

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES MCHENRY and
R. JAMES MATYAS

v.

BELL ATLANTIC CORPORATION and
CELLCO PARTNERSHIP d/b/a
BELL ATLANTIC MOBILE

CIVIL ACTION

NO. 97-6556

MEMORANDUM

Broderick, J.

August 18, 1998

In this action brought by Plaintiffs James McHenry and R. James Matyas on behalf of a putative class and subclass of employees and former employees of Defendants Bell Atlantic Corporation ("Bell Atlantic") and CellCo Partnership d/b/a Bell Atlantic Mobile ("BA Mobile") (collectively "Defendants"), Plaintiffs make claims of breach of fiduciary duties under sections 404 and 502 of ERISA, 29 U.S.C. §§ 1104 and 1132(a) (Counts One and Three), as well as a federal common law claim of equitable estoppel (Count Two). Presently before the Court is Plaintiffs' motion for class certification pursuant to Fed.R.Civ.P. 23. Defendants oppose Plaintiffs' motion. For the following reasons, the Court will certify the following class as to Counts One and Two:

All employees of Bell Atlantic Mobile who were formerly employed by Bell Atlantic Corporation and to whom representations were made by the management of Bell

Atlantic Corporation, acting in its own name and through the management of its wholly-owned subsidiary, Bell Atlantic Mobile, that the employees' pension benefits would remain the same if they transferred their employment to Bell Atlantic Mobile.

The Court will also certify the following subclass as to Count Three:

All members of the Plaintiff class who were participants in the Bell Atlantic Savings Plan for Salaried Employees or the BANM Savings and Profit Sharing Plan between September 30, 1995 and December 31, 1995.

Plaintiffs bear the burden of proving that this action satisfies all of the certification requirements of Rule 23. Georgine v. Amchem Prod., Inc., 83 F.3d 610, 624 (3rd Cir. 1996), aff'd sub. nom. Amchem Prods. v. Windsor, 117 S.Ct. 2231 (1997). The record upon which Plaintiffs move for class certification can be summarized as follows: Plaintiffs allege that in 1984, Bell Atlantic created a new subsidiary, Bell Atlantic Mobile Systems ("BA Mobile"), in order to develop the new field of mobile/cellular/wireless communications. Plaintiffs allege that Bell Atlantic actively recruited veteran employees of the old "wire-line" business to accept employment with the new "wireless" subsidiary. Plaintiffs allege that these veteran employees were participating in a pension plan at Bell Atlantic under which they were accruing substantial benefits on account of their years of service and salary histories, and they were concerned about the

impact a move to BA Mobile would have on their pension benefits. Plaintiffs allege that the management of Bell Atlantic and BA Mobile understood that continuity of pension plan benefits was a material consideration for Bell Atlantic employees considering employment with the wireless company. Plaintiffs allege in their Complaint that "the management of Bell Atlantic, acting in its own name and through the management of its wholly-owned subsidiary, BA Mobile, engaged in a continuing course of conduct and scheme to represent to plaintiffs and the members of the Class, as employees who were considering transfer of employment to the mobile company, that their pension benefits at BA Mobile would be the same as or equivalent to the pension benefits they would receive if they had remained employees of the wire-line business at Bell Atlantic." Plaintiffs further allege that these representations "were published by Bell Atlantic and BA Mobile through substantially uniform oral statements and presentations to plaintiffs and the Class by top executives, hiring managers and human resources representatives."

Both of the named Plaintiffs testified in their depositions that BA Mobile hiring managers actively recruited them to leave Bell Atlantic and accept employment at BA Mobile, and that when Plaintiffs asked about the impact such a move would have on their pensions, they were assured that their pension benefits would not be adversely affected. In the case of Mr. Matyas, the hiring

manager who recruited him told Mr. Matyas that his pension would not be hurt, but that it might get better. The assurances Mr. McHenry received by the hiring manager who recruited him were confirmed at his orientation on his first day at BA Mobile by a human resources representative who once again assured him that his pension benefits would remain the same as they had been at Bell Atlantic. In addition, in their depositions Mr. Matyas and Mr. McHenry identified numerous BA Mobile employees whom they personally knew had transferred from Bell Atlantic after receiving assurances of pension parity.

