No. 07-1107

IN THE
# Supreme Court of the United States

BOARD OF TRUSTEES OF THE OHIO CARPENTERS PENSION FUND ON BEHALF OF THE OHIO CARPENTERS PENSION FUND, *et al.*,

*Petitioners*,

*v.*

CHARLES S. BUCCI,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES



### STATUTE

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In February 2003, Respondent Charles S. Bucci reached an agreement with his employees on a Collective Bargaining Agreement. As part of the deal, Bucci agreed to make employer contributions to certain pension, hospitalization, and annuity funds for the benefit of his employees. Pet. App. 35a. Bucci and his employees also agreed that the employer contributions would become assets of a "Trust Fund" at the point they became due, whether they were paid on time or not. *Id.*

at 12a. The parties' agreement implemented their intent for unpaid contributions to become ERISA plan assets and for Bucci to assume the fiduciary responsibilities imposed by ERISA with respect to those assets. The Sixth Circuit concluded here that even though Bucci willingly assumed these fiduciary responsibilities, he was not "acting in a fiduciary capacity" under 11 U.S.C. § 523(a)(4) with respect to the nearly $86,000 in employer contributions that he subsequently failed to make. *See* Pet. App. 5a-14a. In doing so, the court created a 2-to-1 circuit split on the issue of whether ERISA fiduciary status is sufficient to satisfy the fiduciary-capacity requirement of Section 523(a)(4).

Bucci's brief in opposition provides no basis for denying review. Bucci first contends that the circuit split that petitioners identify does not exist. But the circuits themselves have acknowledged the split (as have other courts), and all three circuit decisions purport to be decided not on the factual differences Bucci points to but on the legal question presented in the petition. Bucci also asserts that further percolation is advisable, but the issue has already been thoroughly explored by the lower courts, and this case provides a favorable vehicle to address that question—and thereby to provide guidance generally on how courts should apply *Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328 (1934), in cases involving statutorily imposed fiduciary obligations. Certiorari is therefore warranted here. At a minimum, the Court should invite the Solicitor General to file a brief expressing the views of the United States, as it recently did in another case concerning the meaning of Section 523(a)(4). *See Denton* v. *Hyman*, No. 07-952, 2008 WL 1775020 (Apr. 21, 2008).

## I. THE CIRCUIT SPLIT ON THE QUESTION PRESENTED IS CLEAR

As petitioners have explained (Pet. 9-14), there is a square 2-1 circuit split on the question whether an ERISA fiduciary is "acting in a fiduciary capacity" under Section 523(a)(4) of the Bankruptcy Code. Bucci contends (Opp. 11-13) that no such split exists because of a factual difference between the relevant cases. Specifically, Bucci asserts that this case and *Hunter* v. *Philpott*, 373 F.3d 873 (8th Cir. 2004), "both involve debtors who failed to make contractually required payments to an ERISA pension plan from general corporate assets," Opp. 12, whereas *In re Hemmeter*, 242 F.3d 1186 (9th Cir. 2001), involved "assets already placed in a formal trust," Opp. 12 (emphasis omitted). This effort to explain away the established split is unavailing.

The Ninth Circuit explicitly held in *Hemmeter* that an ERISA fiduciary is also a fiduciary under Section 523(a)(4). *See* 242 F.3d at 1188 ("This appeal presents the question of whether ERISA plan fiduciaries are also fiduciaries within the meaning of 11 U.S.C. § 523(a)(4). We conclude that they are[.]"). The Eighth Circuit in *Hunter* and the Sixth Circuit here each expressly reached the contrary conclusion. *See Hunter*, 373 F.3d at 875 ("One of our sister circuits has held that an ERISA fiduciary is *ipso facto* a fiduciary for the purposes of § 523(a)(4). . . . We are not satisfied that the simple determination that an individual is an ERISA fiduciary is enough to satisfy the requirements of § 523(a)(4)." (citing *Hemmeter*)); Pet. App. 11a ("This court agrees with *Hunter* that a court should examine the substance of the alleged fiduciary relationship to determine if the requirements for a defalcation are satisfied."). Not one of the three cases placed any weight on the facts that Bucci highlights. They instead made

clear that they were addressing a general legal principle, and ultimately adopting contrary constructions of the relevant statutory language.[1]

Further demonstrating that Bucci's argument is untenable, other courts have likewise acknowledged the existence of the circuit conflict. *See, e.g.*, *In re Gott*, Adv. Pro. No. 06-30223, 2008 WL 1766960, at *3-4 (Bankr. S.D. Iowa Apr. 14, 2008) (discussing *Hemmeter*, *Hunter*, and the Sixth Circuit's decision here); *In re Mayo*, Adv. Pro. No. 04-1067, 2007 WL 2713064, at *9 & n.6 (Bankr. D. Vt. Sept. 17, 2007) ("Courts have split on the question of whether acting in a fiduciary capacity under ERISA is co-extensive with acting in a fiduciary capacity under § 523(a)(4) of the Bankruptcy Code." (citing *Hemmeter*, *Hunter*, and the Sixth Circuit's decision here)); *In re Duncan*, 331 B.R. 70, 81 (Bankr. E.D.N.Y. 2005) ("Courts have reached different conclusions on whether the determination that an individual is a fiduciary for ERISA purposes necessarily means that the individual acted in a fiduciary capacity for purposes of Section 523(a)(4)." (citing *Hemmeter* and *Hunter*). By contrast, Bucci cites not a single authority supporting his view that no circuit split exists because the three cases can be reconciled on their facts. Indeed, even he eventually acknowledges that the cases are "in tension." Opp. 13. In fact, they are in direct conflict

In short, Bucci offers no persuasive argument that the established circuit split identified by petitioners simply does not exist.

