No. _____

**In the Supreme Court of the United States**

JEFFREY H. BECK,
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.*

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

# PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether a pension plan sponsor's decision to terminate a plan by purchasing an annuity, rather than to merge the pension plan with another, is a plan sponsor decision not subject to ERISA's fiduciary obligations.

## LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this proceeding in the United States Court of Appeals for the Ninth Circuit are the same as the parties to this proceeding: Petitioner Jeffrey H. Beck, Liquidating Trustee of the Estates of Crown Paper Company and Crown Vantage, Inc., and Respondents PACE International Union, Edward J. Miller, and Jeffrey D. Macek.

Corporate Disclosure Statement: Petitioner is the trustee in bankruptcy of Crown Paper Company and Crown Vantage, Inc. Crown Paper Company was a wholly-owned subsidiary of Crown Vantage, Inc., which itself had no corporate parent. No publicly-traded entity owned ten percent or more of Crown Vantage, Inc.'s stock.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

CASES

STATUTES



RULES



REGULATIONS



MISCELLANEOUS

## PETITION FOR A WRIT OF CERTIORARI

Jeffrey H. Beck, Liquidating Trustee for the Estates of Crown Vantage, Inc. and Crown Paper Company, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The decisions of the court of appeals are available at *Beck v. PACE International Union*, 427 F.3d 668 (9th Cir. 2005) (reported), and *Beck v. PACE International Union*, 146 Fed. Appx. 917 (9th Cir. 2005) (unreported), and are reprinted at App. 1–24 and App. 25–28, respectively. The order of the court of appeals denying rehearing and rehearing en banc is reprinted at App. 84–85.

The court of appeals affirmed in part and vacated in part the decision of the United States District Court for the Northern District of California, which is unpublished but available at *Beck v. PACE International Union*, 2003 U.S. Dist. LEXIS 2283 (N.D. Cal. Jan. 10, 2003), and reprinted at App. 29–50.

The district court affirmed the preliminary injunction order entered by the United States Bankruptcy Court for the Northern District of California on February 5, 2002, reprinted at App. 74–76. This order incorporated by reference oral findings of fact and law made on December 11, 2001, and reprinted at App. 51–73. By a stipulation of the

parties approved by the bankruptcy court, the preliminary injunction order was deemed a final judgment on the merits. App. 78, 83.

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Ninth Circuit entered its judgment and opinions on October 24, 2005, and denied Petitioner's timely petition for rehearing and rehearing en banc on January 10, 2006. Petitioner's application to extend the time to file a petition for writ of certiorari until May 10, 2006, was granted by Justice Kennedy on February 21, 2006. Supreme Court Docket No. 05A769. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS

29 U.S.C. § 1341(a), "General rules governing single-employer plan terminations," provides:

> (1) Exclusive means of plan termination.
>
> Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

> (2) 60-Day notice of intent to terminate.
>
> Not less than 60 days before the proposed termination date of a standard termination under subsection (b) or a distress termination under subsection (c), the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

29 U.S.C. § 1341(b), "Standard termination of single-employer plans," provides:

> (1) General requirements.
>
> A single-employer plan may terminate under a standard termination only if . . .
>
> > (D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date) . . . .
>
> (3) Methods of final distribution of assets.
>
> > (A) In general.
> >
> > In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan ad-

> ministrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—
>
> > (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or
> >
> > (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

29 U.S.C. § 1344, "Allocation of assets," provides:

> (a) Order of priority of participants and beneficiaries
>
> In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan . . . .

> (d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets
>
> > (1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—
> >
> > > (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
> > >
> > > (B) the distribution does not contravene any provision of law, and
> > >
> > > (C) the plan provides for such a distribution in these circumstances.

29 U.S.C. § 1412, "Transfers between a multiemployer plan and a single-employer plan," provides:

> (a) General authority
>
> 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.

29 C.F.R. § 4041.28(c)(1) provides:

> *In general.* The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

## STATEMENT OF THE CASE

Petitioner Jeffrey H. Beck serves as the liquidating trustee for Crown Vantage, Inc. and Crown Paper Company (collectively, "Crown"). Crown formerly operated a series of paper mills, through which it employed approximately 2600 workers, many of whom were represented by the PACE International Union (PACE) through collective bargaining agreements. App. 4, 55. In March 2000, Crown filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of California. App. 4.

