Case Nos. 06-5008 & 06-5009

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In Re: Lucent Death Benefits ERISA Litigation

Edward Foss, Sarah Conder, Arthur J. Berendt
and Robert Howard, Appellants in No. 06-5008;

Helen P. Lucas as surviving spouse of Vincent R. Lucas,
Appellant in No. 06-5009.

Appeal from the United States District Court for the District of New Jersey,
Case Nos. 03-cv-5017, 04-cv-640, 04-cv-1099 (Cavanaugh, J.)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS EDWARD FOSS, SARAH CONDER, ARTHUR J. BERENDT, AND ROBERT HOWARD

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INTRODUCTION

Defendants offer a simple story that they hope will persuade this Court to affirm. Simplicity was achieved at the expense of accuracy, however, and what they present is incomplete, as three brief examples show.

First, while defendants stress a portion of the plan that says they could distribute death benefits in their "discretion," they sever the language from its context. The plan made that discretion "subject to the following provisions of this paragraph 3" (JA00828; Pls.' Ex. 6 at D001217), which included a requirement that "such Death Benefit **shall be paid**" if a pensioner receiving a service pension was survived by a Mandatory Beneficiary.[1] In other words, the "discretion" existed when there were no Mandatory Beneficiaries, in which case the administrator "may authorize a Death Benefit." (JA00828; Pls.' Ex. 6 at D001217).

Second, defendants chide plaintiffs for breaking down death benefits into separate pieces, ignoring the fact that this was how these benefits were presented to participants for over twenty years. AT&T presented the death benefits it promised as components of three different plans that it numbered as follows:

> #006 -assigned by AT&T for pensions and certain death benefits paid from the Trust Fund

[1] (JA00829; Pls.' Ex. 6 at D001218 (emphasis supplied); *see* JA00831; Pls.' Ex. 6 at D001220 (defining Mandatory Beneficiary)).

#525 -assigned by AT&T for disability pensions and certain death benefits paid from a Participating Company's operating income

#512 -assigned by AT&T to the special accidental death policy underwritten by The Continental Insurance Company.[2]

Lucent did the same thing. (*See* JA01441; Pls.' Ex. 19 at D002267).

Third, defendants insist that the Benefits Agreement cannot be a "plan document," even though it was the first item listed in their disclosures under the heading "Plan Documents" (JA02044; Pls.' Ex. 37 at 5), and it is expressly incorporated into Lucent's plan, which referred to the Benefits Agreement as the source of one of the defined terms in the plan. (*See, e.g.*, JA01292; Pls.' Ex. 11 at D001443). Defendants also do considerable violence to the text of this document, as will be seen when we address the substance of their arguments.

ARGUMENT

I. PENSIONER DEATH BENEFITS WERE PROTECTED PENSION BENEFITS.

A pension plan either "provides retirement income to employees," or it "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond . . . ." 29 U.S.C. § 1002(2)(A); s*ee also* Treas. Reg. § 1.401-1(a)(2)(i) (pension plan is an arrangement "to provide for the livelihood of the employees or their beneficiaries after the retirement of such employees through the payment of benefits determined

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[2] (JA01398; Pls.' Ex. 16 at D010490; *see also* JA01417-18; Pls.' Ex. 17 at D010568-69; JA001420; Pls.' Ex. 18 at D002007).

without regard to profits");[3] *cf.* 29 U.S.C. § 1002(2)(B) (authorizing exemption for plans supplementing "pension benefits of retirees or their beneficiaries").

Pensioner Death Benefits provided for the deferral of income; a benefit payment equal to one year's compensation was pre-funded by AT&T and paid to the surviving Mandatory Beneficiary of a service pension retiree. The Pensioner Death Benefit was not only tied to compensation, it was also tied to service, as only those who qualified for a service pension were entitled to this benefit. These characteristics made the Pensioner Death Benefit the type of "retirement benefit" that a pension plan provides: "Retirement benefits generally are measured by, and based on, such factors as years of service and compensation received by the employees." Treas. Reg. § 1.401-1(b)(1)(i). The record demonstrates that Pensioner Death Benefits were intended to be treated as pension benefits that were protected under the relevant plan documents.

A. The Plan Sponsors Consistently Treated Pensioner Death Benefits as Pension Benefits.

One of the inconvenient facts the defendants overlook in their brief is that they consistently told participants that Pensioner Death Benefits were part of a defined benefit pension plan and distinguished them from other types of death benefits offered under distinct welfare plans. (*See, e.g.,*

[3] Reliance upon Treasury Regulations is appropriate here, since they are authoritative under ERISA's minimum participation, vesting and funding standards. 29 U.S.C. § 1202(c).

JA01398; Pls.' Ex. 16 at D010490). Defendants historically told participants this because they understood it to be the correct legal characterization, as becomes obvious from a review of the plan documents and other materials in the record.

First, Pensioner Death Benefits were treated as pension benefits in a variety of ways in the plan documents. From 1964 on, Pensioner Death Benefits were pre-funded on an actuarial basis.[4] They were paid from the pension trust fund, rather than corporate funds or life insurance.[5] Participants had the authority to file a directive instructing that the Pensioner Death Benefit be paid out in equal monthly installments.[6] Pensioner Death Benefits also survived plan termination.[7] AT&T and Lucent both knew how to tell a participant that a benefit was not a protected pension benefit; both companies' plan documents said that post-

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4 (JA00073; Cons. Am. Compl. ¶ 37(d); JA00178; Pls.' St. at ¶ 19(g); JA00499; Pls.' Ex. 2 at D000293; JA00698-99; Pls.' Ex. 5 at D010222-223; JA00809-11; Pls.' Ex. 6 at D001198-200; JA00955-57; Pls.' Ex. 7 at D001344-346; JA01106-07; Pls.' Ex. 8 at D010333-34; JA01270-71; Pls.' Ex. 11 at D001491-492; JA00297-98; Foss Decl., Ex. 4 at EF000250-251).

