

DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Facsimile: (212) 450-6539
John Fouhey (JF 9006)
Marshall S. Huebner (MH 7800)
Benjamin S. Kaminetzky (BK 7741)

Hearing Date: October 27, 2005 at 2:30 p.m.

Attorneys for Debtors and
Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

----- X
:
In re: :
:
:
DELTA AIR LINES, INC., et. al., : **Chapter 11 Case No.**
:
:
Debtors. : **05-17923 (PCB)**
:
:
:
:
:
:
----- X

**DEBTORS' MEMORANDUM IN SUPPORT OF (1) LIMITED
OBJECTION TO DP3 AMENDED MOTION AND DALRC
APPLICATION FOR APPOINTMENT OF RETIREMENT
COMMITTEES UNDER SECTION 1114, AND (2) OBJECTION TO
DALRC APPLICATION TO AUTHORIZE EMPLOYMENT OF COUNSEL**

TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
BACKGROUND: DELTA HEALTH-CARE BENEFITS	3
ARGUMENT	9
I. ONLY ONE RETIREE COMMITTEE SHOULD BE APPOINTED UNDER SECTION 1114	9
II. DELTA, SUPPORTED BY THE CREDITORS COMMITTEE AND WITHOUT OBJECTION BY THE U.S. TRUSTEE, PROPOSES A SINGLE, REPRESENTATIVE COMMITTEE	15
III. THE DALRC RETENTION APPLICATION IS PREMATURE	16
IV. SECTION 1114 DOES NOT APPLY TO AMENDABLE BENEFITS	17
<i>A. The Majority of Courts Have Ruled that Section 1114 “Retiree Benefits” Do Not Include Amendable Benefits</i>	18
<i>B. By Enacting the 2005 Amendments, Congress Endorsed the Prevailing Interpretation of Section 1114</i>	23
<i>C. References to “Claim” in Section 1114 Further Demonstrate that Amendable Benefits Are Not “Retiree Benefits”</i>	26
<i>D. Applying Section 1114 to Amendable Benefits Would Frustrate the Goals of ERISA</i>	27
<i>E. Applying Section 1114 to Amendable Benefits Would Frustrate the Goals of Chapter 11</i>	30
<i>F. Section 1114 Was a Response to Non-Payment of Retiree Benefits that a Debtor Was Legally Obligated to Pay</i>	31
CONCLUSION	33

Delta Air Lines, Inc. (“**Delta**” or the “**Debtor**”) and those of its subsidiaries that are debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the “**Debtors**”) submit this memorandum of law in support of their (1) limited objection to (a) the DP3, Inc. d/b/a/ Delta Pilots’ Pension Preservation Organization (“**DP3**”) amended motion,¹ and (b) the Delta Air Lines Retirement Committee (“**DALRC**”) application for appointment of retirement committees under section 1114, and (2) objection to the DALRC application to authorize employment of counsel pursuant to 11 U.S.C. § 1114(d).

INTRODUCTION

Despite the efforts of DP3 and DALRC to paint an alarming picture of the treatment of Delta retirees, the Debtor does not seek to modify at this time any retiree benefits that are subject to section 1114 of the Code. The only benefits that Delta currently seeks to modify concern annual open enrollment changes to a health-care plan as to which Delta has consistently reserved and regularly exercised a right to alter program structure, benefit costs, and options. As the vast majority of courts and commentators have held, section 1114 has no application to such benefits, because Delta is free to alter them under well-established, non-bankruptcy law and, as a result, would not use *any* bankruptcy rights or powers to implement such changes.

The Debtors have nonetheless determined not to oppose the formation of a single section 1114 committee at this time. The Debtors do, however, assert a limited objection

¹ The DP3 amended motion supersedes the DP3 September 15, 2005 emergency motion to appoint a committee of retired pilots. In addition, DP3’s counsel has advised Debtors’ counsel that the DP3 application as it relates to a retiree committee under section 1102 or 1113 is withdrawn.

to the DP3 amended motion and the DALRC application for appointment of retirement committees under section 1114 as to a pair of critical issues:

First, the Debtors oppose the DP3 motion and the DALRC application insofar as they seek separate section 1114 retiree committees for retired pilots and for retired non-pilots, rather than a single, integrated committee. As set forth below, Delta, with the full support of its Creditors' Committee, proposes the formation of a *single* section 1114 committee that is truly representative, and gives each of the established retiree organization *more* seats than suggested by their respective membership claims. The Debtors have conferred with the Office of the U.S. Trustee, and the U.S. Trustee has advised, and has authorized Delta to advise the Court and the other parties to this proceeding, that (1) the U.S. Trustee has no objection to the formation of only a single section 1114 committee, made up of seven representative members as set forth below, and (2) the Office of the U.S. Trustee is willing to assist in the selection of such a single section 1114 committee.

Second, and perhaps more important, the Debtors object to appointment of any section 1114 committee unless the scope of its duties is limited to contractual "retiree benefits" as defined in section 1114, excluding in particular the many retiree benefits as to which Delta has reserved the right to amend or terminate at any time, for any reason. As courts have recognized, this question as to the scope of a section 1114 retiree committee is a threshold issue that should be decided in conjunction with any decision to appoint or not appoint such a committee. See, e.g., In re New Valley Corp., Civ. A. No.

92-4884, 1993 U.S. Dist. LEXIS 21420 (D.N.J. Jan. 28, 1993); In re Dorskocil Companies, 130 B.R. 870 (Bankr. D. Kan. 1991).²

BACKGROUND: DELTA HEALTH-CARE BENEFITS

Since at least the early 1970s, Delta has offered active and most retired employees, their spouses, and eligible dependents a variety of health and welfare benefits, including health-care, life insurance, disability, and survivor plans (see Declaration of Robert L. Kight dated October 24, 2005 (“**Kight Dec.**”) ¶ 5). Delta currently offers health-care benefits to approximately 51,000 active and 32,500 retired employees (together, the “**Primary Participants**”), and their spouses and eligible dependents (together with Primary Participants, the “**Beneficiaries**”) (Kight Dec. ¶ 5).³ Medical benefits for active and retired Delta employees are provided primarily through two plans, the Delta Family Care Medical Plan (the “**Family Care Medical Plan**”) and the Delta Pilots Medical Plan (the “**Pilot Medical Plan**”) (Kight Dec. ¶ 15).

Family Care Medical Plan. The main options under the Family Care Medical Plan are a point of service (“**POS**”) plan; an “out of area” indemnity option; and, in certain locations, health maintenance organization (“**HMO**”) plans (see Kight Dec. ¶ 16). Under the POS option, Beneficiaries pay lower out-of-pocket charges by utilizing a network of providers with which Delta has pre-negotiated discounted fees, though non-

² As described below, the Debtors also object to the obviously premature DALRC application for retention of committee counsel.

³ Health-care is by far the costliest component of Delta’s health and welfare benefits for retirees. The other principal components of such benefits are modest life insurance benefits and survivor benefits that are pre-funded for at least the next several years through a tax-advantaged trust (Kight Dec. ¶ 5 n.2).

network services may also be used (see id. ¶ 16(i)). There are presently two choices within the POS option, a Standard Medical Option, and an Enhanced Medical Option with significantly higher premiums but reduced out-of-pocket charges (see id. ¶ 16(i)). The out of area option is limited to Beneficiaries who live in areas not served by POS network providers (see Kight Dec. ¶ 16(ii)). The HMO option generally provides a full range of services at a fixed cost with modest co-payments, but providers are limited to a set group within a given geographic region (see id. ¶ 16(iii)).

Pilot Medical Plan. Health-care benefits for active and retired pilots are subject to the collective bargaining agreement between Delta and the Air Line Pilots Association, International (“ALPA”), as amended (the “**Pilot Working Agreement**”). Under that agreement, the Pilot Medical Plan offers pilots who retired after January 1, 1997 a choice between an “out of area” indemnity option and a POS option with the same provider network as the Family Care Medical Plan (see Kight Dec. ¶ 18). The plan design and premium costs of the Pilot Medical Plan “out-of-area” option are identical to the similar option in the Family Care Medical Plan, and the design and costs of the Pilot Medical Plan POS option are identical to the Enhanced Medical Option in the Family Care Medical Plan (see id. ¶ 18). In addition, the Pilot Working Agreement specifies that active and retired pilots may elect any option offered by the Family Medical Plan in any given year (see id. ¶ 18). As for pilots who retired before 1997, there are six separate plans corresponding to differing pre-1997 retirement periods. Each of these plans provides indemnity coverage only, with no premium charges but varying deductibles, out-of-pockets limits, and lifetime maximums (see id. ¶ 19)

Calculation of Premium Payments. The costs of Delta health-care benefits are generally not covered by insurance purchased by Delta. Instead, after premiums paid to Delta, and co-payments, deductibles, and coinsurance paid to providers, all remaining costs are paid directly by Delta (see Kight Dec. ¶ 9). The dollar amounts of premium payments are determined each year based on a percentage (which varies according to active and retired employee categories as described below) of the actuarially estimated cost to Delta of providing the following year's health-care benefits for different groups of Plan Participants (see id. ¶ 21).

The premium cost percentage for *active, non-pilots* is currently 22%, having been raised from 16% as of January 1, 2005 (Kight Dec. ¶ 22).⁴ The premium percentage for *active pilots* in the Pilot Medical Plan POS option is or will be 31% in 2005, 34% in 2006, 37% in 2007, and 40% in 2008 (see id. ¶ 23). Different percentages apply for the pilots' out of area option. Active pilots who elect coverage under the Family Care Medical Plan (as most do) pay the same premiums as non-pilot active employees (see id. ¶ 23).

For *non-pilot retirees*, there are three components to the percentage premium under the Family Care Medical Plan: (i) the Retiree Medical Premium, a base premium amount, (ii) the Service-Related Premium, an additional premium amount that is set at a cost percentage inversely proportional to a retiree's length of service at Delta, and (iii) the Full Early Retirement Premium, a 100% premium paid by retirees who retire before

⁴ The Enhanced Medical Option and the HMO options generally require a higher premiums for the cost of such options over that of the Standard Medical Option (see Kight Dec. ¶ 16(i)).

the age of 65 until they reach Medicare age (Kight Dec. ¶ 24).⁵ For *pilot retirees*, premium percentages under the Pilot Medical Plan (other than the six no-premium versions of the Plan for pre-1997 retirees) are generally set according to the same three elements as the Family Care Medical Plan: a minimum percentage, a service component, and a 100% premium for retirement before the pilot mandatory retirement age of 60 (see id. ¶ 29). In 2006, the retired pilot *minimum* premium will increase to 25%, in 2007, to 28%, and in 2008, 31% (id. ¶ 29). The many pilot retirees who elect an option under the Family Care Medical Plan (about 40% of retired pilot Beneficiaries are covered by such an option) pay the same premiums as non-pilot retirees under that Plan (id. ¶ 27).

The Family Care Medical Plan Reservation of Rights. Delta has unequivocally reserved its rights unilaterally to change the terms of the Family Care Medical Plan and the premium rates for non-pilot employees and retirees at any time and for any reason (Kight Dec. ¶ 31). The Delta Family Care Medical Plan dated January 1, 1994, the legal document that established and governs the plan, states: “The Company reserves to itself the unilateral right at any time to amend, modify, or terminate the Plans in whole or in part, or suspend contributions to the Plan. . . . The Company does not intend this Plan to constitute a contract with any retired or disabled participant or survivor or their Eligible Family Members” (id. ¶ 31). Over the years, Delta has regularly and consistently re-stated this reservation of rights in summary descriptions of the Family Care Medical Plan, descriptions of Plan changes, Plan enrollment materials, and other health-care communications with both active and retired employees (see id. ¶ 32).

⁵ For new hires as of January 1, 2003, non-pilots who retire after January 1, 2006 will be required to pay 100% of the cost of the Family Care Medical Plan coverage throughout retirement (Kight Dec. ¶ 26).

Non-Pilot Early Retirement Programs. Between mid-1993 and early 2005, a large number of non-pilot employees retired under early retirement programs. Of Delta's 22,000 current non-pilot retirees, about 13,700, or 63%, are Primary Participants in such programs (see Kight Dec. ¶ 37(i)). Among the provisions of these early retirement programs are waivers or adjustments of components of premiums for retirees under age 65 (see *id.* ¶ 35). Two of the largest programs waive *all* premiums for participating pre-65 retirees. As a result, the approximately 5,900 pre-65 retired Primary Participants pay no premiums for their medical benefits (*id.* ¶ 37(iii)).

2001–05 Family Care Medical Plan Changes. Delta annually reviews health-care benefit costs, plan design, and premium percentages under the Family Care Medical Plan. From 2001 to 2005, these reviews have resulted in a consistent pattern of changes to plan design and premium percentages for active and retired Primary Participants in the Plan (Kight Dec. ¶¶ 42, 43). These changes have sought both to improve the Plan's scope of coverage, especially in the area of preventive care, and to control health-care costs by enacting more efficient consumption of health services and increasing employee and retiree cost sharing. Participants have been regularly informed of these changes in annual enrollment materials (*id.* ¶ 43).

2006 Family Care Medical Plan Changes. In keeping with its annual practice, Delta has formulated various changes to the Family Care Medical Plan design which it had intended to implement as of January 1, 2006, for active and retired Beneficiaries. The changes include (i) increases in deductibles and maximum out-of-pocket costs; (ii) improvement in the coverage of preventive services to 100% after applicable co-payments; (iii) elimination of the pre-certification requirement and introduction of a

notification requirement for all inpatient and certain outpatient procedures; (iv) increases in co-payments for certain lifestyle drugs and brand-name drugs that have less expensive over-the-counter, or other equivalents; (v) elimination of several HMO options; and (vi) elimination of the Enhanced Medical Option (see Kight Dec. ¶¶ 44, 45).

These design changes would allow Delta to offset almost all of an otherwise projected \$37 million increase in the overall cost of the Family Care Medical Plan (Kight Dec. ¶ 47). If this cost increase were avoided through the proposed changes, active and retired employees would have to pay only a small increase in cash premiums at current levels of percentage cost sharing (id. ¶ 47). Of the overall projected savings, \$27 million relates to active employees and \$10 million to retirees (id. ¶ 47).

Although the proposed 2006 changes are consistent with Family Care Medical Plan changes in 2001-05, and well within Delta's reservation of rights under the Plan, Delta will not proceed with the implementation of the 2006 changes as to retiree Beneficiaries, unless and until the Court rules that section 1114 of the Bankruptcy Code does not apply to such changes, or the Court otherwise allows the changes to proceed (Kight Dec. ¶ 48).

Unless Delta obtains a ruling soon as to whether the Family Care Medical Plan changes may be implemented for retired employees without prior approval under section 1114, Delta will be compelled to apply the Plan changes to active employees only as of January 1, 2006. This would force an administratively expensive and disruptive bifurcation of the Family Care Medical Plan as between retirees and non-retirees, not to mention loss of savings anticipated from applying design changes to retirees as of January 1, 2006 (Kight Dec. ¶ 49).

ARGUMENT

I. ONLY ONE RETIREE COMMITTEE SHOULD BE APPOINTED UNDER SECTION 1114

Though Delta has yet to even propose, much less implement, any contractual retiree benefit changes that are actually subject to the section 1114 process, Delta does not oppose the formation at this time of a single, representative retiree committee under section 1114. However, the Debtors do object to the burdensome and unnecessary formation of separate committees for pilot retirees and non-pilot retirees as proposed by DALRC and DP3.

Section 1114 plainly contemplates the appointment of a single committee,⁶ and large cases typically have had a single committee, notwithstanding the inevitable existence of retiree subgroups with varying interests and alleged entitlements. For example, in the Eastern Airlines case, the Court appointed a single committee to represent both pilot and non-pilot retirees where the trustee sought to modify retiree benefits under section 1114. See In re Ionosphere Clubs, Inc., 134 B.R. 515, 518 (Bankr. S.D.N.Y. 1991) (retiree committee appointed “to represent (1) Retirees under collective bargaining agreements with the Air Line Pilots Association, International . . . and (2) ‘Non-Contract’ retirees, made up of non-union management and clerical retirees”). Likewise, the U.S. Airways court appointed a single 1114 committee comprising both union and non-union members. See In re U.S. Airways, Inc., No. 04-13819-SMM

⁶ Sections 1114(c)(2) and 1114(d) both refer to appointment of “a committee of retired employees.” The section makes no reference to appointment of multiple or separate committees. See generally Norton Bankruptcy Law and Practice 2d § 84:8, at 84-15 (2002) (“An Official Retiree Committee represents all retirees, even where all retirees were not members of the same union or any union at all.”) (emphasis added).

(Bankr. E.D. Va. Oct. 28, 2004) (order appointing single committee of retirees). The same is true of virtually every other major chapter 11 case in which Debtors' counsel have identified the appointment of a section 1114 committee.⁷

DP3 relies on the existence of union and non-union employee committees in the first Continental Air Lines case twenty years ago. See, e.g., In re Continental Air Lines, Inc., 60 B.R. 459 (Bankr. S.D. Tex. 1985). The relevance of this non-retiree, pre-section 1114 split employee committee is, at best, unclear – particularly since, as the Debtors have confirmed, Continental did not oppose the committee structure, unlike the Debtors here. Given the lack of any record of the reasons for the dual Continental committees, their existence surely provides no support whatever for the “critical distinction” that DP3 perceives between union and non-unionized employees (DP3 Motion ¶ 17).

More recently, in the United Air Lines matter, the court appointed separate committees of retired pilots and retired salary and management employees. In that case, however, the majority of employees were represented by six unions (ALPA, machinists, mechanics, engineers, transport workers, flight attendants, and flight controllers). Five of the six unions chose to represent their retired members pursuant to section 1114(c)(1), while ALPA, as has been its practice, declined to represent retired pilots. The upshot was

⁷ See, e.g., In re Delphi Corp., No. 05-44481 (RDD) (Bankr. S.D.N.Y. Oct. 13, 2005) (order for appointment of single retiree committee to include representatives of union and non-union retirees); In re Solutia, Inc., No. 03-17949 (PCB) (Bankr. S.D.N.Y. Sept. 28, 2004) (order clarifying that previously appointed retiree committee represents retirees covered by collective bargaining agreements); In re Kaiser Aluminum Corp., No. 02-10429 (Bankr. D. Del. Aug. 25, 2003) (order appointing retiree committee including representatives of non-union retirees and retirees not represented by unions); In re National Steel Corp., No. 02-08699 (Bankr. N.D. Ill. Apr. 21, 2003) (order directing appointment of single committee of retired employees not represented by union); In re Bethlehem Steel Corp., No. 01-15288 (BRL) (Bankr. S.D.N.Y. Sept. 12, 2002) (order appointing retiree committee to include representative of union).

that in United, section 1114 proceedings were saddled at the outset at least six retiree representatives – the five unions and a committee. Separate committees for retired pilots and retired management employees merely increased the retiree representatives from six to seven, while avoiding the possible anomaly of leaving retired pilots as the only one of six unionized groups without its own representative or committee.

By contrast, ALPA is Delta’s only major union, and the vast majority of its employees, including its mechanics, reservation and ticket agents, clerical workers, and flight attendants, are not unionized. Given ALPA’s historic refusal to represent retired pilots, there will almost certainly not be any separate union representation of any Delta retired employees. As a result, unlike in United, there is no pre-existing bar to formation of a single, efficient, and representative retiree committee.

Apart from these precedents, the formation of dual 1114 committees would be inconsistent with the appropriate and well-established policy against fragmented creditor committees in this jurisdiction. Indeed, if a single committee can represent *all* creditors as to virtually *all* issues in this complex reorganization (as well as in virtually all other major chapter 11 cases), then surely a single committee can adequately represent all Delta retirees as to relatively narrow issues concerning modification of retiree benefits protected by section 1114. See, e.g., Mirant Americas Energy Mktg. L.P. v. Official Comm. of Unsecured Creditors of Enron Corp., No. 02 Civ. 6274 (GBD), 2003 U.S. Dist. LEXIS 18149, at *27–*28 (S.D.N.Y. Oct. 9, 2003) (multiple creditors committees “severely hamper[.]” the “consultation and balancing of interests necessary for a successful negotiation of a reorganization plan”); In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 85 B.R. 13, 16 (Bankr. S.D.N.Y. 1988) (multiple

committees fracture the centralized voice of a single creditors' committee and make consideration of creditors' opinions more difficult); In re Salant Corp., 53 B.R. 158, 161 n.4 (Bankr. S.D.N.Y. 1985) ("This district has not traditionally appointed separate employee committees although it has many of the larger Chapter 11 reorganization cases."); see also In re Trans World Airlines, Inc., No. 92-115, 1992 Bankr. LEXIS 1344, at *8 (Bankr. D. Del. Mar. 20, 1992) (multiple creditor committees "would create significant problems . . . and would needlessly burden the Debtor's estate with substantial additional administrative expenses"); In re Sharon Steel Corp., 100 B.R. 767, 778 (Bankr. W.D. Pa. 1989) ("separate [section 1102] committees impose additional administrative expenses [and] separate teams of professionals rarely contribute to the spirit of compromise that is intended as the guiding star of chapter 11").

In addition, any retiree committee appointed pursuant to section 1114 will seek to retain both legal and financial advisors to assist in evaluating any proposed modifications to section 1114 benefits. DALRC alone has already moved for retention of *three* law firms – including different firms for non-pilot retirees with somewhat different benefits. In the absence of any particularized showing as to why a single retiree committee could not represent all retirees, the substantial costs to all creditors of multiple retiree committees are unnecessary and inadvisable. See, e.g., In re Williams Communications Group, Inc., 281 B.R. 216, 220 (Bankr. S.D.N.Y. 2002) (appointment of additional committee "raises *cost* concerns since such appointments are closely followed by applications to retain attorneys and accountants") (emphasis original); Norton Bankruptcy Law and Practice 2d § 84:8, at 84-15–84-16 (2002) ("In an effort to keep costs to the estate at a minimum, one committee comprised of a representative selection

of non-unionized employees and employees belonging to the various unions should be sufficient.”).

To be clear, the inefficiencies of dual retirement committees are not just multiplied professional expenses. As shown in the opening weeks of this case, even one retiree committee has the potential for generating substantial burdens and diversion of management time and resources. DP3 alone, *not* itself an official committee, has already filed a 13-page emergency motion for appointment of a retiree committee, a 15-page amended motion for a retiree committee, a 22-page motion to compel the payment of pension contributions and non-qualified pensions, and a four-page supplemental statement in support of the motion to compel.

The fact that only pilot retiree benefits (and those of a small number of flight controllers) are subject to collective bargaining agreements is no justification for multiple section 1114 committees. Whatever the alleged distinctions and differences between union and non-union Delta retirees, conflict will only necessitate additional committees where it fundamentally “impair[s] the ability of the [creditors] to reach a consensus.” In re McLean Indus., Inc., 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987); see, e.g., In re Agway, Inc., 297 B.R. 371, 374 (Bankr. N.D.N.Y. 2003) (“Courts are reluctant to appoint multiple committees in cases notwithstanding the ‘diverse and sometimes conflicting interests of creditors.’”); In re Enron Corp., 279 B.R. 671, 684 (Bankr. S.D.N.Y. 2002) (need for separate committees turns on existing committee’s “ability to function”), aff’d sub nom. Mirant Ams. Energy Mktg., L.P. v. Official Comm. of Unsecured Creditors of Enron Corp., No. 02 Civ. 6274 (GBD), 2003 U.S. Dist. LEXIS 18149 (S.D.N.Y., Oct. 9, 2003); In re Hills Stores Co., 137 B.R. 4, 6 (Bankr. S.D.N.Y. 1992) (no separate

committee unless creditors “had vastly conflicting aims and entitlement and had shown themselves unable to function on a single committee”).

Indeed, whatever the supposed differences between pilot retirees and non-pilot retirees as to section 1114 benefits, there are surely as many such “differences” *among* non-pilot retirees given the range of premium guarantees made to different groups of such retirees (see Kight Dec. ¶¶ 23-24, 36-37), and *among* pilot retirees given the no-premium indemnity plans available only to pre-1997 pilot retirees and the POS Pilot Medical Plan for pilot retirees generally (*id.* ¶¶ 18-19). Conversely, pilot retirees and non-pilot retirees share much in common. For example, most retirees in both groups participate in the same POS health-care network (*id.* ¶ 18), and significant numbers in both groups pay no medical premiums. In addition, approximately 40% of pilot retirees have elected to enroll in a coverage option under the Family Care Medical Plan rather than the Pilot Medical Plan (*id.* ¶ 27).

As to the ability of pilot and non-pilot retiree representatives to function within one committee and reach consensus, on October 18, DP3’s chairman alluded to his group’s “good working relationship” with DALRC in a memorandum on the DP3 website. As the memorandum explained:

There has been confusion on the differing roles of DP3 . . . and DALRC DP3 was founded solely to represent retired pilots, their survivors and dependants. It is an organization of and for retired pilots and their families. The DALRC was created to speak for non-pilots and non-contract Delta retired employees.

Our two organizations have a good working relationship and share in sponsorship of our annual meetings and many other events. We simply represent different constituencies.

See “What really happened in court on Monday? Report from Jim Gray” (Oct. 18, 2005), available at <http://www.dp3.org/> (emphasis added). The same document also acknowledges the existence of differing interests *among* retired pilots:

Delta’s bankruptcy will affect each of us differently. There is a wide range of benefit levels now provided to retired pilots and survivors based on age, length of service[,] date of retirement and other factors. . . . The impact of the bankruptcy on our medical, dental, survivor and disability benefits is unknown because Delta has not yet unveiled its plan for cutting these benefits. In the future, changes in medical benefits will be felt differently by those who qualify for Medicare and those who don’t.

Id.

In brief, the prospect of a schism between pilot-retiree and non-pilot retiree representatives on a section 1114 committee is speculative at best. Many individuals have benefits that are the same; the benefits and plan changes of many also differ. Just like Delta has one official creditors committee, not tens of thousands, so too it should have one official 1114 committee, not two, or three, or some 30,000.

II. DELTA, SUPPORTED BY THE CREDITORS COMMITTEE AND WITHOUT OBJECTION BY THE U.S. TRUSTEE, PROPOSES A SINGLE, REPRESENTATIVE COMMITTEE

As for the composition of a single section 1114 committee, the Debtors – supported by the Official Committee of Unsecured Creditors and without objection from the U.S. Trustee, who is willing to assist in the selection of the members of the single section 1114 committee as set forth herein – respectfully suggest a single, seven-person section 1114 committee as follows:

- (i) one member designated by DP3;
- (ii) two members designated by DALRC;

(iii) one member designated by Delta Pioneers, Inc., a long-standing retiree group (see <http://www.homestead.com/DLPIONEERS>); and

(iv) one pilot and two non-pilot retirees to be selected by the U.S. Trustee, subject to Court approval, from among a canvass of retirees (not necessarily excluding persons otherwise associated with any of the existing retiree groups).

Delta submits that such a committee would balance an appropriate deference to existing Delta retiree groups against the interests of the majority of retirees who are not a member of any ad hoc retiree group. Notably, under the Debtors' proposal, each of DP3 and DALRC would be given *more* representation on the section 1114 committee than their own self-reported membership numbers would justify. Of over 5,000 pilot retirees, DP3 claims about 2,311 bona fide members (i.e., less than half the population of pilot retirees),⁸ yet the group would designate one out of two "pilot seats" under the Debtors' proposal. Similarly, DALRC claims a dues-paying membership of about 5,000 (see Supplemental Affidavit of Cathy Cone dated October 13, 2005 at ¶ 7) out of some 22,000 non-pilot retirees, or less than 25% of the population of non-pilot retirees, yet the Debtors' proposal provides that DALRC would designate two out of five "non-pilot seats" (i.e., 40% of the non-pilot seats).⁹

III. THE DALRC RETENTION APPLICATION IS PREMATURE

DALRC seeks an order authorizing and approving the retention and employment of *three* law firms by the as-yet non-existent section 1114 committee. This request

⁸ This figure is taken from DP3's October 13, 2005 statement filed in support of a separate motion.

⁹ The Delta Pioneers group claims a membership of approximately 9,600 pilot and non-pilot retirees and active employees with over 20 years' service (see <http://www.homestead.com/dlpioneers/DLPIONEER2.html>), and has not appeared in these cases.

plainly ignores the timing and procedural requirements for selection of counsel by an official committee. Once formed, it is the section 1114 committee, not DALRC, which will select professionals and seek appointment. See 11 U.S.C. § 1103(a); 11 U.S.C. § 1114(b)(2).

The Debtors submit that at the appropriate time, committee counsel should be limited to one law firm as principal counsel and, only as necessary, a second firm to serve in a limited role as local counsel. Subgroups of retirees are not entitled to separate counsel as to minor or material differences in their precise benefits. By analogy, creditors committees with a plenary mandate function in virtually every case with a single counsel. Such committees never seek to retain, for example, one law firm for bondholders, one law firm for indenture trustees, and others for trade creditors, unions, or governmental entities.

IV. SECTION 1114 DOES NOT APPLY TO AMENDABLE BENEFITS

The substantial majority of courts to have considered the issue have ruled that “retiree benefits” under section 1114 do not include amendable benefits – those benefits that an employer debtor has reserved a right to amend or eliminate under non-bankruptcy law. Congress, moreover, recently enacted a comprehensive set of amendments to the Code in which the section 1114 definition of “retiree benefits” was left unchanged, thereby demonstrating congressional acceptance of the prevailing view that section 1114 “retiree benefits” only include benefits that a debtor is legally obligated to maintain under non-bankruptcy law (and that could therefore only be amended or rejected using bankruptcy powers). In addition, applying section 1114 to amendable benefits would be at odds with repeated references to “claim” in section 1114 and related Code provisions,

since no “claims” can arise under non-bankruptcy law in connection with amendable benefits. Finally, applying section 1114 to amendable benefits would undermine central policy objectives of both the Employee Retirement Income Security Act (“ERISA”) and chapter 11 of the Code.

A. *The Majority of Courts Have Ruled that Section 1114
“Retiree Benefits” Do Not Include Amendable Benefits*

The Second Circuit first addressed the application of section 1114 to amendable benefits in LTV Corp. v. United Mine Workers (In re Chateaugay Corp.), 945 F.2d 1205 (2d Cir. 1991).¹⁰ In that case, LTV Steel retirees had been granted benefits under a collective bargaining agreement that expired during LTV’s reorganization. LTV petitioned the bankruptcy court to determine whether section 1114 required LTV to continue paying retiree benefits notwithstanding the expiration of the labor agreement.

On appeal, the Second Circuit held that LTV had no obligation to pay benefits under the expired agreement. Whereas section 1114 “expressly state[d] that the . . . the debtor-in-possession . . . must continue to ‘pay benefits to retired former employees under a plan, fund, or program maintained or established by the debtor prior to filing a petition [for bankruptcy],’” 945 F.2d at 1207, the provision did not purport to “alter the terms of that plan,” *id.* at 1209. Once the plan had expired by its own terms, there were no “retiree benefits” subject to section 1114. *See id.* In brief, in order to determine whether protected “retiree benefits” exist “under a plan, fund, or program maintained or

¹⁰ As a technical matter, Chateaugay construed section 3 of the Retiree Benefits Bankruptcy Protection Act of 1988. That provision was a stop-gap measure included in the same legislation that enacted section 1114 to cover chapter 11 cases already pending as of enactment. Chateaugay has been widely applied to section 1114, since the provisions of the stop-gap provision mirror section 1114.

established by the debtor prior to filing a petition,” a court must necessarily “analyze the ‘plan, fund, or program’” in question. Id. at 1207.

The overwhelming majority of courts to have considered the issue – both in this District and elsewhere – have endorsed our Court of Appeals’ ruling that 1114 addresses only those benefits the debtor is obligated to pay – and is not free to alter – under applicable non-bankruptcy law. See, e.g., In re Penn Traffic Co., Case No. 03-22945 (ASH), 2005 Bankr. LEXIS 785, at *21–22 (Bankr. S.D.N.Y. Mar. 11, 2005) (retiree life insurance program “by its terms, is terminable by the Debtors at their discretion and, therefore, section 1114 is inapplicable”); In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 763 (Bankr. S.D.N.Y. 1992) (citing Chateaugay and ruling that section 1114 does not prevent a debtor from modifying or terminating benefits where the debtor has reserved the right to do so); see also In re North American Royalties, Inc., 276 B.R. 860, 866 (Bankr. E.D. Tenn. 2002) (“Despite § 1114, the debtor can terminate the contract as allowed by its terms.”); In re Raytech Corp., 242 B.R. 222, 225 n.3 (Bankr. D. Conn. 1999) (section 1114 inapplicable where employer reserved right to terminate benefits); In re CF & I Fabricators of Utah Inc., 163 B.R. 858, 874 (Bankr. D. Utah 1994) (“§ 1114 does not protect retiree benefits beyond the contractual obligations”); In re New Valley Corp., Civ. A. No. 92-4884, 1993 U.S. Dist. LEXIS 21420 (D.N.J. Jan. 28, 1993) (following Chateaugay); In re Doskocil Companies, 130 B.R. 870, 876 (Bankr. D. Kan. 1991) (section 1114 does not apply to “claims for which the debtor has no contractual or other legal liability”); In re Federated Dep’t Stores, Inc., 132 B.R. 572, 574 (Bankr. S.D. Ohio 1991) (same); In re Jones & Lamson Machine Co., 102 B.R. 12, 16 (Bankr. D. Conn. 1989) (predecessor to section 1114 “leaves intact those property rights derived

from the operation of applicable nonbankruptcy law [H]ad Congress intended to override property rights arising under state law, [the statute] would have been written to expressly achieve that result.”).

Moreover, the leading bankruptcy commentators have both concluded that section 1114 does not apply to amendable benefits. As one explains, “Section 1114 does not . . . protect retiree benefits beyond the contractual obligations of the debtor. The Bankruptcy Code does not create new rights upon filing in bankruptcy that were not in existence prior to filing.” 7 Collier on Bankruptcy ¶ 1114.03[3] at 1114-20 (15th ed. rev. 2005) (footnotes omitted); see Norton Bankruptcy Law and Practice 2d § 39:68, at 39-179, 39-182 (1999) (“[A]bsent an enforceable contractual obligation regarding retiree benefits in existence at the time of the commencement of the case, Code § 1114 should not apply. . . . Thus, if a retiree benefit plan reserves the right to modify or terminate retiree benefits to the debtor, the protections provided by § 1114 do not apply.”); see also In re Ames Dep’t Stores, Inc., 76 F.3d 66, 71 (2d Cir. 1996) (citing commentators with approval), overruled on other grounds, Lamie v. U.S. Trustee, 540 U.S. 526 (2004).

Against this weight of authority, Debtors’ counsel have identified but two written decisions applying section 1114 to amendable benefits. The more recent is In re Farmland Industries, Inc., 294 B.R. 903, 920 (Bankr. W.D. Mo. 2003), in which a Missouri bankruptcy court determined that the debtor – a provider of livestock services – could not modify retiree life insurance outside section 1114 “regardless of whether the debtor has a right to unilaterally terminate the benefits.”

Before Farmland, the only other opinion to favor applying section 1114 to amendable benefits was the discredited ruling of the District Court in In re Ames

Department Stores, Inc., No. 92 Civ. 6145 (KTD), 1992 U.S. Dist. LEXIS 18275 (S.D.N.Y. Nov. 30, 1992), rev'd on other grounds, 76 F.3d 66 (2d Cir. 1996), overruled on other grounds, Lamie v. U.S. Trustee, 540 U.S. 526 (2004). In that case, Judge Duffy summarily ruled that section 1114 applies to amendable benefits, and then, on the Court's own motion, denied the debtor's legal fees on the section 1114 issue.

On appeal of the fee denial only, the Second Circuit reversed and expressed pointed concerns over the District Court's ruling on the merits. Ames Dep't Stores, Inc., 76 F.3d at 71. Noting "substantial room for disagreement" with the District Court's "categorical holding . . . that the debtor was required to follow the requirements of section 1114," the Court of Appeals explained:

At the time the bankruptcy court made its ruling, the applicability of section 1114 in a case where the debtor had the contractual right to terminate a pension plan was a wide open question. Such authority as existed on the question favored the interpretation urged by [the debtor's counsel]. See, e.g., [LTV Corp. v. United Mine Workers (In re Chateaugay Corp.), 945 F.2d 1205 (2d Cir. 1991)] and [In re Federated Department Stores, Inc., 132 B.R. 572, 574 (Bankr. S.D. Ohio 1991)].

Indeed, before the district court issued its order in the fee appeal, the United States District Court for the District of New Jersey handed down an unreported decision in the case of In re New Valley Corp., No. 92-4884, 1993 WL 818245 (D.N.J. Jan. 28, 1993), in which the issue of the applicability of section 1114 was squarely presented. Citing Chateaugay and Doskocil, *supra*, plus In re Federated Dept. Stores, Inc., 132 B.R. 572 (Bankr. S.D. Ohio 1991), the New Valley court held that section 1114 did not apply where the debtor had the contractual right to terminate the plan at issue. The court expressly refused to follow the district court's first opinion in the instant case, and the court below was aware of that fact before it wrote its second opinion, in which it castigated [the debtor's counsel] for bringing the appeal.

The editors of Collier on Bankruptcy (hereinafter “Collier”), a well-recognized authority in this area of the law, found the above interpretation of the law to be persuasive. They said “Section 1114 does not, however, protect retiree benefits beyond the contractual obligations of the debtor.” 5 Collier ¶ 1114.02[1][a] at 1114-13 (15th ed. 1995). See also id. ¶ 1114.02[2] at 1114-16 (“Retirees are protected by section 1114 from the termination of benefits due to the filing of a petition under the Bankruptcy Code, but they are not protected from the termination of rights due to the expiration of the agreement.”). Not one of the foregoing authorities was discussed or even mentioned by either the bankruptcy court or the district court.

Id. Because the denial of legal fees, and not the substantive ruling, was the specific subject of the appeal, the Second Circuit in Ames did not conclusively rule on whether section 1114 applies to amendable benefits. At the least, however, the Court of Appeal’s reversal of the fee denial and its review of the authorities against applying 1114 to amendable benefits suggests a strong sympathy with the majority rule.

In In re Solutia, Inc., No. 03-17949 (PCB), this Court addressed aspects of the scope of section 1114 “retiree benefits” in a brief, oral ruling granting a motion to compel the debtor to follow section 1114 procedures. The debtor Solutia, Inc. had been spun off by Monsanto Company in 1997, along with much of Monsanto’s retiree benefit programs. Shortly after the spin-off, Solutia brought a class action against Monsanto retirees, seeking a declaration that Solutia could modify the benefit programs. A subsequent settlement divided retirees into a complex set of eight groups, each entitled to specific benefits, and with retiree contributions capped within specified groups.

Following its 2003 filing, Solutia in 2004 notified its active employees of new health plans to become effective January 1, 2005, and, without informing the Court, announced changes to the plans that would also affect retiree benefits. The retiree

committee objected, arguing among other things that that the new plans would violate the contractual terms of the class action settlement agreement.¹¹

In granting the retiree committee’s motion to compel section 1114 procedures, the Court expressed concern over the “drastic[]” nature of the changes, and voiced doubts as to whether the proposed changes were authorized by the terms of the settlement agreement. See Transcript of Proceedings, In re Solutia, Inc., No. 03-17949 (PCB) at 17, 27 (Bankr. S.D.N.Y. Sept. 28, 2004) (noting that “in New York, there is a requirement that you exercise good faith in interpreting contracts”). Given these concerns, the Court ordered Solutia to restore retiree benefits it had modified and seek the approval of the Court prior to instituting any changes. See id. at 28. This ruling involved special circumstances not present as to Delta, such as Solutia’s class action settlement and failure to notify the Court of proposed benefit modifications. In addition, since the ruling in Solutia, Congress has enacted the 2005 amendments to the Code, which, as explained below, demonstrate congressional acceptance of the majority rule that section 1114 does not apply to amendable benefits.

B. By Enacting the 2005 Amendments, Congress Endorsed the Prevailing Interpretation of Section 1114

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “**2005 Amendments**”) further demonstrates that section 1114 does not divest debtors of their rights to change amendable benefits under applicable non-bankruptcy law.

¹¹ The committee argued that a proposed “cafeteria-style plan” would make monitoring compliance with the class action settlement unworkable and that a new actives plan was at odds with the class action settlement. See Transcript of Proceedings, In re Solutia, Inc., No. 03-17949 (PCB), at 20-22, 27 (Bankr. S.D.N.Y. Sept. 28, 2004).

As described above, prior to the recent passage of the 2005 Amendments, the Second Circuit and almost all other courts that had addressed the scope of section 1114 (as well as the leading bankruptcy commentators) had all concluded that section 1114 imposes no federal bankruptcy obligation to maintain amendable benefits. Had Congress disapproved of this prevailing judicial interpretation and sought to transform a debtor's amendable benefits into vested rights, it would certainly have amended section 1114(a)'s definition of the term "retiree benefits" to include benefits for which there was no legal obligation under the relevant plan, fund or program. Instead, in enacting a comprehensive revision of the Code, Congress made two changes to section 1114, but left the definition of "retiree benefits" notably unaltered.

