Case Nos. 06-5008 & 06-5009

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

In Re: Lucent Death Benefits ERISA Litigation

Edward Foss, Sarah Conder, Arthur J. Berendt
and Robert Howard, Appellants in No. 06-5008;

Helen P. Lucas as surviving spouse of Vincent R. Lucas,
Appellant in No. 06-5009.

Appeal from the United States District Court for the District of New Jersey,
Case Nos. 03-cv-5017, 04-cv-640, 04-cv-1099 (Cavanaugh, J.)

BRIEF OF *AMICUS CURIAE* NATIONAL RETIREE LEGISLATIVE NETWORK IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

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April 26, 2007

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

In Re: Lucent Death Benefits ERISA Litigation, Nos. 06-5008 & 06-5009

Pursuant to Fed. R. App. P. 26.1 and Third Circuit Local Appellate Rule 26.1, *Amicus Curiae* National Retiree Legislative Network makes the following disclosure:

1) For non-governmental corporate parties, please list all parent corporations.
NONE.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock.
NONE.

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.
NONE.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditor's committee or the top 20 unsecured creditors; and 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

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Dated: April 26, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

Federal Regulations

Court Rules

Other Authorities

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Retiree Legislative Network (NRLN) is a non-partisan grassroots coalition of retiree associations and individual retirees. NRLN operates under § 501(c)(4) of the Internal Revenue Code and is a corporation organized and existing under the laws of the District of Columbia. NRLN is devoted to, among other matters, enacting federal legislation to protect pension plans and retirement healthcare benefits. NRLN's membership organization of more than 2 million persons includes tens of thousands of retirees of the former Bell System Companies, and many of those persons and their beneficiaries reside within the Third Circuit.

NRLN seeks to increase the availability, security, equity, and adequacy of employer-sponsored benefits. Of particular interest to NRLN is the interpretation and enforceability under the Employee Retirement Income Security Act (ERISA) of private anti-amendment provisions set forth within employee benefit plans. In addition, NRLN has a strong interest with respect to this litigation in ensuring that ERISA is not interpreted to permit a successor plan sponsor to eliminate actuarially

funded post-retirement benefits that a predecessor plan sponsor intended to be protected pension benefits. While this case focuses on Lucent retiree pension benefits, its outcome could impact NRLN members retired from other companies across the country.

NRLN respectfully submits this amicus brief to facilitate the Court's decision. NRLN argues in support of Plaintiffs-Appellants and urges for a reversal of the District Court's Order of Dismissal.

Amicus NRLN has the consent of all parties to this filing. Counsel for all parties have provided the undersigned counsel written authorization and consent.

SUMMARY OF ARGUMENT

The District Court erred by ruling the Pensioner Death Benefits were unprotected welfare benefits subject to post-retirement elimination. The Pensioner Death Benefits were classified and intended by the plan sponsor to be protected pension benefits. The plan documents included an extra-ERISA contractual term, a private 'anti-amendment' provision, giving Pensioner Death Benefits tied to eligibility for a service pension protection from being reduced or eliminated without the consent of service pension eligible retirees. The plan documents provided that Pensioner Death Benefits were pre-funded on an actuarial basis and would survive plan termination, consistent with their status as protected pension benefits.

The District Court erred in ruling, pursuant to Rule 12(b)(6) on the basis of the pleadings, that Pensioner Death Benefits were unprotected welfare benefits when the allegations, plan documents and record developed under limited discovery showed Plaintiffs-Appellants presented credible material facts to establish their claims, precluding dismissal. Under the plan documents, a participant became entitled to Pensioner Death Benefits when he or she became entitled to a service pension.

ARGUMENT

I. The District Court Erred by Failing to Give Effect to the Plan Sponsor's Private Anti-Amendment Provision Which Prohibited Changes and Elimination of Benefits To Which Retirees Had Become Entitled to Receive.

For more than fifty years the former Bell System Companies, including AT&T, steadfastly maintained and complied with a self imposed cardinal rule prohibiting reduction or elimination of pensions and other benefits to which employees and retirees had previously become entitled to receive. Even after ERISA's numerous statutory protections became effective, the plan sponsor memorialized in each successive governing Plan document an additional private anti-amendment provision, as follows:

> "CHANGE IN PLAN The Committee, with the consent of the Chairman of the Board. . . may from time to time make changes in the Plan set forth in these Regulations, and the Company may terminate said Plan, but **such changes** or termination **shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder**." (**emphasis added**).

(JA00586 - *1976* Plan; JA00658 - *1979* Plan; JA00742 - *1981* Plan; JA00874 - *1984* Plan; JA01034 - *1985* Plan; JA01151 - *1995* Plan). The "Change in Plan" clause did not give the employer plan sponsor unrestricted power to

make any changes to the pension plan at any time. Instead, the "Change in Plan" clause constitutes an enforceable "private anti-cutback provision." That provision precludes an amendment without the consent of plan participants that would allow the plan sponsor to affect the rights of plan participants to promised "Pensioner Death Benefits."

The District Court's ruling considered only what protection is accorded to employee benefits by ERISA's anti-cutback rule, ERISA Section 204(g), 29 U.S.C. § 1054(g). No consideration was given to the additional protection accorded by the long standing private anti-cutback rule.

In *Call v. Ameritech Management Pension Plan*, 475 F.3d 816 (7th Cir. 2006), the pension plan contained a provision stating, "no amendment will reduce a Participant's accrued benefit to less than the accrued benefit that he would have been entitled to receive if he had resigned [from Ameritech] on the day of the amendment." The Seventh Circuit ruled that pension plan provision was a private anti-cutback provision, "designed to prevent cutbacks by amendment that are not covered by the statutory anti-cutback rule" *Id*. at 820. Moreover, the appellate court reasoned that the plan sponsor could not unilaterally eliminate that private anti-cutback

provision by enacting a subsequent amendment, as that would make the original provision superfluous and empty. *Id* at 821. The appellate court agreed that the provision should be interpreted as preserving benefits that ERISA would otherwise permit to be curtailed.

In *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d. Cir. 1990) this Court noted that "[b]ecause ERISA grants participants the right to seek equitable relief from acts that violate the terms of their plan, see ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (quoted in *Delgrosso v. Spang and Co.*, 769 F.2d 928, 935-936 (3rd Cir. 1985) *cert. denied,* 476 U.S. 1140, 106 S.Ct. 2246, 90 L.Ed.2d 692 (1986), that invalidity alone was sufficient for the *Delgrosso* plaintiffs to obtain the remedy they sought-reformation of the plan to strike the purported amendment-regardless of whether any fiduciary duty had been breached." *Id.* at 1161 n.6.

Likewise, the provision memorialized in the AT&T governing Plan document also serves as a private anti-cutback provision. The self-imposed restriction on AT&T's right to amend or eliminate any pension or other benefit to which a retiree may have previously become entitled was

reiterated in summary plan descriptions (SPDs) issued after the divestiture of AT&T, as follows:

> "AT&T may from time to time make changes in the Plan, or may terminate the Plan, but **future changes will not affect the rights of any individual to any benefit or pensions which he or she may have previously become entitled to receive**." (**emphasis added**).

(JA01375 - *1984* SPD;

This restriction long adhered to by AT&T was passed on to Lucent, as a successor plan sponsor, at the time of the spin-off of that company. (See JA01151, AT&T "Section 10. Changes in Plan - Power to Amend."; JA00336, Lucent "Article 10. Changes in Plan - Power to Amend"). Yet, nowhere within the District Court's ruling is there any discussion or consideration given to the extra-ERISA contractual restriction on plan amendments.[1] Given the existence of the private anti-cutback provision in both the predecessor AT&T governing Plan document and the successor Lucent governing Plan document, the District Court erred by not

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[1] Indeed, as more detailed in Appellant Lucas's opening brief at pp. 10-11, the District Court not only erred by recasting the asserted claims and arguments but further erred by failing to address material arguments and facts which Plaintiffs-Appellants established, thus, entitling them to relief.

determining whether Pensioner Death Benefits fit with the ambit of "any benefit or pension to which [the retirees] had previously become entitled."

The District Court should have looked at the anti-amendment provisions from the viewpoint of the objectively reasonable retiree. See *Harte v. Bethlehem Steel Corp.*, 214 F3d 446, 453 (3rd Cir. 2000) ("in considering the "reasonableness" of a beneficiary's interpretation, the company's own pronouncements and widely-known company practice must be taken into account."); *See also McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992) (court gives words their common and ordinary meaning, as a reasonable person in the position of the plan participant would have understood them); *Keszenheimer v. Reliance Life Ins. Co.*, 402 F.3d 504, 507 (5th Cir. 2005) (the pertinent language is read "in the ordinary and popular sense as would a person of ordinary intelligence and experience, such that the language is given its generally accepted meaning"); *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 985 (9th Cir. 1997) ("terms in an ERISA plan should be interpreted in an ordinary and popular sense as would a [person] of average intelligence and experience"); *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1135 (1st Cir.

1995) (conducting ERISA analysis from "the viewpoint of an objectively reasonable employee"). Applying this analysis, the District Court erred by not concluding the governing Plan documents restricted the right of the plan sponsor to change or eliminate whatever benefits the retirees had previously earned and become entitled to receive as part of their respective service pensions.

It is Plaintiffs-Appellants' contention that "in light of all the surrounding facts and circumstances, a reasonable employee [making a retirement decision] would [have] perceive[d] an ongoing commitment by the employer to provide employee benefits [the Pensioner Death Benefits]." *Belanger v. Wyman-Gordon Co.,* 71 F.3d 451, 455 (1st Cir. 1995); *Deboard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1239 (10th Cir. 2000).

Plaintiffs-Retirees submitted competent evidence set forth within pension plan documents and numerous other materials confirming the plan sponsor intended the Pensioner Death Benefits to be protected benefits and confirming that retirees became "entitled" to said benefits no later than their respective retirements or when eligible for retirement. The

governing Plan document specifically provided that participants were entitled to the Pensioner Death Benefit when retired or eligible for retirement and that entitlement survived the termination of the Plan. See Section II(B), *infra.* In addition, "retirement" was the funding assumption for accruing both service pension and the Pensioner Death Benefit at AT&T and Lucent. [2]

That retirees became entitled to the Pensioner Death Benefit either upon retirement with a service pension or when they became eligible to do so is consistent with the basic notion that a pension plan is "a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." *Hurd v. Illinois Bell Tel. Co.,* 234 F.2d 942, 946 (7th Cir. 1956) (discussing predecessor plans maintained by AT&T, Western Electric and Illinois Bell); *see also In re New Valley Corp.*, 89 F.3d 143, 151 (3rd Cir. 1996); *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 287 (3d Cir. 1995); *Pratt v. Petroleum Prod. Management Employee Sav. Plan*, 920 F.2d 651, 661 (10th Cir.1990). Here, the retirees' right or entitlement to the Pensioner Death

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[2] See Appellant Lucas's opening brief at pp. 38-39.

Benefits was complete upon their commencement of a service pension and, by virtue of the aforesaid private anti-amendment provision, the plan sponsor restricted its right to reduce or eliminate those benefits.

See Hooven v. Exxon Mobil Corp., 465 F.3d 566, 573 (3d Cir. 2006), discussing that unilateral contract principles are properly applied under ERISA "where the asserted unilateral contract is based upon explicit promises in the ERISA plan documents themselves." Plaintiffs-Appellants have properly asserted a claim of unilateral contract to enforce their entitlement to Pensioner Death Benefits and enforce the private anti-amendment provision in the governing Plan document.

When Lucent amended the pension plan inherited from AT&T so as to eliminate Pensioner Death Benefits as of February 1, 2003, the plan sponsor was acting contrary to the long standing private anti-cutback rule, thus violating ERISA Section 1104(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). The Lucent governing Plan document stated:

> **10.1 Power to Amend**
>
> The Board of Directors, or its delegate, may from time to time make changes in the Plan as set forth in this document, or terminate said Plan, but **such changes** or termination **shall not affect the rights of any Employee, without his or her consent,**

> **to any benefit or pension to which he or she may have previously become entitled hereunder**. (**emphasis added**).

(JA00336). This provision is capable of being interpreted to mean that Lucent merely reserved the right to change the pension plan for those individuals who have not already retired under the terms described, not the right to alter the described benefits for those individuals who had retired under those terms. See, e.g., *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 98 (2d Cir. 2001). In *Abbruscato,* the plan document stated the employer "reserves the right to amend and/or terminate the VSO *Program* at any time for any purpose." *Id.* at 97. The Second Circuit held that "[w]e do not believe that this statement *unambiguously* reserves [the employer's] right to reduce the life insurance benefits provided by the VSOP. Instead, this provision is capable of being interpreted to mean that [the employer] merely reserved the right to change the *program* for those individuals who have not already retired under the terms described, not the right to alter the described benefits for those individuals who had retired under those terms." *Id.* at 98. Therefore, the appellate court remanded the case instructing the trial court to allow the parties to present extrinsic evidence concerning the meaning of those terms. *Id.* Under ordinary rules of ERISA plan interpretation, if a party demonstrates ambiguity in a plan on a particular question, reference may be made to

extrinsic evidence to determine the parties' intended meaning. *See Smart v. Gillette Co. Long-Term Disability Plan,* 70 F.3d 173, 178 (1st Cir.1995).

Notwithstanding the prohibition memorialized in the private anti-amendment provision of the governing Plan document, Lucent obstinately did exactly what it could not do, all in violation of ERISA. *Delgrosso*, 769 F.2d at 935-936 (holding that action taken that contradicts an express prohibition in a pension plan constitutes a breach of fiduciary duties).

Because ERISA grants participants the right to seek equitable relief from acts that violate the terms of their plan, see ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (quoted in *Delgrosso*, 769 F.2d at 937), Plaintiffs-Retirees may obtain equitable relief, including reformation of the plan to strike the purported amendment eliminating the Pensioner Death Benefits as of February 1, 2003. Plaintiffs-Retirees seek reformation. (See Consolidated Complaint, ¶¶117, 123, 130 and Prayer ¶ C, JA00102-103, JA00105-106).

Since the District Court erred when determining the Pensioner Death Benefits could be eliminated and not considering the additional protections accorded Plaintiffs-Retirees by the long standing private anti-amendment provision set forth in the governing Plan documents, it was error for the District Court to dismiss Counts I, II and IV of the pending complaint.

Accordingly, this Court should reverse and direct the District Court, when considering the parties' private anti-amendment provision, to look at

the parties' course of dealings which is highly relevant evidence in construing that plan language. See *Teamsters Industrial Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc*., 989 F.2d 132, 137 (3d Cir. 1993) ("past dealings of contracting parties pursuant to an agreement are probative of the parties' intent," (citing Restatement (Second) of Contracts, § 223(2) 1981)).

II. The District Court Erred by Failing to Give Effect to the Historic SPDs, Governing Plan Documents and the Plan Sponsor's Course of Dealings Treating the Pensioner Death Benefit to Be Vested Once a Plan Participant Became Service Pension Eligible.

A. All SPDs Confirmed the Pensioner Death Benefit Was A Defined Benefit Plan Entitlement, Not a Welfare Benefit.

Defendants-Appellees cannot dispute the fact that all Summary Plan Descriptions (SPDs) issued during the course of Named Plaintiffs' employment and when they retired confirmed the Pensioner Death Benefit was not a welfare benefit. The plan sponsor deliberately chose to classify the Pensioner Death Benefit as part of a defined benefit plan. Every SPD issued during at least 1978 through 1996 made the following representation:

> **Type of Plan**
>
> The Plan is classified as both a pension plan and a welfare plan under the definitions of the Employee Retirement Income Security Act of 1974. *It is a "defined benefit pension plan" for Service and Deferred Vested Pension purposes and for payment of certain Sickness Death Benefits at the death of a Pension Plan participant.* The plan is a

> "welfare plan" for purposes of providing certain other death benefit payments and disability benefit payments. (*emphasis added*).

(JA01337 - *1978* SPD; JA01361- *1980* SPD; JA01398 - *1984* SPD; JA01440 - *1996* SPD). This is no mistake. This classification of Pensioner Death Benefits in SPDs repeatedly disseminated to tens of thousands of plan participants is controlling. *Burstein v. Retirement Account Plan for Employees of Allegheny Health, Education and Research Foundation*, 334 F.3d 365, 378 (3d Cir. 2003). Telling plan participants their expected Pensioner Death Benefits are considered defined pension benefits, rather than welfare benefits, tells them those benefits are protected. The plan sponsor has always been sophisticated enough to know exactly how to classify employee benefits. In the SPDs, the Pensioner Death Benefit was *never* reported to be a welfare benefit.

The District Court erred by not addressing either the allegations of the complaint or the record which clearly established that both AT&T and Lucent consistently understood, treated and reported in the SPDs that the Pensioner Death Benefit was a defined pension benefit, not a welfare benefit.

B. In the Event of Plan Termination, the Governing Plan Documents Have *Always* Given the Pensioner Death Benefit a Higher Payment Priority Than Many Categories of Deferred Vested Pensions.

For decades, all governing Plan documents have stated that upon plan termination or partial plan termination, plan assets are to be applied, after making the payments required by ERISA § 4044, 29 U.S.C. § 1344, and after making payments required for service pensioners and deferred vested pensioners on the pension payroll:

> "to making provisions for the payment of deaths attributable to deaths occurring prior to the date of termination which would have been payable from the [Plan] and for the payment, upon the deaths of retired employees who are on the pension roll as of the date of termination and of employees eligible as of that date for retirement, of death benefits which would have been payable from the [Plan] had the Plan not been so terminated."

(See, e.g., JA00702-05 - *1976* Plan and JA01324-25 - *2000* Plan). The governing Plan documents *next* required that plan assets be applied for the payment of several categories of *deferred* vested pensions starting at age sixty-five. (*Id.*) In short, this unique operative language required that in the event of a plan termination, payment of Pensioner Death Benefits was to receive a *higher* payment priority status than many deferred vested pension benefits which indisputably are accrued benefits. Unlike typical treatment of welfare or ancillary benefits, the plan sponsor deliberately chose not to subordinate Pensioner Death Benefits to all other categories of

pension benefits. [3] Instead, both AT&T and Lucent considered, treated and reported the Pensioner Death Benefit as a protected benefit that had to be preserved and given priority over other clearly vested pension benefits. This proves unequivocally the plan sponsor harbored and expressed an intent to treat the Pensioner Death Benefit as either an entitlement or a vested nonforfeitable benefit when a participant retired or became service pension eligible, a treatment that would not be appropriate for a welfare or mere ancillary forfeitable benefit.

As Plaintiffs-Appellants pointed out to the District Court the original framers of the governing Plan documents stressed the importance of the Pensioner Death Benefit as a permanent and fixed part of an employee's entire compensation package. Every governing Plan document contained an additional private anti-amendment provision proclaiming trust funds had to be applied entirely for pension and death benefit purposes only:

> "The Pension Fund and the Second Pension Fund shall be held by a trustee or trustees for, respectively, pension and death

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[3] By contrast, the governing Plan document specifically states that health benefits are ancillary benefits that are "subordinate to the retirement benefits provided by the plan." (JA 01326 - *2000* Plan) "Benefits Not Vested - Health Care Plan and Health Care Fund benefits shall not constitute a portion of any Participant's "accrued benefit" and are not, therefore, subject to the vesting requirements of Code § 411, nor are they subject to protection under Code § 411(d)(5) from reduction or elimination, nor are they protected by corresponding provisions of ERISA." (*Id.*)

benefit purposes only and shall be disbursed as directed by the Company from time to time. . . .the Company undertakes to preserve the integrity of the Pension Fund and the Second Pension Fund as trust funds to be applied solely to pension and death benefit purposes and to take such action as may be necessary or appropriate to insure the application of the entire fund or funds to such purposes." (emphasis added).

(JA00549 - *1976* Plan).

"The Pension Fund shall be held by a trustee or trustees or an insurance company or companies as permitted by law for pension and death benefit purposes only and shall be disbursed as directed by the Company from time to time. The Company undertakes to preserve the integrity of the Pension Plan as a fund held in trust or by an insurance company or companies as permitted by law to be applied solely to pension and death benefit purposes and to take such action as may be necessary or appropriate to insure the application of the entire fund, to such purposes." (emphasis added).

(JA00619 - *1979* Plan).

"The Bell System Management Pension Fund shall be held by a trustee or trustees or an insurance company or companies as permitted by law for pension and death benefit purposes only and shall be disbursed as directed by the Company or any other Participating Company, as applicable, from time to time. The Company undertakes to preserve the integrity of the Bell System Management Pension Fund as a fund held in trust or by an insurance company or companies as permitted by law to be applied solely to pension and death benefit purposes and to take such action as may be necessary or appropriate to insure the application of the entire fund, to such purposes." (emphasis added).

(JA00699 - *1981* Plan).

"The Pension Fund shall be held by a trustee or trustees or an insurance company or companies as permitted by law for pension and death benefit purposes only and shall be disbursed

> as directed by the Company or any other Participating Company, as applicable, from time to time. The Company undertakes to preserve the integrity of the Bell System Management Pension Fund as a fund held in trust or by an insurance company or companies as permitted by law to be applied solely to pension and death benefit purposes and to take such action as may be necessary or appropriate to insure the application of the entire fund, to such purposes." (emphasis added).

(JA00810-811 - *1984* Plan; JA00957-958 - *1985* Plan; JA0107 - *1995* Plan).

Indeed, in March 1997 Lucent adopted its own governing Plan document effective October 1, 1996 and the company reiterated the private anti-amendment provision exactly as pledged by AT&T in its 1995 restated governing Plan document. (JA01271- *1996* Plan, JA01316 (execution page)). In year 2000, Lucent adopted a new restated governing Plan document and knowingly reconfirmed that commitment verbatim. (JA01322 - *2000* Plan).

The governing Plan documents have always provided that the plan sponsor would pre-fund on an actuarial basis Pensioner Death Benefits which were intended "to provide security for the participants by making the receipt of the promised benefits independent of what happens to the company." (JA00192, Pls.' St. ¶ 56; JA01963, Pls.' Ex. 34 at D015298).

C. Pursuant to Treasury Department Regulations, Since the Pensioner Death Benefit is a Post-Retirement Benefit Tied to a Service Pension, it is Not a Welfare or Ancillary Benefit.

Defendants-Appellees' arguments that Pensioner Death Benefits are "ancillary" benefits is unavailing, because the Treasury Department Regulations in effect when Lucent illegally amended the pension did not categorize the Pensioner Death Benefits as ancillary benefits. Treasury Regulations then effective provided: "The following benefits are examples of items that are not section 411(d)(6) protected benefits: (1) Ancillary life insurance protection; (2) Accident or health insurance benefits." 26 C.F.R. § 1.411(d)-4 Q&A-1(d)(1),(2) (2002). Since an actuarially funded trust fund, rather than an insurance company, pays out the Pensioner Death Benefits, they cannot be characterized as "life insurance" or "accident or health insurance benefits." While Defendants-Appellees may now attempt to rely upon more recent regulations defining "ancillary benefits", those new regulations clearly do not apply to plan amendments adopted prior to August 12, 2005. See 26 C.F.R. § 1.411(d)-3(j) (2006), stating "Plan Amendments adopted before August 12, 2005 are to be evaluated in light of the applicable authorities without regard to these regulations."

When Lucent adopted the pension plan amendment effective February 1, 2003, section 1.401(a)(4)-4(e)(2) (2002)of the Treasury Regulations provided the following definition of ancillary benefits:

> "Ancillary benefit. The term ancillary benefit means social security supplements (other than QSUPPs), disability benefits not in excess of a qualified disability benefit described in section 411(a)(9), ancillary life insurance and health insurance benefits, death benefits under a defined contribution plan, preretirement death benefits under a defined benefit plan, shut-down benefits not protected under section 411(d)(6), and other similar benefits."

26 C.F.R. § 1.401(a)(4)-4(e)(2) (2002); *see also* 26 C.F.R. § 1.412(c)(3)-1(f)(2) (2002) ("an ancillary benefit is a benefit that is paid as a result of a specified event which--(i) Occurs not later than a participant's separation from service, and (ii) Was detrimental to the participant's health."). Nevertheless, since the Pensioner Death Benefit is a post-retirement death benefit paid under a defined benefit plan, upon an event *after* separation from employment service, it is <u>not</u> an "ancillary benefit."

Treasury Regulation §1.411(a)-7(a)(1)(ii) (2006), relating to accrued benefits, remains good law and provides a valuable compass to the Court. The Regulation provides, in pertinent part:

> In general, the term "accrued benefit" refers only to *pension or retirement* benefits. Consequently, accrued benefits do not include ancillary benefits *not directly related* to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (see section 411(a)(9) and paragraph (c)(3) of this section), life insurance benefits payable as a lump sum, *incidental death benefits,* current life insurance protection, or medical benefits described in section 401(h). (*emphasis added*).

A "directly related" benefit would be accrued in tandem with the retirement pension using the some or all of the actuarial factors/events of "retirement", "salary", "mortality" etc. For example, in *United Foods, Inc. v. Western Conference of Teamsters Pension Trust Fund,* 816 F. Supp. 602 (N.D. Cal. 1993), *aff'd,* 41 F.3d 1338 (9th Cir. 1994), the court distinguished lump sum death benefits which is essentially an allowance for funeral costs from a benefit computed with reference to the age or service of a participant. The court correctly determined that the death benefits at issue which were directly related to pension benefits were non-forfeitable).

Other courts have recognized that death benefits directly related to a retiree's service pension are not merely "ancillary" benefits, but are protected as accrued pension benefits. *Berger v. Xerox Retirement Income Guaranty Plan*, 231 F. Supp. 2d 804, 816-17 (S.D. Ill. 2002), aff'd, 338 F.3d 755 (7th Cir. 2003); *see also Crosby v. Bowater Inc. Retirement Plan for Salaried Employees of Great Northern Paper, Inc.,* 212 F.R.D. 350, 362 (W.D. Mich. 2002) (death benefit "directly related to the value of retirement benefits" was protected), *vacated on other grounds,* 382 F.3d 587 (6th Cir. 2004).

In contrast, death benefits which are not directly related to retirement benefits, like a flat dollar funeral allowance are ancillary. In *Huber v. Casablanca Indus., Inc.,* 916 F.2d 85 (3rd Cir. 1990, this Court reversed that part of the district court's ruling which had reversed the arbitrator's

decision to include flat dollar $2,500 funeral allowance benefits in the calculation of liabilities. This Court concluded that funeral allowance benefits should not be included in the calculation of unfunded vested benefits, noting the Pension Benefit Guaranty Corporation's (PBGC) position that those unfunded benefits were not guaranteed by PBGC's regulations concerning multi-employer pension plans. *Id.* 104-105. Since, this case does not involve termination of a multi-employer pension plan, nor an unfunded flat dollar amount, the PBGC's regulations are inapposite. Furthermore, unlike in *Huber* where the funeral allowance had no relationship to the plan participant's retirement benefit, the Pensioner Death Benefit in this case is directly tied to the plan participant's service pension in funding and accrual.[4]

D. The District Court Engaged in a Flawed Analysis in Determining That Pensioner Death Benefits Are Not Vested Welfare Benefits.

The District Court erroneously concluded that Pensioner Death Benefits could not be deemed to be vested welfare benefits relying upon a forfeiture provision not applicable to the benefits paid to Plaintiffs-Retirees funded within the defined benefit plan. The District Court misread and

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[4] As more fully described in Appellant Lucas's opening brief at pp. 37-41, the service pension and Pensioner Death Benefit were accrued together on one Form 5500 Schedule B using the *same* actuarial factors.

wrongly applied a forfeiture provision applicable only to a party who might bring a legal action to redress wrongful death of an active employee. The District Court referred to SPD language stating accidental death benefits would not be paid if a suit was brought "against the company outside the provisions of this plan on account of the death of an employee." (JA00025, slip op. at 17 quoting JA01335, Pls.' Ex. 14 at D010406). On its face, that forfeiture provision does not apply to plan participants with *retiree* pay status. Instead that provision can only be meant to apply to plan participants with *employee* pay status who may become eligible for accidental death benefits which are paid out of unfunded operating revenues in the event of an on the job accidental or wrongful death. There is no evidence of intent to apply that provision beyond actively employed workers with rights under worker's compensation laws.

Moreover, the proper test the District Court should have applied is not whether the plan provided protection to a Pensioner Death Benefit as a 'vested welfare benefit,' but rather whether the plan provided protection to the Pensioner Death Benefit as a benefit within the ambit of "any benefit to which a [retiree] has previously become entitled to receive." (See discussion in Section I, *supra).*

III. The District Court's Ruling that the Pensioner Death Benefit is Not an 'Accrued Benefit', But Rather a Welfare Benefit Does Not Find Support in Fact, Relevant Authority and the Course of Dealings Evidence.

The District Court erred by ruling that "accrued benefit" can only be limited to an "annual benefit" that "commences at normal retirement age." That ruling is inconsistent with ERISA, its legislative history and the case law interpreting it. Under the District Court's analysis, pension benefits provided in a cash balance plan would not be protected accrued benefits, since those benefits are often expressed in the form of a lump sum, not an annuity. See *Esden v. Bank of Boston*, 229 F.3d 154, 158 (2nd Cir. 2000) (holding that "notwithstanding that cash balance plans are designed to imitate some features of defined contribution plans, they are nonetheless defined benefit plans").

The historic objective of the AT&T pension plan has been to treat the Pensioner Death Benefit as a vested or accrued pension benefit when a Plan participant became service pension eligible. That was the course of dealings, as reflected in official plan communications, the plan sponsor's actuarial funding efforts and the plan administrator's annual reporting to governmental agencies.

ERISA's definition of "accrued benefit" only states that the benefit be "expressed" in the form of an annual benefit commencing at normal

retirement date, 29 U.S.C. § 1002(23)(A), and qualifies that requirement by stating it is subject to ERISA Section 204(c)(3), 29 U.S.C. § 1054(c)(3).[5] In *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986 (10th Cir. 1991), the Tenth Circuit explained that "section enables one to calculate an employee's accrued benefit in those cases where the benefits either are not annual or are not commenced at a normal retirement age [i.e., age 65] by calculating the "actuarial equivalent of such benefit ⋯" *Id*. at 990. Thus, that some benefits may be paid in a form different than in the form of an annual benefit commencing at normal retirement age does not mean those benefits are not "accrued benefits." For instance, an actuarially equivalent present lump sum benefit can be an accrued benefit.

> What these provisions mean in less technical language is that: (1) the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age; and (2) if the benefit is paid at any other time (e.g., on termination rather than retirement) or in any other form (e.g., lump sum distribution, instead of annuity) it must be worth at least as much as that annuity.

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[5] ERISA Section 3(23)(A) provides, "The term 'accrued benefit' means - (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, **except as provided in section 1054(c)(3) of this title [§ 204(c)(3) of ERISA]**, expressed in the form of an annual benefit commencing at normal retirement age, . . ." 29 U.S.C. § 1002(23)(A) (**emphasis added**). Thus, the definition of "accrued benefit" under ERISA is qualified by reference to the actuarial equivalence provision of Section 204(c)(3). (**emphasis added**).

