

# COPY OF TRANSCRIPT

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT  
NO. 10-2752

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

v.

AT&T, INC.; AT&T PENSION  
BENEFIT PLAN, AND AT&T PUERTO  
RICAN PENSION BENEFIT PLAN

Transcript from the audio recording of the oral argument held Thursday, March 17, 2011 at the United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania. This transcript was produced by James DeCrescenzo, a Fellow of the Academy of Professional Reporters, a Registered Diplomate Reporter, an Approved Reporter of the United States District Court.

**BEFORE:**

**THE HONORABLE MARYANNE TRUMP BARRY**

**THE HONORABLE MICHAEL A. CHAGARES**

**THE HONORABLE JANE R. ROTH**



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1 THE COURT: Good morning. We will  
2 hear argument in the almost-13-year-old case of  
3 Engers versus AT&T.

4 Mr. Bruce.

5 MR. BRUCE: Thank you, your Honor. My  
6 name is Stephen Bruce and I represent the  
7 plaintiffs appellants in this case, and I want to  
8 reserve three minutes for rebuttal.

9 THE COURT: Granted.

10 MR. BRUCE: Your Honor, after notice  
11 in this case was finally issued when the age  
12 discrimination claims were reinstated after the  
13 City of Jackson case, a remarkable 23,900 plus  
14 current and former AT&T employees joined in this  
15 action individually as plaintiffs.

16 This is the largest collective action  
17 that we've been able to find out in U.S. history.

18 AT&T's transition to a cash balance  
19 pension formula was designed in a way which cost  
20 tens of thousands of these people a substantial  
21 part of the retirement income that they might  
22 reasonably expect from working for AT&T.

23 THE COURT: Well, not at final  
24 retirement age.

1 MR. BRUCE: Yes, at final retirement  
2 age. We've provided papers illustrating how Gerry  
3 Smit, who originated this case, had earned -- these  
4 are papers prepared by AT&T which show that he had  
5 earned \$1,985 per month as of January 1st of 1997.

6 After he worked for AT&T for eight  
7 more years, AT&T sent him papers showing that he  
8 was entitled to the exact same amount of 1,980 --

9 THE COURT: He was at a final  
10 retirement age?

11 MR. BRUCE: He was at age 55.

12 THE COURT: I'm talking about final  
13 retirement age.

14 MR. BRUCE: That was when he lost his  
15 job, your Honor, was at age 54, close to age 55.

16 There are hardly any AT&T employees  
17 who make it to age 65 as AT&T employees. Most of  
18 the reductions, which occurred shortly after this  
19 cash balance conversion as a result of a retirement  
20 incentive program, were people in their late 40s  
21 and early 50s.

22 Within the context of AT&T those were  
23 the older AT&T employees, and those were the  
24 employees that AT&T encouraged out the door by

1 establishing a transition where they would be  
2 looking at no additional retirement benefits for a  
3 period of years.

4 THE COURT: But Judge Roth's question  
5 dealt with those who retire at age 65. And those  
6 who retire at age 65 had greater benefits under the  
7 new plan than they did under the old plan. Is that  
8 correct?

9 MR. BRUCE: That's one percent of the  
10 people retire at age 65, your Honor.

11 THE COURT: The answer is yes or no.  
12 If they worked till age 65 they did have greater  
13 benefits, correct?

14 MR. BRUCE: For those one percent of  
15 the people, that's correct.

16 THE COURT: Yes you're saying.

17 MR. BRUCE: During this eight years of  
18 employment that Mr. Smit had between 1997 and 2004,  
19 he earned cash balance credits which totaled over  
20 \$64,000. This is starting from zero, he earned  
21 cash balance credits totaling \$64,000.

22 THE COURT: This is before the change?

23 MR. BRUCE: No, after the change.

24 THE COURT: Okay. Right.

1 MR. BRUCE: He earned 64,000 in  
2 credits which, translated to an age 65 benefit,  
3 would be be \$800, and translated to an age 55  
4 benefit, would be \$450.

5 As a result of this wear-away  
6 provision, he receives none of those benefits. He  
7 does not receive the 450 based on his age 55  
8 retirement, and when he reaches age 65 he will not  
9 receive the \$800.

10 THE COURT: In 1997 could not AT&T  
11 have terminated early retirement subsidies  
12 entirely?

13 MR. BRUCE: They are required by law  
14 to protect --

15 THE COURT: The vested ones, yes.

16 THE COURT: Yes.

17 MR. BRUCE: -- to protect the early  
18 retirement benefits and for people --

19 THE COURT: That had vested.

20 MR. BRUCE: -- have not achieved  
21 eligibility to allow them to grow into  
22 eligibility.

23 And so Mr. Smit was entitled to the  
24 \$1,985 as of January 1st of 1997. If he left AT&T

1 as of that date he would have received that full  
2 amount. It was not conditional on him continuing  
3 to work. It was conditional on him reaching age  
4 55, but not as an AT&T employee.

