Journal of Air Law and Commerce

Volume 70 | Issue 2 Article 6

2005

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AIRLINES JETTISON THEIR PENSION PLANS: CONGRESS MUST ACT TO SAVE THE PBGC AND PROTECT PLAN BENEFICIARIES

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I. INTRODUCTION

THE DOWNTURN IN the airline industry has left many carriers searching for ways to cut costs and regain their previous competitive stature. Passengers have seen the elimination of such creature comforts as pillows and free meals, and have been asked to pay as much as five dollars for headphones to watch in-flight television.[1] These measures, however, amount to only small savings in the context of the airlines' mounting debt. Accordingly, airlines looking for ways to rid themselves of billions of dollars in costs are now targeting their employees' pension plans.[2] In a recent decision, a federal judge approved US Airways' "request to terminate the pension plans for machinists and flight attendants," as well as a large retiree plan.[3] The termination shifts responsibility for the plans to the Pension Benefit Guaranty Corporation ("PBGC"),[4] the government agency that insures failed or terminated pensions.[5] US Airways' analysts expect the plan terminations to save the company $1 billion over

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1 Katie Fairbank, *Fliers are Getting What They Want: Lower Fares*, DALLAS MORNING NEWS, Jan. 8, 2005, at D1.

2 Susan Carey, *Agency Seeks UAL Pension Takeover: By Assuming Plan for Pilots at United, Federal Insurer Hopes to Limit Liabilities*, WALL ST. J., Dec. 31, 2004, at A2; Mark Pilling, *Pension Burden Stacks Up*, FLIGHT INT'L, Jan. 1, 2005, at 16; Susan Carey, *Judge Gives US Air Room to Maneuver*, WALL ST. J., Jan. 7, 2005, at A3.

3 Tom Ramstack, *Bankruptcy Judge Voids US Airways' Union Pact*, WASH. TIMES, Jan. 7, 2005, at C8.

4 *Id.*; Carrie Mason-Draffen, *Ruling Favors US Airways: Bankruptcy Court Judge OK's Carrier's Bid to Cancel Pact Covering Machinists, End 3 Pension Plans*, NEWSDAY, Jan. 7, 2005, at A52.

5 Ramstack, *supra* note 3.

five years.[6] While the cost-savings that result from a plan termination are clear from the airlines' perspectives, the cost to the American public is another matter. The PBGC, already laden with a $23.3 billion deficit, is on the verge of a taxpayer-funded bailout,[7] and each termination leaves airline employees with smaller pensions than previously agreed upon.[8] Section II of this comment will give an overview of the Employee Retirement Income Security Act ("ERISA") and the types of pension plans that it covers. Section III of this comment will give an overview of the PBGC, the types of pension plan terminations, the PBGC's role in those terminations, and look at the PBGC's current economic situation and how the downturn in the airline industry has exacerbated that situation. Finally, in Section IV, this comment will suggest needed changes to ensure the PBGC's solvency, as well as changes that will grant employees more protection in the event of a plan termination.

II. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

ERISA was enacted in 1974 to protect "the assets of millions of Americans so that funds placed in retirement plans during their working lives will be there when they retire."[9] The legislation was born out of "congressional findings that employee-benefit plans substantially affect interstate commerce, federal tax revenues, and the national public interest, as well as the continued well-being and security of millions of employees and their dependents."[10] Congress also found that pension plan maintenance standards were inadequate, plan funds often were insufficient to pay the benefits due, and that plans were terminating before sufficient funds had accumulated.[11] As a result, Congress enacted ERISA establish "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit

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[6] *Id.*

[7] Michael Schroeder, *Pension Agency Puts Pressure on Congress*, WALL ST. J., Jan. 7, 2005, at A4.

[8] Albert B. Crenshaw & Keith L. Alexander, *Pilots' Deal With United Thrown Out; Carrier Works on Pact with Mechanics Union*, WASH. POST, Jan. 8, 2005, at E1.

[9] *Frequently Asked Questions about Pensions Plans and ERISA*, *at* http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html (last visited Feb. 12, 2005).

[10] 60A AM. JUR. 2D *Pensions and Retirement Funds* § 1 (2004).

[11] *Id.*

plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts."[12]

ERISA replaces inconsistent state regulations with a uniform federal system.[13] The federal system protects employee pensions in five key ways. The system: (1) "[r]equires plans to provide participants with information about the plan including important information about plan features and funding;"[14] (2) "[s]ets minimum standards for participation, vesting, benefit accrual and funding. [ERISA] defines how long a person may be required to work before becoming eligible to participate in a plan, to accumulate benefits, and to have a non-forfeitable right to those benefits;"[15] (3) "establishes detailed funding rules that require plan sponsors to provide adequate funding for" pension plans;[16] (4) requires plan fiduciaries to be accountable to plan participants;[17] (5) gives plan participants a cause of action against the benefit plan fiduciaries in the event he or she breaches a fiduciary duty;[18] and (6) "[g]uarantees payment of certain benefits if a defined plan is terminated, through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation."[19]

ERISA also seeks to encourage the development of private pension plans and minimize the financial burden on employers

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[12] *Id.* (citing 29 U.S.C. § 1001(b) (2000)).

[13] *Id.* § 77.

[14] *Frequently Asked Questions about Pensions Plans and ERISA*, *supra* note 9.

[15] *Id.*

[16] *Id.*

[17] *Id.* "ERISA generally defines a fiduciary as anyone who exercises discretionary authority or control over a plan's management or assets, including anyone who provides investment advice to the plan. Fiduciaries who do not follow the principles of conduct may be held responsible for restoring losses to the plan." *Id.*

[18] *Id.* ERISA fiduciary violations include: (1) "failure . . . to operate the plan prudently and for the exclusive benefit of participants"; (2) "[t]he use of plan assets to benefit certain related parties in interest to the plan, including the plan administrator, the plan sponsor, and parties related to these individuals"; (3) "[t]he failure to properly value plan assets at their current fair market value, or to hold plan assets in trust"; (4) "[t]he failure to make benefit payments, either pension or welfare, due under the terms of the plan"; (5) "[t]aking any adverse action against an individual for exercising his or her rights under the plan (e.g., being fired, fined, or otherwise being discriminated against)"; (6) "[t]he failure of employers to offer continuing group health care coverage for at least 18 months after leaving their employer"; *ERISA Enforcement*, *at* http://www.dol.gov/ebsa/erisa_enforcement.html (last visited Feb. 12, 2005).

[19] *Frequently Asked Questions about Pensions Plans and ERISA*, *supra* note 9.

to maintain the plan by setting standard benefit disbursement and claims processing procedures.[20]

A. PENSION PLANS UNDER ERISA

ERISA defines a pension plan as a "plan, fund, or program . . . established or maintained by an employer or an employee organization, or by both,"[21] that provides employees with retirement income[22] or defers employee compensation for a period beyond employment.[23] Under ERISA, the two most prominent types of pension plans are defined benefit pension plans and defined contribution pension plans.

1. *Defined Benefit Pension Plans*

A defined benefit pension plan consists of a pool of assets gathered from all participating employees, or through employer contributions, instead of accounts dedicated to each individual employee.[24] The employer bears the risk of the investment decreasing in value and must cover any plan shortfalls that result from poor investments of the plan assets.[25] The primary factor distinguishing a defined benefit pension plan from a defined contribution plan is that, in a defined benefit plan, the benefit levels are specified in advance.[26] A benefit formula that takes into account an employee's years of service and salary determines the benefit level.[27]

Defined benefit plans are particularly popular amongst unions and are often included in collective bargaining agreements.[28] "In the private sector approximately 70% of AFL-CIO

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[20] 60A AM. JUR. 2D *Pensions and Retirement Funds* § 2 (2004).

[21] 29 U.S.C. § 1002(2)(A) (1996).

[22] *Id.* § 1002(2)(A)(i).

[23] *Id.* § 1002(2)(A)(ii).

[24] 60A AM. JUR. 2D *Pensions and Retirement Funds* § 15 (2004) (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999)).