5 (JA00073; Cons. Am. Compl. ¶ 37(c); JA00178; Pls.' St. ¶ 19(f); JA00514; Pls.' Ex. 2 at D000308; JA00719-20; Pls.' Ex. 5 at D010243-244; JA01122; Pls.' Ex. 8 at D010349; JA01286; Pls.' Ex. 11 at D001507).

6 (JA00178; Pls.' St. ¶ 19(c); JA00834; Pls.' Ex. 6 at D001223; JA00979-81; Pls.' Ex. 7 at D001368-70).

7 (JA00073; Cons. Am. Compl. ¶ 37(h); JA00178; Pls.' St. ¶ 19(h); JA00500-01; Pls.' Ex. 2 at D000294-295; JA00702-03; Pls.' Ex. 5 at D010226-227; JA00964-66; Pls.' Ex. 7 at D001353-355; JA01113-14; Pls.' Ex. 8 at D010340-341; JA01277-78; Pls.' Ex. 11 at D001498-499; JA00301-02; Foss Decl., Ex. 4 at EF000254-255; JA01324-25; Pls.' Ex. 12 at D001685-686).

retirement health benefits "shall not constitute a portion of any Participant's 'accrued benefit.'"[8]

Second, Pensioner Death Benefits were described as pension benefits in the Summary Plan Descriptions issued by both AT&T and Lucent, which told participants that death benefits paid from the fund were part of a defined benefit pension plan.[9]

Third, both companies consistently treated the Pensioner Death Benefits as liabilities of their defined benefit pension plans in their annual 5500s,[10] which serve as part of ERISA's mandatory disclosure scheme, just as summary plan descriptions do. 29 U.S.C. § 1023(a). Indeed, when Lucent amended the plan to terminate Pensioner Death Benefits, the impact was reflected on the financial statements for its defined benefit pension plan, which showed a decrease in liabilities of $477,123,000 for 2003 due to plan amendments, including the elimination of the Pensioner Death Benefit. (JA01940; Pls.' Ex. 33 at D15275).

Although they characterized the Pensioner Death Benefit as a pension benefit for years, defendants now insist that they were mistaken. Apparently, it was a welfare benefit all along.

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[8] (JA01126; Pls.' Ex. 8 at D010353; JA01291; Pls.' Ex. 11 at D001512).

[9] (JA01398-99; Pls.' Ex. 16 at D010490-91; JA01417-18; Pls.' Ex. 17 at D010568-69; JA001420; Pls.' Ex. 18 at D002007; JA01441; Pls.' Ex. 19 at D002267).

[10] (JA01463, 1506; Pls.' Ex. 21 at D15885, 15928; JA01673, 1701; Pls.' Ex. 27 at D008995, 9023).

To support this sudden about-face, defendants first point to the statutory definition of a welfare benefit plan, which does include payments made upon death as a category of welfare benefits. 29 U.S.C. § 1002(1). This argument, however proves too much, as ERISA has always mandated that there be pension payments upon death; the requirement of a joint and survivor annuity was one of the central reforms that the statute provided. Pub. L. 93-406, Title I, § 205, 88 Stat. 829, 862 (1974). As Congress explained, it passed ERISA because "the continued well-being and security of millions of employees **and their dependents** are directly affected by these plans . . . ." 29 U.S.C. § 1001(a) (emphasis supplied).

The fact that Congress required pension plans to offer a joint and survivor annuity to protect beneficiaries suggests that the reference to benefits payable upon death in the definition of "welfare plan" was not intended to apply to all payments upon death under a pension plan. The text of Section 3(1) of ERISA supports this construction; it includes as a "welfare plan" a plan that provides "any benefit described in section 302(c) of the Labor Management Relations Act of 1947 (**other than pensions on retirement or death**, and insurance to provide such pensions)." 29 U.S.C. § 1002(1)(B) (emphasis supplied); *see also* 29 U.S.C. § 1002(2)(B) (authorizing exemption for plans supplementing "pension benefits of retirees or their beneficiaries"). And in passing ERISA, Congress acted in the context of existing standards governing pensions that had developed under the Code. As the Treasury Regulations note, a pension plan is an arrangement "to

provide for the livelihood of the employees **or their beneficiaries** after the retirement of such employees through the payment of benefits determined without regard to profits." Treas. Reg. § 1.401-1(a)(2)(i) (emphasis supplied); *see also* 29 C.F.R. § 2510.3-2(g)(1) ("Generally, an arrangement by which payment is made by an employer to supplement retirement income is a pension plan.").

Defendants also argue that the Pensioner Death Benefit cannot be a pension benefit because it does not comfortably fit within the statutory definition of an accrued benefit under Section 3(23) of ERISA, 29 U.S.C. § 1002(23). Thus, much is made of the fact that participants did not become eligible for Pensioner Death Benefits until they had many years of service.

