IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Civil Action No. 1:05-cv-00478-MSK-PAC

EDWARD J. KERBER,
NELSON B. PHELPS,
Individually, and as Representative of plan participants
and plan beneficiaries of the QWEST PENSION PLAN,

Plaintiffs,

vs.

QWEST PENSION PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PENSION PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Defendants Qwest Pension Plan, Qwest Employees Benefit Committee, Qwest Pension Plan Design Committee and Qwest Communications International, Inc. (collectively "Qwest" or "Defendants"), through their counsel Baird & Kiovsky, LLC, and pursuant to Fed. R. Civ. P. 12(b)(1), hereby submit their Motion to Dismiss Plaintiffs' Amended Complaint in its entirety for lack of subject matter jurisdiction.

Qwest certifies that, pursuant to D.C.COLO.LCivR 7.1(A), counsel contacted Plaintiffs' attorney concerning the grounds for this motion and the relief requested on August 11, 2005. Although Plaintiffs' counsel did not respond to this notice, Defendants assume that Plaintiffs' counsel opposes the relief requested herein.

GROUNDS FOR DISMISSAL

As more fully demonstrated by Defendants' Brief in Support of Motion to Dismiss, which is being filed contemporaneously, this Court does not have subject matter jurisdiction over Plaintiffs' claims. Specifically, Plaintiffs' cannot satisfy the related justiciability requirements of "standing" and "ripeness." Accordingly, Qwest moves to dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

BURDEN OF PROOF

As the party asserting federal jurisdiction, Plaintiffs bear the burden of establishing the elements of standing and ripeness. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 1212 S. Ct. 2130 (1992) (standing); Coalition for Sustainable Resources, Inc. v. United States Forest Svc., 259 F.3d 1244, 1249 (10th Cir. 2001) (ripeness).

MATERIAL FACTS[1]

1. Named Plaintiffs Edward J. Kerber and Nelson B. Phelps ("Plaintiffs") purport to represent a putative class of all participants in the Qwest Pension Plan who retired before January 1, 2004 and are receiving service or disability pension annuities. Amended Compl. at ¶ 157.

2. The Plan provides a pension death benefit (the "Death Benefit"), payable upon the death of a Qwest retiree receiving a service pension to the retiree's surviving spouse or dependent beneficiaries. Amended Compl. at ¶ 1.

[1] For the sole purpose of this Motion to Dismiss, Defendants accept the allegations of the Amended Complaint as true. The material facts are more fully set forth in Defendants' Brief in Support of Motion to Dismiss under "Allegations of the Amended Complaint."

3. In September 2003, Qwest announced that the company was "considering eliminating the death benefit for all retirees regardless of their retirement date." Amended Compl. at ¶ 1. Several days later Qwest announced that the decision to discontinue the Death Benefit was being delayed. Amended Compl. at ¶ 27.

4. Plaintiffs have asked Qwest for assurance that the company will not eliminate the Death Benefit. Amended Compl. at ¶¶ 27, 29. Qwest denied Plaintiffs' request. Amended Compl. at ¶¶ 28, 30.

5. Plaintiffs assert the following claims in seeking declaratory and injunctive relief to prevent *future* elimination or reduction of the Death Benefit: (1) Breach of ERISA Fiduciary Duty/Equitable Estoppel; and (2) "ERISA Section 502(a)(1)(B) Claim to Clarify Future Rights to 'Pension Death Benefit.'" Amended Compl. at ¶¶ 1, 136-156; Amended Compl. at Prayer for Relief ¶¶ C, D, E, F, G, H, and I.

6. Significantly, Plaintiffs do not allege that Qwest announced any intention to discontinue providing the Death Benefit to the putative class of retirees at any time since it withdrew the September 2003 proposal.

MATERIALS OUTSIDE THE PLEADINGS

Materials outside the pleadings need not be considered in resolving this motion.

WHEREFORE, for the reasons identified in this motion and their supporting brief, Defendants respectfully request that the Court dismiss Plaintiffs' Amended Complaint in its entirety.