5 So as of January 1st, 1997 he has  
6 earned this amount of money. And the question is  
7 what does he earn for those additional years of  
8 service.

9 And in terms of age discrimination,  
10 you cannot excuse age discrimination in the current  
11 and future period based on what you've done for  
12 people in the past.

13 You know, as an employer I can call  
14 myself very generous, but if I pay discriminatory  
15 wages or benefits in the current period, I cannot  
16 reach back into the past and say, well, this should  
17 be excused because I have a store house of credits  
18 against age discrimination.

19 THE COURT: All right. Let's leave  
20 Mr. Smit for a moment. Now you conceded, did you  
21 not, that your ADEA claims pertain to benefit  
22 accrual.

23 MR. BRUCE: Our ADEA claims pertain to  
24 both benefit accrual and benefit payment. And the

1 focus is on benefit payment.

2 THE COURT: The outputs?

3 MR. BRUCE: The outputs, in terms of  
4 *Register*, I think would be the benefit payments.  
5 And so the focus of our claims is that people --  
6 Mr. Smit got these credits but he does not receive  
7 any payments from them.

8 THE COURT: So you're saying the  
9 district court was wrong in saying that your claim  
10 was only as to the accrual?

11 MR. BRUCE: I think the district court  
12 was accurate that it --

13 THE COURT: He said you conceded it.

14 MR. BRUCE: No. He said that we  
15 conceded that the claim related to accruals. He  
16 didn't say that --

17 THE COURT: Related to benefit  
18 accrual.

19 MR. BRUCE: He didn't say that we  
20 conceded that that was all that related to. The  
21 claim relates, and the focus of the claim is on  
22 benefit payments, your Honor. And I think that's  
23 --

24 THE COURT: But the protection under



1 ERISA is on accrual.

2 THE COURT: Is on accruals only, isn't  
3 it?

4 MR. BRUCE: According to the *Register*  
5 case.

6 THE COURT: Under 4(i)(4), yes.  
7 According to *Register*, which binds us.

8 MR. BRUCE: It doesn't bind you in  
9 terms of the Age Discrimination Act.

10 Because the Age Discrimination Act  
11 provides for the broad protection of employees  
12 against discrimination in compensation and  
13 specifically employee benefits as a result of the  
14 *Betts* decision and 1990 changes to the Age  
15 Discrimination Act.

16 THE COURT: Regarding Section 4(i),  
17 you mention but don't dwell on, probably obviously,  
18 the *Hurlic* and *Jensen* cases where there's two other  
19 circuits.

20 Aren't you asking us to create a  
21 circuit split?

22 MR. BRUCE: I don't think that it  
23 would be a circuit split with *Hurlic* at all because  
24 *Hurlic* doesn't involve the Age Discrimination Act,

1 it involves a state law counterpart to it which did  
2 not even have Section 4(i) in it.

3 So the *Jensen* case I believe this  
4 court's decision would be inconsistent with. But  
5 the *Jensen* decision is plainly wrong on that issue.

6 The *Jensen* decision is a case that I  
7 did, so I'm very familiar with it. And the logical  
8 --

9 THE COURT: I don't know whether the  
10 Tenth Circuit would agree with you, but okay.

11 MR. BRUCE: Well, the logical flaw,  
12 your Honor, which the district court here  
13 originally recognized, is that Section 4(i)(4)  
14 provides that compliance with Section 4(i) shall  
15 constitute compliance with the requirements of this  
16 section relating to benefit accrual.

17 THE COURT: Right.

18 MR. BRUCE: And as the district court  
19 originally said, that language suggests that there  
20 are other requirements relating to other things,  
21 such as payment.

22 So that if compliance with Section  
23 4(i) established compliance with all of the ADEA,  
24 there would be no reason for the words "relating to

1 benefit accrual," because that's a limiting  
2 phrase. And so --

3 THE COURT: What case stands for that  
4 proposition, as opposed to it being game, set and  
5 match once there's been compliance with Section  
6 4(a)(i)?

7 MR. BRUCE: Well, there are district  
8 court cases which we cited, the *Vaughn* and the *Duke*  
9 *Power* case.

10 And originally the district court in  
11 this case agreed with that. Originally the  
12 district court said that compliance with the  
13 requirements relating to benefit accrual was not  
14 the full extent of the Age Discrimination Act.

15 And if you look at the purposes of the  
16 Age Discrimination Act, it makes no sense that  
17 bookkeeping credits for Mr. Smit would constitute  
18 compliance with the Age Discrimination Act when the  
19 economic substance is that he is earning no  
20 additional benefits for those eight years.

21 Congress --

22 THE COURT: Your yellow light is on.  
23 I want to lead you into another area. Your  
24 improper retroactive plan amendment argument as to

1 which Judge Chesler said was a novel theory,  
2 correct?

3 MR. BRUCE: Right.

4 THE COURT: Did not Judge Chesler say  
5 it was a novel theory but yet go on to decide it on  
6 the merits?

7 MR. BRUCE: No.

8 THE COURT: He had before him the  
9 committee's decision and he said he was reviewing  
10 it under an abuse of discretion standard.

11 MR. BRUCE: No, your Honor, he did  
12 not, at least in my reading of the decision, he did  
13 not go anywhere beyond the conclusion that this was  
14 an entirely new legal theory which was --

15 THE COURT: Well, he says at page  
16 JA-15 that you bear the burden of proof at trial on  
17 the fourth and fifth claim and defendants may meet  
18 their burden by pointing to the absence of evidence  
19 to support plaintiff's case. Defendants have done  
20 so, the burden shifts to plaintiff to support their  
21 case with evidence and have failed to do so, and  
22 granted summary judgment.

23 It was my assessment, because I know  
24 in your blue brief you never mention the committee,

1 period.

2 It was my assessment that Judge  
3 Chesler simply found novel theory and dropped it.  
4 But he did go further than that, didn't he?

5 MR. BRUCE: I don't read that that  
6 way. What I read -- and he did -- he had a similar  
7 analysis in another part of the decision that what  
8 I think he's saying is that this was an entirely  
9 new legal theory, that the amendments were not  
10 timely and properly adopted.

11 Therefore, I'm looking, is there  
12 anything, is there any other theory that was in the  
13 complaint, and that's where he's adding this  
14 language. But he's not -- the theory that we  
15 always prosecuted was that this was not timely  
16 amended.

17 THE COURT: I don't disagree with you.

18 MR. BRUCE: Yes.

19 THE COURT: Yes. I think he probably  
20 was wrong when he said this was a novel theory, and  
21 I will ask your friend across the aisle about it  
22 when his time comes. But even if it were, I'm just  
23 suggesting, he seemed to go further. He didn't  
24 just drop it.

1 MR. BRUCE: Well, I think what he's  
2 saying is that putting that aside, I don't see them  
3 raising any other problem with this, but then he's  
4 --

5 THE COURT: Let's assume we sent it  
6 back on that. What he has before him is the  
7 committee decision reviewable on an abuse-of-  
8 discretion standard, correct?

9 What would you have submitted or what  
10 would you submit to say that the committee abused  
11 its discretion --

12 MR. BRUCE: We don't believe --

13 THE COURT: -- when it found against  
14 you on this improper amendment claim?

15 MR. BRUCE: We don't believe it is an  
16 abuse-of-discretion standard.

17 THE COURT: But why?

18 MR. BRUCE: Because it's a statutory  
19 issue under the *Schoonejongen* and under *Depenbrock*  
20 in this circuit is that --

21 THE COURT: "Skuner-yagen," not  
22 "shooner-yagen." It's a Dutch C-H.

23 MR. BRUCE: I'm sorry. But under both  
24 those cases it's a statutory issue which gets de

1        novo review by both the district court and by this  
2        court to the extent there are factual --

3                THE COURT:    So the committee's not  
4        entitled to any deference at all?

5                MR. BRUCE:    No.    I think the, what  
6        judge -- the reason why we didn't appeal the  
7        sending it back to the, to that committee, was  
8        because we understood that this court would view  
9        that for abuse of discretion and that the district  
10       court always has --

11               THE COURT:    It went to the committee  
12       because Judge Linares found in 2006 you had to  
13       exhaust your remedies, right?

14               MR. BRUCE:    Right, but judge --

15               THE COURT:    And that was how you  
16       exhausted your remedies, by going before the  
17       committee.    And then come summary judgment time and  
18       there were cross motions for summary judgment on  
19       this issue.    And Judge Chesler found that it was a  
20       novel theory.

21               But he also found that you had not  
22       submitted any evidence to support, in opposition to  
23       their motion, and they had submitted evidence  
24       saying that they did not abuse the discretion.

1           So I'm just asking you, if we were to  
2 send it back what would you argue? What would you  
3 argue to Judge Chesler to say that the committee  
4 abused its discretion, or even that it was wrong  
5 under a *de novo* standard of review?

6           MR. BRUCE: Well, that was not a  
7 timely amendment. All you have to do is to compare  
8 the board resolutions in 1997 with the plan  
9 document in 2000.

10           There are conditions on the benefits  
11 involving the wear away and the benefit options  
12 that were not in the board resolutions. And we had  
13 deposition testimony from their 30(b)(6) witness  
14 and the senior vice president who made the  
15 presentation to the board of directors that our  
16 position was correct.

17           We had draft documents showing that  
18 these provisions were changed six months before the  
19 final.

20           THE COURT: Let me ask you another  
21 question. Even if your position were correct --  
22 we're getting even if, even if, even if, even if,  
23 how many plaintiffs could potentially benefit if  
24 Judge Chesler were to agree with you on your



1 argument?

2 Judge Linares suggested, quoting from  
3 your brief before him, that AT&T would have to  
4 recalculate the benefits of any participant who  
5 chose the cash payment option between 1997 and 2000  
6 if that was -- and then find if that was the  
7 participant's highest benefit.

8 Judge Linares speculated that it seems  
9 that this would alter, in some cases, and in some  
10 cases increase the amount of benefits due to  
11 certain plaintiffs.

12 How many plaintiffs are you -- you  
13 talk about a class of 24,000. How many plaintiffs  
14 would come within this apparently narrow range  
15 here?

16 MR. BRUCE: No, it's a three-year  
17 period.

18 THE COURT: Yes, right.

19 MR. BRUCE: And that's a very  
20 substantial part of the class. And in terms of the  
21 wear-away provision, the wear away --

22 THE COURT: Retired with a cash  
23 benefit?

24 MR. BRUCE: Yes, people were taking

1 the cash payments right and left without being  
2 informed that it was a less-valuable option and  
3 that these rules had been created in between the  
4 board and, they were being, they were being applied  
5 without authority.

6 There had been no adoption of the  
7 rules that AT&T was actually applying, so that when  
8 they were giving them this cash payment option,  
9 which was to, up to one year's pay plus \$30,000 and  
10 then the rest of it was supposed to be as an  
11 annuity, that AT&T was not basing that on the  
12 annuity that people already had which was more  
13 valuable.

14 They were basing it on this cash  
15 balance option, which had been devalued. So that  
16 people were electing out of several hundred  
17 dollars. And we had examples of Dollie Dobbins who  
18 lost about \$250 a month from that issue alone; Ed  
19 O'Brien who lost close to \$200.

20 THE COURT: Let me ask you a further  
21 question. If, if, if, another if, if we should  
22 agree with you on the amendment issue, that it can  
23 be addressed on the merits rather than simply  
24 thrown out, can we decide that issue or do we have

1 to remand it to the district court?

2 MR. BRUCE: We only asked you to  
3 remand it to the district court but with  
4 instructions for the district court to consider our  
5 motion for summary judgment, that we had cross  
6 moved and the district court said that our motion  
7 was moot because this was -- so it never really  
8 even addressed our motion.

9 THE COURT: So you never really had a  
10 chance to present?

11 MR. BRUCE: Right.

12 THE COURT: Okay.

13 MR. BRUCE: Thank you, your Honor.

14 THE COURT: Thank you. We'll get you  
15 on rebuttal.

16 Mr. Carpenter.

17 MR. CARPENTER: May it please the  
18 Court, I am David Carpenter for the defendants.

19 THE COURT: Mr. Carpenter, before you  
20 begin, let me just ask you this question before I  
21 lose the thought, with reference to the last couple  
22 of statements that your friend made.

23 With reference to this entirely new  
24 legal theory that Judge Chesler found, if that is

1 correct, what did Judge Linares mean when he said  
2 in 2006 that, quote, plaintiffs argued that the  
3 resolutions adopted by the board in April '97 are  
4 substantively different than two amendments later  
5 approved in October 16th, 2000, and thus the  
6 resolutions constitute an informal amendment in  
7 violation of ERISA, end quote?

8 MR. CARPENTER: The fundamental issue  
9 here is what the meaning of the 1997 resolution  
10 is. We say the 1997 resolution adopted what they  
11 referred to as the wear-away provisions, and it had  
12 also had provision relating to the form of benefits  
13 for the so-called special update.

14 They say that we're wrong, that the  
15 1997 amendment didn't mean that, and that those  
16 particular provisions weren't adopted until 2000.

17 So the fundamental issue here is an  
18 issue of plan interpretation. What did the 1997  
19 board amendment mean? And that's why this was  
20 referred to the benefits committee, because under  
21 your decision in *Harrow*, if it's an issue of plan  
22 interpretation, then you require exhaustion of the  
23 administrative remedy, which meant it would have to  
24 go to the benefits committee first.

1           Now he says he's making an argument  
2 about an interpretation of ERISA. If that's the  
3 argument he's making, that's an entirely new  
4 argument, because this never would have been sent  
5 to the benefits committee if he was making a claim  
6 about an interpretation of ERISA rather than an  
7 interpretation of the plan.