[25] *Id.*

[26] *Id.* (citing Parada v. Parada, 999 P.2d 184 (2000)).

[27] *Id.*; *see also* David A. Duff, *What Kind of Plan Does a Small Business or Professional Client Need?*, SK012 ALI-ABA 1 (A.B.A. Continuing Legal Educ.), Jul. 12-16, 2004, at *9. An example of a defined benefit computation formula would be that the employee is entitled to "an annual pension at age 65 equal to 2% of his highest three years salary for each year worked." Robert Lowe, Karen Grotberg, & Susan Curtis, *Employee Benefit Plans in Corporate Acquisitions, Dispositions and Mergers*, 625 PLI/TAX 271 (Practicing Law Institute: Tax Law and Planning Course Handbook Series), Oct. 2004, at *283.

[28] Advisory Council on Employee Welfare and Pension Benefit Plans, Report of the Working Group on Defined Benefit Plan Funding and Discount Rate Is-

members are [defined benefit] plan participants. That compares to approximately 1 in 7 of the non-union workers in the private sector."[29] The popularity of defined benefit pension plans likely stems from the PBGC's benefit guarantees, which ensure a certain level of employee benefits in the event that the plan terminates.[30]

Defined benefit plans, however, do have drawbacks. Defined benefit plan participants suffer significant benefit losses when they change jobs,[31] and the worker may experience even greater financial detriment if he or she leaves prior to benefit vesting.[32] As a result, an employee under a defined benefit plan has a large financial incentive to stay with one employer until his benefits have vested or he is ready for retirement.[33] "This is the so-called 'golden handcuffs' phenomenon."[34] In today's turbulent airline industry, where layoffs and employee movement have become commonplace, defined benefit pension plans may not be the best choice. Airlines should shift their focus toward the far more portable defined contribution pension plan.

2. *Defined Contribution Pension Plans*

A defined contribution plan consists of individualized accounts for each participating employee.[35] The employee's benefits are based on the amount of his contributions, the amount of the employer's contributions, and any gains or losses that the investment incurs.[36] "Types of defined contribution plans include profit-sharing plans, money purchase pension plans, thrift plans, 401(k) plans, and employee stock ownership plans (ESOPs)."[37]

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sues, *at* http://www.dol.gov/ebsa/publications/AC_110703_report.html (last visited Feb. 12, 2005).

[29] *Id.*

[30] *See id.*

[31] Johnathan Barry Forman, *Public Pensions: Choosing Between Defined Benefit and Defined Contribution Plans*, 1999 L. REV. MICH. ST. U. DET. CL. 187, 196 (1999).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] 60A AM. JUR. 2D *Pensions and Retirement Funds* § 16 (2004).

[36] *Id.* (citing 26 U.S.C.A. § 414(i)). A defined contribution pension account may also gain funds through the forfeiture of other participants' accounts. Daniel E. Feld, Annotation, *What is "Individual Account Plan" or "Defined Contribution Plan" Under 29 U.S.C.A. § 1002(34) Which Defines Such Terms for Purposes of Labor Law Provisions of Employee Retirement Act of 1974*, 51 A.L.R. FED. 552, § 1 (2004) (citing 29 U.S.C. § 1002(34)).

[37] Lowe, *supra* note 27, at *282.

Beneficiaries of a defined contribution plan who change jobs do not suffer financially as much as beneficiaries under a defined benefit plan.[38] Rather, an employee who changes jobs often can "roll over any defined contribution plan accruals and accumulate a large account balance for retirement."[39] Benefits in a defined contribution plan vest sooner than those in a defined benefit plan, and the assets in the account can easily be valued.[40] "[P]ortability is one of the most important advantages of defined contribution plans."[41] "[T]he lack of job security in today's workplace," especially in the airline industry, makes the portability of retirement benefits very important.[42]

Both defined benefit and defined contribution pension plans have advantages and disadvantages. The PBGC, however, only guarantees certain benefit levels prescribed under a defined benefit plan. Benefit levels under a defined contribution plan fluctuate according to the strength of the economy and stock market forces.

III. THE PBGC

Title IV of ERISA established the PBGC, in part, to "[p]rovide uninterrupted payment of some amount of benefits to participants in the event of plan insolvency; [and] [d]evelop regulations to help assure the security of pension benefits for workers, retirees, and beneficiaries."[43]

The PBGC does not guarantee all benefits, but only those that ERISA defines as "nonforfeitable."[44] "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."[45] In *Nachman Corp. v. Pension Benefit Guaranty Corp.*,[46] the United States Su-

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[38] *See* Forman, *supra* note 31, at 196.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] J. Michael Cook, *Pension Accounting: An Executive Guide to the Fundamentals and the Changing Landscape*, 1449 PLI/CORP 1095, (Practicing Law Institute: Corporate Law and Practice Course Handbook Series), Oct. 2004, at *1122; 60A AM. JUR. 2D *Pensions and Retirement Funds* § 585 (2004).

[44] 60A AM JUR. 2D *Pensions and Retirement Funds* § 610 (2004).

[45] 29 U.S.C. § 1002(19) (2000).

[46] 446 U.S. 359 (1980).

preme Court emphasized that "the principal subject of the definition of 'nonforfeitable' is the word 'claim'. . . since it is the claim that must, as provided in the definition of 'nonforfeitable,' be 'unconditional' and 'legally enforceable against the plan.'"[47] The Court went on to assert that a claim can be "valid and legally enforceable," despite the fact that the claimant was not able to collect it from the assets of the pension plan at the time it became nonforfeitable.[48] Further, while a beneficiary's realization of his nonforfeitable pension benefits depends on the adequacy of the plan's assets, the plan's assets do not influence when a benefit becomes nonforfeitable, nor do they change the benefit status.[49]

The PBGC does not rely on tax revenues to ensure continuous funding of pension plan benefits.[50] Instead, PBGC funding comes from insurance premiums from employers who administer defined benefit pension plans, investment returns, and the remaining funds collected from failed pension plans.[51]

A. Defined Benefit Pension Plan Insurance Premiums

The premiums the PBGC collects from the nearly 32,500 pension plans that it insures are one of the main sources of the PBGC's funding.[52] The PBGC collected $812 million in premiums in 2002.[53] Single-employer defined benefit pension plans pay $19 per participant per year.[54] Under-funded plans must also pay a variable-rate risk-related premium of $9 for each $1000 of benefits that have vested but are unfunded.[55] When a company's PBGC-insured pension fund becomes underfunded and terminates, the PBGC becomes trustee of the plan and uses

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[47] Andrew M. Campbell, Annotation, *Construction and Application of Employee Retirement Income Security Act of 1974 (29 U.S.C.A. § 1001 et. seq.) by United States Supreme Court*, 150 A.L.R. Fed. 441, § 14 (2004) (citing *Nachman Corp.*, 446 U.S. 359).

[48] *Id.*

[49] *Id.*

[50] Scott L. Hazan et al., *Airlines: Nosediving into Dangerous Pension Territory*, 859 PLI/Comm 499, (Practicing Law Institute: Commercial Law and Practice Course Handbook Series), Jan. 2004, at *501.

[51] *Id.*

[52] Cook, *supra* note 43, at *1122. The PBGC is statutorily authorized to set the premium rates and the way in which those rates are applied, as necessary, to fully fund the PBGC. 29 U.S.C. § 1306(a)(1) (2005).

[53] Cook, *supra* note 43, at *1122.

[54] *Id.*; Lowe, *supra* note 27, at *306 (citing ERISA § 4006(a)(3)(A)(i)).

[55] Cook, *supra* note 43, at *1122; Lowe, *supra* note 27, at *306 (citing ERISA § 4006(a)(3)).

both the previously collected insurance premiums and the remaining plan funds to pay benefits.[56] Plans typically terminate because: (1) the employer can no longer financially support the plan; (2) the plan has enough money to pay benefits but the employer does not want to oversee it any longer; or (3) the PBGC decides that the plan is underfunded and should be terminated to protect the participants' interests and the PBGC insurance program.[57] These three reasons give rise to three types of terminations respectively called distress terminations, standard terminations, and involuntary terminations.[58]

B. Distress Termination

A defined benefit plan administrator initiates a distress termination when the plan does not have sufficient funds to cover its benefit liabilities.[59] To qualify for a distress termination, the employer and any other plan sponsors must each meet one of the following three criteria: (1) "[he] has filed or has had filed against [him], as of the proposed termination date, a petition seeking liquidation in a case under Title 11 or under any similar Federal law or law of a State or political subdivision of a State . . . and such case has not, as of the proposed termination date, been dismissed";[60] (2) "[he] has filed or has had filed against [him], as of the proposed termination date, a petition seeking reorganization in a case under Title 11 or under any similar law of a State or political subdivision of a State . . . [and] such case has not, as of the proposed termination date, been dismissed";[61] or (3) if the individual demonstrates to PBGC's satisfaction that "unless a distress termination occurs, [he] will be unable to pay [his] debts when due and will be unable to continue in business," or that "the costs of providing pension coverage have become unreasonably burdensome to [him], solely as a result of

[56] Cook, *supra* note 43, at *1122.

[57] Hazan, *supra* note 50, at *501.

[58] Lowe, *supra* note 27, at *301-05.

[59] *Id.* at * 304.

[60] 29 U.S.C. § 1341(c)(2)(B)(i)(I) (2005).

[61] *Id.* § 1341(c)(2)(B)(ii)(I)-(II). The individual seeking reorganization must also submit to the PBGC any request made to the bankruptcy court for approval of plan termination, and the bankruptcy court must determine that, "unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process." *Id.* § 1341(c)(2)(B)(ii)(III)-(IV). The bankruptcy court must approve the plan termination. *Id.* § 1341(c)(2)(B)(ii)(IV).

the decline of [his] workforce covered as participants under all single-employer plans of which [he] is a contributing sponsor."[62]

When the PBGC receives notice of the plan administrator's intent to terminate the pension plan, the PBGC first determines whether the employer, and any other contributing sponsor, meets the three distress termination criteria.[63] The PBGC is obligated to notify the plan administrator of its findings as soon as practicable.[64] If the distress termination requirements have been met, the PBGC focuses its attention on the financial status of the plan itself.[65] The PBGC conducts a careful analysis to determine that the plan either has sufficient assets to cover its guaranteed benefits and benefit liabilities as of the termination date, or that the PBGC is unable to make such determinations based on the information available.[66] The PBGC must then notify the plan administrator, as soon as practicable, regarding the PBGC's findings.[67]

The PBGC's findings regarding the sufficiency of the plan for guaranteed benefits and guaranteed liabilities dictate the PBGC's next step.[68] If the PBGC finds that the plan has sufficient assets to cover its benefit liabilities, or if the PBGC cannot determine this fact, the plan administrator distributes the plan assets, makes certification to the PBGC that the assets were distributed, and then takes the necessary steps to carry out plan termination.[69]

If, however, the PBGC is unable to determine, based on the information provided to it, that the plan has sufficient assets to cover its guaranteed benefits, the PBGC will pursue plan termination under 29 U.S.C. § 1342, ERISA's involuntary termination provision.[70]

Between the time the plan administrator files a notice of plan termination and the time when the PBGC makes its determination regarding the sufficiency of the plan's assets, the plan ad-

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62 *Id.* § 1341(c)(2)(B)(iii)(I)-(II).
63 *Id.* § 1341(c)(2)(B).
64 *Id.* § 1341(c)(2)(C).
65 *See id.* § 1341(c)(3)(A).
66 *Id.* § 1341(c)(3)(A)(i).
67 *Id.* § 1341(c)(3)(A).
68 *See id.* § 1341(c)(3)(B)(i)-(iii).
69 *Id.* § 1341(c)(3)(B)(i)-(ii). "A single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under the plan." *Id.* § 1341(d)(1). "A single-employer plan is sufficient for guaranteed benefits if there is no amount of unfunded guaranteed benefits under the plan." *Id.*
70 *Id.* § 1341(c)(3)(B)(iii).

ministrator must carry out his job in accordance with ERISA's terms.[71] During this interim period, the plan administrator: (1) cannot distribute the plan's assets or pursue other actions regarding the plan termination;[72] (2) can only make employer contributions to the plan in the form of an annuity;[73] (3) cannot use the plan's assets "to purchase irrevocable commitments to provide benefits from an insurer;"[74] and (4) must continue to pay all of the benefits that are fully vested and due pursuant to the terms of the plan. Starting on the proposed termination date, however, the plan administrator must curtail the level of benefit payments to equal the level that the PBGC will guarantee once the plan is terminated.[75]

A pension plan cannot terminate if doing so would violate the terms of a collective bargaining agreement.[76] The plan administrator must also give the PBGC, plan participants, and plan beneficiaries notice of the termination at least sixty days prior to the proposed termination date.[77] Once the plan is terminated, the PBGC distributes the benefits to the plan participants.[78]

C. Standard Termination

A standard termination is a termination in which the plan assets are sufficient to satisfy the plan's benefit liabilities.[79] The plan administrator must send termination notices to plan participants, beneficiaries, and unions at least 60 days, but not more than 90 days, before the proposed plan termination date.[80] If the plan administrator gives all parties fifteen days' notice, he can also freeze the plan and stop benefits from accruing further.[81] A plan administrator cannot, however, terminate a plan

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71 *Id.* § 1341(c)(3)(D)(ii)(I)-(IV).

72 *Id.* § 1341(c)(3)(D)(ii)(I).

73 *Id.* § 1341(c)(3)(D)(ii)(II).

74 *Id.* § 1341(c)(3)(D)(ii)(III).

75 *Id.* § 1341(c)(3)(D)(ii)(IV). If the plan administrator does not carry out his duties as prescribed by ERISA, "any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with the regulations of the [PBGC])." *Id.*

76 Lowe, *supra* note 27, at *304 (citing ERISA § 4041(a)(3)).

77 *Id.*

78 *See id.*

79 *Id.* at *301 (citing ERISA § 4041(b)(1)(D)).

80 *Id.* The plan administrator must also send a notice of intent to terminate the pension plan to the PBGC. 29 U.S.C. § 1341(b)(2)(A).

81 Lowe, *supra* note 27, at *301. However, "notice of a plan amendment that significantly reduces the rate of future benefit accrual must be provided to af-

if the employer and its union collectively bargained for the formation of the plan, and termination of the plan would violate the terms of the collective bargaining agreement.[82]

Prior to the onset of a standard termination, the plan administrator must inform each plan participant and beneficiary as to the level of that individual's benefits upon termination, as well as the method by which the level was calculated.[83] This notice is generally "given within 180 days after [the] proposed termination date."[84] The administrator must also forward this notice to the PBGC.[85]

The PBGC then has sixty days to issue notice of noncompliance.[86] If the administrator has not received a notice of noncompliance within sixty days, asset distribution must begin as soon as practicable if the plan's assets are still sufficient to cover its liabilities.[87] The asset distribution must be completed within 180 days, followed by a post-distribution certification that must be sent to the PBGC within thirty days.[88]

In the event that the plan has more assets than liabilities, the remaining balance can revert to the employer.[89] The plan terms, however, must provide for reversion,[90] and such a provision must have been included in the plan for at least five years before termination and reversion of the excess assets.[91] Further, if any part of the asset surplus is due to mandatory employee

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fected participants within a reasonable time before the effective date of the plan amendment. The notice must be written in a manner calculated to be understood by the average plan participant." *Id.* Failure to provide the requisite notice results in a $100-per day excise tax. *Id.*

[82] *Id.* (citing ERISA § 4041(a)(3)).

[83] *Id.* Specifically, the plan administrator must give notice to each plan participant or beneficiary that specifies "the amount of benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined . . ." 29 U.S.C. § 1341(b)(2)(B)(i). The plan administrator must express the length of service and age of the participant or beneficiary, the level of wages received, the interest rate, and any other information needed to reach the level of benefit liabilities attributable to each participant or beneficiary. *Id.* § 1341(b)(2)(B)(ii).