Respectfully submitted this 12th day of August, 2005.

s/ Elizabeth I. Kiovsky
Elizabeth I. Kiovsky
Baird & Kiovsky, LLC
2036 East 17th Avenue
Denver, CO 80206
Telephone: (303) 813-4500
Facsimile: (303) 813-4501
e-mail: bethk@bairdkiovsky.com
Attorneys for Defendants,
Qwest Pension Plan, et al.

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on August 12, 2005, I electronically filed the foregoing MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

Curtis L. Kennedy, Esq. at CurtisLKennedy@aol.com

and, I also certify that I have e-mailed or served the document via U.S. Mail, postage prepaid, to the following non-CM/ECF participants:

Cynthia P. Delaney, Esq.
Qwest Communications Corp.
1801 California Street, Suite 900
Denver, CO 80202
cynthia.delaney@qwest.com

/s/ Carla A. Chiles, Paralegal
of Baird & Kiovsky, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:05-cv-00478-MSK-PAC

EDWARD J. KERBER,
NELSON B. PHELPS,
Individually, and as Representative of plan participants
and plan beneficiaries of the QWEST PENSION PLAN,

Plaintiffs,

vs.

QWEST PENSION PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PENSION PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendants Qwest Pension Plan, Qwest Employees Benefit Committee, Qwest Pension Plan Design Committee and Qwest Communications International, Inc. (collectively "Qwest" or "Defendants"), through their counsel Baird & Kiovsky, LLC, and pursuant to Fed. R. Civ. P. 12(b)(1), hereby submit the following brief in support of their Motion to Dismiss Plaintiffs' Amended Complaint.

INTRODUCTION

Plaintiffs seek to invoke this Court's jurisdiction based on an assertion that Qwest *may* eliminate a death benefit under the Qwest Pension Plan ("Plan") for an undefined class of retirees at some uncertain time in the future. They acknowledge Qwest has *not* eliminated the benefit for the putative class on whose behalf Plaintiffs have brought this

lawsuit – Plan participants who retired prior to 2004. Plaintiffs do not allege that Qwest has any present intent to terminate the benefit now or in the future. In fact, in their Amended Complaint, Plaintiffs admit that Qwest withdrew a draft proposal to eliminate the benefit nearly two years ago. Under these circumstances, this Court lacks subject matter jurisdiction over Plaintiffs' claims under the related doctrines of standing and ripeness.

ALLEGATIONS OF THE AMENDED COMPLAINT[1]

I. The Qwest Pension Death Benefit

1. Named Plaintiffs Edward J. Kerber and Nelson B. Phelps ("Plaintiffs") retired from Qwest's predecessor, U S West, Inc. in 1990. Amended Compl. at ¶¶ 5, 7.

2. Plaintiffs are participants in the Qwest Pension Plan and receive monthly pension payments from the Plan. Amended Compl. at ¶¶ 5-8. Plaintiffs purport to represent a putative class of all Plan participants who retired before January 1, 2004 and are receiving service or disability pension annuities. Amended Compl. at ¶ 157.

3. The Plan currently provides a pension death benefit (the "Death Benefit"), payable upon the death of a Qwest retiree receiving a service pension to the retiree's surviving spouse or dependent beneficiaries. Amended Compl. at ¶ 1.

4. In September 2003, Qwest announced that the company was "considering eliminating the death benefit for all retirees regardless of their retirement date." Amended Compl. at ¶ 1. Specifically, Qwest shared with Plaintiffs and other Plan participants a "draft proposed notice," which stated that Qwest would eliminate the Death Benefit as of October 1, 2003. Amended Compl. at ¶¶ 124, 125.

---

[1] For the sole purpose of this Motion to Dismiss, Defendants accept the allegations of the Amended Complaint as true.

5. Several days later Qwest announced that the decision of whether to discontinue the Death Benefit was being delayed. Amended Compl. at ¶ 27.

6. Plaintiffs have asked Qwest for assurance that the company will not eliminate the Death Benefit. Amended Compl. at ¶¶ 27, 29. Qwest denied Plaintiffs' request. Amended Compl. at ¶¶ 28, 30.

