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No. 93-1935

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1994

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CURTISS-WRIGHT CORPORATION,  
Petitioner,

v.

FRANK C. SCHOONEJONGEN, et al.,  
Respondents.

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Third Circuit

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*  
AND BRIEF *AMICUS CURIAE* OF THE NATIONAL  
ASSOCIATION OF SECURITIES AND COMMERCIAL  
LAW ATTORNEYS (NASCAT) IN SUPPORT OF  
RESPONDENTS**

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**MOTION OF NATIONAL ASSOCIATION OF  
SECURITIES AND COMMERCIAL LAW  
ATTORNEYS FOR LEAVE TO FILE *AMICUS  
CURIAE* BRIEF IN SUPPORT OF RESPONDENTS**

Pursuant to Rule 37.4 of the Supreme Court Rules, the National Association of Securities and Commercial Law Attorneys ("NASCAT") hereby moves this Court for leave to file an *amicus curiae* brief in this case on behalf of Respondents. Counsel of record for Respondents have given NASCAT consent to file an *amicus curiae* brief in support of their position; however, counsel of record for Petitioner have refused to grant such consent.

As discussed at greater length in the Statement of Interest, NASCAT is an association of law firms consisting of attorneys located throughout the United States who represent parties in antitrust, consumer protection, employment, securities fraud and other types of commercial litigation. NASCAT and its members advocate the enactment and enforcement of effective federal and state laws to protect innocent persons, including consumers, investors, employees and retirees, from wrongful, deceptive and fraudulent conduct, including violations of the Employee

Retirement Income Security Act (ERISA). NASCAT's members currently represent thousands of employees and retirees in pending ERISA and state law class actions challenging termination and/or modification of company-funded health care benefits.

The *amicus curiae* brief which NASCAT seeks to file offers a broad perspective regarding the importance of this case and the potential impact of this Court's decision on thousands (if not millions) of employees and retirees. Thus, NASCAT's brief addresses the public policy and legal implications of a decision in this case on numerous persons who are not parties to this action.

For the reasons stated above, NASCAT respectfully requests leave to file its *amicus curiae* brief on behalf of Respondents in this case.

Respectfully submitted,

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**QUESTIONS PRESENTED**

Section 402(b)(3) of ERISA, 29 U.S.C. §1102(b)(3), requires every employee benefit plan to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The questions presented are:

1. Whether Section 402(b)(3) is satisfied by a plan provision stating that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan."

2. Whether, in the absence of a plan-specified amendment procedure, any attempt by the sponsor to amend the plan is ineffective as a matter of law.

**I. INTRODUCTION AND INTEREST OF AMICUS CURIAE**

The National Association of Securities and Commercial Law Attorneys (NASCAT) is an association of law firms consisting of attorneys located throughout the United States who represent parties in antitrust, consumer protection, employment, securities fraud and other types of commercial litigation. NASCAT and its members advocate the enactment and enforcement of effective federal and state laws to protect innocent persons, including consumers, investors, employees and retirees, from wrongful, deceptive and fraudulent conduct, including violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1101. *et seq.*

NASCAT has an interest in this case because its members currently represent thousands of employees and retirees in pending ERISA and state law class actions challenging termination and/or modification of company-funded health care benefits. NASCAT and its members strongly advocate effective private enforcement of ERISA's statutory provisions and in developing case law that deters employers from violating its provisions and accompanying regulations to the detriment of employees and retirees. As *amicus curiae*, NASCAT respectfully submits that the decision of the Third Circuit in this case should be affirmed.

## II. SUMMARY OF ARGUMENT AND PROCEEDINGS BELOW

### A. The Third Circuit's Decision In This Case Should Be Affirmed

Compliance with the law is not too much to ask of Petitioner; this is all the Third Circuit did in correctly holding that an employee benefit plan must contain procedures for amendment and must identify those persons with the power to amend, as Section 402(b)(3) of ERISA, 29 U.S.C. §1102(b)(3), expressly requires. Absent such provisions, *any* attempt to amend the substantive terms of a plan is invalid.

This Court should affirm the Third Circuit's decision for several reasons. First, to give effect to Curtiss-Wright's attempted amendment to its employee benefit plan would vitiate Congress's mandate that plans expressly provide amendment procedures. As the Third Circuit correctly observed, under Curtiss-Wright's theory of the statute plan sponsors would be better off leaving out the required provisions so as not to be later hemmed in by their own strictures. This would encourage plan sponsors to disregard §402(b)(3), thereby rendering it ineffective. Congress cannot have intended that employers could so easily ignore this important statutory requirement.

Second, permitting companies to amend plan terms without following a specified procedure would undermine ERISA's goal of ensuring that participants are fully advised of (or can ascertain at any time) their rights under employee benefit plans. The lax amendment rule that Curtiss-Wright advocates would eliminate the certainty that ERISA's reporting, disclosure, fiduciary and writing requirements

were expressly designed to protect. Moreover, because employers have up to 210 days after the end of a plan year to inform participants of amendments, participants would have no roadmap to follow during that period to determine whether important changes were made unless the plans contain an express procedure for amendment and for identifying those with the power to amend, as ERISA expressly requires. Moreover, if companies were permitted to amend their plans without having to follow a particular procedure, it would be difficult for employees to express their views or challenge decisions to amend. Indeed, absent a clear identification of the locus of amending power, participants may become lost in referrals from one person or body to another.

Third, although it was the participants in Curtiss-Wright's plan who originally brought this action, ERISA's requirements regarding a formal amendment procedure serve to protect the employer and the plan as well because the amendment procedure and identification of persons with authority to amend help ensure accountability. In the words of the Ninth Circuit, "the writing requirement protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to such. . . ."<sup>1</sup> Requiring compliance with §402(b)(3) benefits *each* of the parties in the tri-partite ERISA

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<sup>1</sup> *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1523 (9th Cir.), *amended*, 1993 U.S. App. LEXIS 37236 (9th Cir. 1993); *accord Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10 (2d Cir. 1992); *Rodrigue v. Western & Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991).

relationship: the employer, the plan and the participants.

Curtiss-Wright advocates adopting a rule invalidating illegal amendments *only* if the absence of an amendment procedure causes *harm* to participants. However, this would place participants in the intolerable position of not knowing which provisions of their plans were valid or invalid at any given time. The same would be true if this Court were to adopt the view that illegal amendments should be invalidated only upon a showing of *detrimental reliance*, which Curtiss-Wright also proposes. Either rule could result in a plan having different meanings for different participants. If these proposed rules proposed were adopted there would be no certainty on the part of sponsors, administrators, or participants as to substantive amendments of a plan without years of litigation regarding whether there was "harm" or "detrimental reliance" in each instance.

Congress wisely avoided such a quagmire with the proverbial "ounce of prevention." ERISA mandates that plans specify a formal amendment procedure *in advance*, in the written plan documents. 29 U.S.C. §1102(b)(3). The plan must strictly abide by that procedure. 29 U.S.C. §1102(a)(1). A plan's failure to comply with these simple requirements makes the validity of any attempted modification unverifiable by sponsors, administrators and participants alike, thereby frustrating Congress's salutary goal.

Curtiss-Wright argues that affirming the Third Circuit's decision in this case would cause many (perhaps thousands of) plans to have to add presently non-existing amendment procedures. Yet, every time this Court clarifies a statute, those who are out of compliance

must change their practices. On the other hand, declining to enforce §402(b)(3) of ERISA, as Congress enacted, it would affect even more harshly the thousands (if not millions) of participants in those plans. They would be unable to ascertain the validity or substance of plan amendments and would, therefore, be uncertain about the operative terms of their plans.

Finally, notwithstanding Curtiss-Wright's protestations, the Third Circuit's decision is fully consistent with ERISA's comprehensive remedial scheme under several different theories of relief: (1) Under §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), the purported amendment could be deemed either arbitrary and capricious or simply a nullity, requiring enforcement of the pre-existing plan provisions; (2) under §502(a)(3)(A), 29 U.S.C. §1132(a)(3)(A), enforcement of the purported amendment could be enjoined as a violation of ERISA; and (3) under §502(a)(3)(B), 29 U.S.C. §1132(a)(3)(B), the participants could obtain traditional equitable relief either to restore them to the status quo ante -- that is, to put them in the position they occupied prior to the illegal amendment -- or to reform the plan document to eliminate the offending amendment. Each of these remedies is available under the plain language of ERISA's civil enforcement scheme.

