding. If the PBGC's pending motion for summary judgment is denied, the adversary proceeding will go to trial on September 21 through 23, 2005.

8. On May 11, 2005, this Court entered the Order Approving Debtors' Emergency Motion To Approve Agreement with PBGC [Docket No. 11229]. Attached to the order, as Exhibit 1, is a copy of the actual settlement agreement between the PBGC and United. In paragraph 7 of this agreement, the PBGC agreed to waive the minimum funding contribution and insurance premium claims it filed against the Debtors. The PBGC also agreed to assert its unfunded liability claim against United Air Lines, Inc. only and waive the unfunded liability claims asserted jointly and severally against everyone else in United's "control group."

9. In addition, paragraph 13 of the settlement agreement is entitled "Release and/or Assignment of Claims." This paragraph states as follows: "At United's option, the PBGC shall assign 45% of its claims in the Chapter 11 Cases as directed in writing by United." There is no provision in ERISA that authorizes the PBGC to allocate, distribute or assign amounts it collects, or seeks to collect, from an employer for unfunded benefit liabilities at the direction of the very employer from whom the benefits are being sought. Rather, ERISA has detailed provisions that outline the manner in which the PBGC's recovery from an employer must be allocated for the benefit of plan participants.

10. United filed its pending Claims Objection on July 27, 2005. On pages 6 through 8 of the Objection, United argues that this Court should rule that "Qualified Pension Claims" asserted by various United retirees should be held to be unenforceable for two reasons. First, United argues that Qualified Pension Claims are not enforceable against the Debtors or their

property because the plans from which these payments are made are separate legal entities distinct from the Debtors' estates. Second, United argues that the PBGC has the exclusive right to assert claims against United for unfunded benefit liabilities. United's arguments are addressed below.

11. This objection is filed on behalf of URPBPA's members who have filed proofs of claim for "Qualified Pension Claims." A copy of URPBPA's membership list is attached as "**Exhibit A.**"

III. Argument

12. United has not filed a plan of reorganization. The Pilot Plan has not been, and may not be, terminated. As a result, United's attempt to limit claims for the vested, qualified benefits United is currently obligated to pay its retired pilots is premature. If the Pilot Plan is terminated as a result of the involuntary termination trial that is scheduled for September 21 through 23, 2005, the issue may be addressed at that time. If the Pilot Plan is not terminated, the contingent, pension-related claims filed by United's retired pilots will never mature into enforceable claims because the retired pilots will still be receiving their full pension benefits. Instead of issuing a ruling on what is, now, a hypothetical question, this Court should defer ruling on the enforceability of the retired pilots' "Qualified Pension Claims" until the parties know whether the Pilot Plan is actually going to be terminated.

13. Alternatively, if the Court believes it needs to make a substantive ruling regarding United's objection to Qualified Pension Claims, United's objection should be denied. United's first argument against the enforcement of "Qualified Pension Claims" is easily refuted. In addition to United's duties under ERISA as the sponsor of the Pilot Plan, United has an ongoing,

contractual obligation to pay the vested pension benefits it promised its former pilots. Although these benefits are, ultimately, paid out of the Pilot Plan's funds, United has a contractual responsibility (and a responsibility under ERISA) to ensure that the Pilot Plan has sufficient funds to pay qualified pension benefits. If a plan sponsor could dodge its contractual responsibility for paying benefits it owes its retirees by arguing that the aggrieved party can only sue the plan from which the benefits are supposed to be paid (and not the employer who is responsible for putting funds into the plan in the first place) the aggrieved party would effectively be prohibited from enforcing his or her vested contract rights. The Pilot Plan is merely a vehicle through which United fulfills its contractual obligation to pay vested pension benefits to United's retired pilots.

14. United's second argument is that only the PBGC has the right to assert Qualified Pension Claims. Under normal circumstances, United may be correct. But under the unique facts here, where the PBGC has abrogated ERISA's procedures for the allocation of its claims against United for unfunded benefit liabilities, United's retired pilots should be permitted to pursue its claims, as individual participants in the qualified portion of the Pilot Plan, against United.