Members of Crown's board of directors served as trustees for the twelve employee pension plans at issue in this case. App. 4. In the bankruptcy, the Pension Benefit Guaranty Corporation (PBGC) filed proofs of claims totaling millions of dollars for the liability it would be forced to assume if it took over Crown's pension plans. The bankruptcy court viewed the continued existence of Crown's pension plans as a "stumbling block" to plan confirmation. *Id.*

To advance the confirmation of a Chapter 11 plan, Crown investigated the possibility of effecting a "standard termination" of the plans under 29 U.S.C. § 1341(b) in July of 2001. App. 4. Specifically, Crown explored termination through purchase of an annuity for plan participants. *Id.*

While Crown investigated terminating the plans, PACE proposed that Crown merge the plans into the PACE Industrial Union Management Pension Fund (PIUMPF). App. 5.

In October 2001, Crown's board met to review a series of final annuity bids. 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. App. 6–7. In opting to terminate the plans by purchase of the Hartford annuity, the Crown board did not accept PACE's alternative merger proposal. *Id.*

In November 2001, respondent PACE, along with respondents and plan members Miller and Macek, filed this adversary action in the Northern District of California, which was referred to that district's bankruptcy court wherein the Crown bankruptcy proceeding was pending. Respondents alleged that Crown had breached its fiduciary duties to plan participants under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, by failing adequately to consider PACE's merger's proposal before purchasing the Hartford

annuity. Respondents sought, *inter alia*, preliminary and permanent injunctive relief restraining Crown from distributing the $5 million plan surplus to Crown creditors and voiding the Hartford annuity purchase. App. 7.

In a telephonic hearing on Respondents' application for a preliminary injunction, the bankruptcy court ruled from the bench that although termination of pension plans is a business decision not subject to ERISA fiduciary duties, discretionary actions taken to *implement* that decision carry a fiduciary responsibility. App. 65–66. The bankruptcy court then concluded that merger into an ongoing plan is a method of terminating pension plans and therefore any decision concerning merger was subject to ERISA's fiduciary obligations. App. 66 As Crown did not make an "intensive and scrupulous investigation" of the possible merger, App. 65, the bankruptcy court ruled that Crown violated its fiduciary duties to the plan participants. App. 66–67.

On that basis, the bankruptcy court partially granted PACE's application for a preliminary injunction. The bankruptcy court declined to void the Hartford annuity purchase, but did order the plan surplus proceeds (the "reversion") frozen pending a final decision on disposition of the reversion. App. 67. The bankruptcy court later issued a written order incorporating by reference its oral preliminary injunction order. *See* App. 74–76. By a stipulation of the parties approved by the bankruptcy court, the court's preliminary injunction order was deemed a final ruling on the merits, in

accordance with FED. R. CIV. P. 65(a)(2) and FED. R. BANKR. P. 7065. App. 78, 83. By the same stipulation approved by the bankruptcy court, the parties agreed to a mechanism for distribution of the reversion to plan participants. App. 79–81. The distribution of the reversion has been suspended during the pendency of the ensuing appeals.

Crown appealed to the district court, arguing, *inter alia*, that its refusal to fully consider PACE's merger proposal was a plan sponsor decision not subject to ERISA's fiduciary obligations. The district court affirmed the bankruptcy court, holding that a plan termination could be effectuated by merger under 29 U.S.C. § 1341(b)(3), and that merger (as a means of implementing a decision to terminate) was subject to ERISA fiduciary obligations. App. 46–47.

Crown appealed the district court decision to the Ninth Circuit, which began its analysis by observing that a decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations, whereas the implementation of such a decision to terminate is subject to ERISA's fiduciary obligations. App. 9 (citing *Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1342–44 (9th Cir. 1994)). Thus, in the Ninth Circuit's view, whether Crown had any fiduciary obligations with respect to considering Crown's proposed merger turned on "whether merger into a multiemployer plan is a permissible means of implementing a decision to terminate." App. 9. Crown argued that merger is not a permissible means of termination, and that in any event, a plan sponsor decision regarding merger is not subject to ERISA fiduciary duties.

The court of appeals held, based on 29 U.S.C. § 1341(b)(3)(A) and 29 C.F.R. § 4021.28(c)(1), that merger is a form of termination permitted by ERISA. App. 11–15. The relevant statutory language relied upon by the Ninth Circuit provides that in terminating a plan, a plan administrator may distribute plan assets by purchasing "'irrevocable commitments from an insurer to provide all benefit liabilities under the plan, *or . . . otherwise fully provide all benefit liabilities under the plan*.'" App. 11–12 (quoting 29 U.S.C. § 1341(b)(3)(A) (i), (ii); emphasis by the court). The regulation cited by the Ninth Circuit provides: "'The plan administrator must . . . distribute plan assets . . . by purchase of an irrevocable commitment from an insurer *or in another permitted form*.'" App. 12 (quoting 29 C.F.R. § 4021.28(c)(1); emphasis by the court). Based on this language, the Ninth Circuit held that "neither the statute nor its implementing regulations preclude mergers into multiemployer plans as a method of providing such benefit liabilities." App. 15.

In response to Crown's argument that ERISA treats terminations and mergers through wholly separate sections of the statute, the Ninth Circuit noted that both sections in question are placed in the same ERISA subchapter, "Plan Termination Insurance." According to the Ninth Circuit, "[i]t would have been logical for Congress to" lodge both statutes in the same subchapter, because "one practical effect of a merger or complete transfer is that at least one pension plan will cease to exist." App. 13.

As noted above, the premise of the Ninth Circuit's decision was that a plan sponsor's *implementation* of a termination is subject to fiduciary duties, even if the decision to terminate itself is not subject to such duties. Given the court's finding that merger into an ongoing plan is a "means of termination," App. 16, it necessarily followed that Crown's rejection of PACE's merger proposal was subject to ERISA's fiduciary obligations. The Ninth Circuit concluded that that Crown had violated those fiduciary duties by focusing on "an improper set of interests" in rejecting PACE's merger proposal. App. 20.

Crown, supported by the Department of Labor and the PBGC as separate *amici curiae*,[1] petitioned the Ninth Circuit for panel rehearing or rehearing en banc. In its submission, the PBGC noted that "[t]he [panel] decision represents an unprecedented interpretation of [ERISA] Title IV that will frustrate PBGC's administration of the termination insurance program and put participants' pension benefits at risk." PBGC Amicus Curiae Br. at 2.

The court of appeals denied the petition on January 10, 2006.

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[1] The PBGC is a federal corporation established by ERISA with the authority to appear in court represented by its own counsel. *See* 29 U.S.C. § 1302. Thus, the PBGC's amicus submission in support of Petitioner was separate from the submission of the Department of Labor.

## REASONS FOR GRANTING THE PETITION

### I. The Ninth Circuit Decision That a Plan Merger Decision Is Subject to ERISA Fiduciary Duties Conflicts with Decisions of the Third and Sixth Circuits and This Court

The Ninth Circuit's decision in this case that Crown was subject to ERISA fiduciary duties when it rejected PACE's merger proposal squarely conflicts with decisions of the Third Circuit and Sixth Circuit holding that decisions concerning the merger of pension plans are *not* subject to ERISA's fiduciary obligations. *See Malia v. Gen. Elec. Co.*, 23 F.3d 828, 833 (3d Cir. 1994) ("Efforts by an employer to merge two pension plans do not invoke the fiduciary duty provisions of ERISA. Such duties do not attach to business decisions related to modification of the design of a pension plan."); *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992) ("BASF's decision to merge the two plans . . . clearly constituted the establishment or amendment of a pension plan and is therefore a business decision that should not be overturned by the court in the absence of violation of state or federal law.").

The Third Circuit's holding in *Malia* and the Sixth Circuit's holding in *Sutter* represent applications of the rationale of a series of this Court's ERISA decisions. In these decisions, this Court has held that the modification, amendment, or termination of an ERISA plan is a business decision not subject to ERISA's fiduciary obligations. *Hughes*

*Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). This rule stems from ERISA's definition of fiduciary.[2] *See Lockheed*, 517 U.S. at 890 ("Because the defined functions in the definition of fiduciary do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review.") (citation and brackets omitted).

A decision to merge (or not merge) a pension plan implicates the same concerns as those involving the modification, amendment, or termination of plan: plan structure, entitlement to benefits, and amount of benefits. *See Hughes*, 525 U.S. at 444 ("In general, an employer's decision to amend a pension plan *concerns the composition or design of the plan itself* and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets.") (emphasis added). Thus, the Ninth Circuit's decision in this case conflicts with the rationale of this Court's decisions in *Hughes*, *Lockheed*, and *Curtiss-Wright*, because a merger implicates the composition or design of a plan just as much as a termination, amendment, or modification.

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[2] ERISA defines a "fiduciary" as a person who possesses "discretionary authority or . . . control respecting management of [a pension plan or] . . . discretionary authority or . . . responsibility in the administration of [a pension plan]." 29 U.S.C. § 1002(21)(A).

## II. The Ninth Circuit Decision Conflicts with the Administering Agencies' Interpretations of ERISA, Which Are Entitled to Deference

Courts "owe great deference to the interpretations and regulations of the [PBGC] . . . and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA." *Blessitt v. Ret. Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988). As noted above, both the Labor Department and the PBGC urged the en banc Ninth Circuit to vacate the panel opinion and reverse the district court decision. The Labor Department argued that under this Court's decisions, a plan sponsor's decision regarding merger, as a decision regarding the structure of the plan, is not subject to ERISA fiduciary obligations. The PBGC argued that under ERISA, termination may not be implemented by merger. The views of these agencies are entitled to deference.

Moreover, the Ninth Circuit's holding conflicts with various PBGC regulations, all of which make clear that merger is not a permitted means of termination. For example, 29 C.F.R. § 4041.23(b)(9) requires that a plan sponsor notify plan participants that termination will end the PBGC's guarantee of their plan benefits. However, under the Ninth Circuit's decision, merger (as the implementation of termination) will not end the PBGC's guarantee because the plan assets are transferred to the new plan, where the guarantee continues.

## III. The Ninth Circuit Destabilizes ERISA Law in the Ninth Circuit

The ramifications of the Ninth Circuit decision are not limited to the parties in this case. The Ninth Circuit decision destabilizes ERISA law in a way that impacts the rights of all ERISA plan participants in that circuit, as well as the planning and administration of all ERISA-regulated entities in that circuit. In addition, the Ninth Circuit decision jeopardizes the interests of the PBGC, the federal agency with primary responsibility for regulating ERISA plans.

### A. The Ninth Circuit Decision Puts the Benefits of Plan Participants at Risk

As discussed below, ERISA requires that in a standard termination, plan participants receive their full benefits, either directly by a cash payment, or indirectly through the purchase of annuity that itself guarantees full payment of plan benefits. In any event, whatever the means of the distribution of plan assets in standard termination, ERISA requires that the distribution provide full plan benefits. As discussed below, however, a merger simply does not guarantee that plan participants will receive their full plan benefits.

### B. The Ninth Circuit Decision Thwarts ERISA's Objective of Encouraging Employers to Adequately Fund Pension Plans

As discussed below, *infra* Part IV.A, ERISA provides that upon distribution of all benefit liabilities in a standard termination, a plan sponsor can choose to retain any surplus assets in the plan. *See* 29 U.S.C. § 1344(d). By reducing or eliminating plan sponsors' entitlement to the residual assets of overfunded pension plans, the Ninth Circuit decision discourages plan sponsors from adequately funding their pension plans. *See Hawkeye Nat'l Life Ins. Co. v. Avis*, 122 F.3d 490, 502 n.7 (8th Cir. 1997) (depriving employers of residual plan assets could encourage employers to underfund plans); *Chait v. Bernstein*, 835 F.2d 1017, 1027 (3d Cir. 1988) (same). This result is inconsistent with ERISA's policy of encouraging adequate employer funding of pension plans and is manifestly contrary to the public interest.

### C. The Ninth Circuit Decision Jeopardizes the PGBC's Interest in Obtaining Insurance Premiums from Plan Sponsors

The Ninth Circuit decision jeopardizes the PGBC's interest in obtaining insurance premiums from plan sponsors for funding the PGBC's statutory obligations. In its amicus submission in the Ninth Circuit, the PGBC explained:

> By holding that a termination can be accomplished by merger, the [panel] has also

> created a basis for the failure to pay insurance premiums in mergers of the kind involved here. Because mergers combine rather than satisfy benefit liabilities, a plan sponsor's obligation to pay statutory premiums under 29 U.S.C. § 1307 continues. Terminations, however, halt the accrual of premiums; if termination can be accomplished by merger, sponsors may seek to merge to avoid their premium obligations.

PGBC Amicus Curiae Br. at 14–15.

## IV. The Ninth Circuit Decision That a Plan Merger Decision Is Subject to ERISA Fiduciary Duties Is Erroneous

### A. ERISA Does Not Permit Termination by Merger Because Termination and Merger Are Mutually Exclusive

The crux of the Ninth Circuit's decision is its conclusion that ERISA permits termination of a single-employer pension plan by merger into a multi-employer pension plan. This conclusion is erroneous as a matter of law because termination and merger are mutually exclusive under ERISA. *See Franklin v. First Union Corp.*, 84 F. Supp. 2d 720, 729 (E.D. Va. 2000) ("The law distinguishes between a merger of a plan and a termination of a plan."). In short, termination results in a distribution of plan assets *outside* of the ERISA-regulated regime, whereas merger merely shifts assets from one ERISA-regulated plan to another.