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[1] Notably, Bucci himself never explains the relevance of the factual distinction on which he focuses, instead describing the distinction and then—when purporting to explain why it is "essential"—merely re-phrasing it. *See* Opp. 12.

## II. IMMEDIATE REVIEW IS WARRANTED

Bucci alternatively asserts (Opp. 13) that "the purported conflict has not fully developed" and that "resolution of the issue would benefit from additional percolation." To the contrary, the split in the lower courts is widespread and well developed. In addition to the Sixth, Eighth, and Ninth Circuits, numerous district and bankruptcy courts have weighed in on the question this case presents. *See* Pet. 14 n.1. Hence, the rationale for allowing further percolation—to ensure that the issue has been fully explored before this Court addresses it—does not apply here. In particular, the fact that a host of bankruptcy judges have brought their expertise in this area to bear on the issue demonstrates that it has already been thoroughly developed. Moreover, the absence of additional circuit caselaw on the question is undoubtedly explained at least in part by the reality that the litigants in many of the cases raising the issue lack the resources to press their cases all the way to the court of appeals, let alone to this Court. This fact provides another rationale for granting review now, as it could well be some time before another case squarely raising the question reaches the Court.[2]

Further counseling in favor of immediate review is the fact that, as explained in the petition (at 19-24), the split over the interplay between ERISA and Section 523(a)(4) is part of a broader disagreement among the lower courts about how to apply this Court's decision in *Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328 (1934), to the many modern statutes that impose some manner of

[2] Petitioners also note that both sides in this case are represented by experienced Supreme Court counsel.

fiduciary obligation. In particular, courts have struggled for years to articulate and apply a workable principle governing which types of statutorily imposed duties are sufficiently like those created by a "technical trust[]," *id.* at 333, that a claim for their breach is nondischargeable under *Davis*.

Bucci does not dispute that this broader disagreement exists, or that the lower courts have for many years lamented the absence of further guidance on the issue from this Court. *See Quaif* v. *Johnson*, 4 F.3d 950, 953 (11th Cir. 1993). Instead, he denies that this case implicates any broader question. *See* Opp. 2. But that denial is belied by Bucci's own defense of the Sixth Circuit's decision here, and specifically by Bucci's reliance (*id.* at 15-16 n.13) on *In re Marchiando*, 13 F.3d 1111 (7th Cir. 1984). That case did not involve ERISA, but rather a state statute that imposed quasi-fiduciary obligations on sellers of lottery tickets. *See id.* at 1113. Yet Bucci quotes extensively from the decision's "cogent analy[sis]" (Opp. 15 n.13) of what he labels the "relevant question" in this case, namely "whether respondent was a fiduciary for purposes of bankruptcy law" (*id.* at 15 (emphasis omitted)). Bucci thus implicitly acknowledges that the fundamental issue in this case is the same as that in the other cases implicating the broader disagreement—a division of authority that is deep, persistent, and irreconcilable, *see* Pet. 19-24—among the courts regarding *Davis*'s application to statutory obligations. Because this case would give the Court's an opportunity to address that disagreement while simultaneously resolving the specific, fully developed split over ERISA's application to Section 523(a)(4), certiorari should be granted.

## III. THE DECISION BELOW IS INCORRECT

As explained in the petition (at 14-19), the Sixth Circuit's decision here was wrong on the merits. The court of appeals failed to recognize that *Davis*'s limitations regarding the scope of "fiduciary" status under the common law do not necessarily apply when Congress itself has (as in ERISA) deemed a particular duty to be "fiduciary." The court also failed to recognize that even if *Davis* governs here, its requirement that "the bankrupt . . . must have been a trustee before the wrong," 293 U.S. at 333, is satisfied in this case. Under the statute and the parties' agreement, Bucci was an ERISA fiduciary of the unpaid contributions as soon as they became due. *See* Pet. App. 12a. His breach (*i.e.*, "the wrong") came only when he later misappropriated those contributions by using them for other purposes, such as paying off other creditors, rather than holding them for the benefit of the funds.

Bucci's response (Opp. 15) is that "[t]he relevant question is not whether respondent was a fiduciary under ERISA prior to the act giving rise to the debt" but rather "whether respondent was a fiduciary for purposes of bankruptcy law." But courts—including this Court in *Davis*—have made clear that a key factor in determining whether a debtor "was a fiduciary for purposes of bankruptcy law" is whether he incurred fiduciary obligations "prior to the act giving rise to the debt." *See Davis*, 293 U.S. at 333 ("It is not enough that, by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee ex maleficio. He must have been a trustee before the wrong[.]"), *quoted in, e.g.*, *Hunter*, 373 F.3d at 877; *Hemmeter*, 242 F.3d at 1190 ("The core requirements [include] . . . that the fiduciary duties be created before the act of wrongdoing and not as a result of the

act of wrongdoing."). As just explained, that requirement is satisfied here.

Bucci also (Opp. 16-17) cites cases from this Court stating that a purely contractual obligation does not necessarily impose fiduciary duties for purposes of Section 523(a)(4), even where the parties employ the terminology of trust law. Those cases do not help Bucci, however, because his obligation was not simply a contractual one. Instead, in creating an express trust within the context of the collective bargaining process, Bucci and his employees invoked and relied upon the fiduciary duties imposed by ERISA. The fact that the duties were imposed by statute rather than by contract is a critical distinction between this case and *Davis*—indeed, it is precisely the distinction that has led to the broader disagreement among the lower courts discussed above—yet Bucci ignores that fact in relying exclusively on cases from this Court that did not involve statutory duties.

Finally, Bucci is wrong in asserting (Opp. 17) that petitioners' argument would mean that "any party who breaches a contractual obligation to pay money to an ERISA plan will incur a debt that is not dischargeable." As Bucci notes, Section 523(a)(4) would apply only if (as in this case) the parties have agreed "that monies owed under [their] contract immediately become 'plan assets' [when due]." Opp. 17 (emphasis omitted); *see also, e.g.*, *ITPE Pension Fund* v. *Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003) ("[U]npaid employer contributions are not assets of a fund unless the agreement . . . specifically and clearly declares otherwise."). In any event, petitioners do not share Bucci's evident dismay at the notion that those who willingly take on fiduciary obligations and then misappropriate funds entrusted to them might find it harder to escape

responsibility for their actions. *See Marchiando*, 13 F.3d at 1115 ("When the bankrupt is a trustee and the creditor a beneficiary of the trust, the balance has been deemed to incline against discharge."); *see also ITPE Pension Fund*, 334 F.3d. at 1014 (noting that an employer in a case like this takes on "heavy responsibilities . . . , but only to the extent that the employer freely accepts those responsibilities"). Indeed, such an outcome would be fully consonant with Congress' intent in enacting a statute it labeled the Employee Retirement Income Security Act.

## IV. In The Alternative, The Court Should Call For The Views Of The Solicitor General

As Bucci notes (Opp. 14), this Court recently invited the Solicitor General to file a brief expressing the views of the United States in *Denton* v. *Hyman*, a case concerning the meaning of "defalcation" in Section 523(a)(4). *See Denton*, 2008 WL 1775020. Although certiorari is warranted here, regardless of the disposition of the petition in *Denton*, for the reasons stated above and in the petition, petitioners respectfully submit that at the very least, the Court should similarly invite the Solicitor General to express the United States' views regarding this case. Indeed, given that this case implicates the meaning of ERISA, a statute over which the Secretary of Labor has enforcement authority, as well as of Section 523 (and the interplay between the two), there is even more reason to obtain the views of the United States here than there was in *Denton*. Moreover, inviting the Solicitor General to express the United States' views would allow him to consider this case and *Denton* together (which the parties in each case obviously have not had occasion to do), and in particular to address whether together the two

present a unique opportunity for this Court to resolve at once several fundamental questions that have long divided the lower courts regarding the meaning of Section 523.[3]

## CONCLUSION

The petition for a writ of certiorari should be granted.

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[3] Bucci asserts (Opp. 13-14) that the Court's action in *Denton* provides a reason to deny review here, in that a ruling by this Court in *Denton* could cause the split implicated in this case to resolve itself. To begin with, that scenario is implausible: Although the Ninth Circuit in *Hemmeter* addressed both "defalcation" and "acting in a fiduciary capacity" (*see* Opp. 14 n.12), nothing in that decision suggests that the court's interpretation of either portion of the statute turned on its construction of the other. Similarly, nothing in *Hunter*, the Sixth Circuit's decision here, or any of the circuit decisions construing "defalcation" indicates that a resolution by this Court of one split would have an effect on the other.

Moreover, even if Bucci were correct that review by this Court in one of the two cases could affect the issue presented in the other, that would only bolster the argument for inviting the Solicitor General to express the government's views in this case. Bucci implicitly assumes that if review is to be granted in only one of the two cases it will be *Denton*, but that assumption is unfounded. It may well be, for example, that resolving the split implicated here would be more likely to resolve the split over "defalcation" than the other way around. Or it may be that this case provides a superior vehicle for addressing the split here than *Denton* does for addressing the split over "defalcation." As noted in the text, inviting the Solicitor General to express the views of the United States in this case would allow him to consider these and other issues regarding both petitions.

Respectfully submitted.

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