Nos. 10-4147, 10-4279, 10-4791, & 10-4792

**IN THE UNITED STATE COURT OF APPEALS
FOR THE THIRD CIRCUIT**

RONALD SHAVER, WILLIAM WHITNEY, JOE FEDELE,
RALPH RIBERICH, and ANTHONY KATZ,
on behalf of themselves and others similarly situated

Appellees/Cross-Appellants,

v.

SIEMENS CORPORATION, SIEMENS WESTINGHOUSE
RETIREMENT PLAN FOR UNION EMPLOYEES, and
SIEMENS WESTINGHOUSE RETIREMENT PLAN,

Appellants/Cross-Appellees.

On Interlocutory Appeal from an Order and Appeal from a Final Judgment of
The United States District Court for the Western District of Pennsylvania

Honorable Judge David S. Cercone, District Judge
Case No. 2:02-cv-01424

BRIEF OF AMICI CURIAE AMERICAN BENEFITS COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS/CROSS-APPELLEES

Christopher J. Rillo (*Lead Counsel)*
Bradford P. Campbell
Suzanne M. Arpin
Diane M. Soubly
SCHIFF HARDIN LLP
1666 K Street, NW, Suite 300
Washington, DC 20006
Counsel for Amici Curiae

Janet Jacobson
AMERICAN BENEFITS
COUNCIL
1501 M Street NW
Suite 600
Washington, DC 20005
*Counsel for
American Benefits Council*

Additional Counsel Listed on Inside Cover

Quentin Riegel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790

Counsel for the National Association of Manufacturers

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street NW
Washington, DC 20062

Counsel for Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit Rule 26.1, *Amici curiae* make the following disclosures:[1]

(1) *For non-governmental corporate parties, please list all parent corporations:*

The American Benefits Council, the National Association of Manufacturers, and Chamber of Commerce of the United States of America are non-profit organizations with no shareholders or parent corporations. Their members include many publicly owned corporations.

(2) *For non-governmental corporate parties, please list all publicly held companies that hold 10% or more of the party's stock:*

Not applicable.

(3) *If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.*

Not applicable.

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[1] No counsel for a party authored this brief in whole or in part. Siemens Corporation ("Siemens") is a member of the *Amici* and paid the Council a portion of the cost of the preparation and submission of this brief. However Siemens was not involved in the Council's decision to file the brief. The decision to file an amicus brief was made by the Council's Executive Board, which does not include Siemens. Fed. R. App. P. 29(c)(5)(A)–(B). No person or entity—other than their *amici*, their members, or their counsel—made a monetary contribution intended to fund this brief's preparation or submission. Fed. R. App. P. 29(c)(5)(C).

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JURISDICTION

Amici curiae the American Benefits Council, the National Association of Manufacturers, and Chamber of Commerce of the United States of America (*Amici*) incorporate Appellants'/Cross-Appellees' delineation of Jurisdiction.

ISSUES PRESENTED FOR REVIEW

Amici incorporate Appellants'/Cross-Appellees" statement of "Issues Presented for Review." *Amici* also expressly state the following issues for review, implied within the Issues stated by Appellants/Cross-Appellees:

1. Whether the district court erred and engaged in an unwarranted extension of the so-called "spin-off rule" in Section 208 of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (ERISA), in conflict with other decisions of this Court and other Circuits, when it applied the rule to an asset purchase agreement transaction where the purchaser declined to assume the seller's pension plans, and where the seller transferred no assets to the purchaser's pension plans to cover pension liabilities that the court deemed transferred to the purchaser.

2. Whether the district court erred and engaged in an unwarranted extension of ERISA's anti-cutback rule in ERISA § 204(g), in conflict with other decisions of this Court and other Circuits, by characterizing a purchaser's separate pension plans as impermissible "amendments" of a seller's pension plans or of a purported "transitional" or "continuing" plan, and by ignoring terms of the seller's plans rendering plaintiffs ineligible for the separation benefit at issue.

3. Whether, if uncorrected by this Court, these unwarranted extensions of ERISA's complex rules will encourage protracted litigation over similar past business transactions and will discourage employers from entering into such transactions at the very time when American companies need maximum flexibility in order to face the challenges of increased global competition and rapid change in certain industry sectors and to contribute to economic recovery.

RELATED CASES

Amici incorporate Appellants'/Cross-Appellees' description of Related Cases.

