

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **07-cv-00644-WDM-KLM**

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
MARTHA A. LENSINK,
SAMUEL G. STRIZICH,
Individually, and as Representative of plan participants
and plan beneficiaries of the QWEST GROUP LIFE INSURANCE PLAN,

Plaintiffs,

vs.

QWEST GROUP LIFE INSURANCE PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

**PLAINTIFFS' REPLY BRIEF FOR
MOTION TO ALTER OR AMEND JUDGMENT**

Plaintiffs, by and through their counsel, submit their reply brief in support of their motion to alter or amend the August 27, 2009 dated Amended Judgment (Docket 161) which incorporates this Court's August 25, 2009 dated order granting summary judgment on Claim II, the breach of ERISA fiduciary duty claim.

- 1. The Court's August 25, 2009 Decision Treated Third Circuit ERISA Breach of Fiduciary Duty Rulings As Controlling Law Followed in this District Court. To Remain Consistent, The Court Should Follow the Third Circuit's Recent Decision in *Unisys*.**

Defendants seeks to place some distance between this Court's August 25, 2009 decision and the Third Circuit's recent decision in the case of *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 579 F. 3d 220 (3rd Cir. 2009), (See Docket 162-2).

Defendants argue, *inter alia*, that the *Unisys* decision is unwise because it is an “extraordinary expansion of fiduciary duty,” and that the Tenth Circuit would not follow the Third Circuit’s decision. (Docket 163 at p. 5).

The Third Circuit held in *Unisys* that the company’s failure to disclose at the time plaintiffs retired its ability to modify or wholly eliminate the plaintiffs’ medical benefits at any point in the future resulted in an inadequate disclosure of information. *Id.*, 579 F.3d at 231. In so holding, the Third Circuit expanded upon *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir.1993) and other Third Circuit cases on the failure to disclose material facts that the participant needs to know for his or her own protection. The *Bixler* case decision is followed in the Tenth Circuit’s unpublished opinion of *Horn v. Cendant Operations, Inc.*, 69 Fed. Appx. 421 (10th Cir. July 3, 2003) (holding that the company speaking through its human resources employees acted as a fiduciary and failed to disclose the ‘actively at work’ eligibility requirement of the plan and the plaintiff cannot be bound by policy terms for which she had no notice).¹

Here, the Plaintiffs pursuing the Second Claim for Relief had no notice of the exact policy terms set forth in the SPD, as that most important document was not distributed to them. Therefore, Defendants reliance on *Averhart v. U S WEST Management Pension Plan*, 46 F.3d 1480 (10th Cir. 1994) is misplaced. Moreover, *Averhart* is inapposite. Therein, the plaintiffs asserted a claim of promissory estoppel

¹ Although the Tenth Circuit does not allow citation to unpublished opinions for precedential value, unpublished opinions may be cited for persuasive value. 10th Cir. R. 32.1.

and contended that representations made to them by company human resources managers served to modify the terms of the plan. The Tenth Circuit ruled such a claim was preempted by ERISA. The appellate court did not address a claim of breach of fiduciary duty, as no such claim was asserted in *Averhart*.

Plaintiffs are not contending the plan terms were modified by oral statements. Instead, they contend the plan terms were inadequately disclosed and the explanation given to them about the ROR contained a material omission or it was an interpretation of the ROR made purposely to allay any fears or concerns harbored by those persons contemplating acceptance of the early retirement offering.

When the Plaintiffs pursuing Claim II were making their retirement decisions they were given a mere 2 page brochure description of the insurance plans. That brochure began with the following statement:

You will be eligible for the plans described below upon your retirement. While the plans listed below are the plans currently provided to eligible employees upon retirement, the Company reserves the right to amend or terminate any or all provisions in the future for any reason.

(Docket No. 107-30 at 24). That entire statement should be read in the context of being provided to persons then contemplating retirement. The statement is easily understood by a reasonable worker contemplating retirement to mean that, on the one hand, the insurance plan benefits described in the brochure are what he or she can count on receiving during retirement if he or she were to then take early retirement, but, on the other hand, the company may choose to provide persons who retiree in the future with insurance plans that have better or worse terms than the plans being provided to current retirees. U S WEST played on that very reasonable understanding by broadcasting

throughout the company's many work locations the Video Conference explanation given by the Director of Human Resources who emphasized the ROR provision set forth in the brochure was "*really intended to make the plans more meaningful and more affordable not only for the employee but for the company.*" (Docket 159, Order at p. 4).

Here, the undisputed facts are that when U S WEST gave specific guidance to employees contemplating early retirement the company, just like Unisys, made a material omission. The company neither disclosed there was any right to *reduce* benefits after the accepting retirees reached age 70 nor did the company fully disclosed the ROR provision exactly as it was set forth in the SPD.

It is true, as Defendants argue, that the Tenth Circuit has ruled that plan language typically controls. See *Alexander v. Anheuser-Bush Cos., Inc.*, 990 F.2 536, 539 (10th Cir. 1993). But, here the company failed to make the life insurance plan or SPD available to Plaintiffs Kerber and Phelps and others at the time they were making their retirement benefits elections. The company therefore failed to provide material information. Instead of providing and informing the workers of the SPD, the company provided them only with a brochure that said basic benefits would not be reduced after age 70.²

In the summary judgment order dismissing Claim II, this Court stated that

² The brochure explained the basic life insurance coverage as follows: "When you retire on a service or disability pension, your Basic coverage (but not Accidental Death and Dismemberment) continues at no cost to you. The amount of coverage is based on one times your pay immediately prior to retirement (rounded up to the next \$1,000). However, your coverage will be reduced by 10% beginning on your 66th birthday and each year thereafter up to a maximum reduction of 50% at age 70." (Docket No. 107-30 at 25.)

“[a]lthough the Tenth Circuit has not articulated a test for analyzing a breach of fiduciary duty claim for misrepresentation, the Third Circuit adheres to a clear test that has been used in this district,” and the Court proceeded to treat Third Circuit decisions as controlling law and cited a substantial number of that appellate court’s ERISA rulings pertaining to an ERISA claim of breach of fiduciary duty. (Docket 159, Order at p. 11). To remain consistent, the Court should follow the Third Circuit’s decision in *Unisys* which explains that

a breach of fiduciary duty claim may be premised on either a misrepresentation or an omission. To establish such a breach, a plaintiff must demonstrate that: (1) the defendant was “acting in a fiduciary capacity”; (2) the defendant made “affirmative misrepresentations or failed to adequately inform plan participants and beneficiaries”; (3) the misrepresentation or inadequate disclosure was material; and (4) the plaintiff detrimentally relied on the misrepresentation or inadequate disclosure.

Unisys, 579 F.3d at 228. Very similar to the allegations made by the *Unisys* retirees, Plaintiffs have alleged the company either negligently or recklessly deceived Pre-1991 Retirees and their beneficiaries and they did not truthfully represent and explain the risk that their basic life insurance benefits might be reduced pursuant to an ROR. (See Docket 69, Second Amended Complaint at ¶ 87; See also Docket 149, Final Pretrial Order, pp. 13-18 (e.g., at p. 15, “Plaintiffs contend that U S WEST’s explanation about the ROR was either intended to fully defuse any worker’s or retiree’s concerns about the ROR or evinces an intent to confuse or deceive on U S WEST’s part, since there was a very positive spin given to the ROR.”).

U S WEST decided to take a short cut and provide its workers contemplating the early retirement offer with only a 2 page brochure describing the insurance plans and

then the company deliberately downplayed the significance of that document's ROR statement during the Video Conference presentation. U S WEST gave a very inadequate explanation, saying nothing about any underlying danger that life insurance benefits could be reduced after age 70. Plaintiffs contend the ROR statement is ambiguous. Plaintiffs respectfully contend the Court did not look at the ROR statement in the 2 page brochure in conjunction with the Video Conference explanation from the point of view of an ordinary reasonable U S WEST worker contemplating early retirement during 1989-1990. The Court ruled, "I must determine, as a matter of law, whether the reservation of rights clauses were ambiguous." (Docket 159, Order at p 14). But that ruling falls short of the Tenth Circuit's specific guidance.

