

Q and A about Delta's Improper Removal of Over \$30 Million from the Trust for the Benefit of Survivors and the Disabled

Questions and Answers about Delta's Improper Removal of Over \$30 Million from the Trust for the Benefit of Survivors and the Disabled

On Monday, December 5, the Section 1114 Committee filed a motion in Delta's bankruptcy case to stop Delta from making further improper withdrawals from the Disability and Survivorship Trust. The hearing on that motion is in the afternoon of December 19, in the Bankruptcy Court for the Southern District of New York.

Q: What is Disability and Survivorship Trust?

A: The Delta Family-Care Disability and Survivorship Trust is a trust set up as a separate fund to pay for disability and survivorship (disability, insurance, and survivor income benefits) of the Delta Family-Care Disability and Survivorship Plan. The Trust has its own assets which do not belong to Delta, which are not part of Delta's bankruptcy estate, and which are not available to Delta's many creditors. The Trust is a tax-exempt Section 501(c)(9) employee benefit association.

Q: What is the purpose of the Trust?

A: The Trust (1) allows Delta to get a tax deduction in good years, for payments made into the trust for future benefits; (2) allows those funds to be invested to grow, tax free, so that more money is available to pay future benefits; and (3) protects and preserves this money for the survivors and disabled entitled to benefits. Despite Delta's bankruptcy and future business challenges, the Trust provides security for payment of the critical benefits of disabled retirees (and disabled active workers) and of the survivors of former Delta workers (widows, widowers and orphans) who are living on survivor income benefits.

Q: Is there a separate Trust for pilots and non-pilots?

A: Yes. We're talking only about the Trust for non-pilots, for now. We don't yet know if there were similar problems in the pilots' trust.

Q: Why did the Committee file this motion?

A: We have been asking Delta for the Plan and Trust documents for the Disability and Survivorship Trust for weeks, along with the financial information. In the middle of last week, we finally got those documents. They showed that for the last three and a half years Delta has been paying severance benefits out of the Disability and Survivorship Trust that are flatly prohibited under the trust documents.

Q: How much money did Delta improperly take out of the Trust for severance benefits?

A: Over \$30 million between June 30, 2002 and June 30, 2005, some additional amount of money (we don't yet know how much) between March 1, 2002 and June 30, 2002, and a large amount of money since June 30, 2005.

Q: Have you told Delta that they are improperly taking money out of the Trust? Did they agree to stop doing this?

A: Yes, we have told them, and we've asked them to stop both in discussions and by a written demand. They haven't yet agreed.

Q: So Delta is still taking money out of the separate Trust, which doesn't belong to them, and is using to pay a different company expense they're barred from paying under the Trust?

A: Yes.

Q: Does it matter? Didn't Delta say during the first week of the bankruptcy that the Disability and Survivor Trust was "fully funded"?

A: That's exactly what Delta said, in its motion seeking authority to continue existing benefit programs, item number 21 on the Delta docket. Unfortunately, that wasn't even close to true. Based upon somewhat unrealistic assumptions (that the Trust assets would earn a 10% compounded return every year) the Trust did have more than enough assets to pay benefits at the end of 2000. Delta's most recent financial disclosures for the trust show that, even with

generous future return assumptions of 9% a year, the Trust was \$212 million under funded at the end of 2004. And it is even more under funded today.

Q: What does that mean?

A: At what we understand is the current (or at least recent) rate money is flowing out of the Trust, the Trust will run out of money completely in something like six years, instead of being able to fund disability benefits for at least 16 years or maybe forever.

Q: How did that happen?

A: A big part of the problem is that Delta has taken many millions (more than \$52 million) out of the Trust that Delta shouldn't have taken, so there are fewer assets, and fewer investments generating future returns. Also, Delta planned to continue to take those amounts out of the Trust into the future, depleting the remaining assets more rapidly.

Q: How did it happen that Delta paid \$30 million out of the Trust for company expenses it wasn't allowed to?