Again, this argument proves too much, since the same is true of the service pension, yet there is "no question" that it is protected as an accrued benefit, even though it does not fit the definition in Section 3(23) of ERISA. *Bellas v. CBS, Inc.,* 221 F.3d 517, 524 (3d Cir. 2000) (citations omitted). Even though Congress has not revamped the definition of "accrued benefits" in Section 3(23), subsidized early retirement benefits, such as the service pension, are protected from elimination. Sponsors that seek to eliminate such a benefit have to permit employees to "grow into" the benefit on the basis of their earnings as of the effective date of the amendment. *Gillis v. Hoechst Celanese Corp.,* 4 F.3d 1137, 1145-46 (3d Cir. 1993). Plaintiffs submit that the Pensioner Death Benefit, which is tied directly to the service pension by the same eligibility criteria, stands on an equal footing.

Moreover, defendants' argument that the benefit did not accrue in any measurable way is flatly contradicted by the record: the plan's actuaries used mortality data and data on the percentage of retirees who were survived by a spouse to calculate the accrual rate under the plan. The 5500s had attachments headed as follows:

AT&T MANAGEMENT PENSION PLAN, PN 006
EIN 13-4924710
ATTACHMENT III TO 1991 SCHEDULE B

AT&T
Annual Rates of Mortality Among Active Employees Assumed in Determining the 1991 Accrual Rate for Service Pensions and Death Benefits

. . .

AT&T MANAGEMENT PENSION PLAN, PN 006
EIN 13-4924710
ATTACHMENT III TO 1991 SCHEDULE B

AT&T
Annual Rates of Mortality For Service Pensioners Assumed in Determining 1991 Accrual Rate For Service Pensions and Death Benefits

. . .

AT&T MANAGEMENT PENSION PLAN, PN 006
EIN 13-4924710
ATTACHMENT III TO 1991 SCHEDULE B

AT&T
Percentage of Active and Retired Employees Dying Who Have Qualified Beneficiaries Assumed in Determining 1991 Accrual Rate For Service Pensions and Death Benefits

(JA01541-42; Pls.' Ex. 23 at D16035-37).

The plan documents described the Pensioner Death Benefits in mandatory terms, using language that this Court has held to be indicative of a vested pension benefit. *See In re New Valley Corp.*, 89 F.3d 143, 151-52 (3d Cir. 1996). Interpreting plan language that said benefits "will be paid" and that eligible participants "will receive" deferred compensation, this Court explained that "[t]he mandatory language of these provisions denotes benefits that will be provided by the company once the participant retires, *i.e.,* benefits that vest at retirement."[11] In *New Valley,* this Court also noted that eligibility for the benefits at issue was tied to participation during employment, retirement and "receipt of a pension under the Basic plan." 89 F.3d at 152. This Court concluded that this provision also supported the plaintiffs' claim that their benefits vested upon retirement. *Id.* The same is true of the Pensioner Death Benefits here, since eligibility was triggered by qualification for a service pension.

The record demonstrates why AT&T and Lucent used mandatory language to describe Pensioner Death Benefits: they had to because the Plan Document expressly stated that the Pensioner Death Benefits "shall be paid from the Pension Fund."[12] The fact that the payments came from the

[11] *Id.* at 151. While *New Valley* involved a top hat plan, that aspect of the plan only affected the Court's analysis of the extent to which it could rely upon extrinsic evidence, not its analysis of the language of the plan document itself. *Id.* at 149.

[12] (JA00839; Pls.' Ex. 6 at D001228). This portion of the plan provided in relevant part as follows:

pension trust fund was why the plan said payments to this category of beneficiaries "shall be made": qualified pension plans must provide for "definitely determinable benefits." Treas. Reg. § 1.401-1(b)(1)(i). The Code even directs that defined benefit plans spell out the actuarial assumption used to determine benefits "in a way which precludes employer discretion." I.R.C. § 401(a)(25). Unless payments from the trust to Mandatory Beneficiaries were mandatory, the plan's qualification under the Code would be jeopardized. In light of the mandatory language set forth in their plan documents, both AT&T and Lucent apparently received favorable determination letters from the IRS, according to their 5500s. (JA1611; Pls.' Ex. 25 at D16073; JA01742; Pls.' Ex. 28 at D9135).

> . . . **Death Benefits payable** pursuant to Paragraph 3(b) of this Section 5 **to the initial beneficiary or beneficiaries on account of deaths of service pensioners**, exclusive of any amount payable under Subparagraph (ii) of Paragraph 3(b) in excess of the minimum set forth in said Paragraph 3(b), **shall be paid from the Pension Fund either directly or through the purchase of annuities from an insurance company as the Company may determine**.

(JA00839-40; Pls.' Ex. 6 at D001228-29) (emphasis added). Paragraph 3(b) of Section 5 of the plan provided for payment of the Pensioner Death Benefit "[i]f such pensioner leaves any beneficiary bearing the relationship to the deceased and conforming to the other conditions stated with respect to the death of an employee in Subparagraph 4(a) of this Section." (JA00829; Pls.' Ex. 6 at D001218). Paragraph 4(a) of Section 5 of the Plan, in turn, provided for payment of death benefits to "Mandatory Beneficiaries" of employees. (JA00831; Pls.' Ex. 6 at D001220). Lucent's plan also provided that the Pensioner Death Benefits would be paid from the pension trust fund. (JA01286; Pls.' Ex. 11 at D001507). The Foss Plaintiffs set forth the relevant language in their opening brief. (Foss Br. at 25 n.21).