First, the 2005 Amendments modified section 1114(d) to provide that the United States trustee rather than a bankruptcy court should appoint the members of a retiree committee once appointment of a committee has been ordered by the court.

Second, Congress added a new section 1114(l) requiring reinstatement of "retiree benefits" modified within 180 days of filing unless "the balance of the equities clearly favors such modification." This provision merely prevents "debtors from evading the[] requirements [of section 1114] by terminating retiree benefit plans on the eve of bankruptcy." H.R. Rep. No. 109-31, pt. 1, at 154 (2005), reprinted in 2005 U.S.C.C.A.N. 88. The problem addressed was illustrated in Buckner v. Westmoreland Coal Co. (In re Westmoreland Coal Co.), 213 B.R. 1 (Bankr. D. Colo. 1997). The debtor in that case had terminated on the eve of bankruptcy a welfare benefit plan that it was obligated to maintain under federal coal industry legislation. 213 B.R. at 19. The bankruptcy court reluctantly agreed with the debtor's pre-section 1114(l) argument that claims arising from

the termination were prepetition and not entitled to administrative priority under section 1114(e)(2): “Unfortunately, this strict interpretation of the language of § 1114 rewards Westmoreland for its prepetition breach of its duty to maintain its [welfare benefit plan].”

Id.

Because Congress must have been aware of the prevailing rule that the section 1114(a)’s definition of “retiree benefits” does not include amendable benefits, its decision to leave that definition unchanged by the 2005 Amendments demonstrates an acceptance of that rule. As the Supreme Court has explained this rule of construction:

Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change [W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Lorillard v. Pons, 434 U.S. 575, 580–81 (1978); see Omnibus Hearing Transcript, In re UAL Corp., No. 02 B 48191, at 24 (Bankr. N.D. Ill. Mar. 18, 2005) (by leaving Code provisions governing claims for pension benefits unchanged, the 2005 Amendments show that Congress approved treatment accorded to such claims by majority of federal courts) (citing Lorillard).

In brief, if Congress had intended radically to expand the scope of section 1114 based on the distinctly minority position that the statute applies to amendable benefits, then it surely could and would have done so explicitly in the 2005 Amendments.

Congress did not.

C. *References to “Claim” in Section 1114 Further Demonstrate that Amendable Benefits Are Not “Retiree Benefits”*

Apart from the section 1114(a) definition of “retiree benefits,” the text of section 1114 repeatedly refers to “*claims*,” further demonstrating that the provision does not apply to amendable benefits.

For example, section 1114(i) provides that “modifications allowed pursuant to this section” give rise to “*claims* for unpaid benefits” (emphasis added). Section 1114(e)(2) states that payment of required retiree benefits “has the status of” an administrative expense, which section 1129(a)(9)(A) describes as “a *claim* of a kind specified in” section 507(a). Section 1114(j) exempts a “*claim* for retiree benefits” from section 502(b)(7), which otherwise imposes a cap on any “*claim* of an employee for damages resulting from the termination of an employment contract.” Finally, section 1129(a)(13) requires that a plan of reorganization must provide “for the continuation after its effective date of payment of all retiree benefits . . . for the duration of the period the debtor has *obligated* itself to provide such benefits” (emphasis added). See New Valley, 1993 U.S. Dist. LEXIS 21420, at *4 (section 1129(a)(13) “appear[s] to limit the application of section 1114 to retiree benefits which the Debtor has ‘obligated itself’ to pay, presumably pursuant to prior contractual agreement”).¹²

¹² In addition, the section 1114 rules for modification of retiree benefits mirror the rules for rejection of collective bargaining agreements under section 1113. “If Congress had intended § 1114 to create some new right in . . . retirees upon debtor’s entry into chapter 11, it is improbable that Congress would have adopted the same standard for § 1114 as prescribed for modification of agreements under § 1113.” In re Doskocil Companies, 130 B.R. 870, 876 (Bankr. D. Kan. 1991). If, however, Congress intended section 1114, like section 1113, “to focus primarily on the modification of debtor’s legal obligations to retirees as opposed to creating for the debtor some new obligation not already imposed by the terms of the retiree benefit plan,” Congress naturally would have

Section 101(5) of the Bankruptcy Code defines a “claim” as a “right to payment.” Although Congress “expected this definition to have a wide scope,” “[h]owever broadly ‘claim’ is understood . . . ‘[a] claim exists only if before the filing of the bankruptcy petition, the relationship between the debtor and creditor contained *all of the elements necessary to give rise to a legal obligation – ‘a right to payment’ – under the relevant non-bankruptcy law.*” LTV Steel Co. v. Shalala (In re Chateaugay Corp.), 53 F.3d 478, 496–97 (2d Cir. 1995) (emphasis added).

In sum, section 1114 does not apply to amendable benefits because the denial or amendment of such a benefit does not give rise to any legal obligation under applicable non-bankruptcy law, and therefore cannot give rise to an allowable bankruptcy “claim.”

*D. Applying Section 1114 to Amendable Benefits
Would Frustrate the Goals of ERISA*

While the Bankruptcy Code determines the treatment of a claim in the bankruptcy process, the existence, enforceability, and amount of the claim are determined by applicable *non-bankruptcy* law. See Grogan v. Garner, 498 U.S. 279, 283–84 & n.9 (1991); Nathanson v. NLRB, 344 U.S. 25, 28 (1952). In particular, “[t]he Bankruptcy Code does not create new rights upon filing bankruptcy that were not in existence prior to filing.” CF & I Fabricators, 163 B.R. at 874. Applying section 1114 to amendable benefits would represent a sharp departure from this principle with arbitrary and irrational consequences.

ERISA expressly authorizes employers to reserve the right to amend non-pension benefits paid to retirees. Although ERISA specifically encompasses both pension and

turned to the standards and procedures it had previously created for the very purpose of adjusting legal obligations. Id.

non-pension retiree benefit plans, see Inter-Modal Rail Employees Ass’n v. Atchison, Topeka & Santa Fe Ry., 520 U.S. 510, 514 (1997), non-pension “welfare plans” are expressly exempted from several of ERISA’s prefunding and vesting requirements. These exemptions are the product not of legislative inadvertence, but of design. As the Supreme Court has explained:

Congress recognized that “requiring the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans.” Giving employers this flexibility also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, they would err initially on the side of omission.