As Plaintiffs point out in their Complaint, effective July 1, 1995, Defendant Bell Atlantic entered into a joint venture and partnership with NYNEX Corporation, called "CellCo," to jointly operate their cellular business. Plaintiffs allege that well before the creation of the new entity, Defendants were seriously considering significant changes in both the Bell Atlantic and BA Mobile pension plans, which changes would cause the former Bell Atlantic employees substantial reductions in their pension benefits as compared to the parallel plan they had previously participated in at Bell Atlantic. However, Plaintiffs allege that Defendants concealed these plans and did not warn either Bell Atlantic employees considering employment with BA Mobile, or the former Bell Atlantic employees who had already moved over to BA Mobile.

Shortly after the creation of CellCo, Plaintiffs allege that the former wire-line employees lost the opportunity to return to employment with Bell Atlantic and to resume participation in the Bell Atlantic pension plan. It was at roughly that time, Plaintiffs allege, that the managements of Bell Atlantic and BA Mobile effected significant reductions in the pension plan benefits for Plaintiffs and members of the class. An internal BA Mobile E-mail sent by Robert Scott, Vice President for the Northeast region to Jeanne Kappel, the Vice President of Human Resources, describes the wide-spread feeling of disaffection among BA Mobile employees, and in particular among those who had transferred from Bell Atlantic, after these changes were effected: "They feel that their distributions are out of balance with the distributions given to their peers at Bell Atlantic. Quite frankly, these people probably would have opted to stay at their previous Bell Atlantic assignments had they known that their long-term finances would be affected."

According to the Plaintiffs' allegations, in response to waning morale among BA Mobile employees regarding their pensions, the company scheduled several group meetings with senior employees to address their concerns. Plaintiff McHenry, who attended two such meetings, testified in his deposition that the attendees voiced their perception that they had been promised pension parity when they were recruited to the mobile business.

Mr. McHenry further testified that in response to these assertions, Jeanne Kappel, BA Mobile's Vice President for Human Resources, acknowledged "that's what we've been telling people for years."

Plaintiffs bring three counts against Bell Atlantic and BA Mobile. Count One alleges that Defendants were acting as administrators of the pension plan in making representations of pension parity to employees considering a move to BA Mobile, and thus were fiduciaries whose conduct was governed by the fiduciary duties of Section 404(a) of ERISA, 29 U.S.C. § 1104(a). Plaintiffs claim that Defendants breached their fiduciary duty to accurately and truthfully describe the benefits that employees will receive and to disclose all material information about those benefits. Count Two alleges that Defendants are estopped from acting in a manner contrary to their representations of benefits parity. Count Three alleges that Defendants violated their fiduciary duty under section 404(a) of ERISA, 29 U.S.C. § 1104(a) in connection with the transfer of the savings plan account balances for BA Mobile employees to the new savings plan established after the creation of the joint venture CellCo. Plaintiffs allege that the transfer of the account balances did not occur in a prudent manner, and as a result the savings plan participants were deprived of substantial investment earnings on their retirement savings accounts. Plaintiffs seek declaratory

relief establishing that Defendants' conduct violated ERISA, as well as injunctive relief in the form of restoration of retirement and savings plan benefits.

In determining a motion for class certification, the Court does not examine the merits of the plaintiffs' underlying claims. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1997). Federal Rule of Civil Procedure 23(a) establishes four prerequisites to a class action: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the representative parties must be typical of the claims of the class; and (4) the representative parties must fairly and adequately protect the interests of the class. Fed.R.Civ.P. 23(a). In order to establish that class certification is proper, Plaintiffs must establish that all four requisites of Rule 23(a) are met. Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 55 (3rd Cir. 1994). In addition, a putative class must comply with one of the parts of Rule 23(b). Id. at 55-56.

The first requirement of Rule 23(a) is that the class be so numerous that joinder of the class would be impracticable. However, "impracticable does not mean 'impossible.'" The representatives of the proposed class need only show that it is

extremely difficult or inconvenient to join all members of the class." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1762 at 159. Furthermore, the Third Circuit has noted that the numerosity requirement should not be rigorously applied in cases where injunctive relief is requested. Weiss v. York Hospital, 745 F.2d 786, 808 (3rd Cir. 1984).

Plaintiffs contend that the proposed class contains at least 250 members of former Bell Atlantic employees who moved to BA Mobile and who were entitled to pension plan benefits, and that the participants are geographically dispersed in numerous states, particularly those who are no longer employed by Defendants. Courts have consistently found that the numerosity requirement is satisfied by classes similar to or smaller in size than the class for which certification is sought here. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1762 at 177-179 (collecting cases where joinder found impracticable when there were 200 or fewer members.) The Court is satisfied that the first prong of Rule 23(a) is satisfied.