II. Plaintiffs' Claims

7. In their Amended Complaint, Plaintiffs assert that this Court has jurisdiction under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1132, and the Declaratory Judgment Act 28 U.S.C. 2201 and 2202. Amended Compl. at ¶¶ 2, 3. They allege that an actual controversy exists between the parties as to whether the Death Benefit is vested and accrued within the meaning of ERISA. Amended Compl. at ¶ 1.

8. Plaintiffs assert the following claims to "clarify [their] rights to future 'Pension Death Benefits' under the terms of the plan:" (1) breach of ERISA Fiduciary Duty/Equitable Estoppel; and (2) "ERISA Section 502(a)(1)(B) Claim to Clarify Future Rights to 'Pension Death Benefit.'" Amended Compl. at ¶¶ 1, 136-156.

9. Plaintiffs seek declaratory and injunctive relief to prevent *future* elimination or reduction of the Death Benefit. Amended Compl., Prayer for Relief at ¶¶ C, D, E, F, G, H, and I.

III. The Amended Complaint Does Not Allege that Qwest Has Any Present Intent to Terminate the Death Benefit

10. Plaintiffs filed the Amended Complaint on May 6, 2005, approximately twenty months after Qwest's announcement that it was withdrawing its draft proposal to terminate the Death Benefit, in September of 2003. Amended Compl. at ¶ 27.

11. During that time, Qwest amended the Plan to discontinue the Death Benefit only for persons retiring after January 1, 2004. Amended Compl. at ¶ 128.

12. Significantly, Plaintiffs do not allege that Qwest announced any intention to discontinue providing the Death Benefit to the putative class of retirees at any time during the twenty months since it withdrew the September 2003 proposal.

ARGUMENT

I. Legal Standard

In reviewing a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, which attacks the sufficiency of the complaint, the court must accept the allegations of the complaint as true. Holt v. United States, 46 F.3d 1000, 1002 (10th Cir. 1995). Although the allegations of the complaint must be construed in favor of the plaintiff, "[n]either ERISA nor the Declaratory Judgment Act, 28 U.S.C. § 2201, extends [a court's] subject matter jurisdiction beyond constitutional limits." United Mine Workers of America Int'l Union v. G.M.&W. Coal Co., 642 F. Supp. 57, 61 (W.D. Pa. 1985). See also Rector v. City and County of Denver, 348 F.3d 935, 946 (10th Cir. 2003) (Declaratory Judgment Act does not itself confer jurisdiction on federal courts and plaintiffs must establish Article III "case or controversy" as a prerequisite to declaratory relief). Moreover, the burden of establishing subject matter jurisdiction falls on Plaintiffs. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 1212 S. Ct. 2130 (1992) (standing).

II. This Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Claims

Under Article III of the United States Constitution ("Article III"), this Court's subject matter jurisdiction is limited to "cases and controversies." Morgan v. McCotter,

365 F.3d 882, 887 (10th Cir. 2004). "Both the Supreme Court and [the Tenth Circuit] have expanded that constitutional limitation, recognizing that prudential considerations 'founded in concern about the proper—and properly limited—role of the courts in a democratic society' must also inform our determination of whether a justiciable dispute actually exists." Id. quoting Warth v.Seldin, 422 U.S. 490, 498 (1975). At issue here are the related justiciability doctrines of standing and ripeness. As the party asserting federal jurisdiction, Plaintiffs bear the burden of establishing the elements of standing and ripeness. Lujan v. Defenders of Wildlife, 504 U.S. at, 561 (standing); Coalition for Sustainable Resources, Inc. v. United States Forest Svc., 259 F.3d 1244, 1249 (10th Cir. 2001) (ripeness). Because Plaintiffs cannot meet their burden, this Court does not have subject matter jurisdiction over their claims.

A. Plaintiffs Do Not Have Standing Because They Have Not Suffered an "Injury in Fact"

Plaintiffs do not have standing because their asserted injury, Qwest's elimination of the Death Benefit, has not occurred, nor is there any indication that elimination of the Death Benefit is planned at any time in the future. The completely hypothetical nature of the alleged injury is insufficient to satisfy standing requirements. To present a justiciable controversy, a plaintiff must establish standing to sue under Article III by meeting the following requirements. "First, the plaintiff must suffer an injury in fact. An injury in fact is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." Morgan v. McCotter, 365 F.3d at 887-88 (10th Cir. 2004) (internal quotations omitted). The plaintiff must also show that the alleged harm is "fairly traceable" to the defendant's conduct and that a favorable ruling from the court would redress the plaintiff's injury. Id. at 888.

To satisfy the injury in fact requirement, Plaintiffs must establish that they have "suffered a present or imminent injury, as opposed to a mere possibility, or *even probability*, of future injury." Id. (emphasis added). The Supreme Court has made clear that an "imminent" injury sufficient to satisfy the "injury in fact" element of standing must be "certainly impending." Lujan, 504 U.S. at 564 n.2 (internal quotes omitted).

Here, Plaintiffs lack standing because they have not and do not allege that they have suffered an injury in fact. Plaintiffs cannot show that they suffered any actual injury because Qwest has not eliminated the Death Benefit for Plaintiffs or the purported class. All Qwest did was submit a draft proposal to terminate the Death Benefit in September 2003. Qwest withdrew that proposal several days later. Further, Plaintiffs cannot establish an imminent injury because they have not alleged that Qwest has any present intent to terminate the Death Benefit. Plaintiffs only allege that Qwest refuses to agree not to eliminate the Death Benefit at some indeterminate future time. At most, the injury alleged here, elimination of the Death Benefit, is a possible future injury.

"[P]ossible future injury is insufficient to create standing." Keyes v. School District No. 1, 119 F.3d 1437, 1445-46 (10th Cir. 1997) citing Lujan, 504 U.S. at 560-61. In Keyes, the court held that appellants lacked standing to challenge the constitutionality of the Colorado Constitution's Busing Clause. Id. The court stated that any injury from the Busing Clause was merely a possible future injury because appellants failed to show that the school district or any school took or refrained from any action due to the Busing Clause. Id. See also Cosco v. Uphoff, 1997 U.S. App. LEXIS 5880, at *5 (10th Cir. March 28, 1997) (prison inmates lacked standing to challenge a policy that subjected their personal property to forfeiture for disciplinary infractions because the mere potential

for injury created by the policy was insufficient to establish imminent injury) (unpublished case).[2]

The requirement that an injury in fact must be imminent is the same under ERISA. In Devlin v. Transportation Communications Int'l Union, 175 F.3d 121, 131 (2d Cir. 1999), the court affirmed dismissal of a challenge to a union's attempt to rescind a Cost of Living Adjustment ("COLA") amendment to a retirement plan for lack of standing. Devlin involved an injury that was far more imminent than the potential harm here. Unlike the present case, where Qwest has merely reserved the right to discontinue the Death Benefit, the plan trustees in Devlin had actually filed suit in Maryland seeking approval to repeal the COLA amendment. Id. at 125, 130-31. Nonetheless, the Second Circuit agreed that appellants had not suffered an injury in fact because at the time the district court rendered its decision, the COLA amendment had not been repealed. Id. at 131. See also Int'l Union v. Facet Enters., 601 F. Supp. 292, 295-97 (S.D. Mich. 1984) (dismissing ERISA claim seeking a declaration that retirement benefits were vested because defendant's "threat" to reduce benefits was too "abstract and speculative" to establish standing).

Finally, not only do Plaintiffs fail to allege any present intent to eliminate the Death Benefit, but they also admit in the Amended Complaint that during the past twenty months, Qwest has not renewed its proposal to eliminate the Death Benefit. Given this admission, Plaintiffs cannot establish an imminent threat of injury. *See* LPA, Inc. v. Chao, 211 F. Supp. 2d 160, 164-65 (D.D.C. 2002) (the asserted injury—the passage by one or more states of laws authorized by a challenged federal administrative rule—was

[2] Pursuant to D.C.COLO.LCivR 7.1(D) a copy of the Cosco decision is attached as Exhibit A.

not imminent because no state had enacted such a law in the 22 months since plaintiffs' expert opined that at least one state was likely to do so within one year).

The lack of any current plan to eliminate the Death Benefit renders Plaintiffs' claims merely speculative and insufficient to allege an injury in fact. Plaintiffs' allegations are no more than an assertion that Qwest might some day eliminate the Death Benefit. As the Supreme Court said in a similar context, "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of . . . 'actual or imminent' injury[.]" Lujan, 504 U.S. at 564 (undefined intentions to observe animals in foreign countries held insufficient for standing to assert claim that a provision of the Endangered Species Act applied abroad). Accordingly, Plaintiffs do not have standing to assert their claims.

B. Plaintiffs' Claims Are Not Ripe for Judicial Review

"'[R]ipeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" Morgan, 365 F.3d at 890 quoting Nat'l Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803 (2003). Similar to standing, the ripeness doctrine requires that the challenged harm be "sufficiently realized." Morgan, 365 F.3d at 890. The ripeness analysis, however, focuses not on whether the plaintiff has been harmed, but whether the asserted harm has "matured sufficiently to warrant judicial intervention." Thus, even if a case presents an Article III "case or controversy," important prudential concerns may require the court to stay its hand until the issues are more developed for judicial review. Morgan, 365 F.3d at 890.

1. Plaintiffs Cannot Establish That Their Claims Are Ripe Because They Have Not Suffered an Injury in Fact

As a threshold matter, Plaintiffs cannot establish that their claims are ripe because they have not suffered an injury in fact sufficient to establish standing. See, e.g., Morgan, 365 F.3d at 887 (noting the overlap between standing and ripeness, particularly where the plaintiff has not suffered an injury in fact); Keyes, 119 F.3d at 1444-46 (holding that impediments to ripeness were also impediments to standing where appellants had not suffered an injury in fact); Cosco, 1997 U.S. App. LEXIS at *5 (holding that plaintiffs could not establish standing *or* ripeness because they had not alleged a "concrete, actual or imminent" injury"). Thus, Plaintiffs fail to allege a ripe case or controversy for the same reason they cannot establish standing.

2. Plaintiffs Cannot Establish the Additional Requirements of the Ripeness Doctrine

Even assuming Plaintiffs could establish standing, they cannot meet the additional requirements imposed by the ripeness doctrine. To determine whether a case is ripe, courts consider two additional factors. First, they evaluate the fitness of the issues for judicial decision. Texas v. United States, 523 U.S. 296, 300-01, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998); Morgan, 365 F.3d at 890. Second, courts consider the hardship withholding judicial review would impose on the parties. Texas, 523 U.S. at 300-01; Morgan, 365 F.3d at 890. Here, neither factor supports the exercise of jurisdiction over Defendants' right to eliminate the Death Benefit in the future.

a. Plaintiffs' Claims Are Not Fit for Judicial Review Because They Are Based on Uncertain or Contingent Future Events

Plaintiffs' claims are not fit for judicial review because the harm they seek to redress, termination of the Death Benefit for all pre-2004 Qwest retirees, may not occur

or if it occurs, may impact only part of the purported class. The rationale underlying the ripeness doctrine is that "Article III courts should not make decisions unless they have to." Nat'l Treasury Employees Union v. United States, 101 F.3d 1423, 1431 (D.C. Cir. 1996). Thus, a case is not fit for judicial decision if it "involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." Morgan, 365 F.3d at 890 (internal quotation omitted); see also Texas, 523 U.S. at 300-01. In Friends of Marolt Park v. United States DOT, 382 F.3d 1088, 1094 (10th Cir. 2004), the court applied this standard to strike down the appellant's claim that a Department of Transportation decision approving a road construction project violated the Transportation Act. The claim was not fit for judicial review because the project could not proceed without voter approval, an event that may not occur. Id.