ERISA provides for (i) terminations of single-employer pension plans, on the one hand, and (ii) mergers of such plans, on the other hand, in two wholly separate sections of the statute, *i.e.*, 28 U.S.C. § 1341 (contained in "Subtitle C—Terminations") and 28 U.S.C. § 1412 (contained in "Subtitle E—Part 2 Merger or Transfer of Plan Assets or Liabilities"). Neither section authorizes a plan administrator to implement the termination of a single-employer pension plan through a merger.

On the contrary, the "exclusive" mechanism for terminating a single-employer pension plan is set forth in Section 1341. *See* 29 U.S.C. § 1341(a)(1) ("Exclusive Means of Plan Termination"). Section 1341 provides that "a single-employer plan may be terminated *only"* under Section 1342 (involuntary termination of financially troubled plans), Section 1341(b) (standard termination), or Section 1341(c) (distress termination). *Id.* (empasis added). Subsections (b) and (c) of Section 1341 "concern the two ways by which an employer may voluntarily terminate a plan," *Hughes*, 525 U.S. at 446, and "these means constitute the *sole* avenues for voluntary termination." *Id*. (emphasis added). Section 1341's "exclusive" termination procedures do not reference the term "merger," nor do they identify merger as one of the "exclusive" ways to terminate a plan.

An entirely different ERISA provision, Section 1412, governs the merger of a single-employer plan, like the Crown plans at issue here, into a multiemployer plan, like PIUMPF. *See* 29 U.S.C. § 1412. Section 1412 is the only ERISA section that

authorizes such a merger, and it does not provide that a merger is a form of termination. Indeed, under the *expressio unius* canon of construction, Section 1412(a) implies that no other section of ERISA applies to mergers: "A transfer of assets or liabilities between, or merger of, a multiemployer plan and a single-employer plan *shall satisfy the requirements of this section*." 29 U.S.C. § 1412(a) (emphasis added).

Under the Ninth Circuit's decision, the separate statutory provisions governing merger and termination would *both* apply when merger is used as a means of termination. That is impossible, however, because termination under Section 1341 and merger under Section 1412 are subject to conflicting requirements and produce different results.

First, and most pertinent to this case, termination under Section 1341 *allows* for reversion of surplus plan funds to a plan sponsor upon termination because in termination, the plan's liabilities are fully satisfied. *See* 29 U.S.C. § 1344(d); *Bigger v. Am. Commercial Lines, Inc.*, 862 F.2d 1341, 1345 (8th Cir. 1988) ("Under section 1344, a plan sponsor may recapture all surplus assets after a termination of a plan if certain criteria are satisfied"). Merger, on the other hand, does not permit any reversion of funds to the employer, because in a merger *all* assets of the merged funds are transferred to the acquiring fund for future satisfaction of benefit liabilities. *See* 26 C.F.R § 1.414(l)-1(b)(2). Thus, merger, which *precludes* reversion of surplus funds, cannot be a means of termination, which *allows* reversion.

Second, a standard termination of a single-employer plan under ERISA requires a distribution that *guarantees* to provide "all benefit liabilities" under the plan. ERISA Section 1341(b)(3)(A) provides that in "any final distribution of plan assets" in a standard termination, the plan administrator shall "purchase irrevocable commitments from an insurer to provide *all benefit liabilities* under the plan" or "*otherwise fully provide all benefit liabilities* under the plan." 29 U.S.C. § 1341(b)(ii) (emphasis added).

Prior to the Ninth Circuit's decision in this case, the only recognized methods of satisfying Section 1341(b)(3) were (i) to pay each plan participant in full, *see* 29 C.F.R. §§ 4041.28(c)(2), (4) (if a plan permits, benefits may be distributed in the form of a one-time lump sum payment under Section 1341(b)(3)(A)(ii)), or (ii) to purchase an annuity guaranteed to pay each plan participant in full, *see* 29 U.S.C. § 1341(b)(1)(D) (permitting employers to implement a standard termination by purchasing "irrevocable commitments from an insurer to provide all benefit liabilities").