STATEMENT OF THE CASE

Amici incorporate Appellants'/Cross-Appellees' "Statement of the Case." The Magistrate Judge and the District Court both concluded that ERISA's "spin-off" rule and its anti-cutback rule applied to an asset sale transaction between Westinghouse Corporation (Westinghouse) and Siemens Corporation (Siemens) in which Siemens (as purchaser) did not assume the seller's ERISA-governed retirement plans (the Westinghouse Plan), and Westinghouse (as seller) did not transfer any assets to the purchaser's retirement plans.

As to these issues, the District Court generally adopted the Magistrate Judge's conclusions that the asset purchase transaction fell within the "spin-off" rule in ERISA § 208, and that anti-cutback rule in ERISA § 204(g) required Siemens to pay the Permanent Job Separation (PJS) benefits in the Westinghouse Plan to over two hundred former Westinghouse employees who moved with the sale from Westinghouse to Siemens, but left Siemens employ in subsequent work force reductions.

STATEMENT OF FACTS

Amici incorporate Appellants'/Cross-Appellees' "Statement of Facts." Plaintiffs, former Westinghouse employees who did not lose a day's work as

a result of the asset purchase transaction, claimed that Siemens owed them the PJS benefit under the Westinghouse Plan when Siemens (their successor employer) terminated them during work force reductions after the asset purchase.

In structuring their asset purchase transaction, Siemens and Westinghouse intended no transfer of liabilities for the disputed benefit. Westinghouse admitted to that intent. Siemens chose not to assume the Westinghouse Plan. The District Court found that Siemens became a "plan sponsor" of the benefits by virtue of a provision in the Asset Purchase Agreement (the APA) under which Siemens undertook to provide the "aggregate of benefits" to the former Westinghouse employees under "substantially identical" terms and conditions of the Westinghouse Plan as if they had continued in Westinghouse's employ. The Westinghouse Plan contained a sunset provision for the PJS benefit at the time of the asset purchase transaction, and the benefit expired on the day before the closing date for pension purposes under the APA. The next day, the Siemens retirement plans took effect; and, when it terminated former Westinghouse employees in subsequent force reductions, Siemens paid them substantial severance benefits under its own retirement plans.

The Westinghouse Plan specifically stated that only Westinghouse or its affiliates fell within the definition of "Employer." The PJS benefit provision expressly excluded employees, like plaintiffs, who enjoyed "continuous employment" as employees of a "successor employer"; such employees did not qualify for the PJS benefit upon termination from the successor employer during work force reductions and job eliminations.

The decisions below (the 2005 Magistrate opinion and the 2007 District Court opinion incorporating the Magistrate's findings and conclusions on these issues) in essence re-wrote a 1998 business transaction between the parties and the parties' ERISA plans. In doing so, the decisions conferred upon plaintiffs a benefit that had ceased to exist under the Westinghouse Plan. Moreover, even if the sunset provision for the PJS Benefit did not have force and effect, plaintiffs remained ineligible for the PJS benefit under the express terms of the Westinghouse Plan.

INTEREST OF *AMICI CURIAE*

The American Benefits Council (the Council) is a broad-based, non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's approximately 335 members[2] are primarily large U.S. employers that provide employee benefits to active workers and retirees. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

The National Association of Manufacturers (the NAM) is the nation's largest industrial trade association, representing small and large employers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

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[2] A list of the Council's members is available on the Council's website, www.americanbenefitscouncil.org.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

Amici limit their *amicus curiae* participation to cases of great significance to their member companies. This case is such a case. By improperly applying this Court's prior decisions and the decisions of other Circuits involving ERISA's anti-cutback rule[3] and its so-called "spin-off rule,"[4] the decision below failed to administer legally compliant ERISA retirement plans as written, eliminating the right of employers to offer

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[3] ERISA § 204(g), 29 U.S.C. § 1054(g). For ease of reference, *Amici* will refer to the ERISA code sections throughout this brief without repeating parallel citations to the identical provisions in the federal Tax Code, here 26 U.S.C. § 411(d)(6). The Treasury Department has responsibility for issuing regulations interpreting and implementing these two sections. *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 747 (2004); *Malia v. Gen. Elec. Co.*, 23 F.3d 828, 832 n.4 (3d Cir. 1994).

[4] ERISA § 208, 29 U.S.C. § 1058.

voluntarily and to design employee benefit plans, a fundamental tenet of America's employee benefits system. Further, the decision below created out of whole cloth an ERISA plan never intended, funded or adopted by the asset purchaser or the asset seller. The lower court's unjustified and unilateral action thrust the asset purchaser into the role of plan sponsor of a plan it never assumed, and for which it never received any transferred plan assets in order to fund the court-created benefits.

The decision violates ERISA core principles and, if uncorrected, will significantly hinder common business transactions and could foster such uncertainty that *amici* members and other companies may decline to enter similar business transactions, transactions crucial to America's global competitiveness and economic recovery, for fear that a court will subsequently rewrite their ERISA plans and transaction documents.

By affording plaintiffs severance benefits during force reductions, the asset purchaser provided, in its *own* separate retirement plans, "the *aggregate* of the benefits" in effect on the "closing date for pension purposes" (the Pension Closing Date) adopted by the parties to the APA.

However, spring-boarding from this Court's decision in *Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir. 2000),[5] invalidating Westinghouse's amendment of its retirement plan to eliminate the PJS benefit before the Pension Closing Date in the APA (a decision issued some two years *after* the asset purchase sale), the District Court inexplicably deemed the asset purchaser a plan sponsor of the seller's PJS benefit. The court also found that a provision in the APA itself impressed an ERISA plan upon the purchaser, whether as a "transitional plan" or as a "continuing plan." Finally, the court granted plaintiffs a windfall by forcing the purchaser to pay the seller's PJS benefit, even though plaintiffs did not fulfill the pre-amendment conditions of that benefit under the seller's plan, and even though the purchaser had already paid plaintiffs severance benefits from its own plan.

Such judicial rewriting of business transactions, under the guise of finding a sufficient basis for invoking the spin-off rule in ERISA § 208 in the context of an asset purchase sale, will serve as a severe disincentive to *amici's* members and other companies who, as large employers, may face inconsistent results regarding the same transactions in different circuits. In *McCay v. Siemens Corporation*, 247 F. App'x 172 (11th Cir. 2007), the

[5] Westinghouse Electric Corporation changed its name to CBS, Inc. and thereafter to Viacom Corporation. Throughout this brief, it will be referenced as "Westinghouse," as it was in the decision below.

Eleventh Circuit reviewed essentially the same business transaction and with the same APA language at issue here, but found the ERISA spin-off rule in ERISA § 208 inapplicable to the transaction. Unlike the decision below, the Eleventh Circuit gave effect to the provisions of the seller's ERISA-governed retirement plan, concluding that the asset purchaser did not fall within the plan's definition of "Employer," and that the plaintiffs did not fulfill the pre-amendment conditions of the PJS benefit where they sought the benefit from a successor employer, so that Siemens' failure to extend the PJS benefit to plaintiffs did not violate the anti-cutback rule in ERISA § 204 and remained consistent with the law. Affirmance of the decision below exposes *amici's* members and other employers to the spectre of inconsistent judicial decisions relating to the same transactions and ERISA plans.

Amici respectfully submit this *amicus* brief by consent, pursuant to Federal Rule of Appellate Procedure 29(a). All parties have consented to the filing of this brief.

STANDARD OF REVIEW

Amici incorporate Appellants'/Cross-Appellees' description of the applicable standards of review.

ARGUMENT

Our nation's employer-sponsored retirement system depends on the principle that employers are free to decide whether to establish a retirement plan and, if so, to determine the terms and scope of the plan. The District Court's decision is inconsistent with this fundamental notion. The District Court erroneously held that Siemens unwittingly established a transition or temporary plan, and the Court dramatically re-wrote the terms of the parties' business transaction and their ERISA plans. In doing so, the District Court misunderstood the substantive provisions of ERISA, including the rule governing plan spin-offs in ERISA § 208, as well as its anti-cutback rules in ERISA § 204(g).

I. ERISA'S "SPIN-OFF" RULE SHOULD NOT APPLY IN THIS CONTEXT.

A. ERISA Encourages Plan Sponsors To Adopt Employee Benefit Plans Voluntarily, Permitting Employers Flexibility In Meeting Demands Of A Changing Economy And Increased Global Competition.

When it passed ERISA in 1974, Congress maintained a delicate balance: it regulated employee benefit plans but did not mandate employer-sponsored plans or dictate their terms. "Nothing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a

plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981)). Instead, Congress sought to foster the voluntary adoption of employee benefit plans by employers through a national and uniform scheme of employee benefit law, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004), encouraging employers to become benefit plan sponsors without fear that they would become subject to inconsistent decisions in different states or regions.

ERISA grants employers a "large leeway" in pension plan design and amendment, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999). That leeway permits employers to retain the flexibility to structure business transactions, such as asset purchase transactions, in light of market forces, including the need to streamline for global competitiveness and the need to acquire service or product lines to participate in economic growth and/or recovery:

> [N]either Congress nor the courts are involved in either the decision to establish a plan or the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation.

Musto v. American General Corp., 861 F.2d 897, 911 (6th Cir. 1988).

By declining to mandate that employers adopt benefit plans or particular benefits, Congress granted employers a critical flexibility in business transactions and invested employers with the power to determine for themselves whether they wished to undertake benefit sponsorship voluntarily. Reflecting that intent, this Court has recognized that ERISA "is not a direction to employers as to what benefits to grant their employees." *Dade v. N. Am. Philips Corp.*, 68 F.3d 1558, 1561 (3d Cir. 1995) (quoting *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988)). See also: H.R.Rep. No. 807, 93rd Cong., 2d sess., reprinted in U.S.C.C.A.N. 4670, 4677. This Court has also observed that, although ERISA protects participants and beneficiaries in their receipt of benefits as promised under the terms of an employee benefit plan, it does not preclude employers from circumscribing such benefits when they are created. *Id.* at 1562. In other words, while ERISA protects "employees' justified expectations of receiving the benefits their employers promise them," *Heinz*, 541 U.S. at 743, ERISA also permits companies the freedom to design their pension plans to prescribe the conditions under which participants become eligible or ineligible for certain plan benefits.

As companies structure business transactions that impact employee benefit plans, ERISA permits companies that purchase businesses through asset purchase agreements the flexibility to decline to assume existing plans, to decline to assume the mantle of plan sponsor and/or to choose to provide the employees they gain through such transactions with benefits under their own separate benefit plans, rather than adopting the benefits previously conferred by the seller.

The District Court's decision essentially rewrites the APA, in which both the seller and the purchaser concur that no transfer of liabilities occurred under that agreement. *Amici's* members and other companies will be far less likely to enter into such transactions if a court may in essence rewrite sale documents after the fact, ignore express terms of the seller's plans, and provide a windfall to the seller by transferring liability for the PJS benefit to the purchaser by judicial fiat.

B. Inventing A "Transitional" Or "Continuing" Plan Contradicts The Intent Of The Parties To The Asset Purchase Agreement And Frustrates The Congressional Intent Of Encouraging Employers To Adopt Plans Voluntarily Under ERISA.

Contravening the Congressional intent under ERISA of encouraging employers to adopt benefit plans voluntarily, the District Court impressed plan sponsorship upon an asset purchaser that specifically had chosen not to

assume the seller's pension plans for salaried and collectively bargained employees.

In enacting ERISA, Congress intended, not only to protect participants' justified expectations of benefits, but also (as the Supreme Court has observed) to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of [remedies]" that preclude significant "litigation expenses" that might otherwise "unduly discourage employers from offering ERISA plans in the first place." *Conkright v. Frommert,* 130 S. Ct. 1640, 1649 (2010) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497; *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)). If uncorrected, the approach followed below, ignoring as it does the limits of the APA and the terms of the parties' ERISA plans in its haste to find a sufficient basis to apply the "spin-off" rule in ERISA § 208, works the very "harm to the interest of predictability" envisioned by the Supreme Court in *Conkright.* If employers cannot rely upon the limitations on benefits written into their plan documents, then, instead of continuing or adopting such benefits, they will chose to reduce benefits in existing plans or will decline to adopt plans altogether. *Id.*

The District Court affirmed the Magistrate Judge's conclusion that Siemens administered some sort of "transitional plan" for the 13 days when former Westinghouse employees continued to accrue benefit service under the Westinghouse Plan before the effective date of the Siemens' retirement plans. The District Court also imposed upon Siemens some sort of "continuing plan" under which Siemens, as the successor employer, became obligated as a plan sponsor to confer the Westinghouse Plan's PJS benefits if it terminated former Westinghouse employees in force reductions.

As the Eleventh Circuit held in *McKay,* 247 F. App'x at 178, Siemens did not become a plan sponsor of any "continuing" Westinghouse Plan during the transition period, when Westinghouse alone allowed, and funded for, eligibility credit, vesting credit and limited pension credit for its former employees under the Westinghouse Plan.

Permitting a district court to establish an ERISA plan unintended by the parties to an asset purchase agreement, and then to rewrite the transaction documents and the parties' own ERISA plans, increases the likelihood of protracted litigation for *amici's* members and other companies. That likelihood, in turn, will lead employers otherwise willing to offer certain benefits, and otherwise willing to reconfigure their businesses, to reduce benefits in existing plans. Employers otherwise eager to participate

in economic recovery or to increase their competitiveness also may refrain from assuming or adopting plans.

C. The Decision Below Failed to Respect Plan Terms and the Intent of the Parties.

The decision below also discourages *amici's* members and other companies from entering into business transactions much needed by the American economy, due to the risk that courts can simply decline to give effect to the seller's and purchaser's intent.

Finding the APA "clear and unequivocal," the District Court refused to consider evidence of the intent of both parties to the APA. Both the seller (Westinghouse) and the purchaser (Siemens) clarified that the seller had retained pension plan liabilities (including the PJS benefit), and even plaintiffs concede that Westinghouse had not transferred assets to cover pension plan liabilities to the Siemens subsequently adopted plans. As the plan sponsor whose plan actually contained the PJS benefit at issue here, Westinghouse had every reason to claim that it had transferred liabilities to Siemens; however, Westinghouse did not. In fact, in an admission against interest, it acknowledged that it had made no such transfer. JA 398.

Rather than crediting the beliefs of both parties to the transaction, the District Court took the unprecedented step of creating a "transitional" or "continuing" plan from a provision of the APA, and of finding that Siemens

remained liable under that temporary plan for the PJS benefit in the Westinghouse Plan. In doing so, the District Court ignored another provision of the APA, expressly stating that the APA did not "confer upon any Person other than the parties hereto . . . any rights or remedies hereunder." JA 142.

Most troubling to *amici* members, the District Court essentially re-drew the transaction documents and rewrote the parties' ERISA plans, contravening another core ERISA principle, *i.e.*, the principle of enforcing plan terms as written. *Cigna Corp. v. Amara*, 563 U.S. ___, 131 S. Ct. 1866, 1877 (2011) (observing that ERISA § 502(a)(1)(B) governing suits for benefits due "speaks of '*enforc[ing]*' the 'terms of the plan,' not of *changing* them"; and holding that, although court may look outside plan's written language to decide what plan language means, "we have found nothing suggesting that [ERISA § 502(a)(1)(B)] authorizes a court to alter those terms. . .where that change, akin to the reform of a contract, seems less like the simple enforcement of a contract as written and more like an equitable remedy.") This Court has also recognized the core ERISA principle that a court "is required to enforce the plan as written unless [it] can find a provision in ERISA that contains a contrary directive." *Dade*, 68 F.3d at 1562.

The decisions below[6] both focused on Section 5.5 of the APA. That provision stated that the purchaser would establish a plan "that contains terms and conditions that are substantially identical with respect to all substantive provisions to those of the Westinghouse Pension Plan as in effect as of the Closing Date [*i.e.*, the Pension Closing Date]." JA 139-140. That provision also stated that the purchaser's pension plan would be administered during a specified period "so that the aggregate of the benefits under the Seller Pension Plan and the Purchaser Pension Plan are the same with respect to Business Employees as if the Business Employees continued employment with Sellers."

As the APA permitted, Siemens created separate plans for the former Westinghouse employees, effective September 1, 1998. As the Eleventh Circuit recognized, *McCay*, 247 F. App'x at 174, when it declined to apply ERISA § 208 to the very same business transaction, Siemens' consulting actuaries subsequently "certified that Siemens benefits were 'in the aggregate comparable' to those provided by [Westinghouse] and thus compliant with the APA."

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[6] The District Court adopted, as modified and augmented, the Magistrate Judge's decision.

If this Court affirms the approach taken by the District Court, *amici's* members and other employers will face substantial litigation expenses as they defend transactions and ERISA plans subsequently re-written by the courts. No longer confident that they may rely upon express limits in their plan documents and business transactions, and concerned that a court might confer plan sponsorship upon them involuntarily, *amici's* members and other employees may find the litigation risk too great to enable them to enter into business transactions that could facilitate economic recovery or global competitiveness.

D. Applying ERISA § 208 In This Context Constitutes An Unwarranted Extension Of The "Spin-Off" Rule.

The spin-off rule in ERISA § 208 provides that a plan may not "merge, consolidate with, or transfer its liabilities to any other plan . . . unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation or transfer (if the plan had then terminated)." 28 U.S.C. §1058. This Court should again squarely hold that ERISA's "spin-off" rule does not apply where, as here, "no transfer of assets or liabilities occurred between the Westinghouse Plan and [the]

Siemen[s] Plan," as the Eleventh Circuit correctly found in reviewing the same business transaction. *McCay*, 247 F. App'x at 177-178.

As this Court has recognized, the ERISA Reorganization Plan No. 4 of 1978 assigned the Treasury Department the responsibility for promulgating regulations relating to certain sections of ERISA. *Malia*, 23 F.3d at 832, n.4. Pursuant to that grant of authority, the Treasury Department promulgated regulations pertaining to mergers, consolidations and "spin-offs" under Internal Revenue Code (IRC) § 414(l), the tax code counterpart to ERISA § 208. Plaintiffs here concede that no merger or consolidation of plans or plan assets occurred during the asset purchase transaction. The District Court construed Section 5.5 of the APA, expressly calling for Siemens to provide an "*aggregate* of benefits" to the legacy employees under "substantially identical" terms and conditions as under the Westinghouse Plan on the Pension Closing Date, as a transfer of liabilities. At the time of the APA, on the Pension Closing Date of September 1, 1998, the Westinghouse Plan no longer contained a PJS benefit. Ironically, the Court construed this provision in a manner never intended by either party, as Westinghouse's admission against interest clearly demonstrates. The Court's creation of an implied term from this provision, without reference to the

parties' testimony that no transfer of assets or pension plan liabilities had occurred, had the effect of re-writing the terms of the transaction.

Had Westinghouse and Siemens intended and agreed to transfer assets and pension plan liabilities from the Westinghouse Plan to the Siemens retirement plans (which both deny), 26 C.F.R. 1.414(l)-1(n) would supply the general rule for "spin-offs" of such assets and liabilities from one pension plan to another:

> In the case of a spin-off of a defined benefit plan, the requirements of section 414(l) will be satisfied if –
>
> (i) All of the accrued benefits of each participant are allocated to only one of the spun off plans, and
>
> (ii) The value of the assets allocated to each of the spun off plans is not less than the sum of the present value of the benefits on a termination basis in the plan before the spin-off for all participants in that spun off plan.

In contrast to the implied term of asset transfer created by the District Court, and consistent with the testimony of Westinghouse and Siemens, the Eleventh Circuit correctly concluded, as it reviewed the very same APA, that the agreement did not provide for any transfers of assets and pension plan liabilities to the Siemens retirement plans, and that no such transfers had occurred. In the absence of a transfer of such assets *and* liabilities, the spin-off rule in ERISA § 208 does not apply.

Such a conclusion comports with this Court's decision in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1147 (3d Cir. 1993). There, this Court required the transfer of sufficient assets to fund transferred liabilities as a condition precedent to the transfer of the liabilities: "to transfer their liability for early retirement benefits, [the transferor] must transfer assets . . . to fund those benefits." Such a requirement reflects the purpose of the spin-off rule in ERISA § 208, as expressed in the provision itself and in the scant legislative history surrounding the adoption of the provision, that a transferring employer remains responsible for funding benefits that it seeks to transfer from one plan to another. In *Gillis*, as here, the seller had sold a part of its business in an asset sale, its former employees remained employed by the successor employer, and it had not transferred sufficient assets as part of the business transaction to effect a transfer of its early retirement liabilities.

Contrary to this correct reading of ERISA's "spin-off" rule, the District Court inferred a transfer of pension plan liabilities where the seller had transferred no assets to fund the purportedly transferred liabilities. *Amici* contend that this Court should reaffirm a bright-line test for the invocation of ERISA § 208; and, in the absence of a sufficient transfer of assets to match an actual (rather than implied) transfer of liabilities

acknowledged by the parties to the sale transaction, courts should not find a sufficient basis to invoke ERISA's "spin-off" rule.

II. ERISA'S § 204(g)'S ANTI-CUTBACK RULE ALSO SHOULD NOT APPLY IN THIS CONTEXT.

This case also presents a critical opportunity for this Court to consider whether the anti-cutback rule in ERISA § 204(g) should apply to a business transaction where the purchaser declined to assume the seller's plans, the seller transferred no assets to the purchaser to cover any purported transfer of PJS benefit liabilities, and the express terms of the seller's plan rendered plaintiffs ineligible for the PJS benefit.

Extending the anti-cutback rule in ERISA § 204(g) to compel a purchaser to provide a benefit that the seller's plan did not confer violates core ERISA principles by failing to apply plan terms as written. Moreover, although American businesses structure their transactions (including asset purchases) in light of the legislative, decisional and regulatory context at the time of the transaction, the decision below discounted that context and imposed an obligation upon the purchaser that neither party to the APA intended.

If uncorrected, the decision below may encourage other courts to rewrite business transactions and ERISA plans after the fact. Concerned that they may not accurately assess the value or cost of their business

transactions, *amici's* members and companies may forebear from engaging in business transactions that courts may later misconstrue, even though such transactions would benefit both companies, their employees, and the American economy.

A. Given The Context At The Time Of The Sales Transaction, The Anti-Cutback Rule Should Not Be Extended To The Benefits In Issue.

At the time that Westinghouse and Siemens entered into the APA, the Westinghouse Plan had been amended in 1994 to eliminate the PJS benefits for separations occurring after August 31, 1998. The Pension Plan Closing Date of the APA was September 1, 1998; and Siemens implemented plans effective September 1, 1998 that did not include PJS benefits. Although the *Bellas* case later ruled that the 1994 amendment to the Westinghouse Plan was an invalid cutback, the ruling should not be applied to the Siemens plans, which had never included the PJS benefits. Moreover, at the time of the Pension Plan Closing Date in the APA, the Westinghouse Plan no longer included the PJS benefits. Siemens agreed to adopt a plan substantially similar to the Westinghouse Plan as amended. Furthermore, authority at the time[7] suggested that the anti-cutback rule would not apply to PJS benefits,

[7] Congress amended ERISA Section 204(g) in 1984 but regulations were not promulgated until after the APA. At the time of the APA, the guidance available to interpret the provision included limited legislative

and the IRS had issued the Westinghouse Plan a favorable determination letter as to its qualified status.

The Siemens plans were newly established plans, not a continuation of the Westinghouse Plan. Accordingly, the Siemens plans never offered PJS benefits and never had anything to cut back. Therefore, it would be inequitable and unreasonable to determine either that (a) Siemens meant to incorporate the PJS provision in its plans based on the language in the APA, or (b) a prohibited cutback occurred in the Siemens plans.

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history and a General Counsel Memorandum. The relevant legislative history indicated that "a subsidy that continues after retirement is generally to be considered a retirement-type subsidy," and that "a plant shutdown benefit (that does not continue after retirement age)" does not fall in that category. S. Rep. No. 575, 98th Cong. 2d Sess. 30, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2574. IRS General Counsel Memorandum (GCM) 39869 (Oct. 2, 1991) opined that shutdown benefits accrued upon the occurrence of the event that triggers the right to the benefits (*i.e.,* the contingent event).

This Court's precedents at the time of the parties' transaction also reflected the spare legislative and regulatory context then available relating to ERISA's anti-cutback rule. After the Retirement Equity Act of 1984 (REA), this Court cautioned that "the fact that such amendments will now be 'treated as reducing accrued benefits' does not mean that Congress intends to foreclose employers from circumscribing the availability of such optional benefits when they are being created." *Ashenbaugh v. Crucible, Inc.*, 854 F.2d 1516, 1527 (3d Cir. 1988). This Court further recognized that IRC § 411(d)(6), effective for plan years beginning after December 31, 1984, excludes any "retirement-type subsidies" from what the Court termed "full 'accrued benefits' protection" unless the participant fulfills the plan's conditions governing the availability of the "benefit subsidy."

B. Extending The Anti-Cutback Rule To Compel A Purchaser To Provide A Seller's Contingent Benefit Subsidy When Former Employees Remain Ineligible For That Benefit Under The Seller's Plan Will Discourage Employers From Entering Into Business Transactions.

The District Court's decision fails to give effect to the terms of both the seller's and the purchaser's ERISA plans. As this Circuit and other federal circuits have held on almost identical or similar facts, the anti-cutback rule in ERISA § 204(g) does not override or supersede plan eligibility provisions or its definitions of qualifying events. *Dade*, 68 F.3d at 1562.