The ripeness requirement that the asserted harm cannot be "uncertain or contingent" applies with equal force in ERISA cases. No court has agreed to resolve an issue regarding an ERISA plan's right to change a benefit until the change has been made. Rather, in cases involving potential changes to benefits, final action by the plan is required before a case is ripe. For example, in United Mine Workers of America Int'l Union v. G.M.&W. Coal Co., 642 F. Supp. 57, 61-62 (W.D. Pa. 1985), the court dismissed plaintiffs' claim for a declaration that they had the right to retirement benefits under an ERISA plan. The court held that the plaintiffs' claim was not ripe because the complaint merely speculated that at some uncertain future time, the defendants might terminate benefit payments. Id. at 62; see also Scwhob v. Standard Insurance Co., 2002 U.S. App. LEXIS 11651 at **12-17 (10th Cir. June 12, 2002) (holding that district court should have dismissed ERISA benefits claim *sua sponte* for lack of ripeness because

insurer agreed to reconsider its decision after initially denying plaintiff's claim) (unpublished case);[3] Internat'l Union, 601 F. Supp. at 297 (ERISA claim seeking a declaration that retirement benefits were vested was not ripe because no benefits had been changed and it was only speculative as to whether benefits would be reduced in the future).

Nor does the Court have jurisdiction to resolve the parties' disagreement as to whether the Death Benefit is vested by virtue of ERISA's civil enforcement provision authorizing actions to "clarify … rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). If that language were sufficient to create jurisdiction here, then courts would have jurisdiction over any disagreement between a plan and its participants about a plan sponsor's right to amend a plan, *even in the absence of a specific proposal.*

Thus, even where plaintiffs seek to clarify their rights to future benefits, final action by the plan is required for a case to be ripe. See United Mine Workers, 642 F. Supp. at 61-62 (involving claim under ERISA, 29 U.S.C. § 1132(a)(1)(B)); Int'l Union, 601 F. Supp. at 297 (same). See also Systems Council EM-3 v. AT&T Corp., 159 F.3d 1376, 1382-83 (D.C. Cir. 1998) (claim that AT&T breached contract to provide benefits by transferring its benefit obligations to Lucent was not ripe because there was no allegation that Lucent was unwilling or unable to provide the benefits); United Steel Workers of America v. Cyclops Corp., 860 F.2d 189, 194-96 (6th Cir. 1988) (prospective contract claims of union and individuals based on defendant's transfer of pension liabilities to a company in Chapter 11 proceedings were not ripe because the transferee had met all pension obligations and it was unclear if it would ever default); Bolton v. Actuant Corp., 2004 U.S. Dist. LEXIS 15192, *4, 7-8 (C.D. Cal. March 5, 2004)

[3] Pursuant to D.C.COLO.LCivR 7.1(D) a copy of the Schwob decision is attached as Exhibit B.

(dismissing as unripe a claim seeking declaration that previous sponsor of deferred compensation plan was liable to fund the plan and make payments under the plan in the event of default by the transferee of the benefit obligations).[4]

The harm Plaintiffs allege here is purely speculative. There is no present proposal to eliminate the Death Benefit and indeed, Qwest may never discontinue the benefit. At most, Plaintiffs assert that Qwest *may* eliminate the Death Benefit for an undefined class of retirees at some uncertain future time.

As demonstrated by the Amended Complaint, Plaintiffs' claims and the purported class are too ill-defined for this Court to exercise jurisdiction. Plaintiffs first allege that Qwest presented a proposal to eliminate the Death Benefit for all retirees, regardless of retirement date. Then they admit that Qwest withdrew that proposal and instead eliminated the Death Benefit *only* for employees retiring after January 1, 2004. Thus, it is not at all clear that *if* the benefit is eliminated, the entire purported class, or even Named Plaintiffs would be affected.[5] There are a myriad of possible ways Qwest could potentially change the Death Benefit. For example, it could eliminate the Death Benefit only for employees who retired after a certain date. Alternatively, the benefit could be eliminated only for retirees who held particular positions or whose final salaries exceeded a particular amount. Or the Death Benefit could be generally discontinued, but retained for those who took special retirement incentives, including Named Plaintiffs. See Amended Compl. at ¶ 85. Finally, instead of completely eliminating the Death Benefit,

---

[4] Pursuant to D.C.COLO.LCivR 7.1(D) a copy of the Bolton decision is attached as Exhibit C.

[5] Cf. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 40 n.20, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976) (the threshold consideration as to whether to certify a case as a class action is whether plaintiff has standing to sue on his own behalf).

Qwest could merely reduce the amount of the benefit using any number of different formulas.

Plaintiffs' attempt to demonstrate an actual controversy based on the parties' disagreement as to whether the Death Benefit is vested also fails. The parties' mere disagreement about the interpretation of a contract does not make the harm asserted sufficiently certain to satisfy the ripeness requirement. See Murray Indus., Inc. v. Federal Insurance Co., 122 B.R. 135, 136-37 (M.D. Fla. 1990) (debtor's claim seeking a declaration that there would be insurance coverage if the debtor sued its officers and directors was not ripe even though the insurance company had already stated that there would be no coverage); see also Int'l Union, 601 F. Supp. at 297 ("At most, the parties' disagreement is a difference in contract interpretation which does not and cannot be addressed by this Court.").

Based on Plaintiffs' allegations, it is entirely unclear whether Qwest will ever change the Death Benefit. Even assuming Qwest changes the benefit, it is completely speculative as to *when* it would occur, *what* the change would be and *who* it would affect. Under these circumstances, permitting this case to proceed could result in a decision that is "completely advisory." Morgan, 365 F.3d at 891. Waiting until Qwest decides to change the Death Benefit, assuming it ever does, would ensure that the dispute is focused on the propriety of that particular decision and the retirees affected. Thus, this case is not ripe because it "involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."

b. Withholding Judicial Resolution Will Not Impose Hardship on Plaintiffs

Under the hardship inquiry of the ripeness analysis, a claim is not ripe unless the challenged conduct causes a "direct and immediate dilemma for the parties." Morgan, 365 F.3d at 891 (internal citation and quotation omitted). Here, the absence of any concrete harm to Plaintiffs demonstrates that there is no "direct and immediate dilemma for the parties." As the Tenth Circuit noted in Morgan, delaying resolution of a case until plaintiffs actually suffer a concrete injury "cannot itself constitute an independent harm[.]" Morgan, 365 F.3d at 891.[6] Further, Plaintiffs do not allege that they have been forced to engage in, or refrain from, any activities based on Qwest's position that the Death Benefit is not vested. See Texas, 523 U.S. at 301.

Finally, Plaintiffs will be able to seek judicial review if and when Qwest decides to eliminate the Death Benefit. See, e.g., Friends of Marolt Park, 382 F.3d at 1094 (holding that declining jurisdiction over challenge to department of transportation decision to approve a road construction project would not impose hardship on appellant's given their ability to sue if and when construction became certain). Accordingly, this case is not ripe because Plaintiffs will not suffer undue hardship if the Court declines jurisdiction.

WHEREFORE, Defendants respectfully request that the Court dismiss Plaintiffs' Amended Complaint in its entirety.

---

[6] To the extent Plaintiffs assert that they will suffer hardship if this case is dismissed due to the necessity of purchasing equivalent life insurance, the Amended Complaint states that Plaintiffs "cannot possibly afford" the cost of purchasing life insurance, so that the decision to purchase life insurance is not dependant on the existence of the Death Benefit. See Amended Compl. at ¶ 147.

Respectfully submitted this 12th day of August, 2005.

s/ Elizabeth I. Kiovsky
Elizabeth I. Kiovsky
Baird & Kiovsky, LLC
2036 East 17th Avenue
Denver, CO 80206
Telephone: (303) 813-4500
Facsimile: (303) 813-4501
e-mail: bethk@bairdkiovsky.com
Attorneys for Defendants,
Qwest Pension Plan, et al.

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on August 12, 2005, I electronically filed the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

Curtis L. Kennedy, Esq. at CurtisLKennedy@aol.com

and, I also certify that I have e-mailed or served the document via U.S. Mail, postage prepaid, to the following non-CM/ECF participants:

Cynthia P. Delaney, Esq.
Qwest Communications Corp.
1801 California Street, Suite 900
Denver, CO 80202
cynthia.delaney@qwest.com

/s/ Carla A. Chiles, Paralegal
of Baird & Kiovsky, LLC