UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHARLES JACKSON GASCHE, JR., DENNIS J. HARRIS, GENE L. PETERSON, WILLIAM A. SCHOKNECHT and JOHN J. SKIBA, *Plaintiffs*, - v. - ASWORTH CORPORATION, *Defendant.*	Case No. 04-CV-0776 Judge David H. Coar

PLAINTIFFS' MEMORANDUM IN SUPPORT OF SETTLEMENT AGREEMENT

Peter D. DeChiara
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, New York 10036-6976
(212) 563-4100

Stanley Eisenstein
KATZ, FRIEDMAN, EAGLE,
EISENSTEIN & JOHNSON
77 W. Washington Street, Suite 2000
Chicago, IL 60602-2904
(312) 263-6330

Attorneys for Plaintiffs

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Plaintiffs respectfully submit this memorandum in support of the Stipulation of Settlement ("Settlement") in the above case.

PRELIMINARY STATEMENT

Shortly after filing for bankruptcy in 1982, Braniff Airways, Inc. ("Braniff") terminated its pilot pension plans. The assets of the plans that remained after termination were used to purchase two group annuity contracts from Prudential Insurance Company of America ("Prudential"), to provide the former Braniff pilots with retirement annuities. In 2001, Prudential converted from a mutual insurance company to a shareholder-owned company and, as part of this "demutualization" process, transferred shares of Prudential stock to its contractholders and policyholders. Defendant Asworth Corporation ("Asworth"), Braniff's successor and the holder of the two group annuity contracts, received certain amounts of Prudential stock as its "Demutualization Compensation."

In this action, five former Braniff pilots sued Asworth claiming that because the annuity contracts were purchased with pension fund assets, Asworth had an obligation to turn over the Demutualization Compensation to a class of former Braniff pilots and their survivors who are the annuitants under the two group annuity contracts. After briefing Asworth's partial motion to dismiss, taking discovery and engaging in extended settlement negotiations, the parties have now entered into the Settlement, which requires Asworth to turn over to the class 60 percent of the Demutualization Compensation.

As discussed below, the Settlement, which permits the parties and Court to avoid prolonged litigation, should be preliminarily approved. First, the suit is appropriate for class

certification since there is just one predominant issue common to all of the over 2,000 class members, namely, whether Asworth has a right to keep the Demutualization Compensation. It would make no sense to have multiple individual suits to determine whether Asworth may retain the Demutualization Compensation.

Moreover, the 60 percent compromise is fair and reasonable because, as discussed below, plaintiffs' claims are uncertain. Plaintiffs decided to accept the 60 percent only after their counsel, who specialize in labor and pension matters, had conducted sufficient discovery, briefing and legal analysis to be able to evaluate the case thoroughly.

Finally, the other terms of the Settlement, including the method of dividing the recovery among the class members and the allotment for attorneys fees and administrative expenses, are all fair and reasonable.

Accordingly, the Court should preliminarily approve the Settlement and set the matter down for a fairness hearing.

BACKGROUND

Termination Of Braniff's Pension Plans And Purchase Of The Annuity Contracts

Braniff had two pension plans for pilots, a defined benefit plan ("the A Plan") and a defined contribution plan ("the B Plan"). *See* Answer ("Ans.") ¶19. Shortly after shutting down its operations and entering bankruptcy in 1982, Braniff terminated both plans. *See* Ans. ¶¶26, 32. Braniff's successor used the assets of the terminated A Plan to purchase group annuity contract GA-8896 from Prudential, in order to provide retirement annuities to the former A Plan participants. *See* Ans. ¶28. Upon termination of the B Plan, participants were given the option

of receiving the funds in their plan accounts as either a lump sum or an annuity. *See* Ans. ¶32. After distributing the lump sum payments, Braniff's successor used the remaining assets of the terminated B Plan to purchase group annuity contract GA-8857 from Prudential, to provide retirement annuities to former B Plan participants. *See* Ans. ¶32.

Prudential has provided, and continues to provide, the former A Plan and B Plan participants and their survivors with the annuity payments required by the two annuity contracts. *See* Ans. ¶34.

Prudential's Payment Of The Demutualization Compensation

When the two group annuity contracts were purchased , Prudential was a mutual insurance company, owned by its member policyholders and contractholders. *See* Ans. ¶37. In 2001, Prudential reorganized and became a publicly traded shareholder-owned company. *See* Ans. ¶39. As part of this "demutualization" process, Prudential transferred shares to its policyholders and contractholders. *See id.* Asworth, Braniff's successor and the current holder of the two annuity contracts, received 308,093 shares of Prudential stock, with approximately 89 percent of the total based on GA-8896 and approximately 11 percent based on GA-8857. *See* Nov. 10, 2004 Declaration of Peter D. DeChiara, Esq. ("DeChiara Dec."), Tab E, at Resp. 4&5. (These shares, plus cash dividends subsequently paid thereon, are referred to herein as the "Demutualization Compensation"). In 2002, the Air Line Pilots Association, International ("ALPA"), which formerly served as the bargaining representative for the Braniff pilots, demanded that Asworth turn over the Demutualization Compensation to the former Braniff pilots, but Asworth indicated that it intended to keep it. *See* Ans. ¶¶44-45.

The Proceedings In the Action

Plaintiffs are five former Braniff pilots who were participants in the A Plan and B Plan and who are annuitants under GA-8896. *See* Complaint ¶¶13-17, 50. Counts I through V of their complaint assert state law causes of action – unjust enrichment, money had and received, resulting trust, constructive trust and breach of fiduciary duty, *see* Compl. ¶¶56-74 – and seek a declaration that the Demutualization Compensation rightfully belongs to the annuitants under the two group annuity contracts, *see id.*, p.14 ("Prayer For Relief," ¶2). Count VI asserts, in the alternative, that the portion of the Demutualization Compensation paid based on GA-8896 is an asset of the terminated A Plan and therefore that Asworth has breached its fiduciary duty under the Employee Retirement Income Security Act ("ERISA") by keeping it. *See* Compl. ¶75-80. Count VI seeks a declaration that that portion of the Demutualization Compensation should be paid to the annuitants under GA-8896. *See id.*, p.14 ("Prayer For Relief," ¶3).

Asworth answered the complaint as to Counts I through V and asserted several affirmative defenses. *See* Ans. ¶¶56-74 & pp.20-21. It moved to dismiss the ERISA claim in Count VI, arguing *inter alia* that, as a matter of law, it can not owe any fiduciary duty in connection with a plan that terminated years before. *See* Asworth's May 17, 2004 Mem. In Support Of Its Motion To Dismiss Count VI ("Dismiss Mem."), at 5. That motion, fully briefed, remains pending.

In discovery, Asworth produced dozens of boxes of documents in response to plaintiffs' document requests and also responded to plaintiffs' interrogatories. *See* DeChiara Dec. ¶7 &

Tab. E. Plaintiffs also subpoenaed documents from Prudential and took a Rule 30(b)(6) deposition of a Prudential official. *See* DeChiara Dec. ¶7.

The Settlement Agreement

Plaintiffs and Asworth engaged in settlement negotiations over the course of many weeks before entering into the Settlement. *See* DeChiara Dec. ¶9. In the Settlement, the parties stipulate, for settlement purposes only, to the certification of a class under Federal Rule of Civil Procedure 23(b)(3) of "[a]ll persons who were entitled, are now entitled or will be entitled to receive annuity payments under either GA-8896 or GA-8857." *See* Settlement §2(A). The Settlement provides that Asworth will transfer 60 percent of the Demutualization Compensation to the settlement class. *See id.* §3. It further provides, in accord with the contingency fee agreements between plaintiffs and their counsel, *see* DeChiara Dec., Tab H, at ¶3(i), and subject to court approval, for the deduction of attorneys fees in the amount of 23 percent of the settlement fund, *see* Settlement §4. The Settlement also permits withdrawal from the settlement fund of the reasonable and actual costs of administering the fund, up to a ceiling of 3 percent or $200,000, whichever is higher. *See* Settlement §4. The balance of the settlement fund will be distributed to the class, with approximately 89 percent divided among the participating GA-8896 annuitants and 11 percent divided among the participating GA-8857 annuitants. *See id.* The GA-8896 annuitants will share in their portion pro-rata based on their accrued benefits under the terminated A Plan. *See id.* The GA-8857 annuitants will share in their portion pro-rata based on the value of their individual accounts in the terminated B Plan. *See id.*

