

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.

SCHEDULING ORDER

**1. DATE OF CONFERENCE
AND APPEARANCES OF COUNSEL AND *PRO SE* PARTIES**

A scheduling conference in the above case was held on August 22, 2005, at 9:00 a.m. in Courtroom A501, 5th Floor of the United States Courthouse, 901 19th Street, Denver, CO.

Appearing for the parties were:

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2. STATEMENT OF CLAIMS AND DEFENSES

A. Plaintiffs' Statement of Their Claims.

Plaintiff EDWARD J. KERBER and NELSON B. PHELPS are participants in the Qwest Pension Plan (PLAN) and they assert two claims for relief based upon ERISA.

For many decades, a stable feature of the PLAN (and predecessor plans) has been a "Pension Death Benefit" payable upon the death of a retiree receiving a service pension and delivered to his or her surviving spouse or dependent beneficiaries. Qwest and its predecessors have a long history of treating the Pension Death benefit as an "accrued" or protected pension benefit payable from trust fund assets.

AT&T and US WEST, as PLAN sponsors, and PLAN administrators (including the US WEST Employee Benefits Committee) designated and treated the "Pension Death Benefit" under the PLAN to be a vested, protected or accrued **defined** pension benefit. For instance, in all of the SPDs issued during years 1977 through at least 1996, under the heading "Type of Plan" the PLAN sponsor and PLAN fiduciaries affirmatively represented that under the definitions of ERISA", the PLAN was "classified" as a "**defined** benefit plan' for service and deferred vested pension purposes and for payment of certain sickness death benefits upon the death of a Pension Participant."¹

By classifying and representing the Pension Death Benefit to be a defined benefit plan, US WEST and PLAN administrators (including the COMMITTEE) elected to treat the Pension

¹ The PLAN sponsor deliberately chose not to classify the "payment of certain sickness death benefits" as a "welfare benefit". At the very least, that language appearing in all of the SPDs representing the "payment of certain sickness death benefits" as a "defined benefit plan" is positive indication of ambiguity, something to make you scratch your head, thus, opening the door to consideration of extrinsic evidence, including testimony of former PLAN sponsor executives, former COMMITTEE members and former PLAN administrators.

Death Benefit to be an entitlement, an "accrued benefit" under ERISA Section 3(23), 29 U.S.C. § 1002 (23), subject to strict vesting requirements.

When Plaintiffs retired from U S WEST and made their respective retirement elections and chose the structure of benefits to be received for themselves and their spouses, they specifically and detrimentally relied upon representations and assurances classifying the Pension Death Benefit to be protected, not a "take away" benefit. The Pension Death Benefit was a *huge* financial component of each Plaintiff's financial and estate planning. For most retirees, the Pension Death Benefit is the equivalent of the retiree's last annual salary at U S WEST.

In July 2000, U S WEST merged with Qwest, the surviving named company. After US WEST's merger with QWEST and up until at least September 2003, PLAN administrators continued to treat the Pension Death Benefit to be an accrued benefit.

In September 2003, Qwest formally announced to Plaintiffs that, contrary to what Plaintiffs understood, the Pension Death Benefit was not a protected or accrued defined pension benefit and that "Qwest is considering eliminating the death benefit for all retirees regardless of their retirement date." Plaintiffs realized they had been duped into believing the Pension Death Benefit was a protected benefit, and it was then too late for them to make other financial arrangements for their spouses and beneficiaries to replace the expected Pension Death Benefit. To the extent there was a breach of fiduciary duty, and Named Plaintiffs had been duped, grounds for that claim were then discovered in September 2003, and the three year statute of limitations began to run on any such claim.

After there was a widespread uproar from the Qwest retirement community protesting Qwest leadership's threat and plans to end the Pension Death Benefit, Qwest leadership thought about the matter and told Plaintiffs that the decision was being delayed. It is noteworthy that

Qwest leadership's decision has not been formally rescinded; implementation has merely been delayed. However, the subsequent announcement to delay implementation only served to create more uncertainty and anguish amongst the retirees.