Esden, 229 F.3d at 163. There can be no dispute that since plan actuaries were accruing the Pensioner Death Benefit in the same way as the service pension, the Pensioner Death Benefit can be actuarially determined for payment in the form of a present lump sum benefit. (JA00437-39, Richard K. Schultz Decl. ¶ 3).

In the proceedings below, Defendants-Appellees advocated a warped analysis of what can constitute an "accrued benefit." Applying that same analysis would recast joint and survivor pension benefits as not "accrued benefits," since those are not expressed as a single life annuity.

Since the Pensioner Death Benefit is *directly* related to - *inextricably intertwined with* - retirement benefits earned by an employee who becomes service pension eligible, it is an "accrued benefit." In *United Foods,* the district court declared the fixed lump sum pensioner death benefit to be directly related to service pension benefits since the formula calculated the benefit as twelves times the monthly pension benefit. 816 F.Supp. at 609-10. Consequently, the pensioner death benefit was part of the employer's withdrawal liability. *Id*. at 610. The district court judge poignantly stated:

> "Employers do not give benefits to their employees gratuitously. Rather, death benefits, like the other benefits at issue in this case, are the product of collective bargaining and represent both a promise by the employer to fund vested benefits in return for labor, and savings which workers have earned in the form of deferred compensation for their work. This was not lost on the Congress which enacted ERISA: "losses

> of pension rights are inequitable, since the pension contributions previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefits which he would have received." S.Rep. No. 383, 93d Cong., 2d Sess. 45, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4930. . . .
>
> For all these reasons, the court finds that the death benefits at issue in this case are nonforfeitable under [29 U.S.C. § 1301(a)(8)]. Although death has not occurred and therefore the liability is not currently payable, these benefits will in fact be paid, thereby affecting the fiscal soundness of the plan. Accordingly, the actuarially determined value of the plan's death benefits for vested participants was properly included in the Fund's withdrawal liability calculation."

Id. at 611.

IV. The District Court's Ruling that the Pensioner Death Benefit is Not a Protected Benefit Requires Reversal of The Dismissal Order.

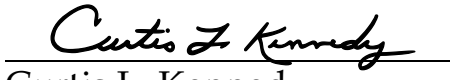
For all the foregoing reasons, the District Court's determination that the Pensioner Death Benefits could be eliminated must be reversed and a determination made whether the benefit was protected by the plan sponsors' long standing anti-amendment provisions, thus, giving the Pensioner Death Benefits status as accrued benefits. ERISA Section 204(g), 29 U.S.C. § 1054(g), prohibits a plan sponsor from either reducing or eliminating an accrued benefit except by process including the Secretary of Treasury after notice to plan participants and the Secretary's determination that the plan amendment is "necessary because of a substantial business hardship." ERISA Section 302(c)(8), 29 U.S.C. § 1082(c)(8). In this instance,

there can be no dispute that process was not carried out and the Secretary of Treasury made no determination of substantial business hardship. Therefore, the District Court's Order of Dismissal must be reversed.

CONCLUSION

For the reasons discussed above, *Amicus Curiae* National Retiree Legislative Network submits that this Court should reverse the District Court's Order of Dismissal and Judgment and these consolidated cases should be remanded for further proceedings.

Dated: April 26, 2007 Respectfully submitted,



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CERTIFICATION OF BAR MEMBERSHIP

I, Curtis L. Kennedy, do hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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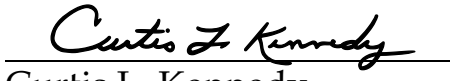

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CERTIFICATE OF COMPLIANCE WITH
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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because Amicus Brief contains **6,230** words in text and footnotes, excluding (table of contents, table of citations, and certificates of counsel) the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Book Antigua 14-point font and word counted in WordPerfect 12, the word processing software system used to prepare this brief.

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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the Third Circuit, Curtis L. Kennedy, hereby certifies the following:

1. The text of the electronic PDF version of the foregoing Amicus Brief that was electronically filed with the Court is identical to the text of the hard copies of the brief that were filed with the Court and served on Counsel; and

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Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Federal Rule of Appellate Procedure 30(a)(3) and 31 and Third Circuit Local Appellate Rule 31.1, two (2) copies of the foregoing Brief of *Amicus Curiae* were sent via Federal Express overnight delivery, on April 26, 2007 to:

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Pursuant to Federal Rule of Appellate Procedure 30(a)(3) and 31, and Third Circuit Local Appellate Rule 31.1, I also hereby certify that an original and ten (10) copies of the foregoing brief were filed with the Clerk of the Court by forwarding the same via Federal Express overnight delivery, on April 26, 2007 to:

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