Rule 23(a) next requires that there be issues of law or fact common to the class as a whole. "The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." Baby Neal for and by Kanter v. Casey, 43 F.3d at 56. Thus, the Third Circuit has noted, the commonality requirement is

"easily met." Id. Factual differences may exist among plaintiffs because they do not need to share identical claims. Id.

Under this standard, it is clear that the Plaintiffs and class members share common issues of fact and law as to each of the three counts alleged in Plaintiffs' Complaint, including whether Defendants engaged in a course of conduct to misrepresent the pension-related benefits class members would receive while employed by BA Mobile, and whether Defendants' alleged misrepresentations were a breach of their fiduciary duties under ERISA. Likewise, Plaintiffs and the subclass (of which both named Plaintiffs are members) share common issues including whether Defendants acted imprudently and in breach of their fiduciary duties in transferring account balances from the Bell Atlantic savings plan to the Bell Atlantic Mobile savings plan. Thus, the Court finds that the second prong of Rule 23(a) is satisfied.

Next, Rule 23(a) requires that the Plaintiffs' claims are typical of those of the proposed class members. In Baby Neal, the Third Circuit noted that "cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims ... Actions requesting declaratory and injunctive relief to remedy

conduct directed at the class clearly fit this mold." Baby Neal, 43 F.3d at 58. Plaintiffs and their proposed class members all challenge the same unlawful conduct, that is Defendants' alleged course of conduct in misrepresenting benefits parity to employees of Bell Atlantic in order to induce those employees to accept employment with BA Mobile. Furthermore, this alleged common course of conduct affected both Plaintiffs and the class members in the same way in that it ultimately resulted in a reduction of the pension benefits of both Plaintiffs and the class members. Likewise, Plaintiffs and their proposed subclass members all challenge the same unlawful conduct, namely Defendants' alleged imprudent management of savings plan accounts in violation of their fiduciary duties under ERISA, and as a result Plaintiffs and the subclass members alike were allegedly deprived of substantial investment earnings on their retirement savings accounts. Therefore, the representative Plaintiffs are typical of the class and the Court finds that the third prong of Rule 23(a) is satisfied.

Defendants contend that Plaintiffs' claims of breach of fiduciary duties and equitable estoppel involve elements of reliance and that as a result, individual issues preclude a finding of typicality. Detrimental reliance is an element of the federal common law claim of equitable estoppel. Curcio v. John Hancock Mut. Life, 33 F.3d 226, 237 (3rd Cir. 1994). Numerous

courts have held that “[b]ecause of their focus on individualized proof, estoppel claims are typically inappropriate for class treatment.” Sprague v. General Motors Corporation, 133 F.3d 388, 398 (6th Cir. 1998)(citing Jensen v. SIPCO, Inc., 38 F.3d 945, 953 (8th Cir. 1994)(estoppel “must be applied with factual precision and therefore is not a suitable basis for class-wide relief”); Peachin v. Aetna Life Insurance Company, 1996 WL 22968, *5 (N.D.Ill.) (“estoppel theory raises issues that are individual in nature and threaten to overshadow the common questions”); Diehl v. Twin Disc, Inc., 1995 WL 330637, *7 (N.D.Ill.)(reliance element of estoppel claim precludes finding of typicality under Rule 23(a)(3)).

This Court is of the opinion that the above cases upon which Defendants rely are distinguishable on the basis of the Plaintiffs’ factual allegations. The Sixth Circuit noted that the Plaintiffs in Sprague had made a “wide variety of representations,” and that “there must have been variations in the early retirees’ subjective understandings of the representations and in their reliance on them.” Sprague, 133 F.3d at 398. In this case, on the other hand, Plaintiffs allege that precisely the same representation was made -- that pension benefits would remain the same -- to all of the employees who transferred their employment from Bell Atlantic to BA Mobile. Indeed, a high-ranking executive has conceded that the employees

who transferred would have remained at Bell Atlantic had they known their pension benefits would be adversely affected. Thus, unlike in Sprague, the reliance element of the equitable estoppel claims does not render Plaintiffs' and class members' claims atypical. See Bunnion v. Consolidated Rail Corp., 1998 WL 372644, *12 (E.D.Pa.)(certifying class as to equitable estoppel claim, finding "no conflict or potential for conflict between the representative plaintiffs and the proposed class.")

