No. 08-1387

United States Court of Appeals
for the
Tenth Circuit

EDWARD J. KERBER, et al.,

Plaintiffs-Appellants,

- against -

QWEST PENSION PLAN, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO,
THE HON. BOYD N. BOLAND, PRESIDING

ANSWER BRIEF FOR DEFENDANTS-APPELLEES

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Qwest Communications International, Inc. is a publicly traded company. No publicly held entity owns more than 10% of Qwest Communications International, Inc.

Qwest Pension Plan, the Qwest Employees Benefit Committee, and the Qwest Plan Design Committee are entities affiliated with Qwest, but they are not corporate entities subject to Fed. R. App. 26.1.

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INTRODUCTION

Appellants brought the action below in response to changes made to a benefit called the Pensioner Death Benefit, an employee welfare benefit set forth in the Qwest Pension Plan ("the Plan"), in 2003 and in apprehension of changes that might be made to that benefit in the future. The court below agreed that the Pensioner Death Benefit was a welfare benefit, that it was not vested prior to the death of any retiree, and that it therefore could be modified or eliminated by the plan sponsor, Qwest Communications International, Inc. ("Qwest"). The conclusion of the court below comported with the statutory scheme of the Employee Retirement Income Security Act ("ERISA") and resolved the issues consistent with a recent decision of the United States Court of Appeals for the Third Circuit that considered and rejected a challenge to the elimination of a similar death benefit by Lucent Technologies Inc. ("Lucent"). This appeal represents Appellants' efforts to distinguish Qwest's Pensioner Death Benefit from Lucent's Pensioner Death Benefit, despite the historic fact that both benefits were inherited by the respective companies from a common predecessor, AT&T Corporation ("AT&T"). As explained herein, Appellants' efforts do not bear fruit and this Court should affirm the well-reasoned judgment of the court below.

JURISDICTIONAL STATEMENT

Appellants have correctly stated the bases for appellate jurisdiction.

STATEMENT OF RELATED PROCEEDINGS

The underlying case here has not previously been before this Court. There are no related cases pending before this Court. Issues raised in this appeal overlap with issues raised by the briefs in an appeal presently pending in this Court, *Chastain v. AT&T Corp.*, Dkt. No. 07-6288.

STATEMENT OF ISSUES

1. Did the District Court correctly determine that the Pensioner Death Benefit is a welfare benefit rather than, as Appellants contend, a pension benefit subject to the anti-cutback rule of ERISA and the Plan?

2. Did the District Court correctly conclude that the Pensioner Death Benefit is not vested and thereby subject to change or elimination by the Plan's sponsor, Qwest?

3. Did the District Court correctly conclude that principles of equitable estoppel should not be applied to limit Qwest's ability to change or eliminate the Pensioner Death Benefit?

STATEMENT OF THE CASE

Appellants commenced this litigation in 2005 as a putative class action. The parties consented to proceed before a Magistrate Judge for all purposes.

In November 2005, the Second Amended Complaint ("SAC") became the operative pleading defining the claims for this action. Qwest moved to dismiss part of the action and obtained partial success on the motion; the court below concluded that Appellants Edward Kerber ("Kerber") and Nelson Phelps ("Phelps") lacked any actual injury from the changes that had been adopted in 2003 (effective January 1, 2004), and therefore did not possess constitutional standing to prosecute a claim connected with those changes. (The remaining plaintiffs, of course, continued to prosecute that claim.) Qwest thereafter answered the SAC and the case proceeded into discovery.

At the close of discovery, in August 2006, Qwest moved for summary judgment on all claims. (*See generally* App. at 166-311, 342-389, 490-521.) Finding this first round of briefing unclear, in September 2007, the court ordered a new round of briefing on Qwest's motion, with directions to conform the briefing to a form that another judge of the court

routinely uses. (App. at 563.)[1] The parties thereafter submitted their briefs and exhibits, fully submitting the motion on December 3, 2007. The Court provided ample opportunity for the parties to present their arguments, including granting Appellants' request to submit an overlength brief. (App. at 1186.)

In an Order dated September 19, 2008, the District Court granted summary judgment to Qwest and its fellow defendants. On a claim-by-claim basis the District Court concluded that the SAC had no triable claims. The court below entered summary judgment on Claim Three of the SAC, which sought a declaration of the entitlement of retired employees to receive the Pensioner Death Benefit, holding that the benefit is a welfare benefit that did not contractually vest. (App. at 1199-1215.) The District Court meticulously examined Appellants' arguments, identifying those which lacked adequate development as well as resolving all arguments on their merits. The court below also examined Count Two, which Appellants had pled under one theory but defended under a different theory, and concluded it could not stand under either theory. (App. at 1215-1217.) Counts One and Four likewise were disposed of with little difficulty.

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[1] *See, e.g., Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1111-12 (10th Cir. 2007) (rejecting challenge to application of the judge's briefing rules).

(App. at 1217-1219.) Finally, the District Court struck Appellants' attempt to cross-move for partial summary judgment, based on a local rule.[2] (App. at 1219-1220.) Concurrent with the Order on summary judgment the District Court entered an order disposing of six collateral motions, including Appellants' motion for class certification, which was denied as moot. (App. at 1186-1187.)

Judgment entered on September 23, 2008. (App. at 1222-1224.) Appellants timely filed a notice of appeal. (App. at 1225.)

STATEMENT OF FACTS

Appellees do not join in Appellants' statement of facts, although substantial agreement on many facts does exist. The differences primarily extend to defining what facts are material to deciding the issues. Like the court below, Qwest views the Plan documents themselves as decisive. This statement emphasizes those documents and does not linger on various extraneous sources (deposition testimony and non-plan documents) that constitute a large measure of Appellants' statement. The legal argument section of the brief will explain why those sources are not relevant or material.

[2] D. Colo. L. Civ. R. 56.1(B) ("A cross motion for summary judgment shall not be included in a response brief.").

The Qwest Pension Plan

Qwest is the successor-in-interest to U S WEST, Inc. ("U S WEST"). (App. at 29, *SAC*, ¶ 16.) In 2000, Qwest acquired and merged with U S WEST. As a result of the merger, Qwest became and remains to this day the sponsor of the Plan, which is the successor to U S WEST's pension plan(s).[3] (*See* App. at 595-596, 2001 Plan, Preamble.)

U S WEST came into being in 1984 when AT&T divested itself of local telephone service. The divesture transaction created the original U S WEST pension plan from AT&T's longstanding pension plan (first established in 1913). In this respect, the original U S WEST pension plan shares the same DNA as Lucent's pension plan, a historical fact that will take on great importance.

U S WEST started its existence with two pension plans, effective January 1, 1984, established as successors to AT&T's pension plans: the

[3] The defendants-appellees other than Qwest and the Plan are the Qwest Employee Benefit Committee ("the EBC"), the Plan's "named fiduciary," responsible for, among other things, administration of the Plan including appointment of other fiduciaries and interpretation of the Plan's provisions (*see* App. at 605, 2001 Plan, §§ 8.4, 8.6, 8.8) and the Qwest Plan Design Committee (incorrectly identified by Appellants in this action as the "Qwest Pension Plan Design Committee"), a nominal party from whom relief is sought by Appellants because it has been given authority by the Plan sponsor (Qwest) to make amendments to the Plan, and it is not a Plan fiduciary. (App. at 605, 2001 Plan, § 8.5.)

U S WEST Pension Plan[4] and the U S WEST Management Pension Plan.[5] These two plans merged into a single plan, named the U S WEST Pension Plan, effective January 1, 1993.[6] Following the merger of Qwest and U S WEST, the U S WEST Plan was renamed the Qwest Pension Plan, effective January 1, 2001.[7] (*See* App. at 595, 2001 Plan, Preamble.) The Plan provides eligible employees and retirees with "employee pension benefits" and "employee welfare benefits." The pension portion of the Plan, notably, is a defined benefit pension plan.