[84] Lowe, *supra* note 27, at *301 (citing 29 C.F.R. § 4041.25).

[85] *Id.* (citing ERISA § 4041(b)(2)(A)).

[86] *Id.* at *302 (citing ERISA § 4041(b)(2)(C); 29 C.F.R. 4041.29).

[87] *Id.* (citing 29 C.F.R. § 4041(b)(2)(D)).

[88] *Id.* (citing 29 C.F.R. §§ 4041.28-4041.29).

[89] *Id.* (citing ERISA § 4044(d)(1)(A)).

[90] *Id.* at *303 (citing ERISA § 4044(d)(1)(c)).

[91] *Id.* (citing ERISA § 4044(d)(1) "Amendment of the plan to permit reversion may be precluded by other provisions of the plan and/or the provisions of a collective bargaining agreement."). *Id.*

contributions, "employees must recover a portion of the surplus equal to the percentage of the employees' benefits (other than voluntary contributions) attributable to mandatory employee contributions."[92] The employer must share the excess assets with those who are plan participants at the time the plan is terminated, as well as with former plan participants who received an annuity or a cash payout from the plan within three years before the plan termination.[93]

The reversion of surplus plan assets, however, is not tax free. The reversion is taxed pursuant to the tax-benefit rule, and "a 50% non-deductible excise tax is imposed on the employer."[94] The employer can reduce the 50% excise tax to 20% if it either creates a qualified plan to replace the terminating plan, or amends the plan to grant increased benefits.[95] As another option, "the employer may provide a pro rata benefit increase in the accrued benefits of participants under the terminated plan so that the aggregate present value of such increase is at least equal to 20% of the maximum reversion possible."[96]

D. INVOLUNTARY TERMINATION

The PBGC may involuntarily terminate an under funded pension plan.[97] The PBGC may institute a termination on its own accord if: (1) the plan does not meet the minimum funding standards set forth in the Internal Revenue Code;[98] (2) the plan

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[92] *Id.* (citing ERISA § 4044(d)(3)(A)).

[93] *Id.* (citing ERISA § 4044(d)(3)(C)).

[94] *Id.* at *302-03.

[95] *Id.* at *303. "The qualified replacement plan may be either a new or existing defined benefit or defined contribution plan. At least 95% of the active participants in the terminated plan who remain as employees after termination must be active participants in the replacement plan." *Id.* If the employer chooses a defined contribution plan to replace the terminated plan, the assets that are transferred to the new replacement plan "must either be allocated to participants' accounts in the plan year in which the transfer occurs, or credited to a suspense account and allocated ratably over a period not more than seven-plan-years beginning with the year of transfer." *Id.* The employer must also designate to the replacement plan at least 25% of the reverting assets. *Id.*

[96] Lowe, *supra* note 27, at *303.

[97] *Id.* at *305. "The [PBGC] shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the [PBGC] determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan." 29 U.S.C. § 1342(a).

[98] Lowe, *supra* note 27, at *305.

> A plan . . . shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year, the plan does not have an accumulated funding deficiency. For purposes of

will not have sufficient assets to pay its benefit liabilities when they become due;[99] (3) the plan's substantial owner receives a benefit distribution from the plan in excess of $10,000;[100] or (4) maintenance of the plan would result in a long-run loss to the PBGC that "may reasonably be expected to increase unreasonably if the plan is not terminated."[101]

The PBGC has a great deal of latitude in the involuntary termination process.[102] The PBGC may prescribe a streamlined termination process as long as the process has safeguards for plan participants, beneficiaries, and the employer.[103] The PBGC may also pool the assets of other terminated pension plans "for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate . . . ."[104]

After making the determination that a pension plan is eligible to be involuntarily terminated, the PBGC is "required" to institute proceedings before termination.[105] It may also, after giving notice to the members of the pension plan, apply to a United States district court to have a trustee appointed to administer the plan under a decree issued to terminate the plan.[106]

> this section . . . the term "accumulated funding deficiency" means for any plan the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which this section applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such accounts for such years.

26 U.S.C.A. § 412(a)(2).

[99] Lowe, *supra* note 27, at *305.

[100] *Id.*

[101] *Id.* (quoting ERISA § 4042(a)).

[102] *See* 29 U.S.C. § 1342(a).

[103] *Id.*

[104] *Id.*

[105] *Id.* § 1342(b)(1).

[106] *Id.*

> If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the [PBGC] determines that the plan should be terminated or that termination is unnecessary.

Id. § 1342(b)(2).

The PBGC is not limited to asking a court for the appointment of a trustee in cases of involuntary termination. The PBGC can petition a court for the appointment of a trustee in any case. *Id.* ERISA gives an affirmative grant of jurisdiction

The PBGC institutes involuntary termination proceedings by giving notice to the plan administrator, and then applying to a "United States district court for a decree adjudicating that the plan must be terminated.[107] Once an application for the appointment of a new trustee, or the application seeking a judicial decree terminating the plan has been submitted, the United States district court to which the application was made has exclusive jurisdiction over the plan and its property.[108] The court has jurisdiction to the extent that a federal district court has jurisdiction over cases brought under Chapter 11 of the Bankruptcy Code.[109] Further, pending the adjudication of a plan termination, the court will move to stay "any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property."[110]

The court itself does not terminate the pension plan.[111] Instead, if the court grants the decree—submitted either by the PBGC or the trustee of the plan—the court grants the requesting party the authority to terminate the plan in accordance with ERISA's provisions.[112]

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to the United States district courts to appoint a trustee over an under-funded pension plan. *See Id.* § 1342(b)(2)(A) ("[U]pon the petition of a plan administrator or the [PBGC], the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee . . . ."). *Id.*

107 *Id.* § 1342(c).

108 *Id.* § 1342(f).

109 *Id.*

110 *Id.*

111 *Id.* § 1342(c).

112 *Id.*

> If the court to which an application is made . . . issues the decree requested in [the] application, in addition to the powers described in subparagraph (A), the trustee shall have the power – (i) to pay benefits under the plan in accordance with the requirements of this subchapter; (ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 1082 of this title or the terms of the plan; (iii) to receive any payment made by the corporation to the plan under this subchapter; (iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan; (v) to issue, publish, or file such notices, statements, and reports as may be required by the [PBGC] or any order of the court; (vi) to liquidate the plan assets; (vii) to recover payments under section 1345(a) of this title; and (viii) to

E. THE STATUS OF THE PBGC AND AIRLINE DEFINED BENEFIT PENSION PLANS

The PBGC has plunged into debt as more and more corporations terminate their defined benefit pension plans.[113] In fiscal year 2001, the PBGC had a $7.7 billion surplus.[114] That surplus evaporated, and the PBGC recorded a $3.6 billion deficit in fiscal-year 2002, and an $11.2 billion deficit in fiscal-year 2003.[115] In 2004, the PBGC had a record-breaking $23.3 billion deficit.[116] "[D]efined benefit plans have been hit by the 'perfect storm' of declining interest rates, weak equity markets, and a business slowdown."[117]

The airline industry is a major contributor to the PBGC's deficit.[118] With the termination of United Airlines pilots' defined benefit plan, terminated airline pensions make up five of the PBGC's ten largest claims.[119] United's termination dumped $1.4 billion in liabilities on the PBGC,[120] while Pan American Airlines, US Airways pilots, and Eastern Airlines, account for $841 million, $726 million, and $552 million in liabilities, respectively.[121] To add insult to injury, United's termination of the remainder of its pension plans adds $5 billion more to the

> do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

Id. § 1342(d)(1)(B)(i)-(viii).

[113] *See* Cook, *supra* note 43, at *1123.

[114] *Id.*

[115] *Id.* The PBGC has also seen the level of benefit payments over which it is responsible skyrocket from $1.5 billion in fiscal year 2002 to almost $2.5 billion in fiscal year 2003. *Id.*

[116] *Id.*; Schroeder, *supra* note 7.

[117] Advisory Council on Employee Welfare and Pension Benefit Plans, *supra* note 28.

[118] Dan Reed, *United Pension Debate Goes on in Wake of PBGC Move to End Pilots' Plan*, USA TODAY, Jan. 3, 2005.

[119] *Id.*

[120] United's plan termination was an involuntary termination, initiated by the PBGC. *See id.* The airline, in an agreement with its pilots' union, had agreed to wait until May 2005 before terminating the plan in a distress termination, thereby allowing approximately $140 million more in PBGC guaranteed benefits to accrue. *Id.* In return, the pilots union had agreed not to oppose the May termination, and to take a 15% salary cut. *Turbulence – American corporate pensions*, ECONOMIST, Jan. 8, 2005, *available at* 2005 WL 64614758. Seeing the chance to save money, and the fact that termination was inevitable, the PBGC stepped in, and with the approval of an Illinois federal judge, terminated the pension plan early. Reed, *supra* note 118.

[121] Reed, *supra* note 118.

PBGC's pension payments, and represents "the biggest corporate pension default in history."[122]

"[T]he airline industry currently is in the midst of a fundamental business crisis, because of the events of September 11, SARS, and the Iraq war."[123] As a result, airlines looking for ways to cut costs have zeroed in on pension plan terminations as a way to save billions and attain a competitive edge. For example, UAL, the parent company of United Airlines, stated that it had to "jettison the plans to become more attractive to lenders needed to fund its emergence from Chapter 11."[124] Bradley Belt, the executive director of the PBGC, fears that moves like that of UAL could force other major airlines to follow suit in order to match UAL's post-termination improved cash position.[125] Mr. Belt recently told Congress that such a competitive domino effect would force the PBGC to assume approximately $31 billion in unfunded pension liabilities.[126]

Further, Mr. Belt does not believe that the current $19-per participant insurance premiums are sufficient to cover the inevitable onslaught of pension benefit liabilities.[127] In fact, he believes that at the current rate of pension plan terminations, the PBGC is on the verge of a taxpayer bailout.[128] Oddly enough, labor unions want a government bailout.[129] Alan Reuther, the legislative director of the United Auto Workers, believes that "[a]t the end of the day, the proper course is to have an infusion of general revenues to cover the airline and steel liabilities that

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122 Jaret Seiberg, *Setting free the bulls*, THEDEAL.COM, Jan. 10, 2005, *available at* 2005 WLNR 4377446.

123 Advisory Council on Employee Welfare and Pension Benefit Plans, *supra* note 28.

124 Carey, *Agency Seeks UAL Pension Takeover*, *supra* note 2.

125 *See* Pilling, *supra* note 2; *see also* Jeff Yastine & Susie Gharib, *Nightly Business Report*, Dec. 30, 2004, *available at* 2004 WLNR 17595634 ("Certainly one of the concerns we have is that they will look to try to [dump their pension plans]. Any number of airline companies CEO's that are not now bankrupt have indicated that they consider that to be a viable option, enter bankruptcy and try to shed their pension liabilities, shift those costs onto the [f]ederal government, onto other premium payers.").

126 Pilling, *supra* note 2.

127 *Marketplace: Pension Benefit Guaranty Corporation needs to look out for its own interests* (Minnesota Public Radio broadcast, Dec. 30, 2004) (transcription on file with the author).

128 Pilling, *supra* note 2; *see also* Robert Dodge, *Safety net no longer is so safe – Pension chief says insurance program's troubles are many*, DALLAS MORNING NEWS, Jan. 16, 2005, at D1.

129 Schroeder, *supra* note 7.

the PBGC is going to be taking over."[130] In contrast, the Bush administration and several congressmen are considering remedies that would keep the PBGC solvent by placing the burden on the companies that pose the highest risk of terminating their plans, rather than on the government.[131] Notwithstanding the differing views on how to solve the looming PBGC crisis, everyone agrees that something must be done. "At stake is the viability of one of the principal means of providing stable retirement income to millions of American workers."[132]

IV. SOLUTIONS

A. Ensuring the PBGC's Solvency

As stated previously, the PBGC does not rely on tax revenues to ensure continuous funding of pension plan benefits.[133] Instead, the PBGC collects insurance premiums from employers who administer defined benefit pension plans, earns money on investments, and pools assets from the many terminated plans under its control.[134] ERISA sets the current regular premium at $19 for each worker participating in a defined benefit pension plan.[135] The pension plan must also pay "an amount equal to $9.00 for each $1,000 (or fraction thereof) of unfunded vested benefits under the plan as of the close of the preceding plan year."[136]

ERISA's terms grant the PBGC significant latitude in setting the level of insurance premiums. Section 1306's sweeping language allows the PBGC to "prescribe such schedules of premium rates and bases for the application of those rates as may be necessary to provide sufficient revenue to the fund for the [PBGC] to carry out its functions."[137] Although the PBGC's insurance premiums could presumably be set at any level, ERISA requires uniformity for all plans.[138]

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130 *Id.*

131 *Id.*

132 *Id.*

133 Hazan, *supra* note 50, at *501.

134 *Id.*

135 29 U.S.C. § 1306(a)(3)(A)(i). The $19 premium applies to single-employer pension plans, which are at issue in this comment. *Id.*

136 29 U.S.C. § 1306(a)(3)(E)(ii). Vested benefits are those that are nonforfeitable, as defined by ERISA. Campbell, *supra* note 47, § 14 (citing Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980)).

137 29 U.S.C. § 1306(a)(1).

138 *Id.*

The first step necessary to ensure the PBGC's solvency is to increase the insurance premiums.[139] At the current level of $19, Mr. Belt, the executive director of the PBGC, does not believe that the PBGC will have the assets to cover its current liabilities going into the future, and especially not the potential future liabilities if other major air carries follow UAL's cost-cutting strategy of terminating pension plans.[140]

The Bush administration recently proposed a graduated premium plan that would charge businesses at risk of bankruptcy a higher insurance premium.[141] This plan, however, will require a major overhaul of ERISA because, currently, PBGC premiums must be assessed uniformly across all single-employer plans.[142] ERISA's terms would have to be changed, and Congress would be forced to create some sort of financial blue-print to aid the PBGC in determining what it means to be "at risk of bankruptcy." In addition to these statutory changes, Congress would be forced to create a method for the PBGC to conduct valuations of each individual company to determine its financial situation. Funding for such a valuation process would undoubtedly fall on the already beleaguered PBGC.

Rather than create a graduated insurance premium, Congress should increase the $9 risk premium[143] that is imposed on each $1,000 of unfunded vested benefits.[144] The risk for the PBGC is not simply that companies may declare bankruptcy, or even terminate their pension plans. If a bankrupt company's pension

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139 Schroeder, *supra* note 7 ("To shore up agency revenue, the Bush administration is likely to propose increased premiums for all participating companies . . .").

140 *Marketplace: Pension Benefit Guaranty Corporation Needs to Look Out for its Own Interests*, *supra* note 129.

141 Schroeder, *supra* note 7.

142 29 U.S.C. § 1306(a)(1).

143 *Id.* § 1306(a)(3)(E)(ii).

144 There is fear that increasing both the general pension insurance premium, as well as the risk premium assessed on unfunded vested liabilities, will lead airlines to terminate their grossly under-funded defined benefit pension plans. Schroeder, *supra* note 7 ("Employer groups and unions say that imposing higher premiums or stiffer rules could prompt some companies to freeze or eliminate their pension plans."). Major air carriers currently experiencing hard financial times would be hit by both of these increases. Airlines such as Delta, whose pension plans are under-funded by nearly $5 billion, would obviously absorb the general premium increase, but would also face a heavy risk premium. Kirsten Tagami & Russell Grantham, *Delta Cuts Some Fees – Frequent Fliers' Gripes Also Addressed*, ATLANTA JOURNAL-CONSTITUTION, Dec. 16, 2004, at E1. Accordingly, Congress must create a disincentive for employers that will dissuade them from terminating their pensions and turning them over to the PBGC.

plan is fully funded, then the PBGC does not realize a deficit. The real risk to the PBGC is that companies will terminate their pension plans with millions of dollars in unfunded benefits, a large portion of which the PBGC must guarantee. Increasing the $9 risk premium increases the burden on those companies that truly pose the risk to the PBGC should they terminate their pension plan. Further, no major overhaul of the ERISA premium provisions, and no eccentric valuation scheme that would burden the PBGC, would be necessary.

Focus should next shift to ERISA's funding rules. Current ERISA funding rules require catch-up payments, also known as deficit-reduction contributions, when the value of the benefits in a defined benefit pension plan drop below 90% of the required funding.[145] These funding rules often go into effect during a recession, when the value of a plan's funds diminishes due to "declining interest rates, falling asset prices and low earnings . . . ."[146] As a result, employers face what has been called a counter-cyclical burden; they must make large pension plan contributions during recessions, and smaller contributions when the economy is prospering.[147] For example, Delta currently must come up with hundreds of millions of dollars to catch up its pension plans to the required funding level.[148] Considering the company's current financial status, it believes its only recourse is to convince Congress to stretch out its payments, or face bankruptcy.[149]

The first change to ERISA's funding rules should be to remove the current full-funding limits to allow employers to overfund their pension plans during prosperous times.[150] This will create a funding cushion to absorb a portion of the decrease in

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[145] Seiberg, *supra* note 122.

[146] Advisory Council on Employee Welfare and Pension Benefit Plans, *supra* note 28, at 18.

[147] *Id.* The counter-cyclical problem that is fostered by the current funding rules is also evidenced by the dramatic increase in pension plan contributions during the recent recession. *Id.* at 12. From 1999 to 2001, the contributions of the Fortune 1,000 companies to defined benefit pension plans totaled $41 billion. *Id.* In 2002, alone, these same companies were required to contribute $43.5 billion. *Id.* Analysts predict that if the current rules remain unchanged, the Fortune 1000 companies will have to contribute nearly $160 billion total to their defined benefit pension plans over fiscal years 2004 and 2005. *Id.*

[148] Tagami, *supra* note 144.

[149] *Id.*

[150] Schroeder, *supra* note 7 ("[The Bush administration] may also propose making it easier for companies to contribute more to their plans during flush times.").

the value of the plan funds when the economy takes a downturn. As a result, employers will no longer be forced to make such large deficit-reduction contributions during a recession.[151] And to encourage over-funding, Congress should grant employers tax deductions for contributions that exceed mandatory funding levels.[152] Allowing employers to over-fund their pension plans will decrease the severity of their "catch-up" payments when the fund value decreases, thereby decreasing the likelihood that an employer will terminate its pension plan and force the PBGC to shoulder more debt.

Congress should then shift its focus to the PBGC's lien rights. When an employer terminates a defined benefit pension plan with unfunded liabilities, the PBGC has two causes of action against the plan sponsor.[153] The first claim "amounts to the lesser of: (1) the difference between the value of the plan assets at the time of termination and the amount of the plan's obligations to its participants; or (2) 30% of the net worth of the plan sponsor (the "Unfunded Liability Claim")."[154] When a defined benefit plan terminates, the PBGC's second cause of action is for the recovery of ERISA's minimum funding contributions that the plan sponsor or employer did not pay.[155] This is called the Minimum Funding Contribution Claim.[156]

These causes of action—the Unfunded Liability Claim and the Minimum Funding Contribution Claim—accrue against both the plan sponsor and his control group.[157] As a result, "[t]he PBGC can assert liens against the plan sponsor's assets

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151 Advisory Council on Employee Welfare and Pension Benefit Plans, *supra* note 28, at 15 ("Mr. LoBombarde commented on the situation where plans go from being prevented from making contributions to extremely high deficit reduction contributions (DRC) in the space of just a few years.").

152 *Id.* at 21 ("Mr. Kelly believed that employers should receive tax deductions for contributions in excess of what is currently allowed."). Some have suggested that, in conjunction with income tax deductions for over-funding a pension plan, Congress should rescind the excise tax and allow some of the surplus to revert back to the employer tax-free. *Id.* at 17. This is not advisable in the current situation. Congress should not make it painless, or tax-free, for an employer to take money out of a pension plan. All incentives should be geared toward encouraging employers to fund their pension plans, not toward taking money out of the plan.

153 Hazan, *supra* note 50, at *502.

154 *Id.* (citing 29 U.S.C. § 1362(b)).

155 *Id.* (citing 29 U.S.C. § 1362(c)).

156 *Id.*

157 *Id.* The plan sponsor and the plan control group are jointly and severally liable for the Unfunded Liability Claim and the Minimum Funding Contribution Claim. *Id.*

(or those in the sponsor's control group) to secure" these claims upon plan termination.[158] If, however, the plan sponsor terminates the pension plan after declaring bankruptcy, the Bankruptcy Code's automatic stay provisions preclude the PBGC's liens from attaching.[159]

The PBGC must be more vigilant in instituting involuntary plan terminations in order to perfect its liens before employers have a chance to file for bankruptcy.[160] The ERISA drafters' authorization of involuntary termination, when maintenance of the plan would unreasonably increase the PBGC's long-run losses, grants the PBGC significant latitude.[161] The PBGC should capitalize on this criterion's subjectivity, much like it did when it saved $140 million by stepping in early and involuntarily terminating one of United's pension plans.[162]

Congress should also strongly consider granting the PBGC priority status on its liens for the under-funded portion of a terminated pension plan.[163] Airlines increasingly put their unfunded pension liabilities on the PBGC, not just to survive, but to gain an advantageous cash position and a competitive edge. This maneuver stands to gain popularity, as airlines such as UAL terminate their grossly underfunded pension plans "to become

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158 *Id.*

159 *Id.* (citing *In re* Chateaugay Corp., 115 B.R. 760, 780 (Bankr. S.D.N.Y. 1990)). The PBGC could only enjoy secured creditor status if it were to perfect its lien prior to the employer declaring bankruptcy. Jill L. Uyalki, *Promises Made, Promises Broken: Securing Defined Benefit Pension Plan Income in the Wake of Employer Bankruptcy: Should We Rethink Priority Status for the Pension Benefit Guaranty Coprroration?*, 6 ELDER L.J. 77, 96 (1998). This would only occur if the PBGC demanded payment and filed notice of its claim before the employer had a chance to declare bankruptcy. *Id.*

160 *See* Frank Cummings, *Terminating Defined Benefit Pension Plans: An Introductory Overview of The Rules and Liabilities*, SF83 ALI-ABA 533 (A.B.A. Continuing Legal Educ.), May 3, 2001, at *560. The lien is perfected on the plan's termination date. *Id.*

161 *See* Lowe, *supra* note 27, at *305.

162 Reed, *supra* note 118. The termination of United's pension plan occurred *after* United's bankruptcy filing. In any event, it is this type of proactive posture that this comment advocates for the PBGC.

163 Uyalki, *supra* note 159, at 96. Ms. Uyalki proposes that Congress grant priority status to PBGC liens primarily as an added level of insurance for employee pensions. *Id.* at 111 ("In short, priority status confers a wealth of benefits to both pension plan participants and society. Pensioners would no longer fear the fate of their future, and society would no longer have to bear the economic brunt of those whose pensions have failed them."). This comment views granting lien priority status not so much as added security, but rather as a great disincentive to companies that attempt to unload their pension liabilities on the PBGC in order to secure funding to emerge from bankruptcy.

more attractive to lenders."[164] Mr. Belt, the executive director of the PBGC, fears that more airlines will follow UAL's lead.[165] In fact, "[a]ny number of airline companies CEO's that are not now bankrupt have indicated that they consider that to be a viable option, enter bankruptcy and try to shed their pension liabilities, [and] shift those costs onto the Federal government, onto other premium payers."[166] Facilitating the ripening of PBGC's claims into liens, and granting PBGC liens priority status, would greatly diminish the current incentive for airlines to declare bankruptcy in an attempt to shed their unfunded pension liabilities. Airlines like UAL could not simply "jettison" their pension plans to look "more attractive" for lenders; they would have a lien attached to their assets that could amount to as much as 30% of the airline's net worth.[167]

Another way to dissuade airlines and other employers from shedding their unfunded benefit liabilities onto the PBGC is to amend the Bankruptcy Code to preclude the discharge of unfunded pension liabilities. Congress would be wise to craft legislation that parallels the Bankruptcy Code's language on student discharges of government-backed education loans. Under the current code, a student-debtor cannot discharge government-backed education loans in bankruptcy "unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents."[168] Congress should require a company to demonstrate that not excepting the unfunded pension liabilities would prevent the company from emerging from bankruptcy, or will result in other undue hardship. There is no good policy reason to make it easier for a major airline to dump its liabilities onto the federal government than for a heavily-indebted college graduate to do the same.