As this Court acknowledged in *Dade*, 68 F.3d at 1562, the anti-cutback rule in ERISA § 204(g) expressly provides that the anti-cutback provision will apply "only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy." The Westinghouse Plan provides that PJS benefits become payable only if Westinghouse itself, or a designated Westinghouse affiliate terminates the employee. In other words, the defined term of "Employer" within the plan clearly does not include Siemens. JA 292-293. The PJS benefit provision also precludes a finding that a "Permanent Job Separation" has occurred if the employee continues employment with a "successor employer which is neither" Westinghouse nor a Westinghouse affiliate. *Id.*

In declining to hold Siemens responsible for the Westinghouse benefit, the Eleventh Circuit determined that Siemens "does not qualify as an 'Employer" under the express terms of the Westinghouse Plan." *McCay*, 247 F. App'x at 177. The Eleventh Circuit cited a case in support of that holding from this Circuit. *Gritzer v. CBS, Inc.*, 275 F.3d 291, 297 (3d 2003) (determining that discharge by company not defined in plan as "employer" doomed claim of PJS benefits by former CBS employee). In addition, the Eleventh Circuit found that, because the terminated employees seeking the PJS benefit had continued employment with Siemens, and because Siemens (a "successor employer") had terminated them for lack of work, they did not fulfill the conditions precedent for the benefit under the express terms of the Westinghouse Plan, 247 F. App'x at 177.

To like effect: *Ashenbaugh,* 854 F.2d at 1527-28 (even if Thirty Year Benefit adjudged a retirement-type subsidy and an "accrued benefit" subject to anti-cutback rule in ERISA § 208, plan provision providing for partial termination benefits and anti-cutback rule did not supersede age and service requirements of benefit); *Ross v. Pension Plan for Hourly Employees of SKF Ind., Inc.*, 847 F.2d 329 (6th Cir. 1988) (legislative history demonstrated no protection for ancillary benefits under ERISA's anti-cutback rule, including plant shutdown benefit that did not continue past

retirement age; and plaintiffs did not meet eligibility terms for plan's collectively bargained plant shutdown benefits upon closing of Massillon facility and thus could not fulfill conditions for shutdown benefit).

Amici simply request that this Court reverse a decision in which the District Court rewrote the terms of a business transaction and circumvented the clear and express terms of an ERISA plan. *Amici's* members and other employers cannot afford to undertake liabilities that they did not negotiate and/or that they specifically disavowed.

CONCLUSION

The District Court's final judgment relating to the "Non-Release Plaintiffs" and its order denying summary judgment to Siemens relating to the "Release Plaintiffs" should both be reversed, and the case remanded with instructions to grant summary judgment to Siemens as to all plaintiffs.

Respectfully submitted,

/s/ Christopher J. Rillo

Christopher J. Rillo (*Lead Counsel*)
Bradford P. Campbell
Suzanne M. Arpin
Diane M. Soubly
David Blickenstaff
SCHIFF HARDIN LLP
1666 K Street, NW
Suite 300
Washington, DC

Counsel for Amici Curiae

Janet Jacobson
AMERICAN BENEFITS COUNCIL
1501 M Street NW
Suite 600
Washington, DC 20005

Counsel for American Benefits Council

Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004-1790

Counsel for the National Association of Manufacturers

Robin S. Conrad
Shane B. Kawka
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street NW
Washington, DC 20062

Counsel for Chamber of Commerce of the United States of America

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit Rule 31.1(c), the undersigned counsel for *Amici Curiae* certifies that this electronic brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,229 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)7)(B)(iii);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it was prepared using Microsoft Office 2003 and is set in 14-point sized Times New Roman font;

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/s/ Christopher J. Rillo

THIRD CIRCUIT RULE 28.3(d) CERTIFICATION

Pursuant to Third Circuit Rule 28.3(d), the undersigned counsel for *Amici curiae* certifies that Christopher J. Rillo is a member of the bar of this court.

/s/ Christopher J. Rillo

CERTIFICATE OF SERVICE

The undersigned counsel for *Amici curiae* certifies that the foregoing brief was served upon all counsel of record via the Court's electronic CM/ECF system on June 3, 2011.

The undersigned counsel further certifies that, on June 3, 2011, ten identical hard copies of the foregoing brief were provided to a third-party courier for overnight delivery to the Clerk of the Court; and that, on June 3, 2011, one identical copy of the foregoing brief was provided to a third-party courier for overnight delivery upon each of the following:

William T. Payne, Esq.
Stember, Feinstein, Doyle, Payne & Cordes
1007 Mount Royal Boulevard
Pittsburgh, PA 15223

David B. Rodes
John T. Tierney, III
Goldberg, Persky & White
1030 Fifth Avenue
Pittsburgh, PA 15219

/s/ Christopher J. Rillo

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