8           THE COURT: Well, Judge Linares found  
9 it was a claim for benefits under 502.

10          MR. CARPENTER: Yes, it's a claim for  
11 benefits because if their interpretation of the '97  
12 resolution were right, then ATT wasn't awarding  
13 high enough benefits to people who retired before  
14 2000 because it would have meant that you would  
15 have had to add something to the special update,  
16 that it wouldn't have been frozen.

17          THE COURT: Were there tens of  
18 thousands of people who fit into that category?

19          MR. CARPENTER: I don't know the  
20 answer to that. I don't know. It's not a moot  
21 issue, that's for sure, but --

22          THE COURT: Can I ask you, when we  
23 do -- now we have a benefit committee decision. Is  
24 that entitled to deference?

1 MR. CARPENTER: Oh, of course, under  
2 the Supreme Court decisions, under your decisions.

3 Now, and his argument that it's not  
4 entitled to deference rests on the false premise  
5 that his claim doesn't involve interpretation of  
6 the plan. Of course it does.

7 His argument is that the, his argument  
8 assumes a valid 1997 interpretation. His argument  
9 is they shouldn't get the frozen special update,  
10 they should get the frozen special update plus an  
11 additional amount. The special --

12 THE COURT: What did Judge Chesler  
13 decide, if anything, besides the fact that this was  
14 a novel theory, which I personally reject.

15 MR. CARPENTER: He decided that we  
16 made a *prima facie* showing under Rule 56(f) and  
17 that they provided no opposition, because the only  
18 claim they've made was this new claim.

19 THE COURT: Is that a finding on the  
20 merits?

21 MR. CARPENTER: Yes, it's a finding on  
22 the merits, that they had no opposition other than  
23 this new claim. It means they had no opposition to  
24 our abuse of discretion --

1 THE COURT: If the claim is not new,  
2 if we find the claim is not new, what then?

3 MR. CARPENTER: The only way you can  
4 find this claim is not new is if you characterize  
5 this claim as a different way of expressing his  
6 plan interpretation claim. Because if he was  
7 arguing that this plan, that there's a violation of  
8 502(a), that would mean that we didn't follow the  
9 plan's procedures when the amendment was made in  
10 1997.

11 That would mean the entire amendment  
12 is invalid, including the special update. They  
13 like the special update. What they're arguing is  
14 that the plan as adopted in '97 has to be  
15 interpreted so they don't get only the special  
16 update, but they get extra amounts above and beyond  
17 the special update.

18 So the only way you can find that this  
19 is not a new theory is if you find it's just  
20 another way of expressing the issue of plan  
21 interpretation that went to the benefits  
22 committee.

23 We demonstrated before Judge Chesler  
24 that that was not abuse of discretion, and Judge

1 Chesler said they hadn't opposed that. And you  
2 don't even have to worry about what they said  
3 before Judge Chesler, because the only argument  
4 they raised on appeal is that their 402(b) -- (a)  
5 claim wasn't new and they didn't argue that they  
6 made any arguments in the opening brief about  
7 whether the benefit committee decision was an abuse  
8 of discretion.

9 In fact, as you point out, their  
10 opening brief didn't even mention the benefits  
11 committee decision.

12 And this claim, the claims they've  
13 made are -- if you send this back this is just a  
14 formal exercise. Their claim is that -- they made  
15 two claims about the special -- three claims.

16 First they said the special update is  
17 not really frozen, you've got to add the special  
18 update and the cash balance amount to get the final  
19 benefit.

20 Now the initial cash balance and the  
21 special update both include service for the period  
22 prior to 1997.

23 So the benefits committee rejected  
24 that claim on the ground, quote, that would have



1 entitled participants to double credit for service  
2 prior to January 1st, 1997. That's, JA-4953.

3 And this claim is so absurd that  
4 plaintiffs now deny they ever made it. And that's  
5 smart, because that claim is just absurd.

6 So the claim they now make is that the  
7 special update really wasn't frozen, but you have  
8 to add the annual service credits to the special  
9 update.

10 But that claim has absolutely no  
11 support in the resolution because the resolution  
12 says the special update is a one-time frozen  
13 benefit and that the cash balance, it's the cash  
14 balance account where you get the accruals.

15 And the benefits committee said about  
16 that is, quote, the cash balance formula is the  
17 only formula under the plan that provides for  
18 ongoing accrual. That's also JA-4953.

19 The final claim they raise is whether  
20 you can get something called a joint, and hundred  
21 percent survivor form of benefit under the special  
22 update.

23 And the benefit committee rejected  
24 that because the plan provides that that's a

1 benefit under the cash balance account formula, not  
2 under the special update. That's JA-4954-56.

3 So all of these claims, I mean we were  
4 right when we said there was no abuse of  
5 discretion. I don't know how the plan could be  
6 interpreted any differently. But Chesler ruled for  
7 us on the merits on that, and they didn't appeal  
8 that.

9 The only argument they made was this  
10 argument about whether the 402(b) claim was a new  
11 claim. And if it's a new -- and if it's not a new  
12 claim it's only because it's a different way of  
13 articulating the claim they made before, which was  
14 a claim of plan interpretation for all the reasons  
15 that I just said.

16 THE COURT: Your time is running. Can  
17 you address the ADEA issue?

18 MR. CARPENTER: Yes. He conceded  
19 today that their claim relates to benefit accrual,  
20 and it clearly does.

21 This is a challenge to the benefit  
22 accrual provisions of this plan. You have the  
23 special update that's frozen, you have the cash  
24 balance plan where you accrue annual credits.

1           And their argument is that those  
2 provisions are unlawful and that you have to accrue  
3 annual credits on top of the special update.

4           So they're seeking to modify,  
5 essentially, the benefit accrual provisions of the  
6 plan. So it clearly relates to benefit accrual,  
7 and they conceded that today.

8           And under the terms of the statute, if  
9 it relates to benefit accrual, then it satisfies  
10 all the requirements of Section 4, if it complies  
11 with the requirement of 4(a), 4(i)(4), that the  
12 rate of benefit accrual not cease or be reduced on  
13 account of age. And that's I think --

14           THE COURT: And you like *Hurlic* and  
15 *Jensen*.

16           MR. CARPENTER: Yes. And *Hurlic*, he's  
17 correct that was a case brought under state ADEA.

18           THE COURT: State law, yes.

19           MR. CARPENTER: But under the federal  
20 law state ADEA claims are preempted if they  
21 couldn't be brought under the federal ADEA. And  
22 the Ninth Circuit held that it couldn't be brought  
23 under federal ADEA because of 4(i).

24           So it's quite clear that wear-away

1 claims are barred by 4(i) when as here there's no  
2 differentiation in the rate of benefit accrual  
3 based on age.

4 Here you have a result of two  
5 different, the interplay of two different benefit  
6 accrual provisions that are nondiscriminatory; the  
7 frozen, the special update is frozen for everyone,  
8 it's a one-time benefit for everyone; and then the  
9 cash balance formula actually benefits older people  
10 because the initial cash balance is bigger if  
11 you're older and the rate of the annual credits is  
12 bigger if you're older.

13 So --

14 THE COURT: Older or longer term of  
15 service?

16 MR. CARPENTER: Older, older.

17 THE COURT: Which is implicit.

18 MR. CARPENTER: Age. Yes.

19 THE COURT: Is it true that only one  
20 percent of AT&T employees wait until they're 65 to  
21 retire?

22 MR. CARPENTER: That probably was true  
23 under the old plan, which had these generous early  
24 retirement subsidies.

1           And one of the things that ATT had a  
2 right to do was eliminate early retirement  
3 subsidies. And the answer to the question one of  
4 you asked, it could have done that, and that would  
5 have meant that anyone who had not yet qualified  
6 for early retirement wouldn't have got early  
7 retirement subsidies.

8           And what ATT did, maybe in a mistake  
9 that led to, you know, an act that led to a lot of  
10 litigation, is that it adopted measures to protect  
11 people who were within seven to eight years of  
12 early retirement eligibility. And that's what  
13 gives rise to this wear-away problem that they're  
14 objecting to.

15           THE COURT: Those people did very well  
16 under the new plan, correct? Those who were closer  
17 to retirement.

18           MR. CARPENTER: Yes, because of this  
19 special update they did better. And the irony of  
20 this age claim is that they're complaining about  
21 something that makes the older worker better off  
22 than the young worker. The younger worker just  
23 gets --

24           THE COURT: Of those people who were

1 closer to retirement and then the benefits tend to  
2 --

3 MR. CARPENTER: Right.

4 THE COURT: -- increase less.

5 MR. CARPENTER: Right. Right.

6 THE COURT: Yes, and are phased out.

7 MR. CARPENTER: By freezing this  
8 special update it means that during this wear-way  
9 period, unlike the younger workers who crossed  
10 over, the older workers get not only the actuarial  
11 equivalent of their age 65 benefit, but they get  
12 something extra.

13 And that something extra diminishes a  
14 little bit each year. And what they want is that  
15 special update to keep accruing the full credits of  
16 the cash balance so that the early retirement  
17 subsidy becomes permanent.

