

NO. 02-5144

ORAL ARGUMENT SCHEDULED FOR APRIL 18, 2003

In The
United States Court of Appeals
For the District of Columbia Circuit

ALLIED PILOTS ASSOCIATION,
H.O. VAN ZANDT, and ROBERT C. STOW,

Plaintiffs-Appellants,

v.

PENSION BENEFIT GUARANTY CORPORATION,
PICHIN CORPORATION, ICAHN ASSOCIATES CORPORATION,
and DOES 1-10,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

Edgar N. James
Kathy L. Krieger
James & Hoffman, P.C.
1101 17th Street, N.W., Suite 510
Washington, D.C. 20036
Tel. (202) 496-0500
Fax. (202) 496-0555

Counsel for Appellants

Dated: December 31, 2002

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

In accordance with Fed. R. App. P. 28 and Circuit Rule 28 (a)(1), the undersigned certifies as follows:

(A) **Parties:** The names of all parties (including intervenors and amici) who appeared before the district court in this action are as follows:

Air Line Pilots Association, International:	Appellants/Plaintiff
H.O. Van Zandt:	Appellant/Plaintiff
Robert C. Stow:	Appellant/Plaintiff
Pension Benefit Guaranty Corporation:	Appellee/Defendant
Pichin Corporation:	Appellee/Defendant
Icahn Associates Corporation:	Appellee/Defendant

By order of this Court dated July 23, 2002, the Allied Pilots Association (“APA”) was substituted for the Air Line Pilots Association, International (“ALPA”), as Appellant. Neither ALPA nor APA is a corporation. Rather, ALPA and APA are unincorporated associations and employee organizations which do not have a “parent” company and are not subject to any ownership interest by a publicly held company.

(B) **Rulings Under Review:** The ruling under review is the Memorandum Opinion and Order dated March 29, 2002 in Air Line Pilots Ass’n, et al. v. Pension Benefit Guaranty Corp. et al., Case No. 1:00CV03113 (Ricardo M. Urbina), granting the defendants’ motions for summary judgment and denying the plaintiffs’ cross-motion for summary judgment. This ruling, which is reported at 193 F. Supp.2d 209, is reproduced in the Appendix at pages A. 465-85.

(C) **Related Cases:** This case was not previously before this or any other court. A subsequent case also filed in the U.S. District Court for the District of Columbia, Adams, et al. v. Pension Benefit Guaranty Corp., et al., Case No. 1:02CV00945 (Royce C. Lamberth), raises similar ERISA claims arising from the same circumstances as this case but was denied “related case” designation. The Adams case has been stayed pending disposition of this appeal.

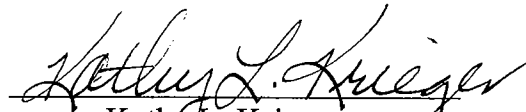

Kathy L. Krieger
Counsel for Appellants

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
GLOSSARY	vii
STATEMENT OF JURISDICTION	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
RELEVANT STATUTES	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6
A. The Statutory Framework	6
B. TWA’s 1992-1993 Bankruptcy Reorganization	12
C. PBGC’s Termination of the TWA Pilots Plan in January 2001	16
D. The Proceedings Below	18
SUMMARY OF ARGUMENT	23
ARGUMENT	25
Standard of Review	25
A. The District Court Improperly Granted Summary Judgment Against the TWA Pilots Without a PBGC Administrative Record, and Despite the Fact that all Evidence Before the Court Indicated that PBGC Never Complied With ERISA Section 4042(a)	25

1.	The Judgment Below Must be Vacated Because the District Court Did Not Have Before it the PBGC Administrative Record Concerning the TWA Pilots Plan	28
2.	Summary Judgment for Defendants Was Improper Because They Failed to Satisfy Their Burden as Movants; Indeed, the Record Below Warranted Judgment for the TWA Pilots on the Claim that PBGC Failed to Make a Section 4042(a) Determination	30
B.	The District Court Erred in Summarily Dismissing the Claim That if PBGC Found Section 4042(a) “Cause” for Involuntarily Terminating the TWA Plans in 1992, it Was Arbitrary and Capricious For PBGC to Terminate the TWA Pilots Plan Eight Years Later Without Determining That Any of the Statutory Termination Prerequisites Existed at That Time	45
C.	CONCLUSION	50
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	
	ADDENDUM (29 U.S.C. § 1342)	

