Nos. 03-15303, 03-15331

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY H. BECK,
Appellant/Cross-Appellee,

v.

PACE INTERNATIONAL UNION,
Appellees/Cross-Appellants

On Appeal from the United States District Court
for the Northern District of California

SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING

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STATEMENT OF INTEREST

This case involves an action under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1101-1169, for an alleged breach of fiduciary duty in violation of 29 U.S.C. § 1104. The Secretary of Labor is authorized to bring civil actions to redress breaches of fiduciary duty under 29 U.S.C. § 1132(a)(2). Accordingly, the Court's determination of what actions constitute a breach of fiduciary duty may affect not only the scope of private civil actions, which are a necessary complement to actions by the Secretary, but also the scope of the Secretary's own authority to enforce Title I of ERISA.

STATEMENT OF THE ISSUE

1. Whether Crown's decision to terminate a pension plan by purchasing an annuity, in accordance with the plan's terms and section 4041(b)(3)(A) of ERISA, rather than to merge the pension plan with another, is a plan sponsor decision not subject to ERISA's fiduciary obligations.

STATEMENT OF FACTS

Crown Vantage, Inc. and Crown Paper Co. (Crown) operated seven paper mills in the United States, employed 2600 workers who were covered by a collective bargaining agreement with Pace International Union (Pace), and maintained 18 pension plans for its workers. Beck v. Pace Internat'l Union, 427 F.3d 668, 672 (9th Cir. 2005). In March 2000, Crown filed for Chapter 11

bankruptcy and began liquidating assets. Id. The Pension Benefit Guaranty Corporation (PBGC) filed proofs of claims totaling millions of dollars for the liability it would assume if forced to take over Crown's pension plans. Id. The bankruptcy court saw these claims as a "stumbling block" to confirmation of the bankruptcy plan. Id. Crown's board of directors, which was also the trustee for each of the eighteen pension plans, then began to obtain quotes for purchasing an annuity to terminate the pension plans. Id.

While Crown was gathering information on annuities, Pace proposed another course, namely, the merger of the seventeen plans that covered Crown's hourly workers with the Pace Industrial Union Management Fund (PIUMPF), a Taft-Hartley Act multiemployer pension fund. Beck v. Pace Internat'l Union, 427 F.3d at 672. Pace suggested that merger was a superior option because union members might receive a thirteenth monthly check and thus "more than the minimum benefits" provided by the existing pension plans. Id. Additionally, Pace asserted that PIUMPF had an established dispute resolution process for plan participants. Id.

Crown's board of directors learned of Pace's merger proposal at the same meeting at which it reviewed bids for the annuities, and agreed to consider the merger option after it received the final annuity bids. Beck v. Pace Internat'l Union, 427 F.3d at 672. The bids revealed that twelve pension plans were

overfunded and that termination would result in a "reversion" of plan assets to the company inasmuch as the cost of the annuity to cover the pension liabilities was less than the amount in the pension plans themselves. Id. Subsequently, the board merged the twelve overfunded plans into one plan (the Merged Plan), while allowing liability for five plans to revert to a prior sponsor and shifting liability for the last plan to the recent purchaser of the mill associated with the plan. Id.

Approximately 10 days later, Crown's board met again to review the final annuity bids, which were set to expire within 24 hours. The PBGC had agreed to release its claims against Crown based on acceptance of one of these bids. Beck v. Pace Internat'l Union, 427 F.3d at 672. Additionally, the board faced a 45 day deadline in the bankruptcy court for dissolving Crown, and Crown had only $10,000 or less in the bank. Id. The board decided to terminate the Merged Plan by purchasing an annuity with the Hartford Life Insurance Company. Id. at 672-73. The purchase of this annuity yielded Crown a reversion of approximately $5 million. Id. at 673. The board, however, did not reconsider the PIUMPF merger offer, which had by then been revised to cover only the Merged Plan. Appellees' response brief at 7-8. The board also did not seek an extension of the annuity deadline or contact the PBGC to determine whether the PBGC would release its claims if the Merged Plan merged with PIUMPF. Id.

THE PANEL'S DECISION

For purposes relevant here, the panel acknowledged that a decision to terminate a pension plan is a business decision not subject to ERISA's fiduciary obligations. Beck v. Pace Internat'l Union, 427 F.3d at 673. It further ruled that implementation of a decision to terminate a pension plan is discretionary in nature and subject to ERISA's fiduciary obligations. Id. Third, it ruled that merger of a pension plan with another is a permissible means of effectuating the termination of a pension plan under Title IV of ERISA, 29 U.S.C. §§ 1301–1461. Beck v. Pace Internat'l Union, 427 F.3d at 674-76. Last, the panel held that Crown breached its fiduciary duties by failing "exclusively to prioritize the interests of plan participants and beneficiaries and failing to make the 'intensive and scrupulous investigation of the plan's investment options.'" 427 F.3d at 678, quoting Leigh v. Engle, 727 F.2d 113, 125-26 (7th Cir. 1984).

SUMMARY OF ARGUMENT

ERISA neither requires an employer to establish an employee benefit plan nor mandates the kind of benefits an employer may choose to provide. An employer is generally free under ERISA to adopt, modify or terminate an employee benefit plan based upon its own business interests. The decision whether to have a plan, the terms of the plan, and issues of plan design generally are left to the employer acting in its capacity as an employer, not as a fiduciary. An

employer is not acting in a fiduciary capacity when it decides to terminate a pension plan or merge it into another. An employer is entitled, therefore, to make a decision to terminate a plan through the purchase of an annuity based on legitimate business concerns and in order to obtain whatever assets remain after securing the participants' benefits through the purchase of an annuity.