Adopting these suggestions would put many airlines in a tough situation because they increase the cost of maintaining an under-funded defined benefit plan. They also make it much more difficult to push benefit liabilities onto the federal government through bankruptcy. The suggestions, however, are needed to ensure the PBGC's solvency. Congress must look at the situation in the aggregate, and not make legislative and pro-

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164 Carey, *Agency Seeks UAL Pension Takeover*, *supra* note 2.

165 Yastine, *supra* note 125.

166 *Id.*

167 Hazan, *supra* note 50, at *502.

168 *In re* Boykin, 313 B.R. 516, 519 (Bankr. M.D. Ga. 2004) (quoting 11 U.S.C.A. § 523(a)(8) (West 1993 & Supp. 2004)).

cedural changes with the sole intention of propping up the airlines.

Major air carriers can survive the implementation of these suggestions and improve their competitive position without relying on plan terminations and bankruptcy. The airlines should begin making a major push away from defined benefit plans and toward defined contribution plans. Such a shift would take the burden of insurance premiums and "catch-up" payments off of the airlines.[169] More importantly, it would remove the risk that the PBGC will be stuck with billions in unfunded pension liabilities.

Admittedly, a move toward defined contribution plans would require changes in collective bargaining agreements,[170] and for the airlines' labor unions to change their current policy of staunchly advocating only defined benefit plans. Unionized employees must begin to realize that a switch to a defined contribution plan—a switch airlines should advocate—does not necessarily increase their risk, but instead changes the risk. Currently, under a defined benefit plan in the airline industry, employees face the risk that their employer will terminate the plan, and that the PBGC will only guarantee a level of benefits far below what the employees expected when they joined the

169 The airlines would not be liable for any unfunded benefits, because the level of benefits in a defined contribution plan is not predetermined, but rather is based on employee contributions, employer contributions, and the state of the stock market. *Pensions and Retirement Funds*, *supra* note 35, § 16 (citing 26 U.S.C.A. § 414(i)).

170 The Railway Labor Act ("RLA") has governed relations between the airlines and their labor unions since 1936. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 248 (1994). The RLA separates disputes between the two parties into major and minor disputes, and designates different dispute resolution procedures for each. *Id.* at 252-53. Major disputes arise when one party seeks to change or create contractual rights in a collective bargaining agreement. Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 302 (1989). A minor dispute, in contrast, is a dispute over the interpretation of the existing collective bargaining agreement. *Id.* at 303. In the event of a major dispute, the parties are required to undergo a lengthy bargaining process and are statutorily obligated to maintain the status quo until the process is complete. *Id.* at 302-03. A federal district court can, in fact, issue an injunction to enforce the status quo. *Id.* at 303. In the event of a minor dispute, the parties are not obligated to maintain the status quo, but they are subject to binding arbitration. *Id.* Assuming that a defined benefit plan was included in a collective bargaining agreement, an airline attempt to unilaterally change it to a defined contribution plan would constitute a major dispute. As a result, the parties would be subject to mediation and required to maintain the status quo.

plan.[171] For example, "a 56-year-old pilot who retires with 26 years seniority would get about $2,200 a month in PBGC insurance payments, rather than the $8,200 expected . . . ."[172] Under a defined contribution plan, employees shift their risk to the stock market. The employees would also remove the defined contribution "golden-handcuffs,"[173] which tie them to their employer, and would give themselves more freedom to seek alternative employment.

The efficacy of defined contribution plans in the airline industry seems to be improving slowly. Recently, Delta "pilots ratified changes . . . that froze their pension plan and started a new defined contribution plan, similar to a 401(k) option that most employers use."[174] The shift to defined contribution plans is a sound financial move for the airline industry and would allow major carriers to better fulfill the pension promises made to their employees. Furthermore, considering the industry's financial situation, it stands to decrease the burden on the PBGC going into the future.

Congress must act soon to ensure the solvency of the PBGC. Congress's first step should be to increase the $19 pension insurance premiums. The second step should be to increase the risk premium, currently $9 for every $1,000 of unfunded, vested benefits. Companies with high amounts of unfunded benefits are the true threat to the PBGC. Next, Congress should remove the upper funding limits currently in place to allow employers to over-fund their pension plans in prosperous times, greatly diminishing the required "catch-up" payments that often come during a recession. The PBGC itself must take a proactive stance, use the latitude Congress granted it, and involuntarily terminate those plans that will unreasonably increase the

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[171] An airline cannot terminate a pension plan if doing so would violate its collective bargaining agreement. Lowe, *supra* note 27, at *304. If the airline declares bankruptcy, however, it could move under Bankruptcy Code § 1113 code for the rejection of the entire collective bargaining agreement. Mark Vogel, *Employee Benefits in Bankruptcy Proceedings*, N98EBMB ABA-LGLED D-1 (A.B.A. Continuing Legal Educ.), Apr. 16-17, 1998, at D-10. Employees would be better served by changing to a defined contribution plan than by driving the airline into bankruptcy where they could do away with their entire collective bargaining agreement, which dictates all of the terms of their employment.

[172] Reed, *supra* note 118.

[173] Forman, *supra* note 31, at 196.

[174] Eric Torbenson, *Struggling With the Load: Cash-strapped airlines are dragging down the pension system. And Social Security? An overhaul may get off the ground. Dumping retirement obligations can keep carriers flying – at a big cost for workers*, DALLAS MORNING NEWS, Jan. 16, 2005, at D1.

PBGC's long-run losses. Congress should also grant the PBGC's liens priority status and restrict the discharge of unfunded pension liabilities. These changes will force companies to resort to bankruptcy only out of necessity, not for beneficial strategic reasons. In light of these changes, which are geared toward the long-term health of the pension system and the PBGC, airlines should begin a stronger push toward defined contribution plans. Airlines must educate their employees about the benefits of a defined contribution plan, and the pitfalls of defined benefit plans, especially in the tumultuous airline industry. Doing so will take a substantial financial burden off of the airlines' shoulders and alleviate much of the risk to the PBGC.

B. Protection for Beneficiaries of Defined Benefit Pensions

The onslaught of pension plan terminations has devastated thousands of employees who planned their retirement around their "defined" pensions. "As a practical example of the impact, [United] and [its] pilots union said . . . that a 56-year-old pilot who retires with 26 years seniority would get about $2,200 a month in PBGC pension insurance payments, rather than the $8,200 expected under the existing plan."[175] Clearly, more needs to be done to protect employees from the reality that comes with their employers' broken pension promises.

Currently, when the PBGC becomes the statutory trustee of a terminated pension plan, it sends each plan beneficiary an initial determination letter detailing the level of benefits due him or her.[176] If the participant[177] disagrees with the PBGC's benefit level determination, he or she can appeal to the PBGC Appeals Board.[178] "The decision of the Appeals Board constitutes the final agency action by the PBGC with respect to the determina-

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[175] Reed, *supra* note 118.

[176] Coleman v. Pension Benefit Guar. Corp., 94 F. Supp. 2d 18, 22 (D.D.C. 2000) (citing 29 C.F.R. §§ 4003.1(a), (b)(6)–(7), 4003.21 (2004)).

