
PHILLIP C. ENGERS, WARREN J. MCFALL,
DONALD G. NOERR, and GERALD SMIT,
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

AT&T and AT&T MANAGEMENT
PENSION PLAN,

Defendants.

:
: **UNITED STATES DISTRICT COURT**
: **DISTRICT OF NEW JERSEY**
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: C.A. No. 98-CV-3660 (JLL/RJH)
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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO
RECONSIDER DECISIONS ON THE CLASS' THIRD, SIXTH AND
SEVENTH CLAIMS**

Stephen R. Bruce
805 15th St., NW, Suit. 210
Washington, DC 20005
(202) 371-8013

Edgar Pauk
144 E. 44th St., Suite 600
New York, NY 10017
(212) 983-4000

Jonathan I. Nirenberg
101 Eisenhower Pkwy, Ste. 300
Roseland, NJ 07068
(973) 795-1240

Attorneys for Plaintiffs

TABLE OF CONTENTS

Introduction	1
I. The Section 204(h) Ruling Inadvertently But Erroneously Construes Exhibits to Mr. Poulin’s 2001 Affidavit and Overlooks His 2003 Expert Report	2
II. The Third Circuit’s 2003 <i>Burstein</i> Decision Distinguishes the Discussion of SPDs in <i>Gridley</i> as “Dictum” from a Case Where “There Was No Summary Plan Description”	9
III. The Ruling on the Breach of Fiduciary Duty Claim Is Premised on Comments in <i>Varity</i> Which Other Courts Have Addressed Without Precluding Other Statutory Claims; this Court’s Ruling Would Prevent the Plaintiffs From Obtaining Relief for Breaches of Fiduciary Duty in Disclosures under the <i>Bixler</i> Line of Cases and for Communications Outside of the SPD, Such as Benefit Election Materials	11
Conclusion	15

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Ackerman v. Warnaco, Inc.</i> , 55 F.3d 117 (3d Cir. 1995)	10
<i>Bixler v. Central Pa. Teamsters Health & Wel. Fund</i> , 12 F.3d 1292 (3d Cir.1993)	14-15
<i>Burstein v. Allegheny</i> , 334 F.3d 365 (3d Cir. 2003)	8-9, 12-13
<i>Cappell v. Board of Trustees of University of Medicine</i> , 1994 U.S. Dist. LEXIS 14283 (D.N.J. 1993)	1
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	11
<i>Colin v. Marconi Commerce System Retirement Plan</i> , 335 F. Supp. 2d 590 (W.D.N.C. 2004)	13
<i>Damiano v. Sony Music Entertainment</i> , 975 F. Supp. 623 (D.N.J. 1997) ...	1
<i>Devlin v. Empire Blue Cross and Blue Shield</i> , 274 F.3d 76 (2d Cir. 2001)	13
<i>Fox v. PNC Financial Svcs Group</i> , 2006 U.S. Dist. LEXIS 15809 (E.D. Pa. 2006)	13
<i>Frommert v. Conkright</i> , 433 F.3d 254 (2d Cir. 2006)	13
<i>Gridley v. Cleveland Pneumatic</i> , 924 F.2d 1310 (3d Cir. 1991)	9
<i>Harte v. Bethlehem Steel</i> , 214 F.3d 446 (3d Cir.), <i>cert. denied</i> , 531 U.S. 1037 (2000)	14
<i>Heffner v. Blue Cross & Blue Shield of Alabama</i> , __ F.3d __, 2006 U.S. App. LEXIS 7659 (11th Cir. 2006)	12