TABLE OF AUTHORITIES

CASES

* <u>American Bioscience, Inc. v. Thompson</u> , 243 F.3d 579 (D.C. Cir. 2001)	23, 28, 29, 30, 32, 47
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986)	30, 31
<u>Attorney Gen. v. Irish People, Inc.</u> , 796 F.2d 520 (D.C. Cir. 1986)	31
<u>Beatty v. Wash. Metro. Area Transit Auth.</u> , 860 F.2d 1117 (D.C. Cir. 1988)	31
<u>Bell-South Corp. v. FCC</u> , 162 F.3d 1215 (D.C. Cir. 1999)	46
* <u>County of Los Angeles v. Shalala</u> , 192 F.3d 1005 (D.C. Cir. 1999), cert. denied, 530 U.S. 1204 (2000)	46, 48
* <u>Citizens to Pres. Overton Park, Inc. v. Volpe</u> , 401 U.S. 402 (1971)	23, 28, 29
<u>Fla. Power & Light Co. v. Lorion</u> , 470 U.S. 729 (1985)	28
<u>Greenberg v. Food & Drug Admin.</u> , 803 F.2d 1213, 1215-16 (D.C. Cir. 1986)	31
<u>Hess v. Hartford Life & Acc. Ins. Co.</u> , 91 F. Supp. 2d 1215 (C.D. Ill. 2000), aff'd, 274 F.3d 456 (7th Cir. 2001)	46
<u>In re C.D. Moyer Co. Pension Trust</u> , 441 F. Supp. 1128 (E.D. Pa. 1977), aff'd, 582 F.2d 1273 (3d Cir. 1978)	26
* <u>In re Pan Am. World Airways</u> , 777 F. Supp. 1179 (S.D.N.Y. 1991), aff'd, 970 F.2d 896 (2d Cir. 1992)	30, passim
<u>Int'l Bhd. of Teamsters v. Zantop Air Transp. Corp.</u> , 394 F.2d 36 (6th Cir. 1968) . . .	39
<u>Int'l Union, UAW v. NLRB</u> , 459 F.2d 1329 (D.C. Cir. 1972)	34

*Authorities upon which we chiefly rely are marked with asterisks.

<u>James Madison Ltd. v. Ludwig</u> , 82 F.3d 1085 (D.C. Cir. 1996)	28, 48
<u>Levitan v. Ashcroft</u> , 281 F.3d 1313, 1317 (D.C. Cir. 2002)	25, 31
<u>Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.</u> , 463 U.S. 29 (1983)	48
<u>Nantucket Investors II v. Cal. Fed. Bank (In re Indian Palms Assocs., Ltd.)</u> , 61 F.3d 197 (3d Cir. 1995)	39
<u>Nat’l Ass’n of Gov’t Employees v. Campbell</u> , 593 F.2d 1023 (D.C. Cir. 1978)	30
<u>Natural Res. Def. Council v. EPA.</u> , 822 F.2d 104 (D.C. Cir. 1987)	46
<u>Niagara Mohawk Power Corp. v. Dep’t of Energy</u> , 169 F.3d 16 (D.C. Cir. 1999)	30
<u>Nyhus v. Travel Mgmt. Corp.</u> , 466 F.2d 440 (D.C. Cir. 1972)	34
<u>PBGC v. Broadway Maint. Corp. (In re Pension Plan for Employees of Broadway Maint. Corp.)</u> , 707 F.2d 647 (2d Cir. 1983)	25
<u>PBGC v. CF & I Fabricators of Utah, Inc. (In re CF & I Fabricators of Utah, Inc.)</u> , 150 F.3d 1293 (10th Cir. 1998)	13
* <u>PBGC v. FEL Corp.</u> , 798 F. Supp. 239 (D.N.J. 1992)	22, passim
<u>PBGC v. Heppenstall Co.</u> , 633 F.2d 293 (3d Cir. 1980)	26
<u>PBGC v. Mize Co.</u> , 987 F.2d 1059 (4th Cir. 1993)	25, 26
<u>PBGC v. Pritchard (In re Esco Mfg. Co.)</u> , 50 F.3d 315 (5th Cir. 1995)	25
<u>PBGC v. Skeen (In re Bayly Corp.)</u> , 163 F.3d 1205 (10th Cir. 1998)	12
<u>Phillips v. Bebbler</u> , 914 F.2d 31 (4th Cir. 1990)	26
<u>S. La. Area Rate Cases v. Fed. Power Comm’n</u> , 428 F.2d 407 (5th Cir. 1970)	39

*Authorities upon which we chiefly rely are marked with asterisks.

Wilson v. Pena, 79 F.3d 154 (D.C. Cir. 1996) 25

STATUTES AND REGULATIONS

Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 1, 6, passim
 29 U.S.C. §1342 2, passim

26 U.S.C. § 412 7

28 U.S.C. § 1291 1

Fed. R. Civ. P. 56(c) 30, 31

Fed. R. Evid. 201(f) 39

MISCELLANEOUS

Hearing on Modernizing ERISA to Promote Retirement Security Before
 the Subcommittee on Employer-Employee Relations,
 Committee on Education and the Workforce, 106th Cong. (2000)
 (Statement of David M. Strauss, Executive Director, PBGC), at
<http://edworkforce.house.gov/hearings/106th/eer/erisa4400/strauss.htm> 11

<http://www.govexec.com/features/1195s1.htm> 11

http://www.pbgc.gov/news/press_releases/2000/pr01_11.htm 49

http://www.regulatoryreform.org/innovations/pension_warning.htm 11

Daniel Keating, Chapter 11's New Ten-ton Monster: the PBGC and Bankruptcy,
 77 Minn. L. Rev. 803 (1993) 7, 11, 26

James B. Lockhart, Securing the Pension Promise, 43 Lab. L.J. 195 (1992) 7-8, 39

*Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

The following abbreviations are used throughout this brief:

ALPA	Air Line Pilots Association, International, the employee organization that represented the pilots of Trans World Airlines, Inc. (TWA) for collective bargaining purposes.
APA	Allied Pilots Association, the collective bargaining representative of pilots employed by American Airlines (including those former TWA pilots who became part of the American Airlines pilots' bargaining unit after American's acquisition of TWA).
CSA	The Comprehensive Settlement Agreement negotiated and approved during the course of TWA's 1992-1993 Chapter 11 reorganization.
ERISA	Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq.
ICAHN COMPANIES	Pichin Corp. and Icahn Associates Corp., two of the Defendants-Appellees.
PBGC	Pension Benefit Guaranty Corporation, an agency established by federal law and a Defendant-Appellee.
TWA	Trans World Airlines, Inc., the employer that formerly sponsored the pension plan at issue in this case.
TWA PILOTS	ALPA, H.O van Zandt, and Robert C. Stowe, the Plaintiffs-Appellants (APA has been substituted for ALPA on appeal).

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this action under 29 U.S.C. §1303(f)(1) and 29 U.S.C. §1303(f)(6). Following the district court's entry of summary judgment in favor of the defendants on March 29, 2002, plaintiffs Air Line Pilots' Association, International ("ALPA"), H. O. Van Zandt, and Robert C. Stow (collectively, "TWA Pilots") filed a notice of appeal on April 24, 2002 under Fed. R. App. P. 4(b). This Court has jurisdiction under 28 U.S.C. § 1291.

Appellant Allied Pilots Association ("APA") was substituted for ALPA by order of this Court dated July 23, 2002.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it granted summary judgment against the TWA Pilots on the merits of their claim for violation of ERISA Section 4042(a) (29 U.S.C. §1342(a)), where:

- The statute required the Pension Benefit Guaranty Corporation (“PBGC”), before terminating the Retirement Plan for Pilots of Trans World Airlines, Inc. (“TWA Pilots Plan” or “Plan”) in January 2001, to “determine” administratively that at least one of the conditions specified in ERISA Section 4042(a) existed;
- the TWA Pilots and the defendants expressly disputed whether PBGC actually made a determination that any of Section 4042(a)’s criteria was satisfied before terminating the TWA Pilots Plan;
- the defendants presented no PBGC “administrative record” attesting that PBGC had ever made the specific administrative determination required by Section 4042(a) concerning the TWA Pilots Plan;
- neither PBGC’s 1992 intervention in a bankruptcy reorganization of TWA, nor the written record of the parties’ settlement of that matter in January 1993, included any evidentiary showing, stipulation or finding that PBGC had in fact made the required Section 4042(a) determination with respect to the TWA Pilots Plan during the period 1992-1993;
- the submissions below did not include evidence establishing that any of Section 4042(a)’s criteria for plan termination was in fact satisfied prior to termination of

the TWA Pilots Plan;

- yet the district court nonetheless found that PBGC had indeed made the administrative determination required by Section 4042(a) at some unspecified point in 1992?

2. Did the district court err in summarily dismissing the claim that if PBGC had actually “determined” that one of ERISA Section 4042(a)’s termination criteria was satisfied in 1992, then PBGC acted arbitrarily and capriciously when it terminated the TWA Pilots Plan eight years later, in January 2001, without making a contemporaneous finding or showing that any of the statutory prerequisites for plan termination still existed with respect to that Plan?

RELEVANT STATUTES

29 U.S.C. § 1342 is reproduced in the Addendum bound with this brief.

STATEMENT OF THE CASE

This case arises from the failure of the Pension Benefit Guaranty Corporation (“PBGC” or “Corporation”) to comply with strict statutory requirements for terminating a defined benefit pension plan. The action was originally brought by ALPA, the employee organization representing participants in the TWA Pilots Plan, together with two ALPA members who participated in the now-terminated Plan. A. 465.¹ The TWA Pilots asserted below: (1) that PBGC violated ERISA Section 4042(a) (29 U.S.C. §1342(a)) when it terminated the TWA Pilots Plan in January 2001 without having made the required administrative determination that at least one of Section 4042(a)’s specified criteria for involuntary plan termination was satisfied; and (2) that even assuming for the sake of argument that PBGC had made the required ERISA Section 4042(a) determination at some point in 1992 or 1993, as the defendants contended, PBGC nonetheless acted arbitrarily and capriciously when it terminated the TWA Pilots Plan eight years later, in January 2001, without making a contemporaneous finding that any of the ERISA Section 4042(a) prerequisites for termination of the Plan still existed. A. 476.

In the summary judgment proceedings below, the defendants argued and the TWA Pilots denied that PBGC had in fact made the administrative determination required by ERISA Section 4042(a) before terminating the TWA Pilots Plan. The defendants, however, submitted no PBGC administrative record concerning the alleged determination and no affidavits or other evidence attesting that any PBGC official had made such a

¹ “A. ___” references designate materials reproduced in the bound Appendix.

determination at any time prior to terminating the TWA Pilots Plan in January 2001. The district court nonetheless decided this disputed issue of material fact against the TWA Pilots, concluding that PBGC administratively determined that a valid ground existed for involuntary termination of the TWA Pilots Plan under ERISA Section 4042(a)(4) at some unspecified point in 1992. A. 481. The district court further ruled that PBGC did not act arbitrarily and capriciously when it terminated the TWA Pilots Plan some eight years later, based on that purported 1992 finding, without determining whether any of the Section 4042(a) conditions for involuntary termination still existed. A. 483. The TWA Pilots contest both of these rulings on appeal.²

² After TWA's acquisition by American Airlines, Inc., the Allied Pilots Association ("APA"), the collective bargaining representative of American's pilots, was substituted for ALPA as an Appellant by order of this Court dated July 23, 2002.

STATEMENT OF FACTS

A. The Statutory Framework

This case is governed by Title IV of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). See 29 U.S.C. §§ 1001-1461. Congress enacted ERISA as a comprehensive statute designed to protect the “well-being and security of millions of employees and their dependents [who] are directly affected by” retirement and other employee benefit plans. 29 U.S.C. § 1001(a). Among other things, Title IV of ERISA establishes the PBGC, 29 U.S.C. §1302, and provides a termination insurance program to ensure that pension plan participants receive a certain level of federally “guaranteed” benefits in the event that their defined benefit retirement plan terminates with insufficient assets to pay the full amounts promised under the plan. See 29 U.S.C. §§ 1301-1455.³ Concurrently, ERISA Title IV strictly limits the circumstances under which a defined benefit plan may terminate, as well as the means of termination. See 29 U.S.C. §§ 1341 (a)(1) and 1342 (prescribing “exclusive” termination avenues).