More significantly however, as the United States Supreme Court has noted, "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 155, 102 S.Ct. 2364, 2369 (1982)(quoting Califano v. Yamasaki, 442 U.S. 682, 701, 99 S.Ct. 2545, 2557(1979)). Refusing to certify a class as to the equitable estoppel claim would potentially unleash 250 separate equitable estoppel claims upon the courts and the parties, which can hardly be said to promote the efficient administration of justice as envisioned by Rule 23. Furthermore, because Plaintiffs in this case are requesting class-wide injunctive relief, the Court may not ultimately need to concern itself with questions of individual reliance on the part of each and every class member. Therefore, the Court is satisfied that reliance is

not an issue which precludes a finding of typicality as to the equitable estoppel claims.

As to the contention of Defendants that a breach of fiduciary duty claim involving misrepresentations requires reliance, the Third Circuit has not identified reliance as an element of that claim. Rather, the elements of that claim are "proof of fiduciary status, misrepresentation, company knowledge of the confusion and resulting harm to the employees." In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig., 57 F.3d 1255, 1265 (3rd Cir. 1995), cert. denied, 517 U.S. 1103 (1996). Likewise, in Fischer v. Philadelphia Electric Company, the Third Circuit noted that an ERISA plan administrator has a "duty of truthfulness," and the focus in determining a breach of this duty is "the materiality of a plan administrator's misrepresentations." 96 F.3d 1533, 1538 (3rd Cir. 1996) ("Fischer II"). Materiality is a "mixed question of law and fact, ultimately turning on whether 'there is a substantial likelihood that [the misrepresentation] would mislead a reasonable employee in making an adequately informed decision...'" Id. (quoting Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (1993) ("Fischer I"). See also Bunnion v. CONRAIL, 1998 WL 372644, *27 (E.D.Pa.) ("the focus on a breach of fiduciary duty claim [under ERISA] is the conduct of the defendants, not the plaintiffs"); In re Unisys Corporation Retiree Medical Benefits

ERISA Litigation, 957 F.Supp. 628, 633 (E.D.Pa. 1997)(reliance not one of four elements of breach of fiduciary duty claims involving misrepresentations). Therefore, the Court is satisfied that reliance is not an issue which precludes a finding of typicality as to the claim of breach of fiduciary duty involving misrepresentations.

Defendants further contend that Plaintiffs have failed to establish a sufficient record of "uniform oral statements" misrepresenting benefits parity to the named Plaintiffs and the class members alike, and that as a result Plaintiffs have failed to carry their burden of proving typicality with respect to the breach of fiduciary duty and equitable estoppel claims brought in Counts One and Two. The Court is satisfied that the record supports the Court's finding. Plaintiffs point to numerous individuals who all claim that the hiring managers who recruited them gave assurances of benefits parity before they moved from Bell Atlantic to BA Mobile. Furthermore, a high ranking executive at BA Mobile concedes in an E-mail widely circulated among top executives that former Bell Atlantic employees would not have accepted employment with BA Mobile had they know about the ultimate reduction in their pension benefits. Finally, according to Plaintiff McHenry, BA Mobile's Vice President for Human Resources acknowledged that it had been the company's "policy for years" to assure prospective employees coming from

Bell Atlantic that their pensions would be unaffected by a move to BA Mobile. Where "plaintiffs' evidence appears to follow a pattern, and the people they claim made the representations are largely the same people," oral communications, even if they are not uniformly communicated to all class members, do not preclude a finding of typicality. Bittinger v. Techumseh Products Co., 123 F.3d 877, 884 (6th Cir. 1997). The Court is satisfied that this record supports a finding of typicality.

Finally, Rule 23(a) requires Plaintiffs to show that they will fairly and adequately represent the interests of the class members. The Third Circuit has held that "[t]he adequacy of representation inquiry has two components intended to assure that the absentees' interests are fully pursued: it considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class." In re General Motors Corporation Pick-up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 800 (3rd Cir. 1995); Weiss v. York Hospital, 745 F.2d at 811. It is uncontested that Plaintiffs' attorneys are qualified and experienced in employee benefits class actions. In addition, the Court finds that there are no conflicts of interest between the Plaintiffs and the putative class members. Indeed, the claims Plaintiffs assert on their own behalf are the same as those they assert on behalf of the class members, and the relief they seek,

if granted, will benefit both Plaintiffs and class members. Therefore, the Court finds that the final prong of Rule 23(a) is satisfied and that the Defendants' objection to the adequacy of representation requirement is without merit.

In addition to satisfying Rule 23(a), Plaintiffs must show that one of the subsections of Rule 23(b) is met. In this case, Plaintiffs allege that class certification is proper under Rule 23(b)(1)(B), 23(b)(2), and 23(b)(3). The Court finds that certification is proper under Rule 23(b)(2).

Rule 23(b)(2) provides that an action may be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). The Third Circuit has held that "this requirement is almost automatically satisfied in actions primarily seeking injunctive relief." Baby Neal, 43 F.3d at 58, 59 (citing Weiss v. York Hospital, 745 F.2d at 811). The Third Circuit noted that what is important under Rule 23(b)(2) is that the relief sought by the named plaintiffs should benefit the entire class. Id. at 59.

There is no doubt that the requirements of Rule 23(b)(2) are satisfied in this case. The proposed class and subclass of

Plaintiffs allege that the Defendants engaged in a common course of uniform misrepresentations affecting the entire class, and that the Defendants engaged in imprudent transfers of savings account balances affecting all members of the subclass.

Plaintiffs seek declaratory and injunctive relief on behalf of the entire class, and such relief, if granted, will benefit the entire class. Therefore, the Court finds that the Rule 23(b) requirement for class certification is satisfied.

Finally, Defendants claim that Plaintiffs' motion for class certification should be denied because Plaintiffs did not file the motion within ninety days of filing their class action complaint as required by Local Rule of Civil Procedure 23.1(c). Local Rule 23.1(c) provides that

[w]ithin ninety (90) days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Fed.R.Civ.P. 23, as to whether the case is to be maintained as a class action.

Defendants are correct that Plaintiff's motion for class certification was not filed in strict compliance with this Local Rule. However, numerous courts have held that failure to comply with the Local Rule in and of itself does not constitute grounds for denying a motion to certify a class action. Muth v. Dechert, Price & Rhoads, 70 F.R.D. 602, 606 (E.D.Pa. 1976); Pabon v. McIntosh, 546 F.Supp. 1328, 1331-32 (E.D.Pa. 1982); Robert Alan

Insurance Agency v. Girard Bank, 107 F.R.D. 271, 274 (E.D.Pa. 1985). Having found that the other prerequisites to class certification are met, this Court will not deny Plaintiffs' motion solely on the basis that it is untimely under the Local Rules.

The Court finds that class certification is proper and therefore the Plaintiffs' motion will be granted in that the Court will certify a class as to Counts One and Two comprising all employees of Bell Atlantic Mobile who were formerly employed by Bell Atlantic Corporation and to whom representations were made by the management of Bell Atlantic Corporation, acting in its own name and through the management of its wholly-owned subsidiary, Bell Atlantic Mobile, that the employees' pension benefits would remain the same if they transferred their employment to Bell Atlantic Mobile. The Court will also certify a subclass as to Count Three comprising all members of the Plaintiff class who were participants in the Bell Atlantic Savings Plan for Salaried Employees or the BANM Savings and Profit Sharing Plan between September 30, 1995 and December 31, 1995.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR
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ORDER

AND NOW, this 18th day of August, 1998; Plaintiffs James F. McHenry and R. James Matyas having filed a motion for class certification; the Defendants Bell Atlantic Corporation and CellCo Partnership d/b/a Bell Atlantic Mobile having opposed the motion; for the reasons set forth in a Memorandum issued on this date;

IT IS ORDERED: The motion of Plaintiffs James F. McHenry and R. James Matyas for class certification is **GRANTED**;

IT IS FURTHER ORDERED: The following class is certified:
All employees of Bell Atlantic Mobile who were formerly employed by Bell Atlantic Corporation and to whom representations were made by the management of Bell Atlantic Corporation, acting in its own name and through the management of its wholly-owned subsidiary, Bell Atlantic Mobile, that the employees' pension benefits would remain the same if they transferred their

employment to Bell Atlantic Mobile;

IT IS FURTHER ORDERED: The following sub-class is certified:
All members of the Plaintiff class who were participants in the Bell Atlantic Savings Plan for Salaried Employees or the BANM Savings and Profit Sharing Plan between September 30, 1995 and December 31, 1995;

IT IS FURTHER ORDERED: The Court reserves the right to alter or amend the definition of the class, the subclass, or to certify additional subclasses at any time before the decision on the merits.

RAYMOND J. BRODERICK, J.