[177] Appeals may be brought only by an individual defined as an aggrieved person. "Aggrieved person means any participant, beneficiary, plan administrator, contributing sponsor of a single-employer plan or member of such a contributing sponsor's controlled group . . . or employer that is adversely affected by an initial determination of the PBGC." 29 C.F.R. § 4003.2.

[178] *Coleman*, 94 F. Supp. 2d at 22 (citing 29 C.F.R. § 4003.7); *see also* 29 C.F.R. § 4003.1(7) (including "[d]eterminations made under section 4022 (b) or (c), section 4022A (b) through (e), or section 4022B of ERISA of the amount of benefits payable to participants and beneficiaries under covered plans" as grounds on which plan beneficiaries may file an administrative appeal).

tion."[179] Only after final PBGC action can the participant seek judicial review.[180]

> Although ERISA itself does not specifically require the exhaustion of remedies available under pension plans, as a matter of judicial discretion, barring exceptional circumstances, plaintiffs seeking a determination pursuant to ERISA of rights under their pension plans must . . . exhaust available administrative remedies . . . before they may bring suit in federal court.[181]

Once an employee has exhausted his administrative remedies, and is eligible for judicial review of the PBGC's benefit determination, it becomes even more unlikely that the employee will prevail. "Upon review, an agency's interpretation and application of its own regulation[s] is entitled to substantial deference."[182] The administrative agency's decision will only be overturned if it is deemed to have been arbitrary and capricious.[183] "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency."[184]

Pension plan participants are not given enough judicial protection when they have a grievance with the PBGC over their benefits level. Currently, courts require aggrieved beneficiaries to exhaust their administrative remedies before filing a complaint. This stance puts those who complain of improper pension benefits in a nearly helpless position because a court will only overturn the PBGC's decision if it is arbitrary or capricious.[185] This is especially alarming considering the complexity of determining which benefits should be insured.[186]

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179 29 C.F.R. § 4003.59(b).

180 *Coleman*, 94 F. Supp. 2d at 22 (citing 29 C.F.R. § 4003.59); 29 C.F.R. § 4003.7.

181 Boivin v. U.S. Airways, Inc., 297 F. Supp. 2d 110, 116 n.8 (D.D.C. 2003) (quoting Communications Workers of Am. v. Am. Tel. & Tel. Co., 40 F.3d 426, 431-32 (D.C. Cir. 1994)); Coop. Benefit Adm'rs, Inc. v. Ogden, 367 F.3d 323, 336 (5th Cir. 2004).

182 Fetty v. Pension Benefit Guar. Corp., 915 F. Supp. 230, 234 (D. Colo. 1996) (citing Renfro v. City of Emporia, 948 F.2d 1529, 1537 (10th Cir. 1991)).

183 *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 653 (1990) (applying the arbitrary and capricious standard of review in looking at the decisions of the PBGC).

184 Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Auto. Ins. Co., 463 U.S. 29, 43 (1983).

185 *LTV Corp.*, 496 U.S. at 653.

186 Pineiro v. Pension Benefit Guar. Corp., 318 F. Supp. 2d 67, 73 (S.D.N.Y. 2003).

ERISA's explicit language "does not . . . require" the exhaustion of administrative remedies.[187] Further, it is clear from viewing other administrative dispute resolution legislation that Congress knows how to require exhaustion of administrative remedies when it wants to.[188] Accordingly, courts should assume that Congress considered requiring exhaustion, but decided against it.[189]

By requiring the exhaustion of administrative remedies, courts are forcing individuals with already greatly diminished incomes—such as the United pilot who saw a 73% reduction in his pension benefits—to retain counsel and demonstrate that no reasonable person could have reached the decision that the PBGC did when determining his benefit level.[190] As airline pension plan terminations increase, so does the number of individuals who have virtually no chance of prevailing in a benefit-level dispute.

Further, only standard terminations require the plan administrator to, upon sending the PBGC a notice of the intent to terminate a plan, also send plan participants and beneficiaries notice of how their benefits were tabulated.[191] As a result, airline employees who have seen their pension plans go through distress and involuntary terminations are left to wait for the plan to terminate, for the PBGC to be appointed trustee of the plan, and then for the PBGC to issue an initial determination letter before they know what level of benefits to expect. Further, they do not have the luxury of having the plan administrator's benefit determination to compare against the PBGC's. Congress should amend ERISA to provide for a benefit determination letter in all instances of plan termination. This change will better

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[187] *Boivin*, 297 F. Supp. 2d at 116 n.8.

[188] *See, e.g.*, 42 U.S.C. § 405(g)(2000) (stating that an individual who disagrees with the decision of the Commissioner of Social Security "may obtain a review of such decision by a civil action *after a final decision*") (emphasis added); 26 U.S.C. § 7422(a)(2000) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . *until a claim for refund or credit has been duly filed with the Secretary*.") (emphasis added).

[189] *Cf. In re* Mirant Corp., 378 F.3d 511, 522 (5th Cir. 2004) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.") (quoting United States v. Johnson, 529 U.S. 53, 58 (2000)).

[190] *See In re* Pan Am. World Airways, Inc. Coop. Retirement Income Plan, 777 F. Supp. 1179, 1182 (S.D.N.Y. 1991).

[191] Lowe, *supra* note 27, at *301 (citing 29 U.S.C. § 1341(b)(2)(B)).

equip airline employees to decide if they need to dispute the PBGC's decision.

Pension plan participants do not receive enough protection in the dispute resolution process with the PBGC. Airline employees are increasingly seeing their pension plans terminated either involuntarily or through a distress termination. As a result, they do not receive a notice from their plan administrator regarding the level of accrued benefits. Also, it is very difficult to win a disagreement with the PBGC. Courts, as a matter of discretion, not statutory mandate, currently require pension plan beneficiaries to exhaust their administrative remedies before filing suit over their benefit levels. This decision gives beneficiaries the nearly insurmountable task of proving that the PBGC's decision was arbitrary and capricious. Congress must amend ERISA to require plan administrators give the same notice to their plan beneficiaries, no matter what type of termination is instituted, and courts should refrain from requiring exhauston through judicial fiat. If necessary, Congress could rework ERISA to explicitly not require exhaustion. These changes will grant employees, especially those of the major airlines, needed protection as pension plan terminations become more and more commonplace.

V. CONCLUSION

Over the last few years, airlines have seen the value of their defined benefit plan assets shrink, and the size of their catch-up payments swell. As a result, the airlines have begun to jettison their pension plans liabilities, leaving the PBGC carrying the debt load, which recently reached $23.3 billion. Congress must act before a savings-and-loan-type taxpayer bailout of the PBGC becomes necessary. Pension insurance premiums should be increased, funding rules should be reworked, and the discharge of pension liabilities in bankruptcy should be made much more difficult. The airlines themselves can also act to relieve their burden, and that of the PBGC. Airlines must begin a stronger push toward defined contribution plans to rid themselves of the premium costs and pension liabilities that accompany defined benefit plans. Moving toward defined benefit plans is also a way of removing the PBGC's risk going into the future. Airline labor unions need to realize that they are better off acquiescing to the change than driving the airline into bankruptcy, where the entire collective bargaining agreement can be rejected. These congressional actions, coupled with a push from the airlines

away from defined benefit plans, will ensure the PBGC's solvency. Taxpayers should not be forced to pay for pension benefits that they did not promise and do not receive.

Congress must also act to provide beneficiaries of terminated pension plans more judicial protection. Plan administrators should be required to provide a benefit-calculation notice during distress and involuntary plan terminations. It is during these types of terminations that plan funds were most likely to have been mishandled. Therefore, beneficiaries to these plans need a clear understanding of why their benefits were cut, and whether they should file a dispute. Further, courts should not require plan beneficiaries to exhaust their administrative remedies prior to filing suit. Congress knows exactly how to draft exhaustion requirements in administrative legislation, and it did not do so in ERISA. Courts should not add such an ERISA requirement by judicial fiat.

Notwithstanding the differing views on how to solve the looming crisis at the PBGC, everyone agrees that something must be done. "At stake is the viability of one of the principal means of providing stable retirement income to millions of American workers."[192]

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[192] Schroeder, *supra* note 7.

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