<i>Jordan v. Federal Express</i> , 116 F.3d 1005 (3d Cir. 1997)	14-15
<i>Lasser v. Reliance Standard Life Insurance Co.</i> , 130 F. Supp. 2d 616 (D.N.J. 2001)	2
<i>Ream v. Frey</i> , 107 F.3d 147 (3d Cir. 1997)	12
<i>Sanders v. Trinitas Hospital</i> , 2005 U.S. Dist. LEXIS 18985 (D.N.J. 2005)	1
<i>Union Steel America Co. v. M/V Sanko Spruce</i> , 1998 U.S. Dist. LEXIS 18021 (D.N.J. 1998)	1
<i>In re Unisys Corp. Retirement Medical Benefit "ERISA" Litigation</i> , 57 F.3d 1255 (3d Cir. 1995)	14
<i>United States v. Compaction System Corp.</i> , 88 F. Supp. 2d 339 (D.N.J. 1999)	1
<i>Varity Corp. v. Howe</i> , 516 U.S. 489 (1996)	11-12

FEDERAL STATUTES & REGULATIONS

ERISA §102, 29 U.S.C. §1022	11
ERISA §204(h), 29 U.S.C. §1054(h)	2, 4
ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B)	11-12
ERISA §502(a)(3), 29 U.S.C. §1132(a)(3)	12
Treas. Reg. 1.401(a)-(20)	15
Treas. Reg. 1.411(d)-6T	6
53 Fed. Reg. 31837 (Aug. 22, 1998)	15

MISCELLANEOUS

Lite, New Jersey Federal Practice Rules 1

Introduction

Plaintiffs request that the Court reconsider its March 30, 2006 decision on the Third, Sixth and Seventh Claims for Relief because dispositive factual matters, including the findings of the Plaintiffs' actuarial expert, and controlling law, including the Third Circuit's determination that *Gridley's* discussion of SPD's is "dictum," were overlooked.

While a motion to reconsider is "an extraordinary remedy," such motions are granted "where a dispositive factual matter or controlling decision of law was presented to the Court but not considered." *Damiano v. Sony Music Entertainment*, 975 F.Supp. 623, 634 (D.N.J. 1997); *United States v. Compaction Sys. Corp.*, 88 F.Supp. 2d 339, 346 (D.N.J. 1999) (Hedges). Reconsideration may also be granted where previously unavailable evidence "undercuts the grounds on which the decision was reached." *Lite*, *New Jersey Federal Practice Rules*, Comment (e)(3) to LR 7.1; see *Sanders v. Trinitas Hosp.*, 2005 U.S. Dist. LEXIS 18985, *8 (D.N.J. 2005); *Cappell v. Bd. of Trustees of Univ. of Medicine*, 1994 U.S. Dist. LEXIS 14283, *12-13 (D.N.J. 1993). Finally, reconsideration may be granted where the Court's decision was, "to some degree sua sponte" and the parties "now cite additional pertinent authorities" that the Court did not consider. *Union Steel America Co. v. M/V Sanko Spruce*, 1998 U.S. Dist. LEXIS 18021 (D.N.J. 1998).

Plaintiffs alternatively request that the Court clarify its decision. See *Lasser v. Reliance Standard Life Ins. Co.*, 130 F. Supp. 2d 616, 618 (D.N.J. 2001) (granting motion to clarify to “aid the progress of this litigation”).

I. The Section 204(h) Ruling Inadvertently But Erroneously Construes Exhibits to Mr. Poulin’s 2001 Affidavit and Overlooks His 2003 Expert Report

The Court’s decision has misread the exhibits attached to Mr. Poulin’s July 2001 affidavit, which was prepared for Judge Politan in support of the standing of the named Plaintiffs to raise the Section 204(h) claim on a class-wide basis. The Court erroneously concluded that each of the four named Plaintiffs’ future accrued benefits expressed in the form of an age 65 benefit were “higher” under the Cash Balance amendments. Slip Op. at 10-11. While the March 30th decision states that it relies on Mr. Poulin’s “expert report,” Slip Op. at 9-11, all of the citations are to the exhibits to the July 3, 2001 affidavit which Mr. Poulin submitted to Judge Politan, which was included in Defendants’ Appendix Volumes. *Id.* Mr. Poulin’s expert report was prepared in response to an Order by Magistrate Judge Hedges and is dated October 3, 2003. See Exhibit 1 in Volume I of Plaintiffs’ Appendix.