Named Plaintiffs learned that Qwest inserted new language in restated pension plan documents classifying the Pension Death Benefit as a "welfare benefit", not an accrued defined pension benefit. Named Plaintiffs wanted the original protective language appearing in former plan documents, including past SPDs, reinserted into the governing plan document.

Accordingly, an internal ERISA claim was submitted on behalf of Named Plaintiffs and a proposed class of retirees and sent to Qwest seeking a resolution that the Pension Death Benefit payable under the PLAN is a protected pension benefit and would neither be eliminated nor reduced. In the denial letters, Qwest formally denied the request and confirmed that all administrative remedies under the Qwest Pension Plan have been exhausted and that an action under ERISA § 502)(a) may be commenced.

Qwest has repeatedly told Plaintiffs that the company's position is that senior leadership could decide *at any time* to end the Pension Death Benefit. Defendants have been rather coy about the entire situation, unwilling to reveal deliberations and the exact decisions that have been made.

Since the Pension Death Benefit is so critical to not only Plaintiffs' families, but thousands of Qwest retirees and their spouses and their beneficiaries, and Qwest senior leadership continue to hold out with the threat that the company may some day take away that important benefit, Plaintiffs have exercised their rights under ERISA §502)(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), to seek an order that will clarify Qwest Pension Plan participants' rights to future Pension Death Benefits under the terms of the pension plan and for other declaratory,

injunctive and appropriate equitable relief. The Court has jurisdiction of the claims for Relief based upon the civil enforcement provisions of ERISA, 29 U.S.C. §§1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), and 1132(f), and upon 28 U.S.C. §§1331 and 1337.

Since the Pension Death Benefit is so critical to Plaintiff's families, thousands of Qwest retirees and their spouses and their beneficiaries, and Qwest senior leadership continue to hold out with the threat that the company may some day take away that important benefit, Plaintiffs have exercised their rights under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to seek an order that will clarify Qwest Pension Plan participants' rights to future Pension Death Benefits under the terms of the pension plan and for other declaratory, injunctive and appropriate equitable relief. The Court has jurisdiction of the claims for Relief based upon the civil enforcement provisions of ERISA, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), and 1132(f), and upon 28 U.S.C. §§ 1331 and 1337.

Named Plaintiffs incorporate their two claims and relief requested, as fully stated in their Complaint. To summarize, the first claim is based upon breach of fiduciary duty and equitable estoppel due to a failure to disclose material information and failure to issue SPDs containing correct information about the Pension Death Benefit. Named Plaintiffs contend Defendants QWEST and the Plan Administrators had a duty to communicate material facts affecting the interests of Named Plaintiffs and other participants. Defendants had a duty to disclose material information, including whether the "death benefit" could be reduced or eliminated in the absence of a Plan termination.

In all the Summary Plan Descriptions ("SPDs") issued to Named Plaintiffs and proposed class members during the years 1977 through at least the merger of US WEST and Qwest, there were representations that retirees were entitled to the Pension Death Benefit and other written

information was provided representing that benefit was a protected defined pension benefit.

Prior to December 2003, neither Defendant QWEST nor PLAN Administrators ever made a *formal* disclosure in the SPDs distributed to Named Plaintiffs and the proposed class advising that the Pension Death Benefit was not a protected benefit or that said pension benefit could either be reduced or eliminated by the sponsoring company even in the absence of a PLAN termination. Defendants' past failure to disclose that the Pension Death Benefit could be either reduced or eliminated even in the absence of a Plan termination was recklessness,² a material omission and fiduciary misconduct, since there was a substantial likelihood that omission would mislead a reasonable Plan participant about whether or not to purchase life insurance on the open market. Named Plaintiffs and Plan participants have been systematically tricked for many years into believing the Pension Death Benefit was a funded protected benefit under the Plan.

Accordingly, Named Plaintiff's and Plan participants reasonably and detrimentally relied upon the written representations made by PLAN administrators that there was a commitment to provide a Pension Death Benefit to the surviving spouse or dependent beneficiaries, and Named Plaintiffs and PLAN participants did not obtain the equivalent in life insurance coverage from other sources. Named Plaintiffs and PLAN participants have been prejudiced from the lack of notice of material information contrary to the written representations in PLAN publications and SPDs given to them about the Pension Death Benefit. Defendants' omissions and written misrepresentations and SPDs about the Pension Death Benefit were material to Named Plaintiffs and Plan participants because a reasonable PLAN participant considered the information

² By "recklessness" Named Plaintiffs mean the PLAN fiduciaries' conduct was an extreme departure from the standards of ordinary fiduciary care and the misconduct presented a danger of misleading Plan participants about important information concerning the "death benefit" that was either known to AT&T (Baby Bells) and U S WEST controlled PLAN fiduciaries or was so obvious that the PLAN fiduciaries should have been aware of the false impression given to Plan participants.

important in making retirement elections and estate planning decisions about whether to buy life insurance on the market.

Now, due to a combination of age, health condition, and meager financial factors, thousands of PLAN participants cannot possibly afford the cost of purchasing life insurance on the market so as to replace the face amount of the expected Pension Death Benefit under the PLAN. The current cost of life insurance to replace the face amount of the expected Pension Death Benefit makes mitigation of damages impracticable for Named Plaintiffs and the proposed class of PLAN participants. Named Plaintiffs seek an order declaring that, if the Pension Death Benefit is truly a welfare benefit, QWEST, its predecessors, and PLAN administrators, by making omissions and failing to make necessary disclosures in the SPDs, failed to discharge duties to act solely in the interests of Named Plaintiffs, PLAN participants and beneficiaries, as required by ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1). Named Plaintiffs request this Court to apply principles of equitable estoppel, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and issue an order forbidding Defendants and successors from ever altering, modifying, eliminating or terminating the death benefit in the absence of a PLAN termination.

Named Plaintiffs contend Qwest has issued a current SPD which falsely states the Pension Death Benefit is a welfare benefit, subject to reduction or elimination at any time. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), Named Plaintiffs request this Court grant injunctive relief requiring QWEST, as PLAN sponsor, to correct the current faulty language in the PLAN's current SPD and issue a corrected SPD with language disclosing the Pension Death Benefit is a vested, protected or accrued defined pension benefit, not subject to reduction or elimination absent a PLAN termination.

To summarize, for their second claim, Named Plaintiffs, pursuant to ERISA Section

502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B), bring this action and request this Court to clarify their rights to future Pension Death Benefits under the terms of the PLAN. Since the Pension Death Benefit is so critical to Plaintiffs' families, thousands of Qwest retirees and their spouses and their beneficiaries, and Qwest senior leadership continue to hold out with the threat that the company may some day take away that important benefit, Plaintiffs have exercised their rights under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to seek an order that will clarify Qwest Pension Plan participants' rights to future Pension Death Benefits under the terms of the pension plan and for other declaratory, injunctive and appropriate equitable relief. Named Plaintiffs seek a declaration that their mandatory beneficiaries, to the extent there are any at time of death, are entitled to the Pension Death Benefit payable from the PLAN.

Other Pending Litigation Concerning the "Pension Death Benefit." All parties are monitoring related pending litigation involving the same Pension Death Benefit historically provided to retirees of Lucent Technologies, Inc. The consolidated case of *Foss v. Lucent Technologies, et al*, Civil Action No. 03-0517, is pending before Judge William G. Bassler in the District of New Jersey.

B. Defendants' Statement of Defenses.

Plaintiffs seek to invoke this Court's jurisdiction based on an assertion that Defendants 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. On August 12, 2005, Defendants filed a Motion to Dismiss Plaintiffs' Amended Complaint and a Memorandum Brief in Support of Defendants' Motion to Dismiss.

To the extent that Defendants' Motion to Dismiss is denied, the death benefit is an ancillary, not an accrued or vested benefit, and therefore can be reduced or eliminated by Qwest through amendment to the Plan under the Employee Retirement Income Security Act ("ERISA"). Defendants have retained the authority under the Plan to discontinue the death benefit. Therefore, Plaintiffs claims of breach of ERISA Fiduciary Duty/Equitable Estoppel and their claim under ERISA Section 502(a)(1)(B) to require Defendants to vest the Pension Death Benefit are subject to dismissal as a matter of law.

c. Other Parties: None.

3. UNDISPUTED FACTS

The following facts are undisputed:

1. Plaintiffs seek declaratory and injunctive relief to prevent elimination or reduction of the Death Benefit. Amended Compl., Prayer for Relief at ¶¶ C, D, E, F, G, H, and I.
2. 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.
3. Plaintiffs are participants in the Qwest Pension Plan and receive monthly pension payments from the Plan. Amended Compl. at ¶¶ 5-8.
4. 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.

5. The Plan currently provides a pension 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.
6. 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.
7. Several days later Qwest announced that the decision of whether to discontinue the Death Benefit was being delayed. Amended Compl. at ¶ 27.

4. COMPUTATION OF DAMAGES

Plaintiffs do not seek damages; they seek declaratory, equitable and injunctive relief.

5. REPORT OF PRECONFERENCE DISCOVERY AND MEETING UNDER FED. R. CIV. P. 26(f)

a. Date of rule 26(f) meeting. August 12, 2005 and August 16, 2005.

b. Names of each participant and party he/she represented.

Elizabeth I. Kiovsy for Defendants

Curtis L. Kennedy for Plaintiffs

c. Proposed changes, if any, in timing or requirement of disclosures under Fed. R. Civ. P. 26(a)(1). Before this litigation commenced, the parties exchanged applicable Plan documents and other documents regarding the Pension Death Benefit. Defendants have, in addition, agreed to provide Plaintiffs with a copy of the draft letter Qwest contemplated sending to retirees in September 2003 and with annual letters from Qwest to retirees regarding the Internal Revenue Code ("IRC") Section 420 transfers

and the Court approves

The parties agree that Rule 26(a)(1) disclosures will be made by the earlier date of either ten (10) days following a ruling on Defendants' Motion to Dismiss or October 15, 2005.

d. Statement concerning any agreements to conduct informal discovery, including joint interviews with potential witnesses, exchanges of documents, and joint meetings with clients to discuss settlement. If there is agreement to conduct joint interviews with potential witnesses, list the names of such witnesses and a date and time for the interview which has been agreed to by the witness, all counsel, and all *pro se* parties.

Defendants have agreed to provide Plaintiffs with a copy of the draft September 2003 letter to retirees regarding the proposal to eliminate the death benefit that was not implemented. Defendants have also agreed to provide Plaintiffs with copies of form letters to retirees regarding the IRC section 420 transfers.

6. CONSENT

[Pursuant to D.C.COLO.LCivR 72.2, all full-time magistrate judges in the District of Colorado are specially designated under 28 U.S.C. §636(c)(1) to conduct any or all proceedings in any jury or nonjury civil matter and to order the entry of judgment. Upon consent of the parties and an order of reference from the district judge, the magistrate judge assigned the case under 28 U.S.C. § 636(a) and (b) will hold the scheduling conference and retain settlement jurisdiction, whereas pretrial case management, jurisdiction of dispositive motions, and trial will be assigned to the magistrate judge drawn at random under D.C.COLO.LCivR 72.2.]

All parties **have not** consented to the exercise of jurisdiction of a magistrate judge.

7. CASE PLAN AND SCHEDULE

a. Deadline for Joinder of Parties and Amendment of Pleadings: **November 1, 2005.**

b. Discovery Cut-off: Fact and expert discovery will be completed by **May 15,**

2006.

*bb Deadline for 28 use § 636(c) consent to a magistrate judge
ca May 25, 06
See LR 72.2*

c. Dispositive Motion Deadline: **June 15, 2006.**

*cc Deadline to file class certification motion
vs Feb. 1, 06.*

d. Expert Witness Disclosure:

- 1) Plaintiffs anticipate designating experts, but are unable to at this time absent Defendants' Rule 26 disclosures.
- 2) Defendants do not presently anticipate designating an expert.
- 3) The parties shall designate all experts and provide opposing counsel with all information specified in Fed.R.Civ.P. 26(a)(2) on or before **March 15, 2006.**
- 4) The parties shall designate all rebuttal experts and provide opposing counsel with all information specified in Fed.R.Civ.P. 26(a)(2) on or before **April 14, 2006.**
- 5) Notwithstanding the provisions of Fed.R.Civ.P. 26(a)(2)(B), no exception to the requirements of the rule will be allowed by stipulation of the parties unless the stipulation is approved by the Court.