Just a few weeks ago on September 30, 2009, the Tenth Circuit issued an ERISA case ruling reiterating that "[i]n order to determine whether a plan is ambiguous, we consider the common and ordinary meaning as a reasonable person in the position of the plan participant, not the actual participant, would have understood the words to mean." *Salisbury v. Hartford Life and Acc. Co.*, -- F.3d --, 2009 WL 3112411 at *2, Case No. 08-3316 (10th Cir. September 30, 2009) (quoting *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1250 (10th Cir. 2007)). Applying the Tenth Circuit's principle, the Court should have agreed with Plaintiffs that no reasonable plan participant during 1989-1990 would have understood the ROR statement, as officially explained by U S WEST, as giving the company the right to reduce benefits after age 70.

The Tenth Circuit will agree with the Third Circuit's reiteration in *Unisys* that "an employer acts as a fiduciary when explaining plan benefits and business decisions about plan benefits to its employees." *Unisys*, 579 F.3d at 230. Furthermore, the Tenth

Circuit's decision in *Horn* is persuasive proof that the appellate court would agree with the principle established in *Unisys* and, therefore, the explanation U S WEST chose to give Pre-1991 Retirees about the ROR should be deemed to be a misrepresentation or omission.

2. Rule 59(e) Contemplates a Judgment Should Be Altered or Amended When the Court Has Misapprehended and Misapplied Undisputed Material Facts as Done in This Case.

Plaintiffs are mindful that Fed.R.Civ.Proc. Rule 59(e) is not designed to give litigants a second bite at the apple. However, Plaintiffs respectfully wish to point out the Court's misapplication of the undisputed material facts. U S WEST did not provide Plaintiffs Kerber and Phelps and other Pre-1991 Retirees a copy of the SPD. The Court has incorrectly given the 2 page insurance brochure-description the same legal force and effect as ERISA gives a SPD. The SPD was material information that should have been disclosed. U S WEST specifically chose to guide workers making early retirement decisions with a message clearly diffusing any worries about the ROR. The Tenth Circuit has stated that "[t]he duty to disclose material information is the core of a fiduciary's responsibility. *Horn*, 69 Fed. Appx. At 427-28 (quoting *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Secs., Inc.*, 93 F.3d 1171, 1182 (3rd Cir. 1996). ERISA was enacted, in part, to ensure that employees receive sufficient information about their rights under employee benefit plans to make well-informed decisions. *Horn*, 69 Fed. Appx. at 428 (quoting *Hart v. Bethlehem Steel Corp.*, 214 F.3d 446, 452 (3rd Cir. 2000). Since U S WEST downplayed and inadequately disclosed the ROR, Plaintiffs and their co-workers had no reason to be concerned about basic life insurance benefits being reduced after age 70.

While the undisclosed 1987 dated SPD stated the company “necessarily reserves the right to amend, modify, or discontinue the Plan in the future” it does not clearly state the right to *reduce* benefits for persons in retirement pay status after age 70. When even that SPD’s ROR language is viewed in conjunction with the contemporaneous explanation U S WEST chose to give about the brochure’s description of the ROR, a reasonable Pre-1991 Retiree plan participant would be led to believe the company would only make future changes to affect future retirees which changes would “make the plans more meaningful and affordable not only for the employee but for the company.” Indeed, since that was U S WEST’s official position about the ROR it was only reasonable for Plaintiffs Kerber and Phelps and other Pre-1991 Retirees to develop no concern about the ROR and not plan for potential detrimental changes. The undisputed facts are that the inadequate information was relied upon to Plaintiff Kerber’s detriment and Plaintiff Phelps’s detriment.

Since this District Court follows Third Circuit law on ERISA breach of fiduciary duty, the Court’s re-examination of the undisputed facts in light of the *Unisys* decision will lead to a correction of clear error and prevent manifest injustice. Also, as discussed above, the Tenth Circuit’s intervening September 30, 2009 ruling in *Salisbury* about how a district court should determine whether employee benefit plan terms are ambiguous warrants application of Rule 59(e) to this case. When the Court ruled the ROR provision was unambiguous the Court misapplied controlling law and did not examine the language from the point of view of a reasonable U S WEST worker contemplating early retirement during 1989-1990.

WHEREFORE, for the reasons set forth in their opening brief and hereinabove

Plaintiffs respectfully move that this Court grant Plaintiffs' motion to alter or amend the August 27, 2009 Amended Judgment.

Dated: October 13, 2009

s/ Curtis L. Kennedy
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2009, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendants' counsel as follows:

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