Inter-Modal Rail Employees Ass’n, 520 U.S. at 515–16 (citations omitted). Because the costs of welfare benefit plans “are subject to fluctuating and unpredictable variables,” Congress determined that extending ERISA vesting to such plans would ultimately “decrease protection for future employees and retirees” by discouraging employers from offering any welfare benefits at all. Moore v. Metro. Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988).¹³

Accordingly, “[e]mployers or other plan sponsors are generally free under ERISA, *for any reason at any time, to adopt, modify, or terminate welfare plans.*” Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) (emphasis added). An employer may, of course, “oblige itself contractually to maintain benefits at a certain

¹³ In 2003, Congress further demonstrated its awareness of an employer’s right to alter retirement benefits by including a 28% employer tax credit as part of the new Medicare “Part D” prescription drug benefit. As explained in the legislative history, the purpose of the tax credit is to encourage at least some employers not to terminate their retiree drug benefit in response to the new Medicare benefit, and thereby avoid further “erosion in coverage.” See H.R. Rep. No. 108-391, at 482-85 (2003), reprinted in 2003 U.S.C.C.A.N. 1808, 1858-60.

level in ways that are not mandated by ERISA,” Vasseur v. Halliburton Co., 950 F.2d 1002, 1006 (5th Cir. 1992), but “such an obligation is not to be inferred lightly,” Senior v. NSTAR Elec. & Gas Corp., 372 F. Supp. 2d 159, 165 (D. Mass. 2005) (citing UAW, Local No. 1697 v. Skinner Engine Co., 188 F.3d 130, 139 (3d Cir. 1999)). Accordingly, if governing plan documents reserve an employer’s right to amend or eliminate welfare benefits, the employer will be permitted to implement such changes. See Moore, 856 F.2d at 492; Doskocil, 130 B.R. at 873 & n.1 (collecting cases); see also In re White Farm Equip. Co., 788 F.2d 1186, 1189–90 (6th Cir. 1986) (ERISA preempts Ohio law that precluded termination of retiree benefits notwithstanding contractual power of termination).

Indeed, in Bioni v. Delta Air Lines, Inc., No. 98 432 RRM, slip op. (D. Del. May 15, 2000), aff’d, No. 00-1910, slip op. (3d Cir. Jan. 3, 2001) (unpublished opinions attached as Exhibit A), the District of Delaware ruled that Delta could not be estopped from establishing a new premium for retiree health-care benefits. As the court explained, “plaintiffs fail to show that Delta made a material misrepresentation that would support their equitable estoppel claim. *There is no evidence that Delta intended its medical benefits to vest. To the contrary, Delta expressly reserved the right to amend or discontinue its Medical Plan at any time.*” Bioni, slip op., at 5 (emphasis added); see also Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 457-58 (11th Cir. 1996) (denying class certification of Delta retirees despite claimed oral statements “because there [is] no federal common law right to promissory estoppel under ERISA in cases involving oral amendments to or modifications of employee plans”).

Construing section 1114 to prevent amendment of amendable benefits as authorized by governing plan documents would resurrect the very automatic vesting requirement that Congress specifically rejected and “create[] for chapter 11 debtors a system that Congress did not impose on employers outside of chapter 11.” North American Royalties, 276 B.R. at 867; see Allen v. Adage, Inc., 967 F.2d 695, 698 (1st Cir. 1992) (“[R]esolution of questions concerning employer obligations under [welfare benefit] plans must be tailored to avoid undermining Congress’ considered decision that welfare benefit plans not be subject to a vesting requirement.”).

Beyond the requirements and congressional intent of ERISA, the application of section 1114 to amendable benefits would create an irrational legal framework: Outside bankruptcy, employers would be free to modify or terminate amendable benefits “for any reason at any time,” Schoonejongen, 514 U.S. at 78. By contrast, an insolvent employer struggling to reorganize would be unable freely to generate needed liquidity by modifying amendable benefits despite the fact that chapter 11 rights and powers were not even being utilized.

E. Applying Section 1114 to Amendable Benefits Would Frustrate the Goals of Chapter 11

“The paramount policy and goal of chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor.” In re Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989); see also Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 389 (1993); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984) (“The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”).

The Code seeks to achieve the goal of preserving business enterprises through chapter 11's framework for the adjustment and prioritization of a debtor's legal obligations. Certain Code provisions grant types of creditors preferential status, protect prepetition property rights, or create special procedures for the adjustment of certain contracts and claims. See, e.g., 11 U.S.C. § 363(c)(2) (use of cash collateral); 11 U.S.C. § 506 (valuation of security interest and setoff); 11 U.S.C. § 507 (claim priorities); 11 U.S.C. § 365(b)(1) & (d)(3)–(4) (lessors of nonresidential property); 11 U.S.C. § 1110 (lessors and conditional vendors of aircraft). Section 1114 likewise protects and creates special procedures for adjusting retiree benefit claims. But no provision of the Code has ever been understood to create an entirely new class of substantive rights for persons to whom a debtor is not liable under non-bankruptcy law, and who therefore lack any bankruptcy "claim" against the debtor.

F. Section 1114 Was a Response to Non-Payment of Retiree Benefits that a Debtor Was Legally Obligated to Pay

As the Supreme Court has long held, when a statutory provision "[i]s enacted as a targeted cure to a specific problem," the scope of the provision should not be construed to extend beyond the specific problem Congress sought to "cure." Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 28 (1997). Congress enacted section 1114 as such a "targeted cure" to "situations with respect to retiree insurance benefits, such as occurred [in 1986] when LTV Corporation, after filing a chapter 11 petition, immediately terminated the health and life insurance benefits of approximately 78,000 retirees." S. Rep. No. 100-119, at 2 (1987), reprinted in 1988 U.S.C.C.A.N. 683, 685.

The "problem" in the LTV case did not concern a debtor's modification of amendable benefits, but rather a debtor's use of its rights and privileges under the Code to

avoid payment of *mandatory* benefits that the debtor was obligated to pay under non-bankruptcy law. See, e.g., 133 Cong. Rec. 3732 (1987) (statement of Sen. Byrd) (“While thousands of retirees could lose their medical and life insurance benefits as a result of their employer’s actions under a chapter 11 bankruptcy, *these companies have a legal and contractual obligation to their retirees*, and such benefits are a lifeline for many of the retirees.” (Emphasis added)).

A statutory cure should be construed to correspond to the issue that the Legislature sought to address. For this reason, section 1114 does not apply to changes to amendable benefits that a debtor would be free to implement under non-bankruptcy law and without any use of the debtor’s bankruptcy powers. See *New Valley*, 1993 U.S. Dist. LEXIS 21420, at *13–*14 (“the unique context and specific problem confronting Congress at the time . . . suggests” that section 1114 was not “enacted to prevent all chapter 11 debtors from modifying retirement plans, regardless of the terms of the plan agreements”). As both logic and legislative purpose demonstrate, section 1114 applies only where a debtor seeks to use the Code to avoid obligations mandatory under non-bankruptcy law.

CONCLUSION

The Debtors respectfully request that the Court (1) order the appointment of a single section 1114 retirement committee pursuant to the procedures suggested herein; (2) order that the scope of such a committee shall be limited to “retiree benefits” as defined in section 1114, excluding in particular retiree benefits as to which Delta has reserved the right to amend or terminate at any time, for any reason; (3) deny as premature the DALRC application for retention of attorneys; and (4) grant such other and further relief as this Court may deem just and proper.

Dated: New York, New York
October 24, 2005

By: /s/ Thomas P. Ogden
Thomas P. Ogden (TO 7428)
Willow D. Crystal (WC 1517)
Rajesh S. James (RJ 7841)
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
Fax: (212) 450-6539

Attorneys for Debtors and
Debtors in Possession