ARGUMENT

I. CLASS CERTIFICATION IS APPROPRIATE

A. The Rule 23(a) Factors Are Satisfied

Class certification requires satisfaction of the four factors set forth in Federal Rule of Civil Procedure 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* Fed. R. Civ. P. 23(a). Here, each is easily satisfied.

First, the numerosity requirement is satisfied because the class has 2,250 members. *See* DeChiara Dec. ¶12 & Tabs. A-D; *Sorenson v. CHT Corp.*, 2004 WL 442638 (N.D. Ill. 2004), at *8 (class sufficiently numerous if has at least 40 members); *Ringswald v. DuPage*, 196 F.R.D. 509, 512 (N.D. Ill. 2000); *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 307 (N.D. Ill. 1995); *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D. Ill. 1986).

The commonality requirement is satisfied because the claims of all the class members share a common nucleus of operative fact, namely, Asworth's decision to keep the Demutualization Compensation. *See Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998); *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *Arenson v. Whitehall Convalescent & Nursing Home, Inc.*, 164 F.R.D. 659, 664 (N.D. Ill. 1996). Asworth's decision raises a question common to all class members, namely, whether Asworth has a legal right to keep the Demutualization Compensation. *See Johnson v. Aronson Furniture Co.*, 1998 WL 641342 (N.D. Ill. 1998), at *3 (just one common question of law or fact needed to satisfy commonality requirement); *Arenson*, 164 F.R.D. at 663 (same).

The typicality requirement, which is not demanding, *see Clarke v. Ford Motor Co.*, 220 F.R.D. 568, 579 (E.D. Wis. 2004); *Endo v. Albertine*, 147 F.R.D. 164, 167 (N.D. Ill. 1993), is satisfied when the named plaintiffs' claims (1) arise from the same course of events as gave rise to the claims of the other class members and (2) are based on the same legal theories as the claims of the other class members. *See Keele*, 149 F.3d at 595; *Rosario*, 963 F.2d at 1018; *Levin v. Kluever & Platt LLC*, 2003 WL 22757764 (N.D. Ill. 2003), at *2; *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 333 (N.D. Ill. 1995). Here, the plaintiffs' claims, like those of each class member, arose out of Asworth's decision to keep the Demutualization Compensation. Moreover, the claims of each of the five named plaintiffs and each of the 2,250 class member are entirely identical, with the minuscule exception that eight of the class members (comprising about one-third of one percent of the class) do not assert the ERISA claim in Count VI because they are annuitants only under GA-8857 and not under GA-8896. *See* DeChiara Dec. ¶12.[1]

Finally, the adequacy-of-representation requirement is satisfied because the named

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[1]That the named plaintiffs are annuitants only under GA-8896 does not prevent them from properly representing that small group of class members (about 5.8% of the class, *see* DeChiara Dec. ¶12) who are also annuitants under GA-8857; Asworth's decision to keep the Demutualization Compensation affected the annuitants under both annuity contracts. *See Clarke*, 220 F.R.D. at 579 (individual in one plan "may represent a class including participants in other plans, providing the essence of the challenge is to general practices that affect all plans"); *accord Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 422 (6th Cir. 1998); *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993); *Alves v. Harvard Pilgrim Health Care Inc.*, 204 F.Supp.2d 198, 205 (D. Mass. 2002); *cf. Endo*, 147 F.R.D. at 167 (stockholders can represent class of both stock and debenture holders, since plaintiffs challenge conduct that affected both stock and debenture holders).

plaintiffs (1) have no interests antagonistic to the class; (2) stand to recover enough individually to have a sufficient interest in the outcome of the case, *see* DeChiara Dec. ¶14 (recoveries will likely range between $500 and $4,500 for each); and (3) are represented by competent, experienced and qualified counsel, *see id.* ¶¶2-5. *See generally Peterson v. H&R Block Tax Servs., Inc.*, 174 F.R.D. 78, 86 (N.D. Ill. 1997); *Riordan*, 113 F.R.D. at 64; *see also Levin*, 2003 WL 22757764, at *2.

B. <u>The Class Should Be Certified Under Rule 23(b)(3)</u>

Class certification also requires that the class fit within at least one of the three categories under Rule 23(b). Here, the class easily fits within Rule 23(b)(3), which provides that a class may be certified when "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy." The predominant question in this case – indeed, really the only question – is whether Asworth has the right to keep the Demutualization Compensation. This question is common to all class members. Moreover, as to that question, there are no distinctions between individuals; either Asworth has the right to keep the Demutualization Compensation or it does not. For this reason, adjudicating the case as a class action is clearly superior to the alternative of allowing multiple individuals suits all over the same question of whether Asworth has the right to keep the Demutualization Compensation.

Rule 23(b)(3) sets forth certain factors pertinent to whether a class should be certified. *See* Rule 23(b)(3)(A)-(b)(3)(D).[2] Each of these support certification of the settlement class here. First, individual class members would have no interest in controlling the prosecution of separate actions since there is one overriding issue in the case, namely, whether Asworth has the right to keep the Demutualization Compensation, and the resolution of that issue does not depend on facts particular to any individual. Second, there are no other pending suits by class members seeking the turnover of the Demutualization Compensation. *See* DeChiara Dec., Tab E, at Resp. 14. Third, since there is just one overriding issue in the case and it is common to all class members, concentrating the litigation of the claims in one forum is desirable. Fourth and last, management of the case as a class action will not be particularly difficult, especially if the settlement is approved. The settlement requires only a one-time transfer from Asworth, and Class Counsel will then distribute the settlement fund in accord with the formulas set forth in the settlement agreement. Allowing multiple cases to proceed individually would pose far greater administrative difficulties.

II. THE SETTLEMENT IS FAIR AND REASONABLE

Federal courts favor the settlement of class actions. *Uhl v. Thoroughbred Technology & Telecommunications, Inc.*, 309 F.3d 978, 986 (7th Cir. 2002); *Isby v. Bayh*, 75 F.3d 1191, 1196

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[2]These are: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

(7th Cir. 1996); *In re Mexico Money Transfer Litig.*, 164 F.Supp.2d 1002, 1014 (N.D. Ill. 2000); *Hispanics United v. Addison*, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997). In reviewing class action settlements, courts limit their inquiry to whether the settlement is lawful, fair, reasonable and adequate, *see Uhl*, 309 F.3d at 986; *Isby*, 75 F.3d at 1196, they do not ask whether the plaintiffs received "the best possible deal." *See In re Mexico*, 164 F.Supp.2d at 1014. The most important factor in the evaluation of a class action settlement is the strength of the plaintiffs' claims compared to the amount they will recover under the settlement. *See Isby*, 75 F.3d at 1199. Other factors include an assessment of the complexity, length and expense of continued litigation; the stage of the proceeding and amount of discovery completed at the time of settlement; the opinion of competent counsel; the presence of any collusion between the parties; and the amount of opposition to the settlement that exists among affected parties;. *See Isby*, 75 F.3d at 1199; *In re Mexico*, 164 F.Supp.2d at 1014; *Hispanics United*, 988 F. Supp. at 1150.

A. The 60 Percent Compromise Is Fair And Reasonable Given The Uncertainty Of Plaintiffs' Claims

The compromise requiring Asworth to transfer 60 percent of the Demutualization Compensation to the class is fair and reasonable because a substantial degree of uncertainty existed regarding plaintiffs' claims. *See In re Mexico*, 164 F.Supp.2d at 1014-17 (approving settlement when plaintiffs' claims were uncertain); *Hispanics United*, 988 F. Supp. at 1164 (same). The two group annuity contracts have no provision addressing who has the right to keep the Demutualization Compensation. Plaintiffs' state-law claims in Counts I through V rest on the theory that Asworth would be unjustly enriched if permitted to keep the Demutualization

Compensation, since the annuity contracts were purchased with assets of the terminated pension plans. *See* Compl. ¶¶56-74. Such claims, which turn on notions of "justice, equity, and good conscience," *Firemen's Annuity & Benefit Fund v. Municipal Employees' Benefit Fund*, 219 Ill.App.3d 707, 712, 579 N.E.2d 1003, 1007, 162 Ill.Dec. 189, 193 (1st Dist. 1991), are by their nature uncertain. Indeed, Asworth argues that the equities lie against plaintiffs, claiming that since the annuitants have received all the annuity payments they are entitled to under the annuity contracts, their receiving anything more would be a windfall. *See, e.g.,* DeChiara Dec., Tab F, at 107-08 (questioning by Asworth's counsel of Prudential official). Uncertainty regarding resolution of plaintiffs' claims is heightened by the various affirmative defenses asserted by Asworth. *See* Ans. at pp. 20-21 (setting forth seven affirmative defenses); *see also* DeChiara Dec., Tab E, at Resp. 15 (Asworth explaining basis for affirmative defenses).

In their ERISA claim in Count VI, plaintiffs contend that Asworth breached its fiduciary duty by keeping the Demutualization Compensation paid on GA-8896 because that portion of the Demutualization Compensation is an asset of the terminated A Plan. *See* Compl. ¶¶77-80. Asworth, however, argues that after a plan has terminated, all fiduciary duties end. *See* Dismiss. Mem. at 5. It also argues that confirmation of the Braniff bankruptcy plan extinguished any right that the former Braniff pilots had to additional payments in connection with the terminated pension plans. *See* Dismiss Mem., at 8; Asworth's July 9, 2004 Reply Mem., at 9-14. How the Court would resolve these conflicting contentions is uncertain.

Probably the best indication of the uncertainty of plaintiffs' claims comes from Prudential itself, which during its reorganization provided advice to its group contractholders regarding how

they should treat demutualization compensation. In its published guide for group contractholders, Prudential noted that the U.S. Department of Labor views demutualization compensation as a plan asset when paid in connection with an existing pension plan. *See* DeChiara Dec., Tab G, at 12. However, Prudential continued, "it is *not clear* under the relevant authorities how demutualization compensation attributable to a *terminated* plan's annuity contract should be treated." DeChiara Dec., Tab G, at 17 (emphasis added).

Given the uncertainty regarding plaintiffs' claims, a settlement requiring Asworth to transfer 60 percent of the demutualization compensation is fair, adequate and reasonable.

B. Other Relevant Factors Support Approval Of The 60 Percent Compromise

The Settlement allows the parties to avoid what would undoubtedly have been expensive and prolonged litigation. *See In re Mexico*, 164 F.Supp.2d at 1019 (approving settlement when further litigation would have required considerable expense and time). Absent the Settlement, the parties would have had to complete discovery; litigate over plaintiffs' class certification motion; and prepare and file cross summary judgment motions. *See* DeChiara Dec. ¶8. Even if there were no trial, the losing party would undoubtedly have appealed, prolonging the case further. The Settlement not only ensures a recovery for the class but also hastens it, which is important for an aging group of former Braniff pilots, many of whom retired years ago.

Settlement at this stage is prudent because plaintiffs and their counsel have sufficient information to evaluate the case properly. *See Isby*, 75 F.3d at 1200 (approving settlement in part based on thorough investigation and discovery performed by class counsel). Plaintiffs'

counsel have extensively researched the legal issues involved, evaluating both the merits of plaintiffs' claims and potential procedural and substantive pitfalls. *See* DeChiara Dec. ¶6. Briefing on Asworth's motion to dismiss Count VI tested the strengths and weaknesses of plaintiffs' ERISA claim. Plaintiffs' counsel reviewed thousands of pages of documents produced by Asworth and Prudential and obtained further relevant information from the Rule 30(b)(6) deposition of Prudential and from Asworth's interrogatory responses. *See* DeChiara Dec. ¶7.