ERISA’s minimum funding standards for defined benefit pension plans, see 29 U.S.C. § 1082, play a significant part in this regulatory scheme. Under those standards, ongoing plans need not be funded at a level sufficient to satisfy all accrued pension

³ Congress structured the PBGC as a corporation within the Department of Labor, governed by a Board of Directors comprising the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce. 29 U.S.C. § 1302. The Corporation is funded primarily by insurance premiums imposed on pension plans within the PBGC’s jurisdiction. See 29 U.S.C. §§ 1306-1307. The Corporation also receives funds from collection of the statutory liability imposed on employers when their plans terminate with insufficient assets. A. 468; 29 U.S.C. § 1362(b).

liabilities at all times. Rather, ERISA permits sponsors of defined benefit plans to, in effect, amortize their plans' liabilities by funding incrementally, over an extended period of time, those benefits attributed to participants' past service. 26 U.S.C. § 412(b)(2)(B)(ii). See Daniel Keating, Chapter 11's New Ten-ton Monster: the PBGC and Bankruptcy, 77 Minn. L. Rev. 803, 811-12 (1993) (analogizing to "a thirty-year mortgage," and noting the significance of "the decision of Congress at the PBGC's inception to guarantee" such "past service liability"). In addition, federal law allows use of "reasonable" actuarial assumptions in determining the funding appropriate for current and future benefits, which gives plan sponsors considerable discretion in determining their minimum funding obligations for any given year. See 26 U.S.C. §412(c)(3)(A); Keating, supra, 77 Minn. L. Rev. at 811.

Thus, as a practical matter many PBGC-insured plans are "properly funded" as a matter of federal law— the sponsor has made all statutorily required contributions, and the plan is paying current benefits as they come due— yet they would not have enough assets to pay the present value of all promised benefits if the plan were to terminate suddenly. See Keating, supra, 77 Minn. L. Rev. at 812-13 (noting distinction between technical underfunding on an "ongoing basis," in violation of ERISA standards, and permissible underfunding on a "termination basis"). Indeed, in 1992 the PBGC's Executive Director publicly cited TWA's fully compliant, but partially funded, pension plans as an illustration of just such a situation. James B. Lockhart, Securing the Pension Promise, 43

Lab. L.J. 195, 197 (1992).⁴

Significantly, ERISA neither requires nor permits termination of a defined benefit pension plan simply because the plan, although properly funded by ERISA standards, would be “underfunded” in the event all liabilities came due at once. Rather, ERISA provides only two potential termination avenues for ongoing PBGC-insured plans that are partially funded and still paying down their liability “mortgage,” as was the TWA Pilots Plan in this case. Both of these options are subject to important conditions and restrictions.

First, ERISA Section 4041(c) authorizes a voluntary “distress” termination, at the initiative of the plan sponsor and with PBGC’s approval, if the plan satisfies all conditions and follows all procedures specified in the statute. See 29 U.S.C. § 1341(c).⁵ Among other limitations, the statute prohibits voluntary termination “if the termination

⁴ The PBGC Executive Director used the example of the TWA plans to argue for legislative reform that would tighten ERISA’s allegedly “inadequate” funding standards for ongoing plans:

Eastern and Trans World Airlines are examples of companies that have made required contributions to their pension plans, yet their plans are still substantially underfunded [on a termination basis]. *In the case of TWA, there were no waivers of contributions or missed contributions*, and yet its regular minimum contributions have left the pension [sic] short by well over \$900 million.

Lockhart, supra, 43 Lab. L.J. at 197 (emphasis added). As explained below in our Argument, p. 39 n.24, this Court may take judicial notice of the PBGC’s public statements and positions.

⁵ Section 4041(b)’s companion provisions authorizing voluntary “standard” termination (29 U.S.C. § 1341(b)), which apply only where the plan has assets sufficient for all its benefit liabilities upon termination, are not relevant to this case and are not addressed in this brief.