Plaintiffs cannot overemphasize that a fundamental error was made in interpreting the exhibits attached to the July 2001 affidavit: Mr. Poulin’s July 2001 affidavit took the exhibits that an AT&T employee/enrolled actuary named Kevin

Armant prepared for AT&T in opposition to the motion for class certification. Without changing Mr. Armant's headings so as not to introduce new issues, compare DA 497-504 with DA 523-26, Mr. Poulin showed Judge Politan that the named Plaintiffs' rates of benefit accruals were significantly reduced compared to the rate of 1.6% of compensation prior to the amendments. DA 516-17.

Mr. Poulin's affidavit told Judge Politan that Mr. Armant's exhibits were improperly comparing the Cash Balance benefits with AT&T's pay-based formulas. Instead of comparing the Cash Balance benefits with benefits added to the 1997 Special Update at the traditional 1.6% of pay rate, Mr. Armant compared Cash Balance with: (1) the Special Update frozen at its January 1, 1997 level without any future benefit accruals, and (2) what Mr. Armant called the "Prior Plan Formula." *Id.* The latter formula, which was in effect before the 1997 Special Update, used 1987-92 salaries to compute benefits. This formula produced much lower benefits than either the Special Update or the Cash Balance formula for 97% of the participants. Pls. Statement of Facts ¶118 (hereafter cited simply as ¶__). The 1997 Special Update updated the pay-base window to move it closer to the present by using 1994-96 salaries. For the named Plaintiffs, the "Prior Plan Formula" was several thousand dollars lower than the starting point under both the Cash Balance column and the Special Update column. For example, it was \$3,241 lower for Donald Noerr. DA 501

and 526 (comparing the 1998 starting amounts). Mr. Poulin told Judge Politan that the proper comparison under Section 204(h) is between the Cash Balance formula and the 1997 Special Update with future accruals at the 1.6% rate. DA 517 (¶¶8-9).

Plaintiffs' opposition and reply explained that Mr. Armant's and AT&T's approach is wrong because it conflates a 1997 amendment increasing benefits with a 1998 amendment reducing benefits, for which Section 204(h) notice was required. See Pls. Opposition at 14-15 and Reply at 6-7. Footnote 6 to this Court's decision states that the Court did not accept Defendants' argument that there was only one combined Special Update/Cash Balance "amendment" to the Plan and footnote 10 states that Court did not consider Mr. Armant's Affidavit and Exhibits. Slip Op. at 7 and 9. The only way, however, that the Court's conclusion that the four named Plaintiffs' benefits were "higher" could be true is if the Court inadvertently accepted both Mr. Armant's and AT&T's position by looking at total benefits under the 1998 Cash Balance plan compared with total benefits under the "Prior Plan Formula" column, i.e., the formula that existed prior to the 1997 Special Update, which lags several thousand dollars behind at the starting point for the four named Plaintiffs.

When the benefits under Cash Balance are properly compared with the Special Update, Mr. Poulin's exhibits show reductions, not higher amounts for three of the four named Plaintiffs. For example, Exhibit C-4 shows that Donald Noerr's total

projected benefit to age 65 is \$28,999 under the 1998 Cash Balance formula, compared with \$31,541 if his age 65 benefits continued to grow after the 1997 Special Update at a 1.6% rate. DA 526.¹

The reductions shown in the exhibits to Mr. Poulin's July 2001 affidavit are more pronounced when the Court looks at "future annual benefits" after January 1, 1998, as the Treasury's temporary regulations expressly direct. For example, Mr. Noerr's future benefits between 1998 and 2007, when he will reach age 65, increase by \$8,917 per year under the Cash Balance amendments, compared with \$12,060 per year under the 1.6% of pay formula (for a 26% reduction). DA 526 (subtracting the 1998 benefit from the 2007 benefit). On an annual basis, his benefits under Cash Balance fall as low as \$821 per year under Cash Balance compared with a constant \$1,206 per year under a 1.6% of pay formula. *Id.*²

The only exception is Mr. Engers, see DA 524, who by 1998 was a relatively highly-compensated AT&T employee and, as a result, was subject to an enhanced

¹ The calculations for Gerald Smit show an age 65 benefit of \$44,559 under the Cash Balance formula, versus \$46,677 if his benefits continued to grow after the 1997 Special Update at a 1.6% rate. DA 523. Mr. McFall's benefits were also lower: \$30,355 with Cash Balance versus \$31,480 with the Special Update. DA 525.

² Mr. McFall's future benefits under Cash Balance grew by \$6,918 per year between 1998 and 2003, versus \$8,845 per year under a 1.6% of pay formula (a 22% reduction). DA 525. Mr. Smit's grew by \$17,590 per year between 1998 and 2015, versus \$21,652 per year under a 1.6% of pay formula (a 19% reduction). DA 523.

accrual rate under AT&T's cash balance design at least until he reached age 61.³ But even for Mr. Engers, the additional accruals from Cash Balance are not real. When Mr. Engers retired in 1999, after two years of service under Cash Balance, he actually received exactly the same benefits that he had before the 1998 Cash Balance amendments. ¶113. Because of AT&T's "greater of" design, which Defendants' actuarial expert admitted is a "minimum benefit" provision, ¶80, the Cash Balance accruals added nothing to his actual future annual benefits. The Treasury Department's temporary regulations specifically recognize that "minimum benefit provisions" and "benefit offset provisions" may negatively affect the future rate of benefit accruals and must be "taken into account." 1.411(d)-6T, Q&A-6.

The findings in Mr. Poulin's October 2003 expert report are consistent with the 26% reduction in future benefits in the exhibits to Mr. Poulin's July 2001 affidavit for Mr. Noerr. Mr. Poulin's report found 15% reductions in general and up to 35% reductions at older ages, before the effects of the minimum benefit provision are even taken into account. Pls. Ex. 1 ¶17. Mr. Noerr was an older participant; therefore, his future annual benefits were produced by a combination of approximately 15% lower

³ Mr. Engers' pay in excess of the Social Security Wage Base made him eligible for double pay credits under the Cash Balance formula. Mr. Poulin's expert report explains how pay in excess of the Social Security Wage Base can produce higher rates of accrual than the prior 1.6% of pay rate. Pls. Ex. 1 at ¶18.

annual rates and up to 35% lower annual rates at older ages.

The charts that AT&T attached to its March 16, 2006 Motion for Partial Dismissal under Rule 12(c) (dkt. #260) offer new evidence of the reductions for the named Plaintiffs.⁴ Those charts show, for example, that Donald Noerr's rates of accrual, future benefits, and future annual benefits after January 1, 1998 are all significantly below the benefits that would be produced with a 1.6% accrual rate. See Exs. E and F to Defs.Br. AT&T's charts show that Mr. Noerr's accrual rates under Cash Balance start at 1.62%, but immediately fall below 1.6% and progressively decline to 1.07% by age 65. On an annual basis, his future benefits drop as low as \$821 per year compared with \$1,206 under a 1.6% of pay formula. His "future benefits" aggregate to \$8,917, whereas a 1.6% rate would offer him \$11,055 in future annual benefits (a 19% reduction). Defs. Ex. E. *Id.*⁵

Plaintiffs respectfully submit that based on the exhibits to Mr. Poulin's 2001 affidavit and AT&T's charts, the named Plaintiffs' benefits were significantly reduced. Furthermore, Mr. Poulin's October 2003 expert report shows that this was "reasonably expected," not just for the named Plaintiffs, but in general (which is the

⁴ AT&T asked this Court to take "judicial notice" of these calculations and charts. Defs. Br. at 12 n.9.

⁵ Defendants' Ex. F shows a 21% reduction with a 3.5% salary increase assumption.

appropriate test under the temporary regulations and for resolution of class-wide claims). Pls. Ex. 1, ¶17 and Ex. D (finding lower rates at every age between 24 and 65, with 15% lower rates generally and up to 35% lower at older ages). On an annual basis, the future benefits drop as low as \$418 per year, which compares unfavorably with a constant \$640 per year under the prior 1.6% of pay rate (\$40,000 x 1.6%).