Not only were Pensioner Death Benefits mandatory, they were directly related to retirees' pensions. The plan documents provided that Pensioner Death Benefits were payable in the amount of one year's compensation, or in the amount of the annual pension allowance, which was set as a minimum.[13] This strongly suggests that Pensioner Death Benefits were intended as pension benefits, as benefits under a pension plan "generally are measured by, and based on, such factors as . . . compensation received by the employees." Treas. Reg. § 1.401-1(b)(1)(i).

The fact that the formula for Pensioner Death Benefits tied the minimum amount to the annual pension allowance is significant, since it shows a direct relationship between the Pensioner Death Benefit and the pension of the retiree. Where death benefits are directly related to the pension being received by the retiree, they are protected. *Berger v. Xerox Ret. Income Guar. Plan*, 231 F. Supp. 2d 804, 816-17 (S.D. Ill. 2002), *aff'd*, 338 F.3d 755, 764 (7th Cir. 2003) *see also Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper, Inc.,* 212 F.R.D. 350, 362 (W.D. Mich. 2002), *vacated on other grounds,* 382 F.3d 587 (6th Cir. 2004); *United Foods, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 816 F. Supp. 602, 609 (N.D. Cal. 1993), *aff'd,* 41 F.3d 1338 (9th Cir. 1994). While defendants have sought to distinguish these cases based on the fact that they involve cash balance plans, they ignore one case that is squarely on point.

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[13] (JA00564; Pls.' Ex. 3 at D000542; *see also* JA00830; Pls.' Ex. 6 at D001219; JA00977; Pls.' Ex. 7 at D001366; JA01118; Pls.' Ex. 8 at D010345).

In *United Foods,* the court addressed whether death benefits should be included in the assessment of withdrawal liability under a multi-employer plan. The dispute turned upon whether death benefits were "nonforfeitable," and the statutory definition focused upon whether the participant had satisfied the requirements for "entitlement" under the plan. 816 F. Supp. at 608 (*quoting* 29 U.S.C. § 1301(a)(8)).

Based upon the direct relationship between the death benefit and the pension benefit, the *United Foods* Court concluded it was nonforfeitable, distinguishing this Court's decision in *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990):

> . . . *Huber* is distinguishable because unlike the death benefits under review, the plan's fixed death benefit in *Huber* was essentially an allowance for funeral costs that had no relationship to an employee's retirement benefit. In other words, the death benefit was not related to the service or age of the participant, or the value of the employee's pension or annuity. The PBGC has stated that those death benefits which are "related to" pension benefits are nonforfeitable. *See* Arbitrator's Decision ("Decision") at 40 (citing Excerpt of Record at 2989 (PBGC Ltr. to Senator Charles E. Grassley, Jan. 24, 1985)); *cf.* 29 C.F.R. § 2613.2 (pension defined as "a benefit payable as an annuity or one or more payments related thereto . . . .").

816 F. Supp. at 609. Thus, the relationship between the Pensioner Death Benefit and the service pension demonstrates that it was a pension benefit to which employees became entitled when they retired with a service pension.

B. The Foss Plaintiffs Became Entitled to Pensioner Death Benefits Under the Plan Documents Upon Retirement.

The plan documents consistently provided that death benefits would survive the termination of the plan and that assets would be allocated

> To making provision . . . for the payment of death benefits attributable to deaths occurring prior to the date of termination which would have been payable from the Second Pension Fund, and for the payment, upon the deaths of retired employees who were on the pension roll as of the date of termination and of employees eligible as of that date for retirement at their own request, of death benefits which would have been payable . . . , had the Plan not been so terminated.[14]

Despite this language, defendants insist that no one became eligible for a death benefit until death.

Apparently, AT&T's actuaries had a different view: "All active employees and retired employees receiving Service or Disability Pensions are eligible for Death Benefits." (JA01974, Pls.' Ex. 34 at D15309). That is how AT&T's actuaries described the plan in their 1985 actuarial report, which was contemporaneous with the retirement of plaintiffs Foss and Howard, as well as Joseph Conder. Moreover, accepting the defendants' premise that death is what creates an entitlement is inconsistent with the plan's termination provision, and would effectively eliminate the specific distinction between Mandatory Beneficiaries (to whom payments were

[14] (JA00501; Pls.' Ex. 2 at D000295). This was a standard term of the plan at both AT&T and Lucent. (JA00073; Cons. Am. Compl. ¶ 37(h); JA00178; Pls.' St. ¶ 19(h); JA00702-03; Pls.' Ex. 5 at D010226-227; JA00964-66; Pls.' Ex. 7 at D001353-355; JA01113-14; Pls.' Ex. 8 at D010340-341; JA01277-78; Pls.' Ex. 11 at D001498-499; JA00301-02; Foss Decl., Ex. 4 at EF000254-255; JA01324-25; Pls.' Ex. 12 at D001685-686).

required to be made in a definitely determinable amount) and Discretionary Beneficiaries. (Foss Br. at 40-41).