Moreover, plaintiffs' counsel are well qualified to make the determination that the settlement is fair. *See Isby*, 75 F.3d at 1200 (approving settlement in part based on opinion of qualified plaintiffs counsel). Lead counsel for the plaintiffs, Cohen, Weiss and Simon LLP ("CWS"), is a prominent firm in the area of representing labor unions and employees, and has particular expertise regarding ERISA and bankruptcy issues. *See* DeChiara Dec. ¶2. CWS, which is general counsel to ALPA, also has extensive experience with pilot pension plans, and it represented ALPA and the pilots in the Braniff bankruptcy. *See id.* ¶3. The individual attorneys who have worked on the lawsuit and the Settlement are experienced and highly competent litigators. *See id.* ¶¶4-5.

Finally, there is no evidence of any collusion between the parties concerning the settlement agreement and no reason to believe that the agreement is anything other than an arms' length agreement.[3]

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[3]The last factor – the extent of any opposition to the Settlement – can not be evaluated until class members are given an opportunity to object at the fairness hearing. However, opposition would have to be considerable to sway the Court to reject an otherwise acceptable settlement. *See Isby*, 75 F.3d at 1200 (settlement approved despite submission of written

C. The Other Terms Of The Settlement Agreement Are Fair And Reasonable

In addition to ensuring that the 60 percent compromise is fair and adequate, plaintiffs have taken care to make sure that the other terms of the Settlement are fair. As will be explained in class counsel's attorneys fee petition, attorneys fees of 23 percent of the settlement fund is entirely reasonable and is in fact below the median percentage recovery in this type of a case. Administrative expenses will be withdrawn from the settlement fund only to the extent necessary to pay the cost of administering the distribution, and will be capped at three percent of the fund or $200,000, whichever is greater.

Distributing approximately 89 percent of the remaining funds to the GA-8896 annuitants and 11 percent to the GA-8857 annuitants is fair, since the Demutualization Compensation was approximately 89 percent attributable to GA-8896 and 11 percent attributable to GA-8857. Dividing the recovery among the GA-8896 annuitants based on their proportional accrued benefits in the A Plan is fair and consistent with plaintiffs' theory of the case, namely, that the annuitants should share in the Demutualization Compensation because their pension earnings were used to purchase GA-8896. For the same reason, it is fair and consistent with plaintiffs'

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objections by thirteen percent of class) (*citing with approval Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) (settlement approved despite objection of 45 percent of class)).

theory of the case to divide the recovery among the GA-8857 annuitants prorata based on the value of their accounts in the B Plan.[4]

CONCLUSION

For the foregoing reasons, the Court should grant preliminary approval to the Settlement Agreement and schedule a fairness hearing.

Peter D. DeChiara
COHEN, WEISS AND SIMON LLP
330 West 42nd Street
New York, New York 10036-6976
(212) 563-4100

Stanley Eisenstein
KATZ, FRIEDMAN, EAGLE,
EISENSTEIN & JOHNSON
77 W. Washington Street, Suite 2000
Chicago, IL 60602-2904
(312) 263-6330
Attorneys for Plaintiffs

[4]Plaintiffs chose not to divide the recovery prorata based on annuitants' "share" in the two group annuity contracts, in part for the practical reason that neither Prudential nor Asworth was able to provide figures showing each annuitant's "share." The dollar amount of each annuitants' annuity payments depends on the type of annuity option chosen (*e.g.*, life only, joint and survivor, etc.), whether the annuitant opted for early retirement or not, and possibly other factors. This multiplicity of factors precluded any attempt to make an "apples-to-apples" comparison between annuitants in order to determine the "share" of each in the annuity contract.

In addition, plaintiffs believe it would be more fair to divide the recovery among the GA-8896 annuitants prorata based on their accrued benefits in the A Plan. Because the A Plan was underfunded when it terminated, *see In re Braniff Airways, Inc.*, 27 B.R. 222, 226 (Bankr. N.D. Tex. 1982), insufficient assets were available to purchase an annuity contract from Prudential to provide payment of all accrued A Plan benefits, and many GA-8896 annuitants lost substantial amounts of accrued benefits. Dividing the recovery prorata based on annuitant's accrued benefits under the A Plan gives those who lost accrued benefits a greater recovery than if the recovery were divided prorata based on their "share" of GA-8896.