Alternatively, Plaintiffs ask that the Court clarify the basis for its ruling that the future annual benefits of the four named Plaintiffs were “higher” under Cash Balance, e.g., whether it is based on Mr. Poulin’s expert report or on Mr. Armant’s and AT&T’s suggestion to regroup the 1997 Special Update with the 1998 Cash Balance changes and compare Cash Balance only with a frozen Special Update or what Mr. Armant labeled the “Prior Plan Formula.”

II. The Third Circuit’s 2003 *Burstein* Decision Distinguishes the Discussion of SPDs in *Gridley* as “Dictum” from a Case Where “There Was No Summary Plan Description”

In addressing the Sixth Claim based on AT&T’s failure to disclose the bad parts of cash balance in the SPD, the Court concluded that the Class must show “extraordinary circumstances” to obtain relief for an SPD that fails to disclose the reductions, restrictions or other disadvantages of plan changes. Slip Op. at 39-41 and 43. After the Third Circuit’s decision in *Burstein v. Allegheny*, 334 F.3d 365 (2003), “extraordinary circumstances” should not be required. *Burstein* recognized that “the

SPD is the primary document on which plan participants must rely.” 334 F.3d at 379.

The Third Circuit states its holdings repeatedly in broad terms which are not confined to the facts of that particular case:

“Today we join with the other Courts of Appeals that have considered this issue, and hold that, where a summary plan description conflicts with the plan language, it is the summary plan description that will control. We are satisfied that this holding, as we have stated it, is faithful to Congressional intent. The ERISA provision governing summary plan descriptions expresses Congress’s desire that the SPD be transparent, accurate, and comprehensive.” 334 F.3d at 378.

“Thus, “ERISA requires, in no uncertain terms, that the summary plan description be ‘accurate’ and ‘sufficiently comprehensive to reasonably apprise’ plan participants of their rights and obligations under the plan.” ... The SPD is the document to which the lay employee is likely to refer in obtaining information about the plan and in making decisions affected by the terms of the plan.” 334 F.3d at 379.

“We also conclude that a plan participant who seeks to claim plan benefits on the basis of a conflict between an SPD and a plan document need not plead reliance on the SPD.” 334 F.3d at 380.

“Upon consideration of the “reliance” issue, we now hold that a plan participant who bases a claim for plan benefits on a conflict between an SPD and plan document need neither plead nor prove reliance on the SPD.” 334 F.3d at 381.

“We thus hold that, in enforcing an SPD’s terms, a participant does not need to plead reliance or prejudice, since the claim for plan benefits under ERISA § 502(a)(1)(B) is contractual.” 334 F.3d at 382.

Burstein expressly distinguishes the discussion of SPDs in the 1991 decision in *Gridley v. Cleveland Pneumatic*, 924 F.2d 1310, on which this Court relied (see

Slip Op. at 43): “in *Gridley*, we held no more than: Gridley could not recover benefits because there was no summary plan description upon which to base her claim, since the overview brochure did not constitute an SPD...“once Gridley held that no summary plan description existed, its discussions as to the place of a summary plan description in the statutory scheme can constitute no more than dictum.” 334 F.3d at 377 (citing 924 F.2d at 1316-17).⁶

The Third Circuit’s Internal Operating Procedures provide that it is the tradition of this circuit that a precedential decision is “controlling” absent an en banc review. IOP 9.1. *Burstein*, and not the Third Circuit’s 1991 *Gridley* decision, is controlling. Plaintiffs respectfully request that the Court reconsider its ruling that *Gridley*’s “extraordinary circumstance” element applies to an SPD claim.

Alternatively, even if the Court continues to apply the “extraordinary circumstance” element, Plaintiffs ask the Court to reconsider its decision to grant summary judgment to AT&T and have a bench trial on the disputed factual issues. The *Ackerman* decision on which this Court relied remanded to the district court in a similar situation where the plaintiffs offered evidence of active concealment, which the defendants sought to diminish as “mere bureaucratic ‘bungling.’” 55 F.3d at 125.