The Death Benefit Plan and the Pensioner Death Benefit

The 1984 Occupational and Management Plans included what was called the "Death Benefit Plan." It provided for death benefits that could be paid to certain survivors of employees and retirees. The Sickness Death Benefit and the Accidental Death Benefit covered active employees; the Pensioner Death Benefit could be paid upon death to certain qualified

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4 Hereinafter referred to as the 1984 Occupational Plan (abbreviated as "1984 Occ. Plan").

5 Hereinafter referred to as the 1984 Management Plan or (abbreviated as "1984 Mgmt. Plan").

6 Hereinafter referred to as the 1993 Plan.

7 Hereinafter referred to as the 2001 Plan. To simplify the exposition about the Pensioner Death Benefit, references to the Plan will focus on the 2001 Plan, which does not differ materially from the earlier plans except as noted. If the context requires reference to a different plan, it will be so identified.

beneficiaries, if any, of retired employees receiving a service pension or disability pension. (App. at 620-628, 1984 Mgmt. Plan, § 5; App. at 646-653, 1984 Occ. Plan, § 5). In subsequent plans, the terms "Death Benefit Plan" and "Pensioner Death Benefit" were discontinued, but the benefits remained the same except as noted below.[8]

The amount of the Pensioner Death Benefit generally was equal to twelve months' "Wages" (a defined term), as of the date of retirement or March 1, 1993 (whichever is earlier), for the decedent. (App. at 600, 2001 Plan, § 7.3(a)) An amendment adopted in 1992 set the cutoff date of March 1, 1993 to cap the future amount of the benefit and to limit the class of employees to whom the benefit would apply. (App. at 798, Bd. of Dir. Min. dated Dec. 4, 1992.) That amendment represented an early modification of the benefit; as further explained below, other changes occurred, most significantly an elimination of the benefit for those who retired on or after January 1, 2004. The discussion of the benefit, then, has a present tense, for those retirees who remain covered by it, and a past tense, for those retirees whose retirement date left them ineligible for it.

[8] For a convenient point of reference, these terms will be used throughout this brief to more precisely identify the death benefit at issue (distinguishing it from the Sickness and Accidental Death Benefits) and the provision in the Plan in which all of the death benefits are set forth.

The Pensioner Death Benefit can be paid to a "mandatory beneficiary," *i.e.*, either an "eligible surviving Spouse" (spouse of the retiree living with the retiree at time of death), "eligible dependent children" (dependent children up to age 23) or an "eligible dependent parent" (dependent parents living with or near the retiree), or "other beneficiaries," which could encompass a wider circle of dependent family members. (App. at 601, *Id.*, § 7.4(b), (c).) If no such eligible persons were living at the time of a retiree's death, then the benefit would not be paid, except for a discretionary burial expense of up to $500. (App. at 601, *Id.*, § 7.4(c), (d).)

The death of a retiree, then, did not automatically result in the pay out of a Pensioner Death Benefit. The retiree had to be survived by a qualifying beneficiary. A person claiming to be that beneficiary had to apply for the payment within one year of the retiree's death and to provide proof satisfactory to the Committee of his or her qualification to collect under the terms of the Plan. (App. at 602, *Id.*, § 7.7.) Additionally, if a retiree's otherwise eligible survivor filed suit against Qwest (or previous plan sponsors) in connection with the retiree's death, no benefit would be paid. (App. at 608, *Id.*, § 13.13.)

Changes to the Pensioner Death Benefit

The Plan's documents, from inception to present, expressly authorize the Plan Sponsor (or its designee) to modify or terminate the benefits provided by the Plan, subject only to specifically stated limitations. When the first U S WEST pension plans were established in 1984 each contained a clause (called the reservation of rights clause) reserving the power and authority to change benefits to the sponsor. The clause stated:

> *The Committee, with the consent of the Chairman of the Board . . . may from time to time make changes in the Plan as set forth in this document,* and the Company may terminate said Plan, but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder.

(App. at 638, 1984 Mgmt. Plan, § 9 (emphasis added); *see also* App. at 659, 1984 Occ. Plan, § 10.)

Beginning in 1993, Qwest changed the Plan's reservation of rights clause, pursuant to its right to make changes, using language that clearly delineated that future changes could be made in any benefits, as long as those benefits had not previously "accrued" under the law. The 2001 Plan provision uses the following language:

> The Company expects this Plan to be permanent, but as future conditions cannot be foreseen *it reserves the right to amend the Plan at any time,*

> *without prior notice to anyone.* * * * Amendments may modify the rights and interests of Employees who are Participants in the Plan at the time thereof as well as future Participants but *amendments may not diminish the accrued benefit (as defined in Section 411(d)(6) of the Code) of any Participant as of the effective date of such amendment.*

(App. at 607, 2001 Plan, § 11.4 (emphasis added).[9]) Earlier versions are quite similar and do not materially differ from the quoted text. (App. at 671, 1993 Plan, § 11.4,; App. at 689-90, 1997 Plan, § 11.4.)

Effective February 28, 1993, the Plan limited eligibility for the Pensioner Death Benefit to individuals hired on or before March 1, 1993. (App. at 603, 2001 Plan, § 7.11; App. at 798, Bd. of Dir. Min. dated Dec. 4, 1992.) It also prospectively froze the payment level for the benefit. The basis for computing the benefit for those still eligible excluded any growth in salary beyond the level achieved by March 1, 1993.

Commencing in 1997, certain management employees became eligible to elect a lump sum pay-out of their retirement benefits. Concomitantly, the Death Benefit Plan was amended to create the option of

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[9] Aside from the express reference to the Tax Code definition of an accrued benefit in this section, the Plan contains its own definition of "accrued benefit" that expressly excludes the death benefit. (App. at 598, 2001 Plan, § 1.0B.) Indeed, it has contained its own definition of the term since the 1993 revision and merger of the former management and occupational plans. (*See, e.g.*, App. at 665, 1993 Plan, § 1.0; App. at 682, 1997 Plan, § 1.0.)

a lump-sum payment to those individuals of an actuarially discounted version of the Petitioner Death Benefit (with an assumption that the retiree would be survived by a qualified beneficiary). (App. at 600-601, 2001 Plan, § 7.3(c).) The 1997 amendment applied only to ordinary retirements; it was not offered as part of an early retirement program.[10]

Effective January 1, 2004, the Plan eliminated the Pensioner Death Benefit for employees retiring on or after that date. (App. at 800-801.) This change, formally known as Amendment 2003-5, will be referred hereinafter as the 2003 amendment, with the understanding that it did not become effective until 2004.

Plan Participants and the Pensioner Death Benefit

Qwest and its predecessor entities regularly provided plan participants with Summary Plan Descriptions ("SPDs") that summarized Plan benefits. SPDs provided to participants throughout the life of the Plan have stated that (1) the plan may be amended or terminated without notice; (2) the SPD is only a summary of and does not describe all of the details of the plan; and (3) the official plan document, not the SPD, governs the participants' right to benefits. (App. at 706, 712, 716, 719, 724-725, 728,

[10] In 1990, on a one-time basis, U S WEST had offered a similar lump sum payout of the Pensioner Death Benefit to a group that included early retirees.

731, 735-736, 739, 742-744, 747, 749, 756-758, 763, 766-767, 772, 775, 777, 779, 782-783, 790, 795-796.) The SPDs also disclose all conditions that had to be fulfilled before the Pensioner Death Benefit can be paid to a qualified beneficiary, if one exists at the time of a retiree's death. (App. at 707-708, 713-714, 717-718, 726-727, 732-734, 740-741, 750-752, 759-761, 769-771, 778, 784, 786, 791-794.)

All five Appellants participated in the Plan and all were alive throughout the relevant events. That they have not died will matter to the extent that this Court agrees with the court below that a death benefit cannot vest prior to the death of the person on whose behalf it is paid. No death (as yet), no vested benefit (as yet).

Kerber and Phelps both retired effective February 28, 1990 from U S WEST and receive "service pension annuities" from the Plan.[11] (App. at 26-27, *SAC*, ¶¶ 5, 7.) The 2003 amendment had no effect on them because it did not alter their benefits. They are, however, concerned in the future of the Pensioner Death Benefit as it relates to individuals who receive a service pension.

All of the remaining Plaintiffs retired from Qwest after January 1, 2004. West and Meister both retired in February 2004. Both received

[11] Both had the option of taking a lump sum pension payout in 1990 and declined to do so.

lump sum payments for their accrued pension benefits but did not receive a lump-sum payment for the Pensioner Death Benefit because the 2003 amendment had eliminated that possibility. (App. at 27-28, *Id.*, ¶¶ 9, 11.) Ingemann retired in March 2005 and currently receives a service pension annuity. (App. at 28, *Id.*, ¶ 13.) He was affected by the 2003 amendment because his survivors, if he has one who might qualify, will not be able to claim a Pensioner Death Benefit after his death.

STANDARD OF REVIEW

This Court "review[s] *de novo* the district court's summary judgment decision, applying the same standard as the district court." *Butler v. Compton*, 482 F.3d 1277, 1278 (10th Cir. 2007).

Summary judgment is appropriate when the record before the district court shows that there is no genuine issue of dispute over any material fact and that the movant is entitled to judgment as a matter of law. *Seegmiller v. LaVerkin City*, 528 F.3d 762, 766 (10th Cir. 2008). The movant "bears the initial burden of presenting evidence to show the absence of a genuine issue of material fact"; if this burden is met, it then becomes the responsibility of the non-moving party "to set forth specific facts showing there is a genuine issue for trial." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002). "Where the record

taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Appellants, as nonmovants, receive the benefit of having the evidence viewed in the light most favorable to them and having all reasonable inferences drawn in their favor. *See, e.g., Trujillo v. PacifiCorp*, 524 F.3d 1149, 1154 (10th Cir. 2008).

This Court may, of course, affirm for any reason stated by the court below or on any basis supported by the record, even though not relied upon by the district court. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 665 n.11 (10th Cir. 2004).

In contrast, this Court generally will not reverse for a reason that was not presented to the court below. *See, e.g., Sewell v. Great Northern Ins. Co.*, 535 F.3d 1166, 1170 n.2 (10th Cir. 2008) ("Particularly on appeal from the grant of summary judgment, we are reluctant to entertain new arguments because they have not been considered by the trial court."); *Tele-Communications, Inc. v. Comm'r*, 104 F.3d 1229, 1232 (10th Cir. 1997) ("This rule is particularly apt when dealing with an appeal from a grant of summary judgment, because the material facts are not in dispute and the trial judge considers only opposing legal theories."); *see also Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141-

42 (10th Cir. 2007) (rule extends to "a theory that is related to one that was presented to the district court" and refuses to consider "the 'vague and ambiguous' presentation of a theory before the trial court").

The decision to enter summary judgment prior to deciding class certification, rendering the latter moot, is reviewed for abuse of discretion. *See Saeger v. Pacific Life Ins. Co.*, 2008 WL 5427965, at *1 (9th Cir. 2008).

SUMMARY OF ARGUMENT

The judgment entered in the court below should be affirmed in all respects.

Qwest's Pensioner Death Benefit squarely meets ERISA's definition of an employee welfare benefit, which expressly refers to death benefits. The benefit does not fit within the statutory definition of a pension benefit and it does not resemble an "accrued benefit," either under ERISA's original definition or under the additional protections added by the Retirement Equity Act. This same issue has been resolved by the Third Circuit in a case involving a death benefit with nearly identical terms and a similar origin in AT&T's pension plan.

As a welfare benefit, Qwest's Pensioner Death benefit could be changed or eliminated unless the Plan contractually committed Qwest to continue it. Such vesting requires clear and express language, which is not

present here. Not only does the Plan contain no language to provide a reasonable participant with any basis to conclude that Qwest promised not to change the death benefit, the Plan contains language expressly reserving (to Qwest) the right to make changes. The combined effect forecloses any claim that the Pensioner Death Benefit vested, leaving Qwest free to make the changes it already has made and to make other changes in the future. Because the Plan's language contains no ambiguity, Appellants' attempts to extract alleged commitments or expectations from extrinsic evidence must be rejected.

Appellants' other claims fail on the law and the facts. The breach of fiduciary duty does not state a claim upon which relief can be granted because Qwest had no duty to make the disclosures upon which Appellants base the claim. Appellants' advocacy of an equitable estoppel claim asks this Court to rule on a theory not heretofore recognized in this Circuit. The Court should decline to make this new law in this case. Even if the Court were to recognize a claim for equitable estoppel in the context of ERISA, Appellants have not demonstrated any issue of material fact prohibiting summary judgment.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT QWEST'S PENSIONER DEATH BENEFIT IS A WELFARE BENEFIT, NOT A PENSION BENEFIT SUBJECT TO THE ANTI-CUTBACK RULE

Appellants argue for application of the so-called anti-cutback provision (ERISA § 204(g), 29 U.S.C. § 1054(g)) to Qwest's decision to eliminate the Pensioner Death Benefit prospectively (applied to those who had not yet retired) in 2003. The anti-cutback provision, however, applies only to accrued pension benefits. *See* 29 U.S.C. § 1051(1); *Rombach v. Nestle USA, Inc.*, 211 F.3d 190, 192-93 (2d Cir. 2000); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 934 (5th Cir. 1993). The threshold issue, then, is whether the Pensioner Death Benefit is an accrued pension benefit or a welfare benefit.

The court below correctly concluded that the Pensioner Death Benefit is not an accrued pension benefit. It does not fit within the applicable statutory definitions. Moreover, the Third Circuit examined the Pensioner Death Benefit eliminated by Lucent, another AT&T successor company, and concluded that Lucent's death benefit did not qualify as a pension benefit. Appellants do not suggest any deficiencies in the Third Circuit examination of the controlling law or ask this Court to disagree with that sister Circuit's reasoning. Instead, they argue that Qwest's Pensioner

Death Benefit is different on the facts. The distinctions that Appellants attempt to draw between Lucent's Pensioner Death Benefit and Qwest's Pensioner Death Benefit, however, do not withstand scrutiny.

A. The Pensioner Death Benefit Does Not Fit Within The Statutory Definition Of A Pension Benefit

ERISA divides all employee benefits into two groups: pension benefits and welfare benefits. The category of "employee welfare plan" includes plans "maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of . . . death . . . ." ERISA § 3(1), 29 U.S.C. § 1002(1). In contrast, the definition of "employee pension plan" turns on whether a plan "was created for the purpose of providing retirement income . . . ." *Oatway v. American Int'l Group, Inc.*, 325 F.3d 184, 189 (3d Cir. 1993). The Pensioner Death Benefit meets the statutory definition of a welfare benefit[12] and does not meet the definition of a pension benefit. Nor does the benefit

[12] Indeed, the Pensioner Death Benefit existed as an integrated part of the Death Benefits Plan, with other pre-retirement death benefits that indisputably are welfare benefits, not pension benefits. This longstanding arrangement confirms the benefit's status as one plan, with one purpose, that falls squarely within the statutory definition of a welfare plan. *Cf. In re Unisys Corp. Ret. Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 901 (3d Cir. 1995) (medical benefits plan that started for active employees and continued into retirement was a welfare plan).

resemble the type of benefit that accrues over time for payment as an annual benefit at retirement age.[13]

The Third Circuit examined a similar contention raised concerning Lucent's Pensioner Death Benefit, a benefit written from the same benefit plan DNA as Qwest's Pensioner Death Benefit. *In re Lucent Death Benefits ERISA Litig.*, 541 F.3d 250 (3d Cir. 2008) (hereinafter *Lucent Death Benefits*). The Third Circuit concluded:

> The pensioner death benefit neither provides retirement income to employees nor results in a deferral of income by employees. *See* 29 U.S.C.

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[13] The statutory definition of "accrued benefits," for purposes of a defined benefit plan (such as the Plan here), "is based upon two characteristics – [the benefit] must be in the form of (1) an annual benefit that (2) commences at normal retirement age." *American Stores Co. v. American Stores Co. Ret. Plan*, 928 F.2d 986, 990 (10th Cir. 1991) (refusing to find a benefit that did not possess one of these two characteristics was "accrued"). The Pensioner Death Benefit bears no resemblance to such "accrued benefits." It does not pay annually. It does not commence at normal retirement age. And a retiree did not accumulate its value through growth over time. *See, e.g., Stepnowski v. Comm'r*, 124 T.C. 198, 207-08 (2005) ("an accrued benefit represents the progressively increasing interest in a retirement benefit that an employee earns each year, under a formula that is provided in the plan"), *aff'd*, 456 F.3d 320 (3d Cir. 2006). Moreover, the conditional nature of the benefit distinguishes it from accrued pension benefits. It is not paid merely upon the death of a retiree; rather, its payment turns on a larger set of conditions, calling for particular survivors at the time of death who manifest the defined conditions of dependency and who agree not to assert certain rights. Pension benefits do not turn on such contingencies. *See, e.g., Dhayer v. Weirton Steel*, 571 F. Supp. 316, 324 (N.D. W.Va.) (observing that "conditional benefits" do not qualify as "accrued benefits"), *aff'd, sub nom. Sutton v. Weirton Steel*, 724 F.2d 406 (4th Cir. 1983).

> § 1002(2)(A) (defining pension plan). Moreover, it could not be an accrued pension benefit since it is not "an annual benefit" and it does not "commenc[e] at normal retirement age." *See* 29 U.S.C. § 1002(23) . . . . Nor does the pensioner death benefit directly relate to an accrued benefit by paying out an accumulated amount of accrued benefits.
>
> Instead, the pensioner death benefit provides "benefits in the event of ... death." *See* 29 U.S.C. § 1002(1) (defining a welfare plan). This fits readily within the definition of a welfare benefit. As the Second Circuit Court of Appeals has explained, the fact that a welfare benefit appears in a larger plan that also provides pension benefits does not change the character of that welfare benefit. As in *Rombach*, the "meaning and function" of the pensioner death benefit "remain[] clear" despite surrounding benefits or the use of the word "Pensioner" to describe the benefit.

Lucent Death Benefits, 541 F.3d at 255 (quoting *Rombach*, 211 F.3d at 194) (citations omitted).

Appellants argue that the Pensioner Death Benefit "obtained protected status" when U S WEST created an actuarially reduced lump-sum payout version of the benefit for individuals who elected to take a lump-sum distribution of their pension benefits at retirement. Appellants never really explain this legal alchemy, a deficiency in their argument identified by the court below. (App. at 1207-1208.) If the Pensioner Death Benefit did not fit within the statutory definition of a pension benefit before Qwest's predecessor-in-interest created an optional form of discounted

early payout, how did the addition of this new form of payout change its legal nature? *Cf. Steiner Corp. Ret. Plan v. Johnson & Higgins of Calif.*, 31 F.3d 935, 939-40 (10th Cir. 1994) (holding that lump sum payments are not accrued benefits in and of themselves but rather an optional form by which an accrued benefit may be paid). How would that alteration "relate back" to the pre-existing form of the benefit to, in turn, change it?

Having effectively conceded that *Lucent Death Benefits* correctly determined the issue for the pre-1997 version of the Qwest Pensioner Death Benefit, Appellants cannot simply latch on to any distinction and argue it disposes of the issue. They must explain how the distinction changes the analysis. The absence of this explanation from their argument – particularly after the District Court redflagged it – provides sufficient reason to reject that argument. *See Merida Delgado v. Gonzales*, 428 F.3d 91, 921 (10th Cir. 2005). To the extent that Appellants' argument relies on the assertion that the change in the Pensioner Death Benefit transformed it into a retirement-type subsidy, or an early retirement benefit, we turn now to that contention.

B. The Pensioner Death Benefit Is Neither A Retirement-Type Subsidy Nor An Early Retirement Benefit

Appellants argue in this Court that, as a result of the lump sum option added in 1997, the Pensioner Death Benefit should be subjected to the anti-cutback provision as either a "retirement-type subsidy" or an "early retirement benefit" protected under ERISA Section 204(g)(2)(A), 29 U.S.C. § 1054(g)(2)(A). The "early retirement benefit" contention was not raised below; the "retirement-type subsidy" contention was raised but, as the District Court concluded, they did "not explain how [the Treasury Department's definition] applies to the facts of this case," leading to an argument that was "conclusory and inadequately developed." (App. at 1209-1210.) The Court should refuse to consider the argument here. Appellants may not assign as error the failure of the District Court to consider arguments that they did not present or presented so poorly that the court below could not follow their logic. *See, e.g., Ecclesiastes 9:10-11-12, Inc.*, 497 F.3d at 1142; *Tele-Communications, Inc.*, 104 F.3d at 1233-34 ("fleeting contention" in District Court may not be blown up into major argument on appeal); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993) (appellate court will not consider "a theory that was discussed in a vague and ambiguous way" below).

On the merits, the fact that the Pensioner Death Benefit does not qualify as a pension benefit ends further inquiry. Congress enacted protections for early retirement benefits and retirement-type subsidies, by adding Subsection 2(A) in the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984), and it did not alter the bases for distinguishing between welfare benefits and pension benefits.[14] Rather, Congress responded to the judicial treatment of a particular category of benefits. *See, e.g., Costantino v. TRW, Inc.*, 13 F.3d 969, 978-80 & n.10 (6th Cir. 1994) (discussing legislative history of REA and judicial treatment of certain benefits that prompted the Act). The Pensioner Death Benefit

[14] Appellants offer a recent District Court decision, *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, 569 F. Supp. 2d 480 (D.N.J. 2008), *appeals docketed*, Nos. 08-3743, 08-3924 (3d Cir.), as authority for the proposition that a welfare plan "tied to" a pension plan comes within the ambit of the anti-cutback rule. For whatever weight might be accorded this unreviewed lower court disposition, *see Harzewski v. Guidant Corp.*, 489 F.3d 799, 806 (7th Cir. 2007), the case does not stand for that proposition. Rather, *Battoni* implements the Treasury Department's rule that an indirect attempt to cut benefits in a pension plan violates the anti-cutback provision. *Battoni*, 569 F. Supp. 2d at 491-92. In *Battoni*, the pension plan attempted to discourage participants from opting for a lump-sum payment of pension benefits by eliminating any welfare plan benefits for a participant who elected that optional form of payment. The *Battoni* court concluded that this violated the anti-cutback provision because it attempted to coerce indirectly what the law prohibited the plan from doing directly – eliminating the optional form of benefit of a lump sum payment. *See id.* at 491-93. In contrast, Qwest's prospective elimination of the death benefit for all post-2003 retirees did not alter the balance between the choice of a lump sum or an annuity form of pension benefit.

simply does not resemble that category of benefits. *Cf. Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc.*, 847 F.2d 329, 333-34 (6th Cir. 1988) (refusing to extend REA to benefit that the Act did not anticipate as covered); *Blank v. Bethlehem Steel Corp.*, 758 F. Supp. 697, 699-701 (M.D. Fla. 1990) (refusing to extend REA to benefits having a contingent nature), *aff'd by adopting district court's reasoning*, 926 F.2d 1090, 1093 (11th Cir. 1991).

Moreover, Appellants construe the law they purport to apply completely contrary to its terms and legislative intent. The REA legislative history explains that death benefits are excluded from protection under the "retirement-type subsidy" provision.[15] Contemplating the Treasury regulations that were to be drafted to further define the term "retirement-type subsidy," the Senate Committee expressed its expectation that "a death benefit (including life insurance) . . . will not be considered a retirement-type subsidy." S. Rep. No. 575, 98th Cong., 2d Sess. 1, 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576. This passage of legislative history clearly expresses congressional intent about the meaning of the subsection. *See,*

[15] The Pensioner Death Benefit could not be an "early retirement benefit" under any stretch of the imagination. In its original form, it paid only after retirement; in its lump sum optional form, it could be paid only to participants who satisfied the age and service requirements to attain full service pension eligibility – regular (not early) retirees. (*See* App. at 600-601, 2001 Plan § 7.3(c).)

e.g., Harms v. Cavenham Forest Indus., Inc., 984 F.2d 686, 692 (5th Cir. 1993); *Ross*, 847 F.2d at 333-34.