Defendants assert that the Foss Plaintiffs read too much into the termination provisions of the plan, noting that the introduction to the termination provision indicated that the assets of the plan were to be first allocated "in the order and to the extent required by Section 4044 of the Pension Act." (JA00620; Pls.' Ex. 4 at D000920). Defendants contend that this clause must mean that the elaborate scheme of priorities would only kick in after all of the benefits payable under Section 4044 of ERISA are paid. The problem with the defendants' thesis is that once all payments are made under Section 4044, there are no benefits left to pay, since the lowest category of benefits under Section 4044 is "all other benefits under the plan." 29 U.S.C. § 1344(a)(6). If, as the defendants assert, the plan's system of priorities only applies after the statutory allocation, then it is completely meaningless.

In construing ERISA plans, courts apply "a federal common law of contract, informed by general principles of contract law and by ERISA's purposes as manifested in its specific provisions." *Burstein v. Retirement Account Plan For Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003) (citations omitted). Each provision should be given effect: "It is a well settled principle . . . that a court should read a contract so as to give all of its terms their intended effect." *American-Cyanamid Co. v. Fermenta Animal Health Co.,* 54 F.3d 177, 184 (3d Cir. 1995)

(citations omitted); *see also Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1013-14 (3d Cir. 1980) (district court erred in adopting a construction of a contract that made a condition a "nullity").

The relevant portion of the plan said that the fund "shall be applied first among the participants and beneficiaries of the Plan in the order and to the extent required by Section 4044 of the Pension Act," but then continued, indicating that "[t]hereafter this Pension Fund shall be applied, insofar as that Act permits, as follows, **with proper adjustment in each case for any portion of the benefit already provided for under a prior allocation under that Act or these Regulations** . . . ." (JA00620; Pls.' Ex. 4 at D000920) (emphasis supplied). The plan document then lists service pensions as the first priority. (JA00621; Pls.' Ex. 4 at D000921).

Nonforfeitable benefits such as the service pension, however, are already payable under Section 4044, where they would fall no lower than the fifth priority. *See* 29 U.S.C. § 1344(a)(5) (providing for distribution of "all other nonforfeitable benefits under the plan"). If, as defendants suggest, the plan's priorities were only intended to apply after all categories under Section 4044 had been satisfied, the placement of service pensions in this tier makes no sense at all. If, however, the relevant section of the plan documents was intended to outline an anticipated distribution framework, which would be subject to Section 4044 to the extent that a court concluded it did not comport with the statute, the placement of service pensions in this category does make sense.

Reading the plan's priorities as reflecting the sponsor's view of how Section 4044 should be applied to the benefits provided by its plan thus gives effect to every provision of the plan. It also explains why both AT&T and Lucent continued to incorporate these priorities in their plan documents over and over again. AT&T subsequently adopted plans in 1980, 1984, 1985 and 1995; Lucent adopted plans in 1996, 1998, and 2000, and each plan document included the same distribution scheme.[15] It is hard to believe that the repeated republication of the same system of priorities on seven separate occasions represents a scrivener's error, and defendants offered no evidence to support such a theory.

As an alternative, the defendants suggest that the termination provisions of the plan cannot be the source of the plaintiffs' entitlement as they were promulgated under Section 4044 of ERISA, relying upon *Mead v. Tilley,* 490 U.S. 714 (1989). *Mead* involved participants who sought to enforce their right to receive a subsidized benefit for which they had not met the age and service requirements, unlike the plaintiffs here. 490 U.S. at 721. The Supreme Court held that Section 4044(a)(6) of ERISA "simply provides for the orderly distribution of plan assets required by the terms of a defined benefit plan or other provisions of ERISA." *Id.* at 725. The Court

[15] (JA00073; Cons. Am. Compl. ¶ 37(h); JA00178; Pls.' St. ¶ 19(h); JA00817-19; Pls.' Ex. 6 at D001206-08; JA00964-66; Pls.' Ex. 7 at D001353-355; JA01113-14; Pls.' Ex. 8 at D010340-341; JA01277-78; Pls.' Ex. 11 at D001498-499; JA00301-02; Foss Decl., Ex. 4 at EF000254-255; JA01324-25; Pls.' Ex. 12 at D001685-686).

specifically noted the PBGC's position was that "the characterization of benefits as forfeitable or nonforfeitable depends upon their status before plan termination." *Id.*

Here, the plan documents provided that Pensioner Death Benefits "shall be paid" where there was a Mandatory Beneficiary, and the plan recognized that these benefits were nonforfeitable prior to termination by indicating that assets should be distributed to pay death benefits "upon the deaths of retired employees who were on the pension roll as of the date of termination and of employees eligible as of that date for retirement at their own request . . . ."[16] Moreover, the idea that participants became "entitled" to Pensioner Death Benefits when they retired with a service pension is consistent with unilateral contract theory, which remains viable here, since the Foss Plaintiffs seek to enforce the plan's promise that Pensioner Death Benefits "shall be paid." *See Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 575 (3d Cir. 2006).

C. *Extrinsic Evidence Supports Plaintiffs' Position that They Were Entitled to Pensioner Death Benefits.*

In construing a contract, a court must first determine whether it is ambiguous and thus, is capable of more than one reasonable interpretation. *See Mellon Bank v. Aetna Business Credit*, 619 F.2d at 1011. Extrinsic evidence is properly considered to decide whether a contract or plan document is ambiguous. Courts are directed to assess "the words of

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[16] (JA00501; Pls.' Ex. 2 at D000295).

the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning." *id.*; *see also In re New Valley*, 89 F.3d at 150. The Foss Plaintiffs have marshaled a litany of extrinsic evidence that supports their position that they were entitled to have Pensioner Death Benefits paid if they were survived by a Mandatory Beneficiary.

First, the plan's actuaries apparently believed that retirees with service pensions were entitled to Pensioner Death Benefits, as they included the benefits in calculating the accrual rate for the defined benefit pension plans maintained by both AT&T and Lucent.[17] At times, the actuaries treated the Pensioner Death Benefits as vested; the 1994 5500 for AT&T's defined benefit pension plan showed all benefits to retirees as vested. (JA01556; Pls.' Ex. 24 at Sched. B line 6d). Plaintiffs submitted a declaration of an enrolled actuary,[18] who confirmed that this 5500 treated Pensioner Death Benefits as vested. (JA00438; Schultz Decl. ¶ 3). Mr. Schultz also confirmed that Pensioner Death Benefits were included in the calculations of the plan's funding requirements. (*Id.*). Moreover, when AT&T spun-off the Baby Bells, the actuaries included death benefit obligations in the

[17] (JA01964; Pls.' Ex. 34 at D15299; JA02150; Pls.' Ex. 40 at AT&T 001410; JA02361; Pls.' Ex. 43 at D009835).

[18] Defendants did not move to strike any of the declarations submitted by the plaintiffs. Consequently, they have waived any evidentiary objections they might have had. *See In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 437 n.12 (3d Cir. 1995).

calculation of the assets and liabilities that were transferred under Section 414(*l*) of the Code. (JA02144-45; Pls.' Ex. 39 at M007514-15).

Defendants counter that Pensioner Death Benefits were not included in the calculation of the Section 414(*l*) amount when Lucent was spun off, ignoring the fact that the actual allocation of assets was performed on a different basis, using AT&T's funding policy.[19] In calculating liabilities under this formula, the following benefits were included:

> The present value of accrued benefits represents the value, at the date of determination, of (i) the benefits expected to be paid with respect to former employees who have retired or who have terminated service with vested benefits; (ii) the benefits expected to be paid to beneficiaries of employees who have died; (iii) the accrued benefits based on service rendered and compensation earned prior to the date of valuation; taking into account specified assumptions as to interest, mortality and, in the case of present employees, withdrawal, retirement, disability, and future service accruals for benefit eligibility.

(JA02194; Pls.' Ex. 42 at D009496).

The result was that AT&T transferred to Lucent far more in assets than it did in liabilities. Lucent's 1996 5500 reflected a "current value of assets" of

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[19] (JA02194; Pls.' Ex. 42 at D009496). AT&T's funding policy called for a significant cushion to protect participants:

> The Funding Policy Amount is the amount of assets required as of September 30, 1996 to ensure there is a 90% probability that at the end of 5 years (September 30, 2001) the market value of assets equals or exceeds the present value of accrued benefits and a 75% probability that at the end of ten years (September 30, 2006) the market value of assets equals or exceeds the present value of accrued benefits.

(*Id.*).

$14,555,719,406, as contrasted with liabilities (including death benefits) on an "RPA '94" basis of $11,089,700,890. (JA01694; Pls.' Ex. 27 at D009016). The surplus of $3,466,018,516 represented a cushion of almost twenty-four percent, which Lucent managed to fritter away. In 2003, Lucent decided to eliminate Pensioner Death Benefits to avoid "the likelihood that we would have to make a contribution to the plan in the near future." (*See* JA00168; Goodwin Decl. Ex. J at 1).

Plaintiffs also noted routine communications issued by both companies that repeated the promise that death benefits will be paid where there was a Mandatory Beneficiary: "[t]he proceeds of the Company's Sickness Death Benefit, amounting to $ [amount] **will be paid** if you are survived by a qualified beneficiary . . . ."[20] While defendants assert that informal documents such as these cannot be used to help establish that plaintiffs were entitled to Pensioner Death Benefits, that is not the case. *See Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155, 1165-66 & n.10 (3d Cir. 1990) (circumstantial evidence of intent shed light on meaning of plan language).

In *Hozier*, this Court addressed a dispute over a severance plan. The defendants contended that the plan only covered employees who were terminated because of the operational consolidation that occurred in connection with a merger and that the plaintiffs were terminated much later. 908 F.2d at 1164. The relevant plan document indicated that the

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[20] (JA00234, 243; Conder Decl. Exs. 1, 4 (emphasis supplied); *see also* JA00256; Foss Decl. Ex. 1; JA00436; Burgess Decl. Ex. 3).

severance policy was to be "used for the merger" and that it was the operative severance policy "for the time frame involved in the adjustment of workload and responsibility that is involved in this merger." *Id.* The defendants also presented testimony that the policy only applied to employees terminated due to operational consolidation. *Id.*

Plaintiffs countered with two types of evidence; an internal memo on the severance plan guidelines, as well as evidence that nine employees received benefits consistent with the terms of the plan after the operational consolidation was over. *Id.* at 1165-66. This Court explicitly held that these materials were significant "because they shed light on the intended scope of the entitlements as originally created . . . ." *Id.* at 1165 n.10. The same is true here: the routine communications that AT&T and Lucent sent to retirees help to shed light on the intent of the language of the plan documents by demonstrating that corporate officials understood plaintiffs were entitled to Pensioner Death Benefits if they were survived by a Mandatory Beneficiary.