A: It's a little complicated. Right after 9/11, without providing notice to the beneficiaries under the Disability and Survivorship Plan funded by the Trust, Delta amended the Trust to allow Delta to pay severance out of the Trust under several layoff programs associated with 9/11. At the same time, however the Trust Agreement was amended to place restrictions on these severance payments. Specifically, Section 3.1(c) of the Trust Agreement was added, which prohibited payment of severance out of the Trust for any severance claim except those that arose between September 11, 2001 and March 1, 2002. After March 1, 2002, Delta adopted a new severance program, which couldn't be funded out of the Trust for three reasons: (1) nothing under the Trust Agreement authorized payment of that new program's expenses, (2) the Trust, in section 3.1(c), specifically prohibited payment of severance arising after March 1, 2002, and (3) Section 11.04 of the Disability and Survivorship Plan that the Trust funds prohibits Delta from using or getting access to any money in the Trust except in strictest compliance with all provisions of the Trust agreement. Unfortunately, even though the Trust agreement prohibited severance payments, for the last three and a half years, Delta has been paying severance out of the Trust anyway.

Q: Why didn't Delta just amend the Trust agreement again in early 2002 to let them take the money?

A: We don't know for sure. We surmise, however, that there might be several reasons several of which we are relatively confident: (1) the Trust was by then under funded, and any changing of the rules certainly would have been a "material modification" of the funding of the Disability and Survivorship Plan that Delta would have had to disclose to all the participants (2) money in an under funded Trust shouldn't be taken away from survivors and the disabled to pay other Delta corporate expenses, and (3) the self interest of the Delta management team in 2002. You may recall, early 2002 was when the Delta Board authorized \$25 million in bankruptcy-proof Supplemental Executive Retirement Plan trusts (SERPs) for then-CEO Leo Mullin and 32 other top executives. If the management team had gone to the Delta Board at the same time seeking authorization for further raids on the Disability and Survivor Trust to help with corporate cash flow, they probably would not have gotten their SERPs. It is hard to see how the Board would have simultaneously sacrificed cash flow to fund new trust for management while breaking into the Trust for survivors and the disabled to improve cash flow.

Q: What about after that?

A: Same problem. We believe that after creating and funding the SERPs (an action later called a big mistake by current Delta CEO Jerry Grinstein) it was politically too difficult (and morale destroying for ordinary workers) to change the Trust to legitimize further raids. As you may recall, in April of 2003 then-CFO (and second largest SERP recipient) M. Michele Burns sent a memo to all Delta employees justifying the SERPs as "an action ...taken to provide security for the payment of retirement benefits already earned." It's pretty difficult to justify providing that "security" for 33 executives while you are eliminating the "security for the payment" of disability and survivor benefits for thousands of Delta former workers which were also "already earned."

Q: Is there any chance of getting the money back that was taken out of the Trust?

A: Yes. The Committee is also seeking authority to bring a federal lawsuit in bankruptcy court, called an adversary proceeding, to get the money back for the Trust on several theories.

Q: Is there any other bad news?

A: Unfortunately, yes. We also understand that Delta, by a "Restated and Amended" Disability and Survivor Plan purportedly dated two days before the bankruptcy, tried to amend the Disability and Survivor Plan to authorize, retroactive to 2004, Delta's changing of the rules to pay over \$22 million of sick pay just in 2004 out of the Trust instead of as an ordinary payroll cost.

Q: Is that allowed?

A: We believe not. We think it was improper both under the Trust and Plan documents, which required strict compliance when the benefit dollars were spent (not 21 months later) and as a transparent and improper attempt to avoid Bankruptcy Code Section 1114, which protects retiree disability and death benefits from these kinds of changes. We are also trying to stop that continuing drain on the Trust.

Q: What is going to happen next?

A: We hope that Delta will do the right thing and stop further improper depletion of Trust assets, and reimburse the Trust. Unfortunately, there are constraints on a company that is operating in bankruptcy, with lenders that have a security interest in all its assets. Those constraints may complicate things. But we are working very hard to attempt to persuade the Court, if not Delta, to fix this problem as soon as possible, and before more money disappears from the Trust.

For Further Information:

1114 Committee

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