e. Deposition Schedule: *to be filed as a supplement 30 days after receipt of Rule 26(a)(1) disclosures.*

| Name of Deponent | Date of Deposition | Time of Deposition | Expected Length of Deposition |
|---|--------------------|--------------------|-------------------------------|
| Nelson Phelps | TBD | TBD | 7 hours |
| Edward Kerber | TBD | TBD | 7 hours |
| Plaintiffs will provide an initial list of deponents after Defendants' Rule 26 Disclosures are provided | TBD | TBD | TBD |

f. Interrogatory Schedule: All interrogatories shall be propounded on or before **April 12, 2006.**

g. Schedule for Request for Production of Documents: All requests for production of documents and requests for admissions shall be propounded on or before **April 12, 2006.**

h. Discovery Limitations:

- 1) The parties agree that each party may depose up to ten (10) witnesses, including experts, prior to class certification and may request the Court for permission to conduct additional depositions.
- 2) The parties agree to limit the length of depositions to seven (7) hours, unless a longer deposition is agreed to by the parties, or ordered by the Court.
- 3) The parties disagree about modifications to the presumptive numbers of depositions or interrogatories contained in the federal rules.
- 4) ~~Defendants propose a limitation of 25 interrogatories, requests for production of documents, including subparts, and 25 requests for admission including subparts. Plaintiffs propose a limitation of 50~~
35 requests for production of documents including subparts and ~~50~~^{*35*} requests for admission including subparts, *for each side.*
- 5) Other Planning or Discovery Orders: Class certification motion deadline: **February 1, 2006.**

8. SETTLEMENT

The parties have discussed the possibility of settlement and have been unable to reach agreement on settlement.

9. OTHER SCHEDULING ISSUES

a. A statement of those discovery or scheduling issues, if any, on which counsel, after a good-faith effort, were unable to reach an agreement. The parties cannot agree on the limit number of interrogatories and requests for documents.

b. Anticipated length of trial and whether trial is to the court or jury. Trial is to the Court and may take one to two weeks.

10. DATES FOR FURTHER CONFERENCES

[The magistrate judge will complete this section at the scheduling conference if he or she has not already set deadlines by an order filed before the conference.]

a. A settlement conference will be held on January 10, 06 at 130 o'clock p.m.

It is hereby ordered that all settlement conferences that take place before the magistrate judge shall be confidential.

() *Pro se* parties and attorneys only need be present.

~~Pro se~~ parties, attorneys, and client representatives with ^{free} authority to settle must be present. (NOTE: This requirement is not fulfilled by the presence of counsel. If an insurance company is involved, an adjustor authorized to enter into settlement must also be present.)

() Each party shall submit a Confidential Settlement Statement to the magistrate judge on or before **January 3, 2006** outlining the facts and issues in the case and the party's settlement position.

b. Status conferences will be held in this case at the following dates and times:

- c. A final pretrial conference will be held in this case on _____ at _____ o'clock ____m. A Final Pretrial Order shall be prepared by the parties and submitted to the court no later than five days before the final pretrial conference.

11. OTHER MATTERS

In addition to filing an appropriate notice with the clerk's office, counsel must file a copy of any notice of withdrawal, notice of substitution of counsel, or notice of change of counsel's address or telephone number with the clerk of the magistrate judge assigned to this case.

In addition to filing an appropriate notice with the clerk's office, a *pro se* party must file a copy of a notice of change of his or her address or telephone number with the clerk of the magistrate judge assigned to this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR 7.1A.

The parties filing motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1D. by submitting proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all *pro se* parties.

12. AMENDMENTS TO SCHEDULING ORDER

This scheduling order may be altered or amended only upon a showing of good cause.

DATED this 6th day of Sept. 2005.

BY THE COURT:

PATRICIA A COAN, SJ Patricia A. Coan
United States Magistrate Judge

APPROVED:

s/ Curtis L. Kennedy

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