18 That's the claim.

19 THE COURT: I keep thinking of my  
20 father's words, "Work is its own reward." You  
21 know, just keep working no matter how old you get.

22 MR. CARPENTER: He didn't talk about  
23 his disclosure claims, but --

24 THE COURT: Well, I wouldn't blame

1 that on him. We've kept him very busy with a  
2 couple of other claims. And maybe you want to --

3 MR. CARPENTER: Yes, I just want to  
4 make one point about this claim that we were  
5 intentionally or actively concealing the fact that  
6 our plan is going to result in a wear away.

7 Twelve days after these amendments  
8 were adopted, April 28th we issued a letter, sent a  
9 letter to all employees saying that if you're  
10 within seven years of early retirement eligibility  
11 generally your benefit is going to be calculated  
12 under the frozen special update and not the cash  
13 balance. Twelve days.

14 In August we sent out a notice about  
15 the cash, about the special update. And then in  
16 November we sent out a booklet about the cash  
17 balance plan that towards the end talked about wear  
18 away and gave two examples of people who are in  
19 wear away.

20 Now their claim that we concealed wear  
21 away is based on minutes of a meeting of the people  
22 who were preparing that November booklet. And what  
23 they were discussing in these minutes -- this is  
24 their smoking gun -- is where in this booklet wear

1 away would be discussed. They said we shouldn't  
2 have it in the first four pages, we'll have it  
3 later in this 30-page booklet.

4 Also, in this 30-page booklet we  
5 reminded people that we'd set up an intranet site  
6 that they could access from their ATT computers  
7 where they could go and calculate what their wear-  
8 away period would be, what the cross-over point  
9 would be.

10 And people, including the named  
11 plaintiffs, went to that site and calculated their  
12 wear-away amount. The named plaintiff, Smit, went  
13 to this website on November 12th and calculated  
14 that his wear-away period would be eight years,  
15 that's JA-774. And he filed the EEOC complaint  
16 that led to this lawsuit on January 15.

17 And that's before he received the  
18 summary plan description that they say is  
19 inadequate. But it's not inadequate because the  
20 summary plan description too says that there may be  
21 instances in which the special update, frozen  
22 special update will exceed the cash balance  
23 amount.

24 So we disclosed wear away beginning



1 right after the adoption of the plan and throughout  
2 the subsequent period. In fact, the most  
3 frequently asked question about the plan in, as of  
4 August 15th had to do with wear away. That's  
5 JA-825.

6 Another claim they make is a fiduciary  
7 duty claim.

8 THE COURT: Let me ask you, on the  
9 amendment and the improper amendment, the new  
10 theory, if we decide that we won't consider it  
11 under the new theory, we'll consider the claim on  
12 the merits, can we do that ourselves or do we have  
13 to remand this case to the district court?

14 MR. CARPENTER: Absolutely you can do  
15 it yourself because we made the showing that there  
16 was no abuse of discretion, the district court  
17 found our showing sufficient, said they had no  
18 opposition to it. And for the reasons I said  
19 before, this is a no brainer.

20 I mean the provisions of the  
21 resolution are perfectly clear.

22 THE COURT: Sometimes when I read  
23 ERISA I feel like I'm a no brainer in the other  
24 sense of the word.

1 THE COURT: Yes.

2 MR. CARPENTER: Well --

3 THE COURT: Can you imagine some man  
4 or woman from Mars listening to this argument?

5 MR. CARPENTER: I agree that --

6 THE COURT: Nothing's a no brainer.

7 MR. CARPENTER: -- ERISA is not a  
8 model of clarity. But no one, I don't think, could  
9 reasonably have thought that the special update was  
10 not frozen, and that's their argument.

11 We said over and over and over again,  
12 the resolution said it, everything we said in our  
13 communications to employees said this is frozen,  
14 there may be instances in which your frozen  
15 benefit, the special update, will exceed the cash  
16 balance benefit, and the cash balance benefit is  
17 the only benefit that grows. And their claim is  
18 that the special update should grow.

19 So I see my time is up, so.

20 THE COURT: Any questions? Thank you,  
21 Mr. Carpenter. Rebuttal.

22 MR. BRUCE: A couple of things. When  
23 we took depositions of the two former CEOs, of C.  
24 Michael Armstrong and Robert Allen, who was the CEO

1 at the time of this cash balance conversion,  
2 neither one of them understood the wear away.

3 Mr. Allen testified that he did not  
4 know what wear away was, even though he sat on the  
5 board of directors and was chairman of the board of  
6 directors during that time period.

7 Mr. Armstrong is displayed in town  
8 meetings with the employees, was under the  
9 impression that if people got beyond the cross-over  
10 period that all was made whole. And that is  
11 reflected in part of what Mr. Carpenter says today,  
12 that somehow during this period of wear away that  
13 people are still getting value from somewhere.