Although the plan fiduciary is under a duty to implement the termination decision in a manner consistent with its duties of prudence and loyalty, it is necessarily constrained by the particular method chosen by the plan sponsor -- here, the purchase of an annuity, as permitted by ERISA § 4041(b)(3)(A), and as expressly provided in the governing plan documents. Consistent with its duties of loyalty and prudence, the fiduciary's responsibility in implementing the termination decision is to engage in a process designed to purchase an annuity that will ensure that participants will receive all of the benefits to which they are entitled. The plan fiduciary is not free to disregard the plan's terms and the sponsor's decision by choosing another option, like merger. The decision to merge a pension plan, like the decision to terminate a plan, is a plan sponsor decision. A plan fiduciary does not have the authority to merge the plan with another when the sponsor has decided to terminate the plan. This conclusion is consistent with ERISA's text concerning plan terminations, the common law of trusts, and this Court's case law which has interpreted "implementation" of a termination decision to mean the

process for choosing among annuity providers, not the consideration of an entirely different option such as merger.

ARGUMENT

THE DECISION WHETHER TO TERMINATE OR MERGE THE CROWN PLAN WAS A PLAN SPONSOR DECISION NOT SUBJECT TO ERISA'S FIDUCIARY OBLIGATIONS

Title I of ERISA defines a "fiduciary" to include a person who engages in specified activities with respect to a plan including "any discretionary authority or . . . control respecting management of such plan or . . . authority or control respecting management or disposition of its assets . . . or . . . any discretionary authority or . . . responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Because those defined functions do not include matters of plan design, the Supreme Court has stated that "employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. When employers undertake those actions, they do not act as fiduciaries, but are analogous to the settlors of a trust." Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996) quoting Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995).[1] ERISA neither requires employers to establish employee benefit plans nor mandates the kind of benefits employers must provide.

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[1] The Spink court made clear that its reasoning applies equally to pension plans. 517 U.S. at 890-91; Hughes Aircraft Company v. Jacobson, 525 U.S. 432, 443 (1999).

Accordingly, ERISA's fiduciary duties are not implicated in an employer's decision to amend a pension plan, which "concerns the composition or design or the plan itself [and] . . . regard[s] the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999). As the Seventh Circuit observed, "[a]s the entity with ultimate responsibility for satisfying the pension promises, the employer is entitled to control decisions about the level of benefits to be guaranteed and the means by which that is accomplished." Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1189 (7th Cir. 1994). Whether, how much, and under what conditions to provide benefits is, therefore, generally left to the sponsor under ERISA.

A decision to merge a pension plan with another plan implicates these very same concerns -– plan structure, plan design, entitlement to benefits, and amount of benefits available to plan participants. Consequently, the courts of appeals have correctly and consistently refused to impose ERISA's fiduciary obligations on a decision to merge plans. Malia v. Gen. Elec., 23 F.3d 828, 833 (3d Cir. 1994); Sutter v. BASF Corp., 964 F.2d 556, 562 (6th Cir. 1992); see also Sengpiel v. B.F.

Goodrich, 156 F.3d 660 (6th Cir. 1998).[2] The decision to merge a plan, like the decisions to establish, terminate or amend a plan, implicates the sponsor's business interests which it is free to consider under ERISA. Hughes Aircraft, 525 U.S. at 443; Spink, 517 U.S. at 890; Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 540, 511 (1981). Thus, any attempt to impose on employers a fiduciary duty to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), in these types of decisions would be both unworkable and inconsistent with Congress' policy decision to separate fiduciary and plan sponsor functions under ERISA.

The panel's decision goes astray in holding that plan fiduciaries were required to consider the proposed plan merger in the context of implementing the decision to terminate the plans. The decision whether to maintain an ongoing plan, merge the plan with another plan providing different or enhanced benefits (e.g., the "thirteenth check"), or terminate the plan through the purchase of an annuity were not "fiduciary" decisions. Just as Crown was entitled to decide whether, and on what terms, to establish the plan in the first instance based on its own interests as an employer and business, it was entitled to decide whether to terminate the plan through the purchase of an annuity based on its own business interests and

[2] To the extent the panel's opinion holds a decision to merge is subject to ERISA's fiduciary obligations, it conflicts with the Malia and Sutter decisions and thus warrants rehearing en banc pursuant to Circuit Rule 35-1.

judgment. In the context of the bankruptcy, Crown had an obligation to its creditors to maximize the company assets available for distribution in the bankruptcy estate.

Crown's authority, as the plan sponsor, to elect to terminate the plan through the purchase of an annuity is fully supported by ERISA's termination provisions as well as by the common law of trusts on which ERISA's fiduciary duties are founded. Varity Corp. v. Howe, 516 U.S. 489, 496 (1996). By its terms, ERISA permits termination to be effectuated solely through the purchase of an annuity or by the provision of all of the plan's liabilities "in accordance with the provisions of the plan."[3] The fiduciary's authority over plan termination is, thus, constrained by the settlors' right to determine the plan's provisions in the first place. ERISA expressly imposes on the fiduciary the duty to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]." 29 U.S.C. § 1104; Hunt v. Hawthorne

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[3] ERISA subsection 4041(b)(3)(A), states:

> In distributing 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.

29 U.S.C. § 4041(b)(3)(A) (emphasis added).

Assocs., Inc., 119 F.3d 888, 892 (11th Cir. 1997) ("plan administrator and named fiduciary must discharge their duties in accordance with the written instrument").[4] In this case, the plan's fiduciaries had no obligation to consider a merger option, which was not contemplated by the statute, authorized by the plan, or approved by Crown, as plan sponsor.[5]

ERISA's allocