

COPY OF TRANSCRIPT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: LUCENT DEATH BENEFITS ERISA LITIGATION

v.

EDWARD FOSS; SARAH CONDER; ARTHUR J. BERENDT;
ROBERT B. HOWARD,
Appellants No. 06-5008

IN RE: LUCENT DEATH BENEFITS ERISA LITIGATION

v.

HELEN P. LUCAS, as surviving spouse of Vincent R.
Lucas,
Appellant No. 06-5009

Transcript from the audio recording of
the oral argument held Wednesday, April 16, 2008,
at the United States Courthouse, 601 Market Street,
Philadelphia, Pennsylvania. This transcript was
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United States District Court.

BEFORE:

THE HONORABLE THOMAS L. AMBRO
THE HONORABLE D. MICHAEL FISHER
THE HONORABLE PAUL R. MICHEL



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1 THE COURT: Next case is numbers
2 06-5008 and 5009, In Re: Lucent Death Benefits
3 ERISA Litigation. And we have Mr. Malone,
4 Ms. Quesada and Mr. Pope.

5 MR. MALONE: Good morning, your Honor,
6 may it please the Court --

7 THE COURT: Hang on. Let's let
8 everybody get together. Just hold on for one sec.

9 Oh, you set a record for the quickness
10 I've ever seen.

11 MR. MALONE: Hopefully we can get out
12 of here just as quickly when our time is up and the
13 next case is called.

14 May it please the Court, my name is
15 James Malone and I speak on behalf of the Foss
16 plaintiffs.

17 Ms. Quesada and I have a request we
18 would like the Court's indulgence on. We would
19 request that we be permitted to divide our rebuttal
20 time so that I would take two minutes and she would
21 take two minutes.

22 THE COURT: That's fine.

23 MR. MALONE: Thank you very much, your
24 Honor.

1 The district court erred in dismissing
2 this action because the allegations that the
3 plaintiffs made and the supporting documents that
4 they submitted demonstrated that the pensioner
5 death benefit at issue here was designed and
6 treated as a defined pension benefit for nearly 40
7 years.

8 It provided retirement income. It was
9 described in the plan language in mandatory
10 language. The plan said, "It shall be paid."

11 The summary plan descriptions issued
12 by AT&T said it will be paid.

13 THE COURT: Now, the plan language
14 said that the plan administrator may grant a
15 pensioner death benefit in its discretion.

16 Now, it did, but it sounds like in its
17 discretion means it also could take it away
18 provided that the person had not, I guess had died.

19 Is that --

20 MR. MALONE: I don't think,
21 respectfully, your Honor, that that's a fair
22 reading of the plan language. This plan had two
23 different kinds of death benefits. There were
24 discretionary beneficiaries, who are not in this

1 case, and there were mandatory beneficiaries.

2 So first it says in its discretion.
3 But then the language continues and it indicates in
4 substance that if there is a mandatory beneficiary
5 or a beneficiary having the following relationship,
6 then the benefit shall be paid as follows. And
7 that's the benefits that we have at issue here.

8 And it's interesting how that fits
9 within the structure of the plan, because when the
10 benefits were discretionary, they paid them wholly
11 outside of the pension trust.

12 When they were paid to a mandatory
13 beneficiary, the issue that's before the court,
14 they were paid from the corpus of the trust.

15 THE COURT: Article 10.1 does say
16 that, "The board of directors or its delegate may
17 from time to time make changes in the plan as set
18 forth in this document, or terminate said plan, but
19 such changes shall not affect the rights of any
20 employee to any benefit to which he or she may have
21 previously become entitled hereunder."

22 But to become entitled to a death
23 benefit you have to die, don't you?

24 MR. MALONE: I don't think so, under

1 this plan. That does not appear to be the intent
2 of this plan. And I think one thing I would ask
3 you to think about is this.

4 THE COURT: And the reason for that
5 would be?

6 MR. MALONE: The termination
7 provisions, your Honor. The termination provisions
8 of this plan set forth and indicated that if the
9 plan terminated death benefits would be paid post
10 termination, not just for those who had already
11 died, which would be what you would assume if the
12 entitlement arose upon death. But also for those
13 who were on the pension roll at the time receiving
14 service pensions, and for those who were still
15 employed who were eligible to retire with service
16 pensions.

17 That to me suggests that the
18 entitlement arose not upon death, but at the time
19 that you rendered the service to the employee, as
20 an employee, which then triggered your eligibility
21 for a service pension and for this related
22 benefit.

23 And there's support for this if you
24 look at some of the language that they use to

1 describe the plan.

2 For example, AT&T in its summary plan
3 description, which is Plaintiffs' Exhibit 16, goes
4 through the criteria, and then it talks about
5 former employees. And it says, "Former employees,
6 even if eligible for deferred vested benefits, are
7 not eligible for sickness death benefits."

8 Similarly, Lucent in its summary plan
9 description says, "If you are a former employee you
10 are not eligible," not your beneficiaries, you are
11 not eligible.

12 The 1985 actuarial report prepared by
13 AT&T's --

14 THE COURT: Just refresh me. Where in
15 the plan or the summary of the plan is there clear
16 vesting language?

17 MR. MALONE: I would submit that the
18 best record on the clear vesting language starts
19 with the termination provision. And the fact that
20 it's tied -- this is a benefit that's joined at the
21 hip with the service pension.

22 If you are not service pension
23 eligible you will not get this benefit post
24 retirement. If you are, you will.

1 THE COURT: But what is the exact
2 language that you're relying on? Not your
3 characterization of it, but what do the words
4 actually say?

5 MR. MALONE: The termination
6 provision, your Honor, says that if the plan
7 terminates then benefits will be paid -- let me
8 find the precise language for you. "To make
9 provision for the payment of death benefits
10 attributable to deaths occurring prior to the date
11 of termination -- you would expect that if death is
12 the qualifying event -- which would have been
13 payable from the pension fund, and for the payment
14 upon the deaths of retired employees who are on the
15 pension roll as of the date of termination, and of
16 employees eligible as of that date for retirement
17 of death benefits which would have been payable
18 from the pension fund had the plan not been so
19 terminated."

20 So that if eligibility is tied to
21 death you would not include those two categories of
22 employees, current employees who are eligible to
23 retire, and retirees who are already drawing
24 service pensions, you would just say with respect

1 to deaths that occurred before the date of
2 termination.

3 And it's interesting to see the
4 conduct over time and how they treated this. For
5 example, the AT&T plan --

6 THE COURT: Mr. Malone, let's take a
7 step back a second, because your time is going to
8 be running out. Let's look at the law.

9 MR. MALONE: Sure.

10 THE COURT: And how do you get around
11 the fact that ERISA, I think fairly clearly,
12 defines a benefit in the event of death, among
13 other things, as a welfare benefit? How do you get
14 around that?

15 MR. MALONE: Well, the definition of a
16 pension plan provides some tension with that, your
17 Honor. The definition of a pension plan says that
18 any plan that provides retirement income,
19 regardless of the method of computing benefits, or
20 the method of distribution, is a pension plan. The
21 IRS has put a gloss on that through regulations
22 saying --

23 THE COURT: Okay, let's just take a
24 look.

1 THE COURT: How does that cover you?

2 THE COURT: Yes. It says, "Pension or
3 pension plan means any plan, fund or program which
4 heretofore hereafter establish or maintained by
5 employer and employee organization or by both to
6 the extent that by its express terms, a result of
7 the circumstances, provides retirement income to
8 employees or results in a deferral of income."

9 MR. MALONE: And then the IRS has put
10 a gloss on that through its regulatory authority
11 which covers not just employees but their
12 beneficiaries.

13 And beyond that --

14 THE COURT: What do you mean the IRS
15 put -- what's the IRS say?

16 MR. MALONE: The IRS promulgated a
17 regulation that said, "A plan designed to provide
18 benefits for employees or their beneficiaries to be
19 paid upon retirement or over a period of years
20 after retirement will be considered a pension plan
21 if the employer contributions under the plan can be
22 determined based on definitely determinable
23 benefits."

24 Now, that was a pre-ERISA regulation,

1 it's Treasury Reg. 1-401-1(b)(1)(i). But it was
2 re-promulgated post-ERISA to apply to ERISA plans.
3 Under 1-401(a)-1(b)(ii) [citation corrected].

4 THE COURT: But you got a statute,
5 just back to Judge Fisher's point and then he can
6 pick up with this. You've got definition of
7 welfare benefit plan or welfare plan includes,
8 among other things, benefits in the event of
9 sickness, accident, disability, death.

10 MR. MALONE: Right.

11 THE COURT: Isn't this like a life
12 insurance policy, a lump sum payable on the event
13 of the death of the person involved?

14 MR. MALONE: Let me address that first
15 and then come to that. Understand that the
16 definition of welfare benefit also excludes
17 pensions payable upon death. That's one of the
18 carve-outs that's built into the definition of
19 welfare benefit under ERISA in Section 3(1).

20 And one of the structural features of
21 this statute when it was passed, one of the reforms
22 that Congress sought to enact, was a requirement
23 that every pension plan pay death benefits to
24 spouses in the form of a joint and survivor

1 annuity.

2 THE COURT: Yes, but there seem to be
3 two different kind of death benefits, one is some
4 residual money that otherwise would go to the
5 employee who's now died, and the other is a lump
6 sum like an insurance policy.

7 My understanding was it's only the
8 latter that is disputed in this lawsuit.

9 MR. MALONE: That is correct, your
10 Honor. I'm just trying to address first the point
11 that is every death benefit a welfare benefit. I
12 don't think that that could be sustained under the
13 statute given the structure.

14 THE COURT: Maybe not when you use
15 death benefit as loose terminology. But when we
16 focus on the lump sum payable upon death, that
17 seems to be totally different than deferred
18 compensation or regular periodic retirement
19 payments.

20 MR. MALONE: It's not always paid as a
21 lump sum. It was eligible for distribution in
22 installments. It was accrued on the 5500s that
23 were filed by the plan, in conjunction with the
24 service pensions to which it was joined.

1 It was directly related to the service
2 pension, which under another IRS reg is an
3 indication that it's not a type of ancillary
4 benefit that a sponsor is free to pull out.

5 In fact, when they broke up the Bell
6 system and transferred assets, the actuaries
7 concluded that funding for this death benefit had
8 to be included in the funding for the transfer
9 under that circumstance.

10 THE COURT: We're not bound by what
11 the actuaries thought or what somebody else said.
12 We're bound by what the plan says and what ERISA
13 said.

14 MR. MALONE: I understand that. But,
15 your Honor, if you look at the overall totality of
16 the circumstances, what you have is you have a
17 sophisticated sponsor that knew a welfare plan when
18 they saw it.

19 When they had welfare benefits like
20 disability benefits, they didn't pay them out of
21 the pension trust fund, they didn't put them on the
22 same 5500 as the pension benefits. They created
23 separate plan numbers for them --

24 THE COURT: You're not arguing that

1 somehow they're estopped by treatment along the way
2 from saying now, as they do, that these were
3 welfare benefits not pension benefits by their very
4 nature.

5 MR. MALONE: We don't raise a claim of
6 estoppel, but I think when somebody, when you look
7 at the question of intent and somebody treats
8 something as a pension benefit for 40 years and
9 then to suddenly say oh, no, it's a welfare
10 benefit, at a minimum I would think that that
11 treatment over 40 years would be relevant to the
12 question of an intent to vest the benefits since
13 pension benefits normally vest.

14 THE COURT: Mr. Malone, how can you
15 distinguish this case from the Second Circuit's
16 decision in *Rombach vs. Nestle*?

17 MR. MALONE: *Rombach* involved
18 disability benefits, your Honor. There's no
19 question that disability benefits are a --

20 THE COURT: Well, there was a question
21 in that case.

22 MR. MALONE: Well, that was only
23 because the plaintiff hung his hat on the mere --

24 THE COURT: They treated it as a

1 pension benefit throughout the courts.

2 MR. MALONE: They called it the, they
3 used the buzz word pension.

4 THE COURT: Right.

5 MR. MALONE: And that was really what
6 the --

7 THE COURT: Okay, but the Second
8 Circuit said notwithstanding what they called it,
9 we look at the law.

10 MR. MALONE: That is true. But it was
11 also on a summary judgment, not on a motion to
12 dismiss. It also was involving the type of
13 benefit, for example, that this sponsor clearly
14 recognizes is a welfare benefit because they put it
15 in a welfare benefit plan when they described the
16 benefits in the SPD.

17 They put a 500 label on it instead of
18 an 00 label, as they would for a pension plan, they
19 didn't report disability benefits on their 5500 for
20 the defined benefit plan. So it was -- the
21 disability is such a clear context of a welfare
22 benefit and it's indisputable.

23 Whereas here you have something that
24 was created prior to ERISA, carried forward under

1 ERISA, and which was treated for 40 years by
2 everybody as a defined benefit under this defined
3 benefit pension plan.

4 And the question is did the sponsor
5 have enough freedom to design its plan so that this
6 benefit payable at the time of death, admittedly,
7 out of the corpus of its trust, could be deemed a
8 defined benefit under ERISA. And I think it could.

9 Thank you. You've been patient with
10 me.

11 THE COURT: Thank you.

12 THE COURT: You better pull that mic
13 down more than a tad.

14 MS. QUESADA: I think you're right.

15 THE COURT: Ms. Quesada, let me ask
16 you a procedural question before you get started.

17 MS. QUESADA: Okay.

18 THE COURT: Because I looked at this
19 again this morning. I know there's some dispute
20 whether or not your client should still be in this
21 case and you've asked us to substitute your
22 client. I don't know that we've ruled on the
23 motion to substitute your client.

24 And there's no appeal from the,

1 there's no appeal from the action below where the
2 district court refused to substitute your client.

3 MS. QUESADA: We did appeal. We put
4 it --

5 THE COURT: It's not before us.

6 MS. QUESADA: Yes, it is. It's an
7 issue in our statement --

8 THE COURT: It's an issue in your
9 brief.

10 MS. QUESADA: Right.

11 THE COURT: But, the question, the
12 procedural question I have here is since this case
13 has not yet been certified as a class action, do
14 you have any procedural standing to be here before
15 the fact of certification?

16 I'm not sure it means, other than what
17 you want to say, and I know it's important, but
18 procedurally, I just wonder whether or not your
19 client is here.

20 MS. QUESADA: Well, I think
21 procedurally that if the district court judge had
22 ruled timely on the motion he would have granted it
23 as a matter of routine.

24 So the fact that he says it's moot

1 would seem on some issue, a way of denying a person
2 appeal rights, which would be inappropriate,
3 actually.

4 We did raise this, an issue on appeal,
5 in our appeal. We appealed everything when we
6 filed our notice of appeal. And I think at this
7 point, since the court has already denied the
8 motion to strike the briefs, we're here to argue
9 the merits.

10 And if you affirm, then it remains
11 moot. If you send it back, then the district court
12 can appropriately resolve it.

13 THE COURT: Okay. All right.

14 MS. QUESADA: Let me just jump right
15 into some of the questions that seem to be of
16 interest to the court. And I think the three most
17 important words in this case are the words "defined
18 benefit plan."

19 In the SPDs that were issued in this
20 case they told the participants that this is a
21 defined benefit plan. A defined benefit plan
22 speaks volumes. This is a term of art in this
23 industry. It's called a "DB plan."

24 And a DB plan is the Cadillac of

1 pension plans. It gets the biggest current
2 deductions for a benefit that it pays in the
3 future. And it's subject to 401(a) of the Code,
4 it's subject to Title One of ERISA, which means
5 it's a benefit that has to vest, it has to accrue,
6 it has to meet the minimum funding standards, it
7 has to file a Schedule B, and it has to be
8 actuarially funded and accrued.

9 THE COURT: But part of the question
10 here is has it vested?

11 MS. QUESADA: Yes. Well, it has our
12 position that it has vested --

13 THE COURT: Before termination.

14 MS. QUESADA: -- because if they
15 called it a DB plan, that alone raises an
16 allegation sufficient to not dismiss this case
17 because they called it a DB plan, which has to, by
18 law, vest. And then they put it on the Form 5500
19 in the Schedule B.

20 THE COURT: Educate me here because it
21 has to vest at a particular time. Doesn't it -- I
22 guess maybe the question is when it vests. But
23 they're saying that it doesn't vest until such time
24 as the person dies.

1 MS. QUESADA: Well, that, that's a
2 misreading of even DB plans. Because you could say
3 oh, someone doesn't get their defined benefit
4 service pension until they retire. You could add
5 that same contingency to anything. That's the
6 triggering event for payment. It doesn't tell you
7 whether the benefit, if it's vestable or not. What
8 tells you whether the benefit is vestable or not is
9 the status of the benefit.

10 THE COURT: Isn't part of the point
11 here something that Judge Fisher asked your
12 co-counsel, which is, is this a welfare plan or a
13 pension plan?

14 MS. QUESADA: Well, the thing is --

15 THE COURT: Or benefit I should say.

16 MS. QUESADA: The interesting thing is
17 that determination is not made today. That
18 determination was made 40 years ago. Because
19 employee benefit plans are -- one side is ERISA,
20 the other side is the tax code. And this court has
21 said the actual and intended tax treatment guides
22 in the determination of the plan.

23 Now, if this is a defined benefit plan
24 it had to satisfy minimum funding, it had to file a

1 Schedule B, and it had to select what it was. Was
2 it pension? Was it welfare?

3 Just like you and me, if we're filing
4 a tax return, we have to know if we're filing
5 jointly, we're a corporation, we're a partnership.
6 They had to know that and they had to know it back
7 then.

8 And all the evidence in this case
9 shows that they were treating it as a defined
10 benefit plan to maximize their defined benefit
11 deduction.

12 THE COURT: By treating it as a
13 defined benefit plan, does that mean that they
14 treated this death benefit as a pension --

15 MR. QUESADA: Yes.

16 THE COURT: -- as opposed to a welfare
17 benefit?

18 MS. QUESADA: Absolutely. And the
19 fact that it's on --

20 THE COURT: Because?

21 MS. QUESADA: Because it's on --
22 because if it's a defined benefit plan by
23 definition it's a pension benefit. But even more
24 than a pension benefit, it's the Cadillac of

1 pension benefits. It has to file a Schedule B,
2 which shows how it's actuarially funded and
3 accrued.

4 And if you look, and we argued that
5 and we showed it in the papers, the Schedule B here
6 has tables showing how the accrual rates for the
7 service pension and the death benefit are together.

8 THE COURT: I'm having trouble
9 following your logic. You seem to be saying that,
10 or implying that a defined pension benefit plan can
11 never have ancillary welfare benefits as well, that
12 it's always excluded, categorically excluded.

13 MS. QUESADA: No. No. I am not
14 saying that. What I am saying --

15 THE COURT: If you're not saying that,
16 then the question becomes, well, why doesn't this
17 plan contain both types of things?

18 MS. QUESADA: It does. In fact they
19 divided it up into three different plans but they
20 put the death benefit payable from pension trust,
21 the service pension, and the deferred vested
22 benefits were all put in the pension plan which was
23 plan 006 and plan 001.

24 They put them all together and then

1 they put those benefits on the 5500. They
2 protected those benefits in the pension plan
3 termination provisions. They even said that this
4 death benefit could be used for rollover and lump
5 sum treatment.

6 Can you imagine AT&T telling all these
7 people that they could have rollover treatment and
8 lump sum benefits from a welfare plan? Welfare
9 benefit plans are not on the Schedule B.

10 The point of the matter is that death
11 is a triggering event for payment under pensions
12 and retirements. So you can't just look at the
13 triggering event to say what the character of the
14 benefit is.

15 This court has said in In Re: IT
16 Group, Inc., that you have to look at the intended
17 and actual tax treatment. And if you study this
18 plan you will see that in every single plan
19 document they are showing that this is a defined
20 benefit plan and that it's ratably accrued. They
21 say it in the SPDs, they show it in the 5500s.
22 What's a welfare benefit doing on a Schedule B?
23 That it should not be on. It should not be given
24 protection before a deferred vested benefit in the

1 pension plan termination provision.

2 THE COURT: Why don't we hear from
3 Mr. Pope and then we'll get you both back on
4 rebuttal.

5 MS. QUESADA: Okay.

6 THE COURT: And then we'll go from
7 there.

8 MR. POPE: May it please the Court, my
9 name is John Houston Pope. I represent all of the
10 appellees.

11 THE COURT: Maybe you can start with
12 the, where Ms. Quesada left off, which is she's
13 saying that this is a defined benefit plan and
14 therefore it must be a pension benefit that's
15 involved here, even if the statute talks about
16 death benefits seemingly, or on a space being under
17 a welfare, being a welfare benefit.

18 MR. POPE: Before even ERISA, your
19 Honor, it was understood that ancillary benefits
20 can be funded out of a pension trust, and that is
21 exactly what has happened here.

22 If you look at the plan itself, it
23 tells you this is a death benefit plan within the
24 pension plan, and that is a separate welfare plan.

1 It has three components to it. It has a sickness
2 death benefit, it has an accident death benefit, it
3 has a pensioner death benefit.

4 The pensioner death benefit is nothing
5 more or less, your Honor, than the sickness death
6 benefit, which there's been no contention that's a
7 pension benefit, nor could there be. It is nothing
8 more than that. Sickness death benefit continued
9 into retirement.

10 As this court said in the Unisys
11 Retiree Medical Benefit Litigation, if all you're
12 taking is a welfare benefit during employment and
13 continuing it into retirement, that doesn't turn it
14 into a pension benefit, that doesn't change its
15 character. It continues to be a welfare benefit.

16 And that is what you have here, a
17 welfare benefit that started in employment and
18 continues into retirement.

19 If it was as you said --

20 THE COURT: How did it start in
21 employment?

22 MR. POPE: It starts in employment as
23 the sickness death benefit, and that is a death
24 benefit that is paid to the survivors of active

1 employees who die during their employment from a
2 sickness-related cause as opposed to an accidental
3 cause.

4 THE COURT: Seems to me that that's a
5 different benefit than a death benefit. A sickness
6 death benefit would be a death benefit that would
7 be paid upon death but it was recognized that the
8 sickness was during employment. There's no
9 sickness here.

10 MR. POPE: It's not -- actually this
11 is, it says in the plan itself, Judge Fisher, that
12 this is the sickness death benefit paid to the
13 survivors of retirees. That's the actual wording
14 of it, of the plan, that the total amount shall not
15 exceed the maximum amount which would have been
16 paid as a sickness death benefit under the terms of
17 Section 5.3 if the pensioner had died on his or her
18 last day of active service before retirement on
19 pension.

20 It's essentially saying we will have a
21 death benefit in retirement that will be the same
22 as a sickness death benefit was before retirement.

23 THE COURT: Okay.

24 THE COURT: What about the tax

1 treatment argument?

2 MR. POPE: The tax treatment argument
3 is an enormous red herring in this case, for a
4 couple reasons. One is it wasn't properly raised
5 below, and for that reason we don't have a proper
6 record on that particular issue.

7 It goes to whether or not the plan
8 would continue to be qualified under the tax code
9 if they had erroneously tax treated this. And that
10 issue wasn't raised below. If it would have, there
11 would have been evidence introduced that the IRS
12 and that the Department of Labor passed on this
13 particular change and found no threat to
14 qualification. That evidence wasn't put in because
15 this argument wasn't raised below.

16 So I think in that respect it should
17 be excluded from your consideration.

18 If you do decide to consider it, the
19 tax treatment doesn't tell you anything more or
20 less than what was being filled out on the tax
21 form. It doesn't change the legal determination
22 that you must make, which is what is the character
23 of this benefit and how does that fit into the
24 code?

1 And we noted for you, for instance,
2 cases from the Seventh Circuit and from other
3 circuits, the fact that you might end up with a tax
4 treatment that looks one way or the other doesn't
5 answer your legal determination for you.

6 This is -- I don't think it even gets
7 to what Ms. Quesada wants to make it out to be,
8 because you have to account for how you deal with
9 the corpus of the trust to the tax authorities
10 regardless.

11 And the tax authorities allow you to
12 use a portion of that for an ancillary benefit.

13 THE COURT: So you say the tax
14 treatment is irrelevant.

15 MR. POPE: It's irrelevant to the
16 determination that you have to make, your Honor.

17 THE COURT: And what drives our
18 determination, as you understand the law?

19 MR. POPE: You have to look at the
20 description of the benefit in the plan documents.
21 The plan documents being the SPD and the plan
22 itself, what is the nature and character of that
23 benefit. Is it the nature and character of that of
24 a welfare benefit or of a pension benefit?

1 THE COURT: And what does that turn
2 on, the fact that it's lump sum?

3 MR. POPE: I believe the fact that
4 it's a lump sum benefit that is paid in the event
5 of death. And that characterizes it as welfare.

6 It doesn't fit any of the definitions
7 of what a pension benefit is. This doesn't defer
8 income. This doesn't pay retirement income.

9 I think it's a bit of sophistry to
10 talk about the fact that there's an administrative
11 convenience in this plan to allow it to be paid out
12 over, up to five years, to call that somehow, it
13 looks like a retirement income.

14 That's nothing more than allowing the
15 benefit to the beneficiaries who would have
16 collected it to get the most favorable tax
17 treatment that they could in accepting the payout
18 of this, because they may have already gotten other
19 large income receipts in the first year or two of
20 death from the estate, and may wish to spread the
21 money out rather than have it all impact in the
22 highest marginal tax rates.

23 THE COURT: Since it's a year of
24 salary, why wouldn't it be a deferral of income?

1 MR. POPE: Because it's not a -- that
2 is just a measure of the amount, Judge Fisher.
3 It's not actually deferring a year of salary from
4 somewhere out in the 30 years of, or 29 or however
5 many years someone works for the company. That's
6 just a measure that was put out there actually in
7 1964 as a convenience for how much would be paid.
8 It's nothing more than that.

9 And it says, it's the greater of \$500
10 or a year of salary. I submit to you in 1964 there
11 were more than a few people who came out better
12 than \$500.

13 In 19 -- people who retired in 1985,
14 such as plaintiffs, came out better in the one year
15 of salary.

16 THE COURT: Are there any cases in
17 which a defined benefit plan had within it, as you
18 say this one does, a separate section for
19 distinctly different type of benefit that fits the
20 definition of a welfare benefit?

21 MR. POPE: I think both *Rombach* and
22 *Robinson* in the Second Circuit, when they have a
23 distinctly different benefit, which is the
24 disability pension, what they call the disability

1 pension, is within the pension plan itself being
2 funded out of trust monies and it is even described
3 erroneously within it as being a pension benefit.
4 And the courts agreed you have to make the legal
5 determination to find that it's a welfare benefit.

6 THE COURT: On the vesting issue, why
7 isn't this case controlled by *New Valley*?

8 MR. POPE: Well, *New Valley* doesn't
9 provide for you the rules on how to interpret an
10 ERISA plan, your Honor, an ERISA plan that's within
11 the regular standards.

12 It is a top hat one. And this court
13 has said that top hat plans are interpreted by
14 different rules. We look to more of an integration
15 and a closed area within standard ERISA plans.
16 This "shall be paid" language that goes on, that is
17 the touchstone that the plaintiffs want to go with,
18 has to be read within the entire plan as a whole,
19 which includes the reservation of rights clause.
20 It even has to be read within its own context,
21 which I think doesn't tell you that it "shall be
22 paid" in all instances. It tells you it "shall be
23 paid" in accordance with the following.

24 Grammatically it's telling you that

1 when the benefit is paid you have to follow one of
2 these two rules.

3 So I would go again up to what we
4 pointed out to you, which is in the first clause of
5 the pensioner death benefit section which says the
6 committee may, in its discretion, authorize a death
7 benefit.

8 The "shall be paid" doesn't tell you
9 anything more than it's going to be paid in accordance
10 with the rule if it's going to be paid it has to be
11 one of these two rules depending on when you
12 retire.

13 THE COURT: Mr. Malone made the point
14 that his clients are what he would refer to as
15 mandatory beneficiaries. Do you accept that
16 distinction?

17 MR. POPE: His clients aren't
18 mandatory beneficiaries. He has one client who
19 would have been a mandatory beneficiary under the
20 old system. The rest of his clients are actually
21 the people who are going to have to die before a
22 benefit is paid, so they're not a beneficiary.
23 They're the triggering event, as Ms. Quesada tells
24 you.

1 It doesn't make a difference to the
2 interpretation in this instance, your Honor.

3 THE COURT: It seems to me, Mr. Pope,
4 that if you're a -- AT&T, if you were an AT&T
5 employee, if you were a Lucent employee and you
6 looked at your pension plan and you examined all of
7 the documentation in the plan, if you had looked at
8 the summary plan, if you had access to the IRS
9 forms that were filed, that you would conclude that
10 you're receiving a certain amount during your
11 lifetime and at your death your spouse or other
12 eligible beneficiary was going to get this death
13 benefit.

14 I mean there's nothing in there, other
15 than -- there's nothing that I would see in looking
16 at that plan that draws into question at all your
17 eligibility for that death benefit. And if you're
18 planning for your estate you're going to think,
19 well, this is one less lump sum I'm going to have
20 to cover to protect my family in life insurance.

21 Why shouldn't this be treated as a
22 defined benefit that you yourselves clearly
23 defined? Why shouldn't it be?

24 MR. POPE: Your Honor, it's a welfare

1 benefit. You have to make that legal
2 determination.

3 THE COURT: What tells us it's a
4 welfare benefit?

5 MR. POPE: We know it's a welfare
6 benefit because it's a lump sum paid upon death.

7 THE COURT: Because of ERISA?

8 MR. POPE: Because of ERISA. That
9 said, when you characterize it within pension --

10 THE COURT: Let me stop you there.
11 When Congress enacted ERISA, who were they looking
12 out for?

13 MR. POPE: They were balancing the
14 interests of retirees that they wanted to protect
15 and the companies who were offering benefits.

16 THE COURT: Weren't they looking to
17 protect the retirees and weren't they looking to
18 protect the plans that were established by the
19 companies?

20 MR. POPE: That was one of the
21 important considerations that they were looking at,
22 yes, your Honor. And they were also looking to
23 balance the rules. This is what the Supreme Court
24 tells us.

1 They were looking to balance the rules
2 so that companies would continue to have incentives
3 to offer benefits.

4 THE COURT: But it seems to me that
5 you're boot strapping your argument to support your
6 plan based on language, based on a law that wasn't
7 necessarily intended to benefit you, the employer.

8 MR. POPE: Well, your Honor, it's not
9 a benefit to the employer to be able to end the
10 benefit. We're not being benefitted. It's not
11 like somebody took the money out of this plan and
12 put it in Lucent's pocket.

13 THE COURT: Well, it's money that you
14 don't have to pay.

15 MR. POPE: It was money that they
16 didn't have to pay at a time at which perhaps that
17 contribution could have pushed them into bankruptcy
18 and put other benefits into jeopardy, your Honor --

19 THE COURT: Might not be a pocket but
20 it certainly sounds to me like an account.

21 MR. POPE: It's not an account, your
22 Honor. There is a question on an ongoing basis as
23 to whether or not you have to make contributions to
24 a plan and whether or not that challenges the

1 financial viability of a company, which could
2 challenge ultimately other retiree benefits.

3 And so there are decisions being made
4 that balance a number of factors, your Honor. But
5 the fact is that Congress, when they implemented
6 ERISA, at least this is what the Supreme Court
7 tells us, because we know it's a carefully drafted
8 and reticulated statute that we are all supposed to
9 be afraid to mess with.

10 But what we've been told was that
11 Congress was balancing the fact that it wanted to
12 protect retirees and it wanted to protect employees
13 against the company's need to have flexibility that
14 was sufficient to provide incentives to maintain
15 some level of benefits.

16 They didn't want companies to go out
17 the day after ERISA was passed and start
18 terminating plans as quickly as they could because
19 they didn't want to face the future of being locked
20 into some benefits that would become
21 extraordinarily expensive and that they couldn't
22 deal with.

23 So we know that piece of it, and there
24 is a balancing that goes on.

1 So I guess I don't want you to feel
2 that we're trying to exploit ERISA. There's no
3 exploitation of ERISA involved here. There is a
4 welfare benefit. And while there may be some
5 subjective expectations that you describe that you
6 believe the retirees would have, those subjective
7 expectations don't control whether or not it's a
8 welfare or pension benefit.

9 It has to be a legal determination,
10 your Honor. It has to be looking at what the
11 statute provides for as to how we define what's a
12 pension and what's a welfare benefit.

13 This is a welfare benefit with a
14 reservation of rights clause.

15 THE COURT: You seem to be saying that
16 the two categories are entirely mutually exclusive,
17 that a benefit is either a pension benefit or it's
18 a welfare benefit. And one way you know it's a
19 welfare benefit is if it doesn't look like a
20 pension benefit. If it's not deferred income, it's
21 not a monthly pension check, it doesn't have any
22 earmark of a pension, right?

23 MR. POPE: That is one of the ways,
24 yes.

1 THE COURT: Can a death benefit ever
2 be a pension benefit?

3 MR. POPE: It can be if it is as -- I
4 think it was Judge Michel described that you can
5 have one that is, I think your term was very good,
6 it's the residual that the employee otherwise would
7 receive. When a death benefit pays out that
8 residual, it is a pension benefit.

9 THE COURT: How's it set up in this
10 particular plan then?

11 MR. POPE: In this particular plan
12 it's not paying out a residual of what an employee
13 would have otherwise received.

14 This particular death benefit we are
15 talking about is like a life insurance policy that
16 happens to be paid from a corporate, from a pension
17 trust, but it's like a life insurance benefit, it's
18 a lump sum.

19 THE COURT: Does the SPD somehow give
20 the impression, however, that when you retire this
21 vests?

22 MR. POPE: No. There's nothing that
23 says one way or the other what happens. It doesn't
24 say when this retire this vests for your life.

1 You have to understand, your Honor,
2 the notion of vesting is language that says
3 essentially we're not going to take this away.
4 It's not simply language that describes the
5 benefit. That's a benefit description language.

6 And benefit description language
7 doesn't vest. That's not the clear and express
8 language we look for for vesting.

9 The clear and express language we look
10 for is saying that this is a benefit we're not
11 going to change.

12 THE COURT: What if we were to hold
13 that the language here is ambiguous, what would be
14 the remedy?

15 MR. POPE: The remedy for ambiguity?
16 Well, your Honor, I don't think the language is
17 ambiguous.

18 THE COURT: I understand. You're not
19 conceding that. I'll give you that.

20 MR. POPE: I don't think that there is
21 a sufficient question of fact to get you past the
22 summary judgment that's already entered, even if
23 there's an ambiguity.

24 The reservation of rights clause

1 resolves the ambiguity against the plaintiffs
2 because it places within Lucent's hands the right
3 to make the changes.

4 THE COURT: Did they grant a motion
5 to, did the court grant a motion to dismiss or did
6 the court grant summary judgment? I know you
7 slipped that word, summary judgment, in your last
8 response there.

9 MR. POPE: Because it is both, your
10 Honor. It was originally made as a motion for
11 summary judgment at a time at which the plaintiffs
12 were asking to substitute in a consolidated Amended
13 Complaint adding this claim under Section 420 of
14 the Internal Revenue Code.

15 So the arrangement that was agreed in
16 allowing them to put in the amended complaint, I
17 say agreed in the sense that this is what the judge
18 decided to do, not what we agreed to do, because we
19 didn't want the new complaint.

20 What the procedural posture that was
21 followed was is that the consolidated amended
22 complaint would be filed and we would move as a
23 combination of a 12(b)(6) and a summary judgment
24 motion bringing forward the summary judgment

1 arguments with regard to all the claims that
2 previously had been asserted and on which discovery
3 had been conducted and summary judgment had already
4 begun, and it would be a motion to dismiss as to
5 this new claim on Section 420, which was really
6 just a legal argument.

7 So the judge is granting a motion to
8 dismiss and a motion for summary judgment. Based
9 on the reading of his opinion, he looked at the
10 summary judgment materials, so I think we have to
11 read it as a Rule 56 motion.

12 THE COURT: But he said the
13 defendant's motion to dismiss is granted.

14 MR. POPE: I understand that, your
15 Honor. I think we have to read it a little bit
16 more practically. He was looking at the materials
17 that were in, and even if you just read it
18 literally, I think that we would look at it from
19 the point of view both sides put in all of their
20 proofs, it would be a 12(b)(6) motion converted to
21 summary judgment by consent and practice.

22 THE COURT: It does make a difference
23 from our review, does it not?

24 MR. POPE: Well, ultimately it

1 doesn't -- it's not going to make a difference in
2 this case, your Honor. It can make a difference.

3 But since a legal question is our most
4 important one with regard to pension versus welfare
5 benefits is a de novo review anyway, summary
6 judgment is de novo review anyway. The only
7 question is would you look at materials outside the
8 four corners of the complaint. Since both sides
9 put in all their proofs and essentially consented
10 to that being done because they understood that the
11 notice for motion included Rule 56, it's not going
12 to make a difference to your Honors as to what your
13 scope of review is because you get to look at that
14 entire record and decide whether or not the judge
15 below was correct, as we would contend, in granting
16 the motion.

17 THE COURT: Thank you very much,
18 Mr. Pope.

19 Mr. Malone.

20 MR. MALONE: Let me start by talking
21 about *New Valley* very quickly. *New Valley* is a top
22 hat case, that's true. That only affects the scope
23 of what the court can look at. In other words,
24 outside of the top hat context the statute provides

1 a strong integration clause.

2 The language that we're citing in *New*
3 *Valley* when we talk about mandatory language, when
4 we talk about a benefit that's tied to another
5 retirement benefit as indicia of vesting, is based
6 on a construction of the operative plan document in
7 this case.

8 So the fact that it was a top hat plan
9 I don't think has any bearing on that aspect of *New*
10 *Valley's* applicability here.

11 The subject came up of who was the
12 statute passed for. Congress told us who they
13 passed this statute for. They passed it --

14 THE COURT: Yes, Senator Long made
15 that pretty clear.

16 MR. MALONE: Retirees and also
17 beneficiaries, which somehow got lost in the
18 discussion earlier.

19 And I think that's important, because
20 that's what we're talking about. We're talking
21 about a deferral of income to be paid to
22 beneficiaries of retirees from the corpus of the
23 plan.

24 Now, there's one nuance here that we

1 haven't talked about, which is the real structure
2 of this benefit. For most people it was going to
3 be a year's salary. But there was a minimum set
4 forth in the plan. And the minimum was a very
5 interesting one.

6 It's the annual amount of the pension
7 allowance that you would receive as a service
8 pension. So there is a direct relationship. As I
9 said earlier, these two benefits are joined at the
10 hip.

11 To qualify to get this benefit you had
12 to meet the age and service requirements. It's a
13 post-retirement benefit that only those who met the
14 age and service requirements for a service pension
15 would receive.

16 And there's an IRS reg that's covered
17 in some of the death benefit cases that we've
18 talked about where benefits are directly related
19 to.

20 Comes up in the cash balance context.
21 Most cash balance plans will provide that, although
22 it's a defined benefit plan, if the employee dies,
23 they can designate that their account balance or
24 its actuarial equivalent can be distributed, often

1 in a lump sum.

2 So again, there's a category of
3 benefit payable on death that has historically been
4 treated by every court that's looked at it as a
5 pension benefit and not a welfare benefit.

6 Thank you very much, your Honor.

7 THE COURT: Thank you very much.

8 Thank you.

9 Ms. Quesada.

10 MS. QUESADA: Just quickly on the
11 procedural matter. It's our position that the
12 judge did Rule 12(b)6. He only referenced the
13 allegations of the complaint and the documents that
14 were in there. And he does have a reference to
15 that on page 19 of his opinion.

16 We had very limited discovery in this
17 case, your Honor. We got document discovery. No
18 depositions of the actuaries or company officials
19 who filed these Schedule Bs and these tax returns.

20 THE COURT: That's not part of the
21 appeal, right? There's no challenge to the limits
22 on discovery that's been presented to us.

23 MS. QUESADA: Well, we were faced with
24 a summary judgment motion and we responded, your

1 Honor. We only got the discovery that we had at
2 the time that the motion was made.

3 THE COURT: What's the answer to my
4 question of whether your appeal includes the
5 challenge to the ruling that limited your
6 discovery?

7 MS. QUESADA: We didn't make that
8 application, your Honor. About what the benefit is
9 that we're appealing, there were two types of
10 benefits, death benefits paid from operating and
11 death benefits paid from the pension trust.

12 And if you look in the provisions that
13 we're relying upon, the summary plan description,
14 is very clear, that death benefits paid from the
15 pension trust were treated as defined benefit
16 plans.

17 Death benefits paid from the pension
18 trust were treated on the 5500s as pension and they
19 were on the Schedule B. Welfare benefits are not
20 on Schedule Bs. They're not subject to 412.

21 THE COURT: What about Mr. Pope's
22 argument that it doesn't make any difference how
23 you treat it, it's what the statute says?

24 MS. QUESADA: Well, the interesting

1 thing, the statute says, ERISA, 3002(c) defers to
2 the tax code on certain treasury regulations. They
3 are 410, 411 and 412. 411 is vesting and accrual;
4 412 is funding.

5 And if you look at the definition of
6 funding under the 411 regs, it basically says
7 accrued benefit is an accrued benefit under the
8 plan.

9 So if the Treasury provisions trump
10 ERISA, and it suggests to me that it does, under
11 that provision, if Treasury is permitting this
12 benefit to be accrued as a pension benefit, and
13 there's every indication that they did, then that
14 should in fact prevail.

15 There is clearly more creativity under
16 the Code than there is in ERISA, as far as the tax
17 deductions and the treatment of these plans.

18 And I think our brief shows that you
19 are permitted to fund a small death benefit that is
20 directly related, sort of like a little mini-me,
21 that attaches to your pension benefit to maximize
22 your pension deduction.

23 AT&T with the best lawyers, they did a
24 beautiful job. Everywhere you see the three

1 benefits they called to be defined benefits: death
2 benefits paid from the pension trust, service
3 benefits and deferred vested benefits, got the same
4 treatment throughout the documents, same treatment
5 in the 5500, same treatment in the pension plan and
6 the pension plan termination provisions.

7 Those were the three that were
8 rewarded first, and they put the death benefits
9 paid from the pension trust in the middle.

10 If it was a welfare benefit, what's it
11 doing there? It's not supposed to be there. It
12 shouldn't be on the Schedule B if it's a welfare
13 benefit. And it certainly shouldn't get lump sum
14 and rollover treatment.

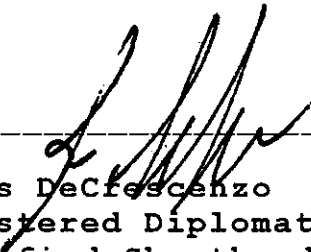
15 THE COURT: Thank you very much. I
16 want to thank all counsel for very, very well
17 presented briefs and oral argument.

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CERTIFICATION

1
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3 I, JAMES DeCRESCENZO, a Registered
4 Diplomate Reporter, Certified Realtime Reporter,
5 Certified Shorthand Reporter of New Jersey, License
6 Number XI 00807, and Notary Public, hereby certify
7 that the foregoing is a true and accurate
8 transcript.

9
10 I further certify that I am neither
11 attorney nor counsel for, not related to nor
12 employed by any of the parties to this action; and
13 further, that I am not a relative or employee of
14 any attorney or counsel employed in this action,
15 nor am I financially interested in this case.

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19 James DeCrescenzo
20 Registered Diplomate Reporter
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22 Notary Public
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