15. Under ERISA, when an underfunded defined benefit plan, like the qualified portion of the Pilot Plan, is terminated, the PBGC is required, at a minimum, to pay "guaranteed benefits" to the participants of the terminated plan. 29 U.S.C. § 1342. The PBGC is required to pay these guaranteed benefits even if the plan being terminated does not have sufficient assets to pay these benefits.

16. As stated in United Steelworkers v. United Engineering, Inc., 52 F.3d 1386, 1391 (6th Cir. 1995), “[p]rior to the 1986 and 1987 amendments to ERISA, an employer was liable to the PBGC only for the lesser of the unfunded guaranteed benefits or 30% of the employer’s net worth, 29 U.S.C. § 1362(b)(2)(B) (Supp. 1994), and the PBGC was obligated to pay only guaranteed benefits under 29 U.S.C. § 1322.” But, as a number of cases, including the leading case, Murphy v. Heppenstall Co., 635 F.2d 233 (3rd Cir. 1980), held under the pre-1986 version of ERISA, the ERISA provisions that limited an employer’s liability to the PBGC did not limit the employer’s contractual responsibility to pay pension benefits in excess of those ERISA guarantees to plan participants.

17. In Murphy, sixteen retired Heppenstall employees, who were beneficiaries of a terminated plan, sued their former employer for the difference between the pension payments the PBGC guaranteed and the vested benefits Heppenstall was obligated to pay its retirees under the collective bargaining agreement that created Heppenstall’s defined benefit plan. The court stated that §1362(b) of ERISA “does place a ceiling on employer liability for pension payments, but that liability is to the PBGC...Two lower courts have expressly held that the limitation in Section 1362 of employer liability does not limit the employer’s direct contractual liability to its employees.” Murphy, 635 F.2d at 238. The 3rd Circuit affirmed the district court’s summary judgment in favor of the retired employees and held that the employer had direct contractual liability to its retirees with respect to their vested pension benefits. Id. at 239.

18. In order to help retirees recover a greater percentage of the pension benefits to which they were promised after a plan termination, Congress enacted the Single-Employer Pension Plan Amendments Act of 1986, which was then superseded by the Pension Protection

Act of 1987 (“PPA”). The PPA modified § 1362 of ERISA and, under what is now § 1362(b)(1), created a “*requirement* that the PBGC itself pursue third parties for the recovery of both guaranteed and non-guaranteed benefits.” Ricke v. Armco, Inc., 882 F. Supp. 896 (D.Minn. 1995) (emphasis added). Now, under § 1362(b)(1)(A), an employer of an underfunded, terminated plan is liable to the PBGC for “the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations proscribed by the corporation.” To the extent the PBGC is successful in collecting from the employer of an underfunded plan, the PBGC is required to share its recovery in excess of the PBGC guarantee with plan participants in accordance with the new rules set forth under 29 U.S.C. § 1322(c).

19. After the enactment of the PPA, some courts have prevented retirees from asserting claims directly against their former employers for unfunded pension benefits in excess of the PBGC’s guaranty. In re Adams Hard Facing Co., 129 B.R. 662 (W.D.Okla. 1991), which is cited on page 7 of United’s Claims Objection, is one of those cases.

20. In Adams, the Court described the changes the PPA made to ERISA. The Court stated that, as a result of the enactment of the PPA, the “PBGC has been obligated to collect all claims for unfunded pension benefits, and to allocate and distribute the values of its recoveries.” Adams, 29 B.R. at 663. The court stated that the distribution of the PBGC’s recovery had to be allocated in accordance with the requirements of ERISA § 4022, 29 U.S.C. § 1322 and, in addition, stated that the PBGC “must collect the employer’s unfunded benefit liabilities and distribute those amounts to plan participants within the priority scheme of § 4044(a).” Id.