14 But there is no value. Mr. Smit had  
15 \$1,985 as of January 1st, 1997. If he walked out  
16 the door he had that \$1,985 without reservation.

17 All he got in the eight years since  
18 that time were bookkeeping entries. And if we're  
19 at a point where bookkeeping entries can establish  
20 compliance with the Age Discrimination Act, where  
21 it does not have to reflect any reality in terms of  
22 people receiving payments, then I think that we're  
23 certainly at a point where Congress will do  
24 something again.

1                   They've already stepped in and  
2 prohibited these wear-away periods whether or not  
3 anybody proves that they were age discriminatory.  
4 They prohibit them whether or not there was  
5 adequate disclosure.

6                   This was a pernicious practice, and it  
7 was directed at the older employees. We discovered  
8 spreadsheets which we have in Exhibits 111 through  
9 150 is a series of spreadsheets where AT&T was  
10 calculating the periods of wear away that the older  
11 employees would have.

12                   They did line graphs to show that.  
13 All this was internal. And they had PowerPoint  
14 presentations to the executives who were making  
15 these decisions specifically stating that younger  
16 employees, quote, will earn benefits immediately.  
17 Other employees will take three to eight years.

18                   Those other employees were the ones  
19 that they wanted to leave AT&T, and droves of them  
20 did in 1997 and 1998 as they were facing no  
21 additional benefits.

22                   Mr. Armstrong was asked at a town  
23 meeting, where's the retention incentive for a  
24 50-year-old employee in terms of the pension

1 benefit?

2 THE COURT: But if we decide that what  
3 is done complies with the statute, the fact that  
4 you think something else should have been done  
5 really is of not great significance, right?

6 MR. BRUCE: If you decide that  
7 bookkeeping entries are all that's required to  
8 satisfy --

9 THE COURT: Complies with the statute,  
10 yes.

11 MR. BRUCE: -- the Age Discrimination  
12 Act or ERISA. The idea that anti-backloading rules  
13 only protect bookkeeping entries and that people do  
14 not have to receive payments, even though the  
15 statute says "payable" over and over again, you  
16 know, these reform-minded statutes are being  
17 subverted by bookkeeping analysis and manipulation  
18 of numbers, where on the 204(h) claim they want to  
19 manipulate when the benefit reductions were  
20 effective, they want to go back to an earlier point  
21 in time where they can group increases with the  
22 reductions so that people aren't told that as of  
23 1998 you are not earning benefits at the same rate  
24 as you were before.

1                   Their own spreadsheets show that,  
2                   their own actuarial expert made calculations  
3                   showing that. They still deny it today. They  
4                   still deny it to their employees that the cash  
5                   balance conversion was designed to reduce people's  
6                   benefits.

7                   THE COURT: I thought you -- I just  
8                   heard you say something that I thought you agreed  
9                   with me earlier, that under the new plan age 65  
10                  benefits are higher at -- when you retire at age 65  
11                  than they were under the prior plan.

12                  MR. BRUCE: If someone like Mr. Smit,  
13                  if he did not start his retirement benefits at age  
14                  55 --

15                  THE COURT: Leave, yes, right.

16                  MR. BRUCE: -- but waited to age 65,  
17                  he would be giving up value. There's no way that,  
18                  unless a person was still working for AT&T --

19                  THE COURT: That's what I'm saying.

20                  MR. BRUCE: -- there's no economically  
21                  rational reason --

22                  THE COURT: I'm saying somebody who  
23                  left at 65 would be doing, would do better under  
24                  the new -- under the amended plan than they would

1 have under the prior plan, right?

2 MR. BRUCE: Right.

3 THE COURT: That's what I thought you  
4 had said.

5 MR. BRUCE: Somebody who continued to  
6 work to age 65.

7 THE COURT: Yes.

8 MR. BRUCE: But somebody who left,  
9 lost their job at age 55, as most of these  
10 employees did, if they waited until age 65 to start  
11 drawing those benefits, they would be giving up  
12 economic value.

13 There's no economically rational  
14 reason why they would do that. Thank you.

15 THE COURT: Well, the case was  
16 extraordinarily well argued and obviously we're  
17 going to take it under advisement.

18 The panel would like to have a  
19 transcript of the argument. Can you work together  
20 and see that that is done?

21 MR. BRUCE: Yes.

22 THE COURT: Appreciate it. Thank you  
23 very much.

24

1  
2  
3 **CERTIFICATION**

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

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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17  
18  


19 \_\_\_\_\_  
20 James DeCrescenzo  
21 Registered Diplomate Reporter  
22 Certified Shorthand Reporter Notary Public  
23  
24