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ERISA Litigation Practice Group: Trilogy of Recent Victories in Class Actions Regarding the Elimination of Retiree Death Benefits

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The EpsteinBeckerGreen ERISA Litigation Practice Group scored a major victory on July 17, 2009 for our client, Qwest Communications, Inc., when the U.S. Court of Appeals for the Tenth Circuit affirmed summary judgment in Qwest's favor in a putative class action challenge to Qwest's decision to prospectively eliminate the death benefit paid to the survivors of employees who retired after December 31, 2003. The case, *Kerber v. Qwest Pension Plan*, __ F.3d __, 2009 WL 2096221 (10th Cir. July 17, 2009), completes a trilogy of cases about retiree death benefits successfully litigated by EBG in the trial and appellate courts.

The three cases in this trilogy arise out of common antecedent: AT&T's nearly century-old, pioneering pension plan. Many years ago, AT&T created within its pension plan a provision to pay death benefits to the survivors of its active employees and retirees. In the 1960s, the plan raised the pay out on the retiree death benefit to the equivalent of the retiree's last year's pay. When AT&T divested itself of local telephone service providers in 1984 and spun off other business units in 1996, the companies it created, among which are the companies now known as Qwest Communications International, Inc. (a successor to US WEST) and Alcatel-Lucent (USA) Inc. (a successor to Lucent Technologies Inc.), inherited the generous benefit structure of AT&T's pension plan.

This trilogy starts with *In re Lucent Death Benefits ERISA Litig.*, 541 F.3d 250 (3d Cir. 2008), decided in August of 2008. In this case, in early 2003, Lucent Technologies eliminated a death benefit paid to the survivors of retirees who had been Lucent and AT&T employees. Several of the former employees objected to the elimination of this death benefit and filed three putative class actions against various defendants. The former employees claimed, among other things, that the defendants violated ERISA's

anti-cutback rule – which protects against reduction of accrued pension benefits – in terminating the death benefits. After limited discovery, the defendants moved to dismiss and for summary judgment against the class actions. The U.S. Court of Appeals for the Third Circuit agreed with the defendants, upholding the judgment entered in Lucent's favor by the U.S. District Court for the District of New Jersey. The Third Circuit agreed with the District Court that the death benefit underlying the lawsuit was not an accrued pension benefit, holding, rather, that it was "an unvested welfare benefit that Lucent could terminate without violating [the anti-cutback provisions of] ERISA or unilateral contract principles."

The second case in the trilogy is *Chastain v. AT&T Corp*., 558 F.3d 1177 (10th Cir. 2009), decided in March of 2009. In this case, former employees of AT&T, who retired as participants in AT&T's benefit plans but subsequently were transferred to Lucent benefit plans when AT&T spun off Lucent in 1996, filed a class action suit seeking to hold AT&T liable after Lucent eliminated the retiree death benefit (the same decision challenged in the *Lucent* case) and made certain reductions in medical and dental benefits. The District Court ruled in favor of AT&T both on the merits (concluding that the benefits were not vested and could be changed) and on the procedural issue of standing. Under ERISA, only "participants" or "beneficiaries" of an employee benefit plan have standing to sue to recover his or her benefits, enforce his or her rights or to clarify rights to future benefits under the plan. The U.S. Court of Appeals for the Tenth Circuit affirmed on the standing issue, holding that since the plaintiffs were no longer participants or beneficiaries of any AT&T employee benefit plan, they did not have standing under ERISA to sue AT&T directly for benefits that Lucent changed or eliminated after the participants transferred to Lucent benefit and pension plans.

In *Kerber*, the third and most recent case, Qwest prospectively eliminated its retiree death benefit, which was funded from its pension plan. Several retirees challenged the change, arguing that the death benefit constituted an accrued pension benefit that could not be reduced due to ERISA's anti-cutback rule. As described above, EpsteinBeckerGreen successfully defended Lucent against a similar challenge in *In re Lucent Death Benefits ERISA Litigation*. The Qwest case added an additional wrinkle – that the pension plan had permitted retirees to take lump sum distributions of their pensions at retirement, to which Qwest added to each a lump sum payment to reflect an actuarially reduced death benefit. This extra payment, called the "DLS Equivalent," became the focus of the appeal.

The Tenth Circuit endorsed the Third Circuit's holding in the *Lucent Death Benefits* case and concluded that the unique features of the DLS Equivalent did not alter the result. Neither the DLS Equivalent nor Qwest's retiree death benefit met the statutory definition of "accrued benefit" and, therefore, both were considered nonvested employee welfare benefits that could be changed or eliminated by the plan sponsor (Qwest).

This trilogy of cases develop and advance the understanding of the difference between accrued pension benefits and welfare benefits. *Lucent* and *Kerber*, in particular, delineate important distinctions between benefits that truly accrue (that is, grow over time) and those that simply pay out in conventional welfare benefit style. *Chastain* additionally provides guidance on where responsibility for employee benefit decisions lies between divesting companies and their spin-offs in the post-spinoff world. EBG is pleased to make these contributions to the development of this body of law in the successful defense of its clients.

John Houston Pope was the lead EBG lawyer on these three cases.

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