Merger of a single-employer plan into a multi-employer plan, however, carries no guarantee of immediate or future payment of *full* plan benefit liabilities. A multiemployer plan could never satisfy Section 1341(b)'s guarantee of full payment of pension benefits because, following a merger, ERISA does not provide full protection for the benefits owed to the participants of a former overfunded single-employer plan. Instead, participants of a single-employer plan must rely on the continuing solvency

of the multiemployer plan, which is by no means assured in fact or in law. Once assets of a single-employer plan have been transferred to a multiemployer plan, those assets are available to satisfy the benefit liabilities of *all* participants in the multiemployer plan, not merely the participants in the former plan. Precisely because merger (unlike termination) does not *guarantee* a plan participant's full benefits, the Ninth Circuit erred in holding that Section 1341(b)(3) allows for merger as a means of termination.[3]

Third, under a standard termination, the plan sponsor is required to distribute plan assets in accordance with Section 1344. *See* 29 U.S.C. § 1341(b)(3). Under Section 1344, "in the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan . . . *among the participants and beneficiaries of the plan*." 29 U.S.C. § 1344(a) (emphasis added). In a merger, however, the plan's assets are not distributed to plan

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[3] If the multiemployer plan becomes insolvent and is subsequently terminated, the consequences to the plan participants of the former single-employer plan are disastrous. First, under Section 1441, the sponsors of the multiemployer plan would be required to reduce the benefits to which the participants of the single-employer plan formerly were entitled. *See* 29 U.S.C. § 1441. Second, only approximately $13,000 of those reduced annual benefits would be guaranteed by the PBGC and any additional amount owed to a participant could be recovered, if at all, only from the insolvent multiemployer plan. *See* 29 U.S.C. § 1322(a). The participants in the formerly fully funded single-employer pension plan simply would not receive their full retirement benefits.

participants and their beneficiaries; instead, the assets are transferred to the acquiring multiemployer plan, where the assets would be available to pay *all* benefits of *all* participants in the multiemployer plan.

Fourth, because a standard termination fully satisfies benefit liabilities to plan participants, termination extinguishes the PBGC's obligation to guarantee certain minimum benefits under a terminating plan. *PBGC v. LTV Corp.*, 496 U.S. 633, 639 (1990). In a merger, however, a participant's accrued benefit is not satisfied, and the merger does not extinguish the PBGC's guarantee.

Fifth, a termination of a single-employer plan ends a plan sponsor's obligation to pay insurance premiums to the PBGC, precisely because the liabilities to plan members are satisfied by the termination's distribution. *See* 29 U.S.C. § 1307(a); 57 Fed. Reg. 22168 (May 27, 1992). Merger, however, does *not* end a plan sponsor's obligation to pay insurance premiums to the PBGC. *See* 29 U.S.C. § 1307(e)(1). If merger is a valid means of termination, as the Ninth Circuit decision holds, then the obligation to pay premiums would seemingly be ended. Such a result would leave the PBGC to insure unpaid plan benefits, without any payment of insurance premiums.

Sixth, in a termination, the plan administrator must comply with stringent notice requirements to participants in advance of the distribution of plan proceeds. *See* 29 U.S.C. § 1341(a)(2). The required notice must inform participants that upon distribu-

tion, the PBGC's guarantee is extinguished. 29 C.F.R. § 4041.23. In a merger, however, participants receive notice after the fact, 29 C.F.R. § 2525.104-4, and as noted above, the PBGC's guarantee continues.

In sum, termination and merger are different in kind under ERISA. The two procedures are governed by different statutes, subject to different requirements, and produce different results: termination results in the end of an ERISA-regulated plan, while merger results in continuance of the plan (in a different form) under the ERISA regime. The Ninth Circuit's holding that termination can be effected by merger is simply wrong.

### B. In Any Event, Merger Is a Plan Sponsor Decision Not Subject to Fiduciary Duties

The Ninth Circuit's decision is wrong for a second and independent reason. Under ERISA, fiduciary duties only attach to the exercise of "discretionary authority or . . . control respecting management of [a pension plan or] . . . discretionary authority or . . . responsibility in the administration of [a pension plan]." 29 U.S.C. § 1002(21)(A). As discussed above in Part I, *supra*, this Court's decisions teach that a plan sponsor's decisions regarding plan design or structure are not subject to fiduciary obligations. *See Lockheed*, 517 U.S. at 890. As merger involves a decision regarding plan structure or design, it simply cannot be subject to fiduciary review.

## CONCLUSION

For the reasons provided above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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May 10, 2006

# APPENDIX