



## Synopsis of the Soaring Eagles Court Case against the PBGC

March 26, 2009

As most of you know, USAir Retirees (herein "Soaring Eagles") have been aggressively pursuing claims against the PBGC. I think it's fair to say that they were frustrated by having to wait until final determinations and then the requirement that administrative remedies be exhausted. However they are now in Court-and making considerable waves!

They sued in an eleven Count Complaint (a "Count" is just a separate complaint), raising issues -most of which are of interest to any beneficiary of a qualified plan. Today I will report on the two counts receiving the most attention.

Soaring Eagles sued claiming that the PBGC had exercised its "discretion" subject to the wrong standard. The law is that, generally, an administrative agency is given some latitude by the courts when the agency is administering its own statute; that is, the law which created it and which it is to apply. Without putting too fine a point on it, the courts give "deference" to decisions made by an agency relative to the meaning of its Regulations and "its" statute. There are several ways this "deference" is articulated which are not relevant here.

Soaring Eagles claims that the PBGC is not entitled to that degree of discretion (indeed, perhaps not the same "kind" or degree) when it accepts the responsibility of being the successor *trustee* of a pension plan--here the USAir Pilot Plan. Soaring Eagles argues that the PBGC as a *trustee* is more or less like any other trustee--and, therefore subject to the same standards. The law of trusts is very old--at least 700 years old--so the obligations of a trustee are fairly well established. Generally a trustee owes the beneficiaries of the trust a *fiduciary* duty. A fiduciary duty is the highest duty one person can have to another under English (and successor jurisdictions) law. The USA generally follows English law on this subject--as does every English speaking nation in the world. Any trustee making decisions subject to this standard would be subject to different treatment on appeal (because of a change in the "deference" standard") than would an agency, and would have different responsibilities. (There is a recent Supreme Court decision on this issue which is not nearly as clear as my statement! The decision has several "opinions" and I am telling what I think the bottom line will be.)

The PBGC takes the opposite position and argues that it is not a "classic" or "normal" fiduciary but that, if it is a "fiduciary" its duties are more or less the same as they would be if it were an agency acting as an agency.

Soaring Eagles also claims that the PBGC has interpreted its obligation to provide "insurance" erroneously. Soaring Eagles argues that the PBGC should compute the retiree's loss and *then* go into the guarantees----instead the PBGC computes the retiree's share (so to speak) of the assets in the plan, and, *if they meet the guarantees* it makes no contributions to make the retiree whole. Soaring Eagles argues that such an approach is not what "insurance" means nor what was meant by the statute.

The PBGC has a lot to say about why Soaring Eagles is wrong but at this point its main argument is that Soaring Eagles did not raise this before the PBGC Appeals Board and therefore has waived it.

Soaring Eagles joined the issue by filing suit and asking the District Court (the initial court involved) to enjoin the PBGC from attempting to collect what it claimed were overpayments to about 85 of the USAir retirees. The PBGC filed a comprehensive defense to all eleven counts; filed a Motion to Dismiss to Counts 5 and 10 (a Motion to dismiss says essentially that if everything the Complainant says is true, he still doesn't win.) and resisted the Injunction.

The District Court refused to grant the injunction, and in a preliminary Order found that it was unlikely that Soaring Eagles would win on the merits. Soaring Eagles appealed. The appellate Court reversed the District Court on the Injunction issue and transferred the case to a "Merits" panel to hear the case. This is somewhat stunning as a District Court has considerable discretion itself on whether or not to grant an injunction. The next day the District Court Judge issued an order on the PBGC's Motion to Dismiss and ruled that Soaring Eagles can go forward *both* on his argument that the PBGC is subject to the usual rules applicable to trustees *and* on the issue of the PBGC's duty as to "insurance" determinations.

The Judge did not rule that Soaring Eagles was right at this point although he virtually did on the "trustee *vel non* issue"; only that the Motion to Strike was denied. Soaring Eagles still have to prove their case.

Nevertheless, this has to be considered a victory--even a great victory. Now some of the issues will be further briefed both in the District Court and the Court of Appeals. Soaring Eagles will be very busy for the next few weeks!!

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