⁶ Likewise, *Ackerman v. Warnaco*, 55 F.3d 117 (3d Cir. 1995), does not concern the adequacy of the disclosures in an SPD, but involves the distribution of a Handbook at a particular plant. 55 F.3d at 122.

Finding that evidence is insufficient to grant summary judgment, Slip Op. at 50, should only lead to a grant of summary judgment to the opposing party if the movant will at trial “be unable to produce sufficient evidence to support an essential element of his case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. The Ruling on the Breach of Fiduciary Duty Claim Is Premised on Comments in *Varity* Which Other Courts Have Addressed Without Precluding Other Statutory Claims; this Court’s Ruling Would Prevent the Plaintiffs From Obtaining Relief for Breaches of Fiduciary Duty in Disclosures under the *Bixler* Line of Cases and for Communications Outside of the SPD, Such as Benefit Election Materials

Although it was not argued in Defendants’ cross-motion, the March 30, 2006 Decision grants summary judgment to AT&T on the breach of fiduciary duty claim on the ground that an SPD/ERISA §102 violation must be brought under ERISA §502(a)(1)(B) and that *Varity Corp. v. Howe*, 516 U.S. 489 (1996), limits the availability of a breach of fiduciary duty claim “to situations where ERISA does not provide a plaintiff with an alternate remedy.” Slip Op. at 35. The passages on which this Court relies address arguments that amici to the Varity Corp. raised about how plaintiffs might “repackage” “denial of benefit” claims “as a claim for breach of fiduciary duty” if the Court recognized claims for breach of fiduciary duty under §502(a)(3), 516 U.S. at 512-13. In response to those “concerns,” the Supreme Court commented that “where Congress elsewhere provided adequate relief for a beneficiary’s injury, there will likely be no need for further equitable relief, in which

case such relief normally would not be appropriate.” 516 U.S. at 515 (emph. added). There was no suggestion that the Court’s comments were intended to limit participants to the least favorable of two potential causes of action or force them to pursue only one statutory violation before any relief is awarded.

First, it cannot be denied that ERISA provides a cause of action under ERISA §502(a)(3) for an SPD which violates the statutory requirements. Section 502(a)(3) expressly provides a cause of action for a participant, beneficiary or fiduciary:

“(A) to enjoin any act or practice which violates any provision of this title [ERISA title I] ..., or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title”

See also *Ream v. Frey*, 107 F.3d 147, 152 (3d Cir. 1997) (ERISA §502(a)(3) “permits ‘appropriate equitable relief’ to ‘redress any act or practice which violates any provision of this title’”); *Heffner v. Blue Cross & Blue Shield of Alabama*, 2006 U.S. App. LEXIS 7659 *18 (11th Cir. 2006). Hence, even if the Plaintiffs’ SPD claim could be pled under §502(a)(1)(B), it is not necessary for them to plead it under that subsection alone.

Second, in *Burstein*, the Third Circuit allowed the plaintiffs, as they requested, to proceed under ERISA §502(a)(1)(B) with their SPD claim. 334 F.3d at 382. But *Burstein* did not use this as a ground to preclude the plaintiffs’ concurrent claims for breach of fiduciary duty claim related to misrepresentations in the SPD and a plan

brochure. 334 F.3d at 374. Instead, the Third Circuit examined the merits of those claims. 334 F.3d at 384-89.