Although the court held that it would not permit plan participants to make claims directly against the bankruptcy estate for unfunded, non-guaranteed plan benefits, because that would interfere with ERISA's allocation provisions, at the same time, the court specifically ruled that the "PBGC is instructed to collect and allocate the unfunded benefit liability amounts in strict compliance with the ERISA sections referred to herein." *Id.* See also United Engineering, 839 F.Supp. 1279, 1281 (N.D.Ohio 1993) ("PBGC is obligated to allocate the recovered funds between 'guaranteed' and 'non-guaranteed' liabilities, according to a 'recovery ratio' described in § 1322(c), and allocate the 'non-guaranteed' fund among plan participants and beneficiaries according to the priority scheme set out in 29 U.S.C. § 1344(a)."); United Engineering, 52 F.3d at 1391 ("ERISA now states that the PBGC is responsible for disbursing nonguaranteed benefits in accordance with a precise formula as set out in 29 U.S.C. §§ 1322(c)(2), 1322(c)(3)(A)").

21. All of the cases that have cited Adams have followed its reasoning. But the reasoning of Adams does not apply under the present facts. In Adams, the court recognized that, if the PBGC is deemed to have asserted an exclusive claim to unfunded, non-guaranteed pension benefits, the PBGC must strictly comply with the allocation provisions set forth under §§ 1322 and 1344 of ERISA. The Adams court stated that the allocation procedures outlined under ERISA would be defeated if the individual plan participants asserted direct claims for unfunded pension benefits, but it also recognized that, if the PBGC is going to prosecute the sole claim for unfunded, non-guaranteed pension benefits, the PBGC must comply with its responsibility to strictly adhere to ERISA's allocation provisions.

22. In this case, it is clear that the PBGC has not strictly adhered to ERISA's allocation provisions. In paragraph 13 of the PBGC's settlement agreement with United, the

PBGC assigns 45% of its unfunded benefit liability claim against United back to United. There is no provision in ERISA that allows this to happen. The PBGC is supposed to be using its statutory authority to collect unfunded benefits and distribute a portion of those benefits to plan participants. ERISA does not give the PBGC the authority to return back to the plan sponsor the very benefits it is supposed to be collecting for the benefit of plan participants! Paragraph 13, in fact, turns ERISA's recovery scheme on its head.

23. There is nothing under the language of ERISA that prohibits plan participants, like United's retired pilots, from seeking to recover unfunded, non-guaranteed benefits directly from a plan sponsor. The PPA did not overrule Murphy or any of the other cases that held that plan participants can pursue individual claims against a plan sponsor for unfunded, nonguaranteed benefits and very few cases have interpreted the provisions of ERISA that were amended by the PPA. Rather, the cases that follow Adams merely state that permitting plan participants to assert claims directly against the plan sponsor will interfere with ERISA's allocation provisions. But in this case, the PBGC is not even attempting to follow ERISA's allocation provisions but is, instead, assigning its right to recover significant unfunded pension liabilities back to United, the plan sponsor. Because the PBGC has abrogated its statutory duties, if the Court feels it must decide United's "Qualified Pension Claims" objection at this time, United's objection should be denied.

WHEREFORE, the United Retired Pilots Benefit Protection Association respectfully requests that the Court either defer its ruling on the Debtors' "Qualified Pension Claims" objection until it is determined whether the Pilot Plan will, in fact, be terminated or, in the alternative, deny the Debtors' objection.

Date: August 17, 2005

UNITED RETIRED PILOTS BENEFIT
PROTECTION ASSOCIATION,

By:

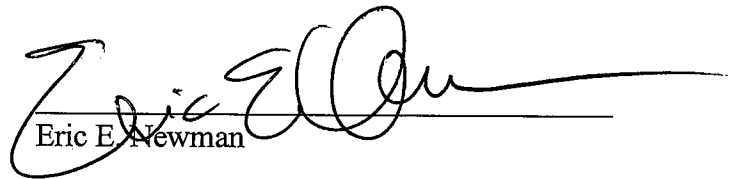

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CERTIFICATE OF SERVICE

I, an attorney, state that, on August 17, 2005, I caused **United Retired Pilot Benefit Protection Association's Response Filed In Opposition To Debtors' Twenty-Seventh Omnibus Objection To Claims** to be served upon the attached Core Group Service List by U.S. Mail and the parties listed on the attached Rule 2002 Service List by electronic mail or, if no e-mail address is provided, by the method listed on the Rule 2002 Service List filed herewith.


Eric E. Newman