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IN THE  
**Supreme Court of the United States**

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JEFFREY H. DECK  
Liquidating Trustee of the Estates of  
Crown Vantage, Inc. and Crown Paper Company,  
*Petitioner,*

v.

PACE INTERNATIONAL UNION,  
EDWARD J. MILLER and JEFFREY D. MACEK,  
*Respondents.*

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

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**BRIEF IN OPPOSITION**

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June 12, 2006

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

An employer with conflicting interests as sponsor, trustee and administrator of its employees' pension plans may decide to terminate the plans. The questions presented are:

1. Whether the employer owes a fiduciary duty under ERISA to consider all options available for providing benefit liabilities in terminating the plans.
2. Whether merger into a multiemployer pension plan is a method of providing benefit liabilities in terminating a single-employer plan under ERISA.

**LIST OF PARTIES AND RULE 29.6 STATEMENT**

Respondent PACE International Union recently merged with USW, AFL-CIO. PACE and USW were and are unincorporated associations.

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**BRIEF IN OPPOSITION**

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**STATUTES AND REGULATIONS**

Respondents accept the statutes and regulations listed by petitioner, but add a fuller selection from 29 U.S.C. § 1412:

- (a) A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.
- (b) No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) than the benefit immediately before that date.

### STATEMENT OF THE CASE

The narrative in the Bankruptcy Court's judgment is accurate. Respondents hereby incorporate it. App. 54-62.

However, respondents offer this abbreviated account to correct misstatements in petitioner's *Statement of the Case*, particularly the third paragraph on page 7.

In the summer of 2001, Crown Vantage, Inc., was preparing a Chapter 11 bankruptcy liquidation plan. The Directors of Crown Vantage, Inc., were also the trustees of seventeen pension plans covering hourly employees. The trustees were both the sponsor and the administrator of the plans. Because Crown was winding up its affairs in preparation for its own demise, its pension plans had to be wound up, too.

Crown was considering the purchase of an annuity to provide plan benefits to the participants. The employees' bargaining representative, PACE International Union, offered to fold all seventeen plans—some overfunded; some underfunded—into its Taft-Hartley plan, the PACE Industry Union-Management Pension Fund (PIUMPF). Crown promised to consider that option. “[PIUMPF’s] offer will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers,” say the Board minutes of September 26, 2001. SER 3.

On October 4, 2001, during bankruptcy proceedings, Crown promised in open court that it would not take final action on the pension plans without informing the court and PACE, so that PACE would have an opportunity to be heard. SER 1, 15:14-16:8.

On October 10, however, without notice to the court or union, Crown committed \$84 million to Hartford Life Insurance Company to provide an annuity covering twelve of the pension plans. Crown abandoned five underfunded plans. After the premium was paid, nearly \$5 million remained in

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the twelve plans, which Crown intended to take as a "reversion." Petitioner states at page 7:

Based on a variety of advantages provided by termination through annuitization, including but not limited to the financial security of the annuity, Crown's board approved and immediately consummated the purchase of an \$84 million annuity from Hartford Life Insurance Company. . . In opting to terminate the plan by purchase of the Hartford annuity, the Crown Board did not accept PACE's alternative merger proposal.

To the extent this paragraph implies that Crown *compared* merger with annuitization, it is contrary to the evidence and the findings of the courts below. Hartford's financial stability was not an "advantage" over PIUMPF, since PIUMPF was also financially stable. PIUMPF supplied Crown with all requested financial information, but Crown never looked at it, or had it evaluated by an expert. The Bankruptcy Court found that Crown "gave no serious consideration to the PIUMPF merger proposal"—a finding that is amply supported by the record. App. 62.

One true advantage of merger was that PIUMPF formally proposed that "All of the liabilities of the Crown Vantage Plans shall become the liabilities of the PACE Fund." (SER 10, page 4, emphasis added.) The Petition's *Statement of Facts* implies that the Hartford annuity would also have provided "all benefit liabilities under the plan," as required by 29 U.S.C. § 1341(b)(3)(A)(i). That implication is not supported by the record and is contrary to fact.

The Bankruptcy Court held a full-day hearing on November 29, 2001. On December 11, 2001, the Court found that Crown had breached its fiduciary duties to the participants by failing to make an adequate investigation of its options. App. 64-67. The court therefore imposed a constructive trust on the reversion for the benefit of participants. App. 77-83.

Both the District Court and the Ninth Circuit affirmed the finding of a fiduciary breach under ERISA. As the administrator implementing a termination, Crown owed a duty of undivided loyalty to participants. Crown was obliged to keep "an eye single to the interests of the participants." At the same time, Crown owed a conflicting duty to its creditors to maximize assets in the bankruptcy estate. The District Court and the Ninth Circuit correctly applied the universally accepted rule of *Donovan v. Bierwirth*, 680 F.2d 263 (2nd Cir. 1982), cert. den., 459 U.S. 1059. *Bierwirth* requires conflicted trustees to make a scrupulous and impartial investigation of their options. On appeal, Crown never challenged the finding that it failed to make such an investigation.

The case has been remanded to the Bankruptcy Court. Further proceedings are pending there, including respondents' motion for leave to amend the complaint.

#### REASONS FOR DENYING PETITION

Respondents respectfully suggest there are no compelling reasons to grant this petition for writ of certiorari.

The situation presented here is uncommon and of no great national importance: An employer, simultaneously wearing the hats of sponsor and plan administrator, is faced with a choice between purchase of an annuity and merger with another pension plan in the course of plan termination. A careful search of published decisions, legislative history, and scholarly works shows no discussion of a case with similar facts, except for a series of PBGC *Opinion Letters*, which favor the respondents, not the petitioner. This suggests that the scenario is rare.

The Ninth Circuit's decision is not "in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). Nor is the decision in conflict with administrative regulations.

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