D. The Reservation of Rights Clause Did Not Authorize Elimination of Pensioner Death Benefits.

Defendants put substantial focus upon a reservation of rights clause in the plan documents. The clause, however, was far weaker than others this Court has considered. *See In re Unisys Retiree Med. Benefit "ERISA" Litig.,* 58 F.3d 896, 900 (3d Cir. 1995). There, the plan document said the following:

> The Company expects to continue the Plans, but *reserves the right to change or end them at any time*. The Company's decision

> to change or end the Plan may be due to changes in federal or state laws governing welfare or retirement benefits, the requirements of the IRS or ERISA, the provisions of a contract or policy involving an insurance company *or any other reason* . . . .

58 F.3d at 900 (emphasis by the Court). Here, the reservation of rights clause was consistently qualified, indicating that changes to the plan "shall not effect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder."[21] In light of the language of the plan documents, the SPDs, the 5500s and the extrinsic evidence, the Foss Plaintiffs plainly offered a plausible reading of the plan documents establishing that they were entitled to Pensioner Death Benefits. Accordingly, the reservation of rights clause did not authorize defendants' elimination of Pensioner Death Benefits.

In fact, as the Foss Plaintiffs demonstrated that they were entitled to Pensioner Death Benefits, the reservation of rights clause is an affirmative limitation on Lucent's right to amend the plan that they can enforce through an action in equity under ERISA. *See Hozier,* 908 F.2d at 1161 n.6 (discussing *Delgrosso v. Spang & Co.,* 769 F.2d 928 (3d Cir. 1985)).

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21 (JA00874; Pls.' Ex. 6 at D001263; *see also* JA01034; Pls.' Ex. 7 at D001423; JA01151; Pls.' Ex. 8 at D010378). These were the provisions in place when the Foss Plaintiffs retired. While defendants focus upon subsequent documents promulgated by Lucent, they all said that "[f]or Transferred Individuals who terminated employment before October 1, 1996, the provisions of the AT&T Management Pension Plan in effect at the termination of the Transferred Individual's employment shall be deemed to be incorporated in this Plan and shall govern." (JA01215; Pls.' Ex. 11 at D001436; *see also* JA00265; Foss Decl. Ex. 4 at EF000218; JA01321; Pls.' Ex. 12 at D001660).

II. PENSIONER DEATH BENEFITS WERE PROTECTED UNDER SECTION 204(g).

The Pensioner Death Benefit was related to the service pension in several ways: the age and service requirements for a service pension triggered eligibility for Pensioner Death Benefits, compensation was a factor in calculating both service pension benefits and Pensioner Death Benefits, and the minimum amount of the Pensioner Death Benefits was the annual pension allowance. Where death benefits are directly related to pension benefits, they are protected as accrued benefits. *See Berger,* 231 F. Supp. 2d at 816-17; *United Foods,* 816 F. Supp. at 609-10. The relevant Treasury Regulation is to the same effect, indicating that accrued benefits do not include ancillary benefits that are "not directly related to retirement benefits." Treas. Reg. § 1.411(a)-7(a). Defendants counter by asserting that the Pensioner Death Benefit is an incidental death benefit, relying upon Rev. Ruling 60-59, 1960-1 C.B. 154.[22]

Revenue rulings do not command the deference afforded to promulgated regulations: "courts are to give weight to IRS revenue rulings but may disregard them if they conflict with the statute they purport to interpret or its legislative history, or if they are otherwise unreasonable."

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[22] Defendants also rely upon *National Life Ins. Co. v. Tower,* 251 F. Supp. 215 (D. Md. 1966), *rev'd on other grounds,* 374 F.2d 381 (4th Cir. 1967). The death benefit there was funded through life insurance policies. 251 F. Supp. at 217-18. The IRS has long taken the position that "[a]ncillary life insurance protection" is not a protected benefit. Treas. Reg. § 1.411(d)-4 Q&A-1(d)(1) (2002). Here, the benefits were not funded through life insurance, but from the pension trust fund, which must provide definitely determinable benefits.

Geisinger Health Plan v. Commissioner, 985 F.2d 1210, 1216 (3d Cir. 1993) (citations omitted). After issuing the ruling relied upon by defendants, the IRS questioned its own statutory authority to place limitations on post-retirement death benefits in GCM 33663, 1967 WL 15842 (Oct. 20, 1967). Moreover, to the extent it is invoked to apply to a post-retirement death benefit, Revenue Ruling 60-59 is inconsistent with a variety of provisions of the Code and the Treasury Regulations.

For example, if all post-retirement death benefits paid from a pension trust are ancillary benefits rather than accrued benefits, joint and survivor annuities would be ancillary benefits, even though they are a required provision of every pension plan under both ERISA and the Code. 29 U.S.C. § 1055(a); *see also* I.R.C. § 401(a)(11). Second, treating all post-retirement death benefits as ancillary benefits that can be eliminated is inconsistent with Section 411(a)-7(a) of the Treasury Regulations, which provides that only benefits "not directly related to retirement benefits" fall outside the scope of accrued benefits. Treas. Reg. § 1.411(a)-7(a). Third, treating all post-retirement death benefits as ancillary benefits that are freely terminable is inconsistent with the basic purpose of a pension plan: "to provide for the livelihood of the employees **or their beneficiaries** after the retirement of such employees through the payment of benefits determined without regard to profits." Treas. Reg. § 1.401-1(a)(2)(i) (emphasis supplied).

Moreover, plaintiffs submitted evidence that Pensioner Death Benefits were a retirement-type subsidy, since they provide a contingent benefit over and above the normal retirement amount. (JA00438; Schultz Decl. ¶ 4). This meets the definition of a retirement-type subsidy previously adopted by this Court. *See Bellas,* 221 F.3d at 525.

III. PENSIONER DEATH BENEFITS WERE PROTECTED UNDER THE BENEFITS AGREEMENT.

When Lucent was spun-off from AT&T, the two companies entered into the Benefits Agreement. (JA00086; Cons. Am. Compl. ¶ 70; JA00195; Pls.' St. ¶ 66). In the Benefits Agreement, Lucent agreed to "pay, perform, fulfill and discharge" the following liabilities of AT&T: "all Liabilities to or relating to Lucent Individuals and Transferred Individuals and their respective dependents and beneficiaries, in each case relating to, arising out of or resulting from employment by AT&T or an AT&T Entity before becoming Lucent Individuals or Transferred Individuals . . . ." (JA01200; Pls.' Ex. 10 at D008901; *see also* JA00086; Cons. Am. Compl. ¶ 70). The term "liabilities" was separately defined in the Separation and Distribution Agreement between AT&T and Lucent, and it specifically reached contingent obligations. (JA01165-66; Pls.' Ex. 9, § 1.62).

Although it agreed to "pay, perform, fulfill and discharge" AT&T's obligations to the Foss Plaintiffs, Lucent chose not to do so. Defendants offer several arguments why it should not be required to meet its obligations, which we address below.

Initially, defendants posit that the Benefits Agreement is not a plan document. This, of course, is directly contrary to what they said when they served their disclosures, listing the Benefits Agreement first under the heading "Plan Documents." (JA02044; Pls.' Ex. 37 at 5). It is also inconsistent with the structure of Lucent's own plan documents, as the Foss Plaintiffs demonstrated in their opening brief. (Foss Br. at 53) (noting incorporation of Benefits Agreement into plan documents).

Defendants assert that the Benefits Agreement precludes third party beneficiaries from enforcing its terms, based upon a provision headed "Non-Termination of Employment; No Third-Party Beneficiaries." (*See* JA01207; Pls.' Ex. 10 at D008938). This contention is barred by the plain language of the Separation and Distribution Agreement between AT&T and Lucent: "**The article, section and paragraph headings** contained in this Agreement and in the Ancillary Agreements are for reference purposes only and **shall not affect in any way the meaning or interpretation of this Agreement or any Ancillary Agreement**." (JA01187; Pls.' Ex. 9, § 12.10) (emphasis supplied). Nor is there room for any dispute that the Benefits Agreement was an Ancillary Agreement: "Ancillary Agreements means . . . the Employee Benefits Agreement . . . ." (JA01159; Pls.' Ex. 9, § 1.6).

The text of the provision defendants invoke offers them no greater assistance, as it simply says that no provision in the Benefits Agreement "shall be construed to **create** any right, or **accelerate** entitlement, to any compensation or benefit." (JA01207; Pls.' Ex. 10 at D008938) (emphasis

supplied). The Foss Plaintiffs do not seek to use the Benefits Agreement to create a new right or accelerate their entitlement to a benefit. Instead, they seek to enforce the promise that Pensioner Death Benefits "shall be paid" if they are survived by a Mandatory Beneficiary, a liability that Lucent agreed to "pay, perform, fulfill and discharge." (JA01200; Pls.' Ex. 10 at D008901).

The Benefits Agreement did authorize Lucent to amend benefits plans, but that right was limited; Lucent could amend plans "except as expressly provided in this Agreement." (JA01207; Pls.' Ex. 10 at D008938). This qualification is dispositive: the Benefits Agreement expressly provided that Lucent would "pay, perform, fulfill and discharge" (JA01200; Pls.' Ex. 10 at D008901) all of AT&T's liabilities to the Foss Plaintiffs; therefore Lucent was precluded by the Benefits Agreement from amending its plan to eliminate the Pensioner Death Benefits. Consequently, the Foss Plaintiffs can enforce their right to Pensioner Death Benefits under the Benefits Agreement. *Hozier,* 908 F.2d at 1161 n.6 (where plan document restricts a sponsor's right to amend, participant may enforce the restriction).

CONCLUSION

Based upon the arguments and authorities set forth above and in their opening brief, the Foss Plaintiffs respectfully request that the district court's order dismissing these actions be reversed and that these actions be remanded for further proceedings.

Dated: July 9, 2007

Respectfully submitted,

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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 6986 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 Book Antiqua.

Dated: July 9, 2007

/s/ James R. Malone, Jr.
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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

1. I hereby certify that the text of the electronic PDF version of the foregoing Reply Brief of Plaintiffs-Appellants 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 further certify that a virus check of the electronic PDF version of the reply brief was performed using Norton Antivirus Software, and the PDF file was found to be virus free.

/s/ James R. Malone, Jr.
James R. Malone, Jr.

CERTIFICATE OF SERVICE

I, James R. Malone, Jr., hereby certify that on this 9th day of July, 2007, ten copies of the foregoing Reply Brief of Plaintiffs-Appellants Edward Foss, Sarah Conder, Arthur J. Berendt, and Robert Howard were sent by UPS overnight delivery to the Clerk of the Third Circuit Court of Appeals and two copies of the foregoing Reply Brief of Plaintiffs-Appellants Edward Foss, Sarah Conder, Arthur J. Berendt, and Robert Howard were served by UPS overnight delivery on:

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