#### **B. The Proceedings In The Court Below**

Both the district court and the Third Circuit rejected Curtiss-Wright's argument that its general reservation-of-rights clause satisfied the requirements of §402(b)(3) of ERISA, 29 U.S.C.

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§1102(b)(3). As a result, the district court determined that the purported amendment taking away retirees' health benefits was invalid and the Third Circuit affirmed. See *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1038-39 (3d Cir. 1994) (*Curtiss-Wright*).

In its opinion denying Curtiss-Wright's motion for certification of an interlocutory appeal, the district court reiterated its determination that the company had violated ERISA by failing to include in its plan a procedure for amendment. The district court concluded that benefit plans may not be amended by informal means, such as those based only upon a general reservations-of-rights clause, because the validity of plan amendments can *only* be determined by reference to particularized procedures required to be set forth in written plans. The district court struck Curtiss-Wright's attempted amendment because of the absence of such procedures and the resulting impossibility of evaluating and determining the propriety of the attempted amendment. *Id.* at 1039.

The Third Circuit agreed, affirming that Curtiss-Wright's reservation-of-rights clause failed to satisfy the requirements of ERISA §402(b)(3), 29 U.S.C. §1102(b)(3). The Third Circuit concluded that "[a] simple reservation of a right to amend is not the same as a 'procedure for amending [the] plan.'" *Id.* The court emphasized that a general reservation clause fails to further one of the primary purposes of §402(b)(3), which is "to ensure that all interested parties will know how a plan may be altered and who may make such alterations. Only if they know this information will they

be able to determine with certainty at any give time what the plan provides." *Id.* As a result, the Third Circuit held the attempted amendment invalid. *Id.* at 1038-39.

### III. ARGUMENT

#### A. A Boilerplate Reservation-Of-Rights Clause Does Not Satisfy Section 402(b)(3) Of ERISA

Beginning in 1966, Curtiss-Wright Corporation provided its retirees with post-retirement health coverage. *Curtiss-Wright*, 18 F.3d at 1036. In September 1976, the company established the Post-Retirement Health Benefits Program in accordance with ERISA, which had recently become effective. Various letters and documents, including a "Constitution," provided that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." *Id.* at 1037. In 1983, relying entirely on this reservation clause as authority, Curtiss-Wright issued a new Summary Plan Description ("SPD") purporting to modify the plan by providing, for the first time, that a retiree's medical coverage under the plan would cease "upon termination of business operations of the facility" from which he or she retired. *Id.* Immediately thereafter, Curtiss-Wright closed one of its plants and, in accordance with the new provision, terminated the health benefits of workers who had retired from that plant. *Id.* at 1037-38.

Curtiss-Wright now asks the Court to hold that a boilerplate reservation-of-rights clause like the one included in its "Constitution" satisfies ERISA's mandatory requirement that

Every employee benefit plan shall . . .

(3) provide a *procedure* for amending such plan, and for identifying the persons who have authority to amend the plan. . . .

29 U.S.C. §1102(b)(3) (emphasis added). Because a general reservation-of-rights clause cannot satisfy §402(b)(3) of ERISA, this Court should affirm the Third Circuit's decision in this case. *See Curtiss-Wright*, 18 F.3d at 1038-39.

**1. Modifying A Plan Without Following A Specified Procedure Would Violate ERISA And Undermine Its Goal Of Certainty**

Curtiss-Wright contends that its generalized reservation clause satisfies ERISA's mandate that each plan set forth a procedure for amendment and for identifying the persons who have authority to amend. For the reasons stated by the courts below and for the reasons that follow, Curtiss-Wright is wrong.

If companies were able to satisfy their obligation under §402(b)(3) merely by including a generalized reservation clause (like Curtiss-Wright's) and were not required to follow a specifically delineated "procedure," they would undermine Congress's mandate that plan participants be apprised of and be able to effectively

challenge the sponsor's decisions regarding disqualification, ineligibility, or denial or loss of benefits. As emphasized by the Third Circuit, this would destroy one of ERISA's principal objectives -- to ensure that participants are able to determine at any moment, by reviewing the plan documents, precisely what their rights and obligations are under employee benefit plans.

When enacting ERISA, Congress made clear that every employee benefit plan must be in writing and must include a procedure for amending the plan and for identifying those persons with the authority to amend. These requirements further Congress's goals that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan . . . [and] know who is responsible for operating the plan." H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077-78.<sup>2</sup> To permit companies the discretion to modify employee benefit plans in whatever manner they desire without requiring them to follow a specified procedure would eviscerate this statutory purpose and, as a result, participants would not know how their benefits could be modified and by whom, nor could they easily verify the terms of plans as modified.

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<sup>2</sup> See also *Schoonmaker v. Employee Sav. Plan of Amoco Corp.*, 987 F.2d 410, 413 (7th Cir. 1993) (quoting *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989)); *Miller v. Coastal Corp.*, 978 F.2d 622, 624-25 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1169 (3d Cir. 1990).

Affirming ERISA's primary purpose, courts have continuously sought to ensure that each participant be able to determine, by reviewing the plan documents, exactly what his or her rights are. For example, in *Algie v. RCA Global Communications*, 1994 U.S. Dist. LEXIS 4735, at \*1-\*2 (S.D.N.Y. April 12, 1994), former employees claimed entitlement to severance benefits under their previous employer's plan rather than benefits provided under its successor's plan. Expressly following the Third Circuit's ruling in *Curtiss-Wright*, the district court held that a simple reservation-of-rights clause does *not* satisfy §402(b)(3)'s requirement that an amendment procedure be included as part of each written plan. *Id.* at \*7, \*63-\*68, \*74-\*75. The district court reasoned:

The logic of this [*Curtiss-Wright*] analysis is compelling. The employer is required by ERISA to have a written plan and to specify a procedure for its modification in order "to ensure that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan."

*Id.* at \*66-\*67 (citing cases and legislative history). Even an effective, unambiguous reservation-of-rights clause simply does not serve this purpose.<sup>3</sup>

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<sup>3</sup> Another example is provided by *Miller v. Coastal Corp.*, 978 F.2d at 624-25, in which the Tenth Circuit rejected an employee's claim that his retirement plan had been orally modified in a manner that would increase his benefits. The court ruled that plans may be modified only by following the formal written procedures, which §402(b)(3) requires be included in the plan, concluding that any other rule would prevent employees from being able to rely on plan documents and would, therefore, run afoul of one of

Under Curtiss-Wright's approach, the absence of an amendment procedure would permit companies to vary the terms of written plans via informal means because no controls would exist over the methods of amending. Such a practice would violate the well-established rule that plans cannot be modified either orally or by informal writings.<sup>4</sup> This settled rule is necessary to make certain that employees are fully advised of all of their rights under benefit plans. A contrary rule permitting companies to amend plans without explicit procedures in place necessarily erodes the certainty of plan terms which ERISA

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ERISA's primary goals.

<sup>4</sup> See, e.g., *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir.), *reh'g den'd*, 1993 U.S. App. LEXIS 20392 (6th Cir. 1993) (it is "a basic principle of ERISA that terms of a plan may not be modified or superseded by oral statements or other extrinsic evidence"); *Miller v. Coastal Corp.*, 978 F.2d at 624 ("[a]n employee benefit plan cannot be modified ... by informal communications ... regardless of whether those communications are oral or written; .... ERISA requires all modifications to an employee benefit plan to be written, 29 U.S.C. § 1102(a)(1), and to conform to the formal amendment procedures, 29 U.S.C. § 1102(b)(3)"); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993) ("[b]ased upon this statutory scheme [ERISA § 402(a)(1) and (b)(3)], any modification to a plan must be implemented in conformity with the formal amendment procedures and must be in writing[;] [o]ral or informal written modifications to a plan ... are of no effect"); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("[b]y explicitly requiring that each plan specify the amendment procedures, Congress rejected the use of informal written agreements to modify an ERISA plan[;] ... [r]eading the 'written agreement' provision of subsection 1102(a)(1) in light of subsection 1102(b)(3)'s requirement of formal written amendments procedures necessitates our conclusion that ... ERISA precludes oral modifications of employee benefit plans").

strives to ensure. Participants may not become aware of important amendments until well after they are adopted,<sup>5</sup> thereby shrouding plan terms in secrecy – especially if the plan illegally fails to identify the persons who have authority to amend.

Another important purpose served by §402(b)(3) of ERISA is to ensure that employees have sufficient information to enable them to express their views concerning amendments or challenge decisions to amend and amendments. *See, e.g., Siskind v. Sperry Retirement Program*, 795 F. Supp. 614, 617 (S.D.N.Y. 1992). In *Siskind*, the district court held that a committee of officers that had express authority to amend the plan improperly delegated that authority to others. In support of its refusal to permit the attempted delegation, the court explained that

[t]he statutory requirement of designation of the locus of amending power is not a mere formality. Clear identification of the source of amendments is crucial so that employees will not become lost in referrals from one person or body to another if they seek to determine how to argue to -- or challenge the decisions of -- the person or entity making decisions about retirement benefits. . . .

*Id.* Merely providing that the "company" reserves the right to amend falls well short of clearly identifying "the source of amendments" because plan participants equipped with only this general identifier

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<sup>5</sup> Section 104(b)(1) of ERISA requires employers to communicate plan modifications to participants and beneficiaries "no later than 210 days after the end of the plan year in which the change is adopted. . . ." 29 U.S.C. §1024(b)(1).

will have unnecessary difficulty determining the locus of amending power.<sup>6</sup> Likewise, absent a formal amendment procedure, it would be difficult to determine the process and sequence of events culminating in the adoption of an amendment in order to determine its validity.

It is well-settled that if, as is required by statute, a plan provides a written procedure for amending plan terms and identifying the persons with authority to amend, that procedure *must* be followed.<sup>7</sup> If the expressed procedure is not followed, the plan may not be amended. It is illogical, not to mention patently unfair, to enforce a specified plan procedure that complies with ERISA while

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<sup>6</sup> Section 402(b)(3) is in the fiduciary responsibility part of the statute. See 29 U.S.C. §§1101-1114. In the process of enacting ERISA, Congress declared:

[T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights. . . .

H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649. Absent a rule requiring that written plans contain specific procedures for amendment and for identifying those with the power to amend, employees will not "be armed with enough information to enforce their own rights." *Id.*

<sup>7</sup> See e.g., *Schoonmaker*, 987 F.2d at 413; see also Wm. T. Payne, *Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits*, 10 *The Labor Lawyer* 91, 101 (1994).

permitting companies like Curtiss-Wright to amend plans without conforming to a specified procedure, simply by virtue of including only a reservation-of-rights clause in their plans which does not comply with statutory requirements. The Third Circuit recognized that such a result "would render requirements of §402(b)(3) meaningless. . . ." *Curtiss-Wright*, 18 F.3d at 1038. Surely this would violate the settled rule that statutory provisions are to be construed so as to give them meaningful effect.<sup>8</sup> In this regard, the Southern District of New York recently stated:

If an employer could modify a plan by any procedure in the absence of a specified plan procedure, it would in effect benefit by failing to comply with [§]402(b)(3), a result that would sabotage the statutory scheme and the underlying policy of full notice to plan participants.

*Algie*, 1994 U.S. Dist. LEXIS 4735, at \*67. As a practical matter, if this Court were to rule that general reservation clauses satisfy §402(b)(3), in the future very few (if any) plans would contain a procedure for amendment and for identifying those with the authority to amend; such a ruling would simply write §402(b)(3) out of ERISA and out of existence. As emphasized by the Third Circuit, adopting

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<sup>8</sup> See, e.g., *U.S. ex rel. Harlan v. Bacon*, 21 F.3d 209, 210-11 (8th Cir. 1994). Simply put, courts are to construe statutes "so that no part will be inoperative or superfluous, void or insignificant." *Sekula v. FDIC*, 1994 U.S. App. LEXIS 31382, at \*19 (3d Cir. Nov. 9, 1994); accord *Mears Transp. Group v. State of Florida*, 34 F.3d 1013, 1019 (11th Cir. 1994); *Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 587 (D.C. Cir. 1993).