Interestingly, in the court below Appellants argued that the Treasury regulations effective August 12, 2005 – a major focus of their brief on this appeal – did not apply to the 2003 amendment at issue here. (*See* App. at 838 n.11, 839 n.13, 1209.) Appellants offer no explanation why they have switched gears, rejecting their original argument against application of the 2005 regulations in order to argue for their application now.[16] This Court has no obligation to consider this changed position on appeal. *See, e.g., Lefler v. United Healthcare of Utah, Inc.*, 72 Fed. Appx. 818, 824 n.15 (10th Cir. 2003) (unpublished) (refusing to consider argument where party reversed position on appeal); *Lyons*, 994 F.2d at 721 (this Court is "particularly insistent on this rule in cases where the theory advanced on appeal was in direct contradiction to the theory pursued in the trial court"). Moreover, the change in position does not advance Appellants' case because the 2005 Treasury regulations follow the expressed intent of Congress and specifically refer to death benefits like the Pensioner Death Benefit as falling with the definition of an "ancillary benefit" not subject to

[16] Appellants appear to concede that the law of this Circuit prior to the 2005 Treasury regulations, as stated in *Steiner Corp. Retirement Plan*, 31 F.2d at 940, forecloses their argument. (Appt. Br. at 28.) That certainly may explain their change in position on appeal.

the accrued benefit rules.[17] *See* 26 C.F.R. § 1.441(d)-3(g)(2). The District Court's difficulty in comprehending Appellants' argument is understandable and its conclusions cannot be called into question by Appellants' ever-changing and erroneous view of the law.

This Court should affirm the District Court's conclusion that the Petitioner Death Benefit is a welfare benefit, not an accrued pension benefit.[18]

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[17] The legislative history of ERISA suggests that Congress envisioned three categories of benefits: (1) accrued benefits; (2) ancillary benefits; and (3) other. *See American Stores Co.*, 928 F.2d at 991. Appellants must provide the Court with a basis to conclude the Pensioner Death Benefit falls into the first category in order to apply the anti-cutback rule. The Treasury Department has grouped an incidental death benefit, such as this one, into the second category, both in the 2005 regulations (noted above) and before. *See* 26 C.F.R. § 1.411(a)-7(a)(1)(ii).

[18] Appellants devote an entire argument point to contesting the ruling of the court below that Kerber and Phelps lack constitutional standing to challenge the 2003 amendment eliminating the Pensioner Death Benefit for post-2003 retirees. The issue lacks significance at this point; three other Appellants concededly have standing and therefore the merits of the controversy are squarely before the Court. In Qwest's view, the lower court got it right. Kerber and Phelps suffer no injury in fact from the 2003 amendment and therefore lack an essential element of standing. Appellants' contention that ERISA confers statutory standing misapplies a narrow exception that applies solely to disclosure-related claims. The statute confers a statutory entitlement to certain disclosures and that entitlement confers standing to enforce those rights. *See, e.g., Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1148 (3d Cir. 1993). A claim to set aside a plan amendment, however, constitutes a request for relief of a more individualized nature and therefore requires proof of individualized loss. *See Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 454 (3d Cir. 2003).

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE PENSIONER DEATH BENEFIT IS NOT VESTED AND THEREFORE MAY BE MODIFIED OR ELIMINATED BY QWEST

Having correctly concluded that the Pensioner Death Benefit is a welfare benefit, the District Court correctly reached the further conclusion that the benefit was not vested and could be changed or eliminated by the plan sponsor, Qwest. The Plan documents do not contain the type of language that clearly and expressly vests a benefit. To the contrary, the Plan documents include a reservation of rights clause that evidences Qwest's intention to reserve its right to change or eliminate the benefit.

A. The Pensioner Death Benefit Was Not Vested

Welfare benefits vest as a matter of plan interpretation; no statutory provision requires or compels vesting. Welfare benefits may be changed or eliminated if they are not contractually vested. *See Member Servs. Life Ins. Co. v. Am. Nat'l Bank & Trust Co. of Sapulpa*, 130 F.3d 950, 954 (10th Cir. 1997). Vesting, though, cannot be lightly inferred. A plan sponsor's intent to provide contractually for the vesting of a welfare benefit must be found in *clear* and *express* language stating as much in the plan documents. *See, e.g., Welch v. UNUM Life Ins. Co. of Am.*, 382 F.2d 1078,

1083 (10th Cir. 2004); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996).

The interpretative task requires a court to distinguish between language that merely describes the benefits that exist at any given time from promises to continue benefits into the future. "Benefit descriptions cannot be translated into guarantees benefits will never be altered." *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 857-58 (4th Cir. 1994). Instead, the court must look for "precise language denying the right to withdraw benefits." *Wise v. El Paso Nat'l Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993). "To prevail, plaintiffs must assert *strong* prohibitory or granting language; mere silence is not of itself abrogation." *Id.* (emphasis added).

Appellants appear to take a different view. While they make scattered attempts to identify plan language that might be construed as suggestive (albeit not clear or express) of vesting, their focus is on "cumulative sufficient evidence of *action* by former Plan Sponsor U S WEST reflecting an intent to vest the [Pensioner Death Benefit]." (Appt. Br. at 42 [emphasis in original].[19]) Conduct, however, cannot alter the terms of an ERISA plan. As the Seventh Circuit recently observed:

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[19] Appellants' argument is based on a misreading of *Chiles*. This Court clearly stated at the outset of *Chiles* that "a promise to provide vested benefits 'must be incorporated, in some fashion, into the formal written

> [B]ecause a plan must be maintained pursuant to a writing, it can be modified only in writing. Modification by conduct is tacit, and therefore (unless evidenced by a writing) unwritten, like oral modification; why should it matter that it is nonverbal? The statutory requirement "that the plan be in writing is thought to carry over to this 'procedure for amending such plan,' hence to mean that plan amendments must be in writing." John H. Langbein, Susan J. Stabile & Bruce A. Wolk, *Pension and Employee Benefit Law* 690 (4th ed. 2006). That would exclude modification by subsequent dealings not confirmed in writing.

Orth v. Wisconsin State Employees Union, Council 24, 546 F.3d 868, 873 (7th Cir. 2008); *accord Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 573-578 (3d Cir. 2006); *Reichelt v. Emhart Corp.*, 921 F.2d 425, 431 (2d Cir. 1990). Consistent with this principle, this Court has "repeatedly rejected efforts to stray from the express terms of a plan, regardless of whom those express terms may benefit." *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002).

Examining the text of the Plan, then, yields nothing for Appellants. They point to the priority for payout of benefits set forth in the

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ERISA plan.'" *Chiles*, 95 F.3d at 1511 (quoting *Jenson v. Sipco, Inc.*, 38 F.3d 945, 949 (8th Cir. 1994)). Subsequent language in the opinion references a participant's burden "of showing an agreement *or other demonstration of employer intent* to have company-paid premiums vest under the plan." *Id.* (emphasis added). Nothing in this second phrase alters the first; the "other demonstration of employer intent" must be incorporated into the formal written plan. Appellants' efforts to look at sources outside the plan documents cannot be squared with *Chiles*.

clause that governs termination of the Plan, which they contend places the Pensioner Death Benefit higher in priority than other indisputably vested benefits.[20] As the court below correctly noted, a termination clause addresses an issue distinct and different from vesting and accordingly provides no basis to infer any intent about vesting. (App. at 1212.) This Court already has stated that it is "unwilling to hold that the vesting of benefits upon the occurrence of a specified expressed condition (termination) can be read broadly to include vesting generally upon an unexpressed condition . . . ." *Chiles*, 95 F.3d at 1513.

The only other Plan document language identified by Appellants are snippets from the 1993 Plan and associated SPDs that describe a change to the Pensioner Death Benefit to eliminate it prospectively and freeze its amount. (Appt. Br. at 43-44.) The language, in context, clearly serves to describe a current benefit and does not promise indefinite continuation of that benefit. *See, e.g., Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 918-19 (8th Cir. 2007) (refusing to find language describing retiree medical coverage as lasting until retiree's death, and afterwards for surviving dependants, as

[20] Qwest does not agree that this constitutes a correct reading of the Plan's termination priorities. Nor could it, since ERISA Section 4044(a) would require that the Plan pay all vested benefits ahead of nonvested benefits, without regard to what the Plan itself says.

"explicit vesting language"); *In re Unisys Corp. Ret. Med. "ERISA" Litig.*, 58 F.3d 896, 904 (3d Cir. 1995); *Gable*, 35 F.3d at 857-58. As the Third Circuit concluded, the plan language may forcefully describe how the current benefit is administered, "but the vesting event remains the pensioner's death." *Lucent Death Benefits*, 541 F.3d at 256.

The Pensioner Death Benefit likewise appears in a plan that contains language noting that the EBC pays the benefit subject to many conditions[21] and that contains a reservation of rights clause. A reasonable participant is held to the standard of reading this plan as a whole. *See, e.g.*,

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[21] This distinguishes *United Foods, Inc. v. Western Conference of Teamster Pension Trust Fund*, 816 F. Supp. 602 (N.D. Calif. 1993), *aff'd*, 41 F.3d 1338 (9th Cir. 1994). Indeed, the *United Foods* case is quite different from this case. In *United Foods* an employer withdrawing from a multi-employer pension plan challenged an arbitrator's determination of its liability for contributions to fund various benefits, including a death benefit. (A withdrawing employer must pay its proportionate share of unfunded vested benefits.) The death benefit was not being eliminated (as it has been for some retirees here); in fact, the employer conceded that vested plan participants were assured a death benefit under that particular plan. *United Foods*, 816 F. Supp. at 608. Further, the benefit arose out of a collectively bargained pension plan, *id.* at 610-11, and union plans involve many considerations not present when construing a plan for management retirees, as here. These differences leave the case with no persuasive authority to guide the Court's task here. Moreover, the proposition for which Appellants cite *United Foods* – that vesting of a death benefit occurs prior to the retiree's death – must be read as unique to the terms of that particular plan, for the case is otherwise inconsistent with the law of the Circuit in which it was heard. *Cf. Wein Consolidated Airlines, Inc. v. Comm'r*, 528 F.2d 735, 737 n.4 (9th Cir. 1976) (self-insured worker's compensation death benefits "vest on the death of the employee with relatives of the required sort").

Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 1119, 1123 (10th Cir. 2004). This includes examining the reservation of rights clause, which would lead a reasonable participant inexorably to conclude that the benefit did not vest because it could be changed. *See, e.g., Unisys Ret. Med. Litig.*, 58 F.3d at 904; *Gable*, 35 F.3d at 856; *Alday v. Container Corp. of Am.*, 906 F.2d 660, 665 (11th Cir. 1990). As this Court has observed, "the weight of case authority" holds that the inclusion of a "reservation of rights" clause in a benefits plan almost always will be sufficient to demonstrate that the sponsor did not intend to vest any of a plan's welfare benefits.[22] *See Chiles*, 95 F.3d at 1512 n.2. In essence, the sponsor's decision to reserve the right to make changes answers the question concerning its intent.[23] We turn now to the relevant provision in the Plan by which Qwest expressed its intent not to vest the

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[22] While this Court recognized the majority rule in *Chiles*, it did not commit to it, or to any other rule. The experience of the past fourteen years, however, should be sufficient to persuade the Court to make the commitment to the majority rule now.

[23] Appellants also appear to argue, in substance, that vesting could be inferred because reservation of rights language did not appear in every description of the benefit. Nothing in ERISA requires plan sponsors to insert language to the effect "if we do not change or eliminate this benefit" repeatedly into every narrative passage of a plan or SPD. *See Sprague v. General Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998) (en banc) (rejecting the idea that the company had to "tell the early retirees at every possible opportunity that which it had told them many times before – namely, that the terms of the plan were subject to change").

Pensioner Death Benefit and reserved to itself the power to carry out that intent.

B. Qwest Possesses The Right To Change Or Eliminate The Pensioner Death Pursuant To The Reservation Of Rights In The Plan

Under ERISA, the unambiguous written provisions of a plan must control. *Willard*, 393 F.3d at 1123. The reservation of rights clause contains no ambiguity. It authorizes the sponsor to make changes. In its original form (in 1984), it provided an exception to that plenary power only when a change would "affect the rights of any Employee . . . to any benefit or pension to which he or she may have previously become entitled hereunder." Subsequently, in 2001, the plenary power came to be limited only by language restricting the sponsor's power to cut accrued benefits, a term defined to exclude the Plan's death benefits. In substance, the two versions of the clause do not differ. Both clearly authorize Qwest's actions in the 2003 amendment.

The 1984 version of the reservation of rights clause is standard AT&T language of long vintage. Several courts have examined it; all have concluded it is unambiguous. *See, e.g., Lucent Death Benefits*, 541 F.3d at 257 (construing Lucent plan); *Chastain v. AT&T Corp.*, 2007 WL 3357516, at **10-11 (W.D. Okla. Nov. 8, 2007) (construing Lucent and AT&T plans),

appeal pending, Dkt. No. 07-6288 (10th Cir. argued Nov. 17, 2008); *Jones v. AT&T Co.*, 798 F. Supp. 1137, 1142-43 (E.D. Pa.) (construing language AT&T severance plan), *aff'd*, 981 F.2d 1247 (3d Cir. 1992); *see also Patrick v. Telis Communications Inc.*, 2005 BCCA 592, 49 B.C.L.R.4th 74, ¶14 (B.C. Ct. App. 2005) (analyzing Canadian telecom company's pension plan), *appeal denied*, [2006] S.C.A.A. No. 35 (Can. 2006). It confers the right to change or eliminate the death benefit here at any time prior to the death of a retiree.[24] *See Lucent Death Benefits*, 541 F.3d at 256-57.

The 2001 version of the reservation of rights clause likewise offers no room for ambiguity. Its sole exception to coverage concerns accrued benefits, narrowly defined in the clause itself and further excluding death benefits by virtue of a definition of "accrued benefits" that

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[24] By its very terms this exception clause could not be invoked to protect a death benefit because such benefits are paid – if at all, given that an eligible beneficiary must exist at the time of a participant's death – to someone other than the *Employee* after that *Employee* has died. An *Employee*, by definition, *never* will become entitled to it. No reasonable construction of the exception clause would permit a court to read it to refer to a benefit to which someone other than an *Employee* may become entitled. *Cf. Hollingshead v. Blue Cross & Blue Shield of Okla.*, 216 Fed. Appx. 797, 801-02 (10th Cir. 2007) (unpublished) (refusing to read language limiting coverage for organ transplants to one transplant per organ to require coverage until transplant is successfully accomplished); *In re Unisys Corp. Long-Term Disability Plan ERISA Litig.*, 97 F.3d 710, 715-17 (3d Cir. 1996) (holding that the words "benefits you receive" – where "you" is the employee – were unambiguous as a matter of law and could not be stretched to mean "benefits you and your dependents receive").

additionally states that the term does not include any benefits under Article VII – the death benefits plan. (App. at 598, 2001 Plan, §1.0B.)

Appellants argue for the application of the doctrine of *contra proferentum* to the reservation of rights clause, citing *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1252 (10th Cir. 2007). This doctrine only assists with the interpretation of ambiguous contract provisions and the provisions at issue here contain no ambiguity. Moreover, the doctrine does not apply to plans of the type at issue here. *Miller* applied the doctrine to an insurance policy plan subject to *de novo* judicial review because the plan lacked a grant of power to the plan administrator to construe plan terms or determine eligibility. *See id.* at 1250. The Plan here reserved such power to its administrator (the EBC, which is empowered to resolve any ambiguities). (App. at 605.) The doctrine of *contra proferentum* therefore cannot be applied to the reservation of rights clause. *See Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100-01 (10th Cir. 1999); *see also Miller*, 502 F.3d at 1253.

The Plan empowered its sponsor, Qwest, to make changes and Qwest cannot be faulted for exercising that right. The District Court correctly reached this conclusion and should be affirmed.

C. Appellants' Miscellany Of Arguments Relating To Vesting Concern Documents Other Than The Plan Documents That Must Clearly And Expressly Vest A Benefit

Appellants include a hodge-podge of sources that are outside of the Plan documents to bolster their case that Qwest's "conduct" demonstrates that the Pensioner Death Benefit is vested. If the Court considers these sources – despite the black-and-white rule requiring Plan language to support vesting – they do not provide any reason to overturn the judgment of the court below.

Appellants, for example, seek to draw inferences from the Form 5500 tax returns filed with the IRS. Tax forms do not control the terms of the Plan. In *RLJCS Enterprises, Inc. v. Professional Benefit Trust, Inc.*, 438 F. Supp. 2d 903 (N.D. Ill. 2006), *aff'd*, 487 F.3d 494 (7th Cir. 2007), the court rejected the plaintiffs' "experts' legal opinions and . . . a private letter ruling by the IRS" in favor of looking to the terms set forth in the plan documents. 438 F. Supp. 2d at 912-13. As the Seventh Circuit summarized, in its affirmance, "the IRS's view of the tax consequences does not change the Trust's terms[.]" 487 F.3d at 496; *see also Neuma, Inc. v. AMP, Inc.*, 259 F.3d 864, 876-77 (7th Cir. 2001) (affirming district court's refusal to rely on information in Form 5500 tax form to clarify allegedly latent

ambiguity in plan). Whether these forms accurately or inaccurately described the benefit thus is immaterial.

Appellants also seek to rely on various "reassuring communications" that they claim came from U S WEST personnel during the time of Appellants' employment. These alleged communications cannot alter the terms of a written benefit plan. "ERISA plans must be in writing and cannot be modified orally." *Livick v. The Gillette Co.*, 524 F.3d 24 (1st Cir. 2008); *accord Miller v. Coastal Corp.*, 978 F.2d 622, 624 (10th Cir. 1992); *Straub v. Western Union Tel.*, 851 F.2d 1262, 1265 (10th Cir. 1988). "The purpose of this requirement is to ensure that participants know their rights and obligations under the plan and to provide some degree of certainty in the administration of benefits." *Fenton v. John Hancock Mutual Life Ins. Co.*, 400 F.3d 83, 88-89 (1st Cir. 2005); *Cirulis v. UNUM Corp.*, 321 F.3d 1010, 1013 (10th Cir. 2003). The statute implements a sound policy choice:

> Were all communication between an employer and plan beneficiaries to be considered along with the SPDs as establishing the terms of a welfare plan, the plan documents and the SPDs would establish a floor on an employer's future obligations. Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988). Consistent with the statute and the policy underlying it, the Court should reject any reliance on the extrinsic communications offered by Appellants as evidence of vesting.[25] *See, e.g.*, *Unisys Ret. Med. Litig.*, 58 F.3d at 906 n.16 ("To the extent that the retirees relied on extrinsic evidence of 'what the company said in explaining the plans to its employees,' and 'how the plans were applied in practice,' this evidence cannot be used to contradict the unambiguous written terms of an ERISA plan."); *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 930-31 (10th Cir. 1992) (refusing to consider extrinsic evidence to interpret unambiguous plan terms).

Appellants additionally argue that the 1989 SPD did not adequately disclose the power to make changes to the Plan. The District Court rightly rejected this argument. An SPD is not required to disclose that welfare benefits do not vest and it is not required to quote the Plan's reservation of rights clause in full. The 1989 Management Plan SPD, for example, cautions participants that it "is a summary of the U S WEST Management Pension Plan and does not attempt to cover all details. Specific details are contained in the official plan documents which regulate the operation of the Plan and govern any questions arising under the Plan."

[25] The arguments set forth in the next section on equitable estoppel apply with equal force here.

(App. at 720.) So warned, participants bear a responsibility to read the Plan. *See, e.g.*, *Hooven*, 465 F.3d at 577; *Jenson*, 38 F.3d at 953. Importantly, the 1989 SPD does not state that the sponsor could not make future changes in benefits. It thus did not conflict with the Plan provision that reserves the sponsor's right to do so. *See, e.g.*, *Charter Canyon Treatment Ctr. v. Pool Co.*, 153 F.3d 1132, 1136 (10th Cir. 1998) ("a summary plan description which is silent on a specific term or issue cannot prevail over the master plan document"); *Sprague*, 133 F.3d at 401 ("the failure to allude to this power [to amend or terminate the plan] in some of the booklets did not prejudice [the sponsor's] right, clearly stated in the plan itself, to change the plan's terms"). A reasonable person, reading the SPD and the Plan, would understand that Qwest (and its predecessors) reserved that right. *See Sprague*, 133 F.3d at 401; *Wise*, 986 F.2d at 938.

Finally, Appellants contend in this appeal the Pensioner Death Benefit vested when transfers of excess plan assets occurred in 1998 through 2001 to assist with the funding of retiree medical benefits. In the court below, this theory was raised in the SAC (App. at 61-62, ¶¶ 170-73) but Appellants did not defend it when Qwest moved for summary judgment. (App. at 1216.) While the District Court resolved the theory "[t]o the extent the plaintiffs continue to assert" it (*id.*), this Court should

not entertain its reassertion in this forum. *See, e.g., Grynberg v. Total, S.A.*, 538 F.3d 1336, 1351 (10th Cir. 2008). If it chooses to do so, however, it should resolve it as the District Court did, for the reasons set forth by Qwest in the court below, which we reproduce in the margin.[26]

These collateral arguments thus do not call into question the judgment entered below. This Court should affirm.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANTS HAVE NO VIABLE CLAIMS BASED ON ANY ALLEGED BREACHES OF FIDUCIARY DUTY OR BASED UPON PRINCIPLES OF EQUITABLE ESTOPPEL

Recognizing that the Plan documents ultimately fail to support their case, Appellants argued for application of legal theories outside of the

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[26] Appellants' claim challenges the legality of Amendment 2003-5. It therefore must arise under Section 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)). *See Ross v. Rail Car Am. Group Disability Inc. Plan*, 285 F.3d 735, 740-41 (8th Cir. 2002). That provision authorizes an action to "enjoin any act or practice which violates any provision *of this subchapter*," 29 U.S.C. § 1132(a)(3)(A) (emphasis added), or "to obtain other appropriate equitable relief (i) to redress *such* violations or (ii) to enforce *any provisions of this subchapter* or the terms of the plan[.]" 29 U.S.C. § 1132(a)(3)(B) (emphasis added). Thus, to prevail on a claim, Appellants must prove that the 2003 amendment violated a provision of subchapter I of ERISA (29 U.S.C. § 1001-1053) or the terms of the Plan. Notably, Section 420 is not part of subchapter I of ERISA, so by its terms Section 502(a)(3) does not provide a vehicle for relief. Further, this Court has not recognized any claim based on Internal Revenue Code Section 420, and does not generally allow ERISA claims based solely on the IRC. *See Stamper v. Total Petroleum, Inc. Ret. Plan for Hourly Rate Employees*, 188 F.3d 1233, 1238-39 (10th Cir. 1999). There appears to be no viable statutory basis for asserting this claim.

Plan, which the District Court correctly rejected. Their breach of fiduciary duty claim relies on a specious argument about the content of SPDs. Their equitable estoppel theory asks this Court to adopt a theory of liability this Circuit has not previously recognized (and assumes that they could satisfy its strictures). Like the court below, this Court should reject these theories.

A. Appellants Have Not Raised Any Cognizable Claim of Breach of Fiduciary Duty

Appellants argue that a breach of fiduciary duty claim arises out of the SPDs, which they contend did not comply with 29 U.S.C. § 1022(b) because the SPDs did not fully restate Qwest's reservation of the right to make changes. This argument varies somewhat from their position in the District Court, where they claimed the breach of duty allegedly occurred because Qwest did not expressly disclose that the benefits were not vested. The version of the argument asserted below had no support in the law, *see, e.g.*, *Jenson*, 38 F.3d at 952 ("the failure to disclose that a welfare plan's benefits are not vested is neither a material misrepresentation nor a breach of the plan administrator's fiduciary duties"); *Wise*, 986 F.2d at 936-38, and neither does their argument here. Tellingly, Appellants do not cite any cases in support of their argument, which has been rejected in a number of circuits. *See, e.g.*, *Gable*, 35 F.3d at 858 ("ERISA does not require SPDs to specifically address the possibility that those terms might later be changed,

as ERISA undeniably permits"); *accord Sprague*, 133 F.3d at 401-02; *Jenson*, 38 F.3d at 952; *Wise*, 986 F.2d at 935. Appellants offer no argument why this Court should depart from the settled law on this point. Their claim should be rejected.

B. The Court Should Not Recognize The Viability Of Equitable Estoppel But, If It Considers That Theory, Appellants Do Not Present A Viable Claim

Appellants alternatively ask this Court to adopt the theory of equitable estoppel for ERISA cases. In *Cannon v. Group Health Service of Oklahoma*, 77 F.3d 1270, 1277 (10th Cir. 1996), this Court considered the theory and reserved decision on adopting it. This is not the case to do so, the theory is not one the Court should embrace, and Appellants could not state a claim under the theory.

As this Court has observed, equitable estoppel only applies "'where the terms of a plan are ambiguous' and 'the employer['s] communications constituted an interpretation of that ambiguity.'" *Averhart v. U S West Mgmt. Plan*, 46 F.3d 1480, 1486 (10th Cir. 1994) (quoting *Alday*, 906 F.2d at 666). In any other circumstances, the theory would act to circumvent ERISA's written plan requirement, discussed above. *See, e.g.*, *Straub*, 851 F.2d at 1265. As the analysis in this brief has shown, the Plan documents harbor no ambiguity about whether Qwest may

amend or eliminate the Pensioner Death Benefit. Equitable estoppel thus cannot be used to alter the controlling terms of the Plan and need not be considered by this Court.

The theory is not one this Court should embrace, in any case. Equitable estoppel introduces unacceptable levels of uncertainty into the field of employee benefits. Appellants clearly state their intention to base their estoppel on oral representations – the antithesis of ERISA's commitment to written documents. As the Seventh Circuit has observed:

> Havoc would ensue if plans meant different things for different participants, depending on what someone said to them years earlier. Memory is weak compared to the written word, and there is a substantial risk that participants will not correctly recall what was said, will exaggerate (in their favor) what they heard, or will simply prevaricate in order to improve their position. Employers could do little to protect themselves against such claims – which is why ERISA calls for writings, and why we concluded above that a rule akin to the statute of frauds applies to all claims based on bilateral contracts.

Frahm v. Equitable Life Assurance Soc. of U.S., 137 F.3d 955, 960 (7th Cir. 1998); *see also Orth*, 546 F.3d at 873 (observing that Seventh Circuit will not permit application of equitable estoppel unless based on a writing).

Notably, this Court has expressed the view that, were it to recognize equitable estoppel, it would consider doing so only for *egregious* cases, by which it has referred to instances involving "lies, fraud or an

intent to deceive" by a fiduciary. *See Callery v. U.S. Life Ins. Co. of N.Y.*, 392 F.3d 401, 407-08 (10th Cir. 2004). If the theory were adopted, this high bar seems necessary, to reserve equitable estoppel for use only in circumstances where it counterbalances reprehensible conduct by plans or plan sponsors. No such circumstances are alleged, or could be proved, here. To the contrary, Appellants describe a Plan administered in good faith where the plan sponsor simply changed course in 2003 to modify a benefit it previously offered. *Cf. Frahm*, 137 F.3d at 961 (estoppel not appropriate where plan sponsor acted honestly when it told participants it intended to continue offering a benefit and then subsequently changed course).

These arguments adequately dispose of Appellants' claim, but one final note is in order. Reasonable reliance is an element of any estoppel claim and Appellants certainly would fail to state a claim based on their inability to satisfy this element. "In federal law, a person cannot rely on an oral statement when he has in hand written materials disclosing the truth." *Frahm*, 137 F.3d at 961. Appellants had in hand – figuratively if not literally – Plan documents disclosing Qwest's right to make changes. That fact, in and of itself, forecloses a successful estoppel claim. *See, e.g., Tocker v. Philip Morris Cos., Inc.*, 470 F.3d 481, 488-89 (2d Cir. 2006); *Weir v.*

Federal Asset Deposit Ass'n, 123 F.3d 281, 290 (5th Cir. 1997); *Gable*, 35 F.3d at 856-57; *Kolentus v. Avco Corp.*, 798 F.2d 949, 958 (7th Cir. 1986).

The Court accordingly may and should affirm the court below on any or all of these grounds.

IV. APPELLANTS ARE NOT ENTITLED TO ATTORNEY'S FEES OR TO RECONSIDERATION OF THEIR MOTION FOR CLASS CERTIFICATION

Appellants' additional requests for relief from this Court merit no additional argument. They must succeed on their claims in order to seek attorney's fees, *see, e.g.*, *Graham v. Hartford Life & Acc. Ins. Co.*, 501 F.3d 1153, 1162 (10th Cir. 2007); *Phelps v. U.S. West, Inc.*, 141 F.3d 1185, 1998 WL 165117, at *3 (10th Cir. 1998) (unpublished), or obtain reconsideration of their motion for class certification. The court below committed no abuse of discretion when it declined to certify a class in light of the successful summary judgment motion. *See, e.g., Greenlee County, Ariz. v. United States*, 487 F.3d 871, 880-81 (Fed. Cir. 2007); *Cowen v. Bank United of Texas, FSB*, 70 F.3d 937, 941 (7th Cir. 1995); *Adamson v. Bowen*, 855 F.2d 668, 677 n.12 (10th Cir. 1988).

CONCLUSION

The court below carefully examined the facts and arguments and correctly reached the conclusion to grant summary judgment to Qwest and the other defendants. For the reasons set out by that court, and any additional reasons stated herein, this Court should affirm the judgment of the District Court.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

Appellees acquiesce in Appellants' request for oral argument. The facts and law involved in the issues raised by this appeal are unfamiliar and the Court may be assisted by the opportunity to question counsel more particularly on those issues.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains approximately 11,150 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Georgia font.

s/John Houston Pope

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, 2009, the original and seven copies of the foregoing Answer Brief for Defendants-Appellees were sent by Federal Express to the Clerk of the United States Court of Appeals for the Tenth Circuit and one copy was served by Federal Express on Curtis L. Kennedy, Esq., 8405 East Princeton Ave., Denver, CO 80237-1741, Counsel for Plaintiffs-Appellants.

s/John Houston Pope

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

1. I hereby certify that the text of the electronic PDF version of the foregoing Answer Brief for Defendants-Appellees that was filed electronically with the Court is identical to the text of the hard copies of the brief that were filed with the Court and served on Counsel.

2. I hereby certify that this brief complies with the privacy policy of the Judicial Conference of the United States.

3. I hereby further certify that a virus check of the electronic PDF version of the brief was performed using Symantec Antivirus Software (v.10.1.5.5000, current as of 1-29-09 rev. 3), and the PDF file was found to be virus free.

s/John Houston Pope