

**Consolidated Case Nos. 23-1499, 23-1501, 23-1503, 23-1511, 23-1518, 23-1526,
23-1546, 23-1868, 23-1869**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LUCY DUNNE, REPRESENTATIVE FOR HELENA DUPONT WRIGHT;
JAMES MILLS; JOSEPH WRIGHT; T. KIMBERLY WILLIAMS

v.

ELTON CORPORATION; GREGORY FIELDS; FIRST REPUBLIC TRUST
COMPANY OF DELAWARE LLC; M.C. DUPONT CLARK EMPLOYEES
PENSION TRUST

FIRST REPUBLIC TRUST COMPANY OF DELAWARE LLC; M.C. DUPONT
CLARK EMPLOYEES PENSION TRUST

v.

MARY MILLS ABEL SMITH; CHRISTOPHER T. DUPONT; MICHAEL
DUPONT; JAMES B. WYETH, SOLELY AS EXECUTOR AND PERSONAL
REPRESENTATIVE OF THE ESTATE OF PHYLLIS M. WYETH;
KATHARINE D. GAHAGAN

On Appeal from the United States District Court
for the District of Delaware
(Case No. 1:17-cv-00286)

AMICUS CURIAE
PENSION RIGHTS CENTER
BRIEF IN SUPPORT OF PLAINTIFF APPELLEE
T. KIMBERLY WILLIAMS
PETITION FOR REHEARING AND REHEARING *EN BANC*

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*MEWA: Multiple Employer Welfare Arrangements under the
Employee Retirement Income Security Act (ERISA): A Guide to Federal and State
Regulation 3-4*, (revised 2022), available at [https://www.dol.gov/sites/
dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-
under-erisa-a-guide-to-federal-and-state-regulation.pdf](https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf)..... 3, 4

DISCLOSURE STATEMENT

The Pension Rights Center is a nonprofit corporation, which is not publicly held and has no parent corporation.

IDENTITY AND INTEREST OF *AMICUS CURIAE* PENSION RIGHTS CENTER

The Pension Rights Center is a national nonprofit consumer organization that has been working for more than four decades to protect and promote the retirement security of workers, retirees, and their families. The Center advocates for laws and regulations that expand retirement programs, and make them fairer, more dependable, more adequate and more secure; helps individuals obtain retirement benefits they have been improperly denied; and works to preserve pension protections conferred by Congress in the landmark private pension law, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et. Seq.*

The issue presented by this case, whether an employee can rely on a promised pension when the promise is housed in a private family trust that covers the employees of family members, is a consequential one. We are concerned that the decision of the panel, holding that such a trust arrangement creates an impregnable wall separating the employees from the basic protections of ERISA, provides a blueprint for similarly situated families to make unenforceable promises to their employees.

The source of authority to file this brief is Rule 29(b), which provides that an amicus curiae may file a brief by leave of the Court. The accompanying motion asks the Court for such leave.

REQUIRED STATEMENT OF AMICUS CURIAE

- (1) No party's counsel authored this brief in whole or in part.
- (2) No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief.
- (3) No person other than amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

While the Pension Rights Center agrees with the arguments in Appellee's petition for rehearing and believes they justify rehearing either by the panel or the *en banc court*, we write to make two additional points, both of which we believe deserve consideration by the Court

First, the panel's reliance on *Gruber v. Hubbard Bert Karle, Inc.*, 159 F.3d 780 (3^d Cir. 1998) seriously misreads *Gruber*, a case in which the issue was the demarcation of a true ERISA welfare benefits plan from an entrepreneurial enterprise seeking to market substandard health "insurance" contracts through an organization of employers without a common interest in providing benefits. In particular, the Court erred in holding that the members of the DuPont family whose

employees participated in the trust lacked sufficient nexus to be considered a multiple employer plan under ERISA because the plan was a legitimate pension plan and not an entrepreneurial scheme to market health coverage to employers. The court ignored the key part of *Gruber*'s nexus text, that the group's nexus be "unrelated to the provision of benefits." Here, the nexus between the group—family ties--was a common relationship unrelated to the provision of benefits.

Second, the panel's decision is significant beyond the facts of this case, since it provides a blueprint for family groups to establish an ERISA-exempt plan for employees of an extended family or other group in similar circumstances.

ARGUMENT

1. The Panel Misconstrued *Gruber*'s Common Nexus Requirement

The panel decision holds that the familial relationship between the employers whose employees participated in the DuPont family retirement plan is an insufficient nexus for the plan to be considered established or maintained by a "group of employers." The panel's reading of the *nexus* requirement in *Gruber*, which holds that the group that establishes or maintains the plan must be an association of employers tied by a common interest unrelated to employee benefits.

This "nexus" requirement was developed by the Department of Labor in the 1980s to distinguish legitimate employee benefit plans and entrepreneurial schemes to market employee health products while posing as plans—which at one

time in ERISA’s history resulted in broad preemption of state law. See Department of Labor, *MEWA: Multiple Employer Welfare Arrangements under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State Regulation* 3-4, (revised 2022), available at <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf>.

As suggested in the *Gruber* case, the nexus doctrine—never adopted by the Department of Labor’s ERISA regulatory partner agencies, the IRS, the Department of the Treasury, and the Pension Benefit Guaranty Corporation—was developed for and applied in cases involving welfare benefit plans, not pension plans. In any case, the doctrine is intended to sort out artificial associations of employers—that is, those with no natural nexus that predated the organization. Close familial ties, such as in this case, are just such a delimiting, pre-plan adoption nexus. *Id.* at 9-10 (group of unrelated employers for sole purpose of providing benefits is not an association of employers).

2. The Panel Decision Provides a Roadmap for Other Wealthy Families to Evade ERISA

The decision of the panel, if left intact, is likely not a one-off situation. If a single family member establishes a trust to provides pensions or other employee benefits for the employees of his or her children or grandchildren (or for that matter, employees of business entities of his children, it will be a relatively

effortless exercise: form a trust for such purpose but do not directly involve your children, who can then notify their employees of the trust's existence and its promise of retirement income, and then at the appropriate time, provide the supporting documentation to the trust to establish their entitlement to a pension. Such a trust, with a wink and a nod from the grantor's descendants, will reflect all the fundamental aspects of a private sector pension plan but without the protections that Congress sought to provide to all participants. Even though the panel denominated the decision nonprecedential, it will be read closely by those who can replicate it as an employer escape hatch from the responsibilities of ERISA.

CONCLUSION

For the reasons provided in Appellee's Petition and for the additional reasons presented in this brief, the panel should grant the Petition for Rehearing.

Respectfully submitted,

s/ Tybe A. Brett

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CERTIFICATE OF BAR MEMBERSHIP

Attorney for Appellee certify that she is a member in good standing of the bar of this Court pursuant to Third Circuit LAR 28.3.

Respectfully submitted,

s/ Tybe A. Brett
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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 29(b)(4)

1. This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because this brief contains 1,292 words, excluding the parts of the brief exempted by FRAP 32(f).

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using 365 Word Apps for Business in Times New Roman typeface and 14 point font size.

Respectfully submitted,

s/ Tybe A. Brett
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ELECTRONIC FILING CERTIFICATION

This is to certify that the text of the electronic brief and the hard copies of the *Amicus* Brief are identical. A virus check was performed using Security Manager AV Defender (BitDefender), Cisco Umbrella DNS Filtering, and Huntress Managed Detection which performs automatic scanning.

Respectfully submitted,

s/ Tybe A. Brett _____
Tybe A. Brett

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2024, I caused to be electronically filed the foregoing brief with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users. All attorneys in this case are registered CM/ECF users and will, therefore, be directly notified of the filing.

November 6, 2024

/s/ Tybe A. Brett _____