Burstein's approach is consistent with other decisions that have addressed the comments in *Varity*. The Second Circuit holds that the determination of whether "further equitable relief" is appropriate under a §502(a)(3) cause of action should be made at the relief stage. *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 89-90 (2d Cir. 2001) ("we therefore hold that *Varity Corp.* did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited to such equitable relief as is considered appropriate"); *Frommert v. Conkright*, 433 F.3d 254, 272 (2d Cir. 2006) ("we disagree with the district court's conclusion that all of the relief sought by the plaintiffs in their claim for breach of fiduciary duties can be adequately addressed by the relief available under 502(a)(1)(B)"; the district court must "determine what appropriate equitable relief is necessary" if plaintiffs prevail on claim).⁷

It is especially critical that this Court's decision be revisited because in combination with the holding that *Gridley*'s "extraordinary circumstance" standard applies to an SPD claim, the decision would effectively eviscerate the Third Circuit's

⁷ Accord *Fox v. PNC*, 2006 U.S. Dist. LEXIS 15809 *15 (E.D. Pa. 2006); *Colin v. Marconi Commerce Ret. Plan*, 335 F.Supp.2d 590, 608 (W.D.N.C. 2004).

line of decisions on the fiduciary duty to disclose material information. As this Court has recognized, the Third Circuit has held in the *Bixler-Unisys-Jordan-Harte* line of cases⁸ that fiduciaries have a duty to provide “complete and accurate information material to the beneficiary’s circumstances.” See Slip Op. at 32-33. The Third Circuit has specifically held that “extraordinary circumstance is not required under our fiduciary duty analysis.” *Jordan*, 116 F.3d at 1012-14 (emph. added). But under this Court’s decision, a “Catch 22” would be created: Relief would be available to the participants under the breach of fiduciary duty claim, but the participants would be blocked from it because of having moved for judgment on an SPD violation.

The Court’s decision that the Plaintiffs’ SPD claim precludes their breach of fiduciary duty claim also overlooks that Plaintiffs’ claims for breach of fiduciary duty do not overlap with the SPD claims. Plaintiffs’ motion for summary judgment on the breach of fiduciary duty claim covers not only the disclosures in the SPD, but also AT&T’s failure to comply with requirements for disclosing the “relative values” of benefit options. In this claim, Plaintiffs relied not just on *Jordan* and *Bixler*, both of which involved benefit elections, see 116 F.3d at 1007 and 12 F.3d at 1302-3, but on

⁸ See *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, 12 F.3d 1292 (3d Cir. 1993); *In re Unisys Corp. Retirement Medical Benefit “ERISA” Litigation*, 57 F.3d 1255 (3d Cir. 1995); *Jordan v. Federal Express*, 116 F.3d 1005 (3d Cir. 1997); *Harte v. Bethlehem Steel*, 214 F.3d 446 (3d Cir.), cert. denied, 531 U.S. 1037 (2000).

specific disclosure regulations mandating that participants and their spouses be provided with explanatory material in benefit election packages which explains the “relative value” of benefit options, including “the extent to which optional forms are subsidized relative to the normal form of benefits.” Treas. Reg. 1.401(a)-20, Q&A 36, 53 Fed. Reg. 31837, 31849 (Aug. 22, 1998).

Plaintiffs’ reliance on the regulations was overlooked. Page 49 of the Decision states that “Plaintiffs ... do not point to legal authority that AT&T was required to disclose ... differences in the relative values of participants’ benefits.” However, Plaintiffs described, and quoted from, these regulations in their memorandum in support of summary judgment. *Id.* at 37-38.

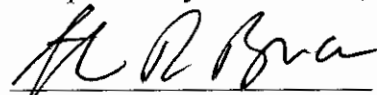
Accordingly, Plaintiffs respectfully submit that the Court’s dismissal of the breach of fiduciary duty claim based on *Varity* should be reconsidered.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court reconsider its rulings on the Third, Sixth and Seventh Claims.

Dated: April 17, 2006

Respectfully submitted,



Stephen R. Bruce

Allison C. Caalim

805 15th St., NW, Suite 210

Washington, DC 20005
(202) 371-8013

Edgar Pauk
144 E. 44th St., Suite 600
New York, NY 10017
(212) 983-4000

s/ Jonathan I. Nirenberg
Jonathan I. Nirenberg
101 Eisenhower Pkwy, Suite 300
Roseland, NJ 07068
(973) 795-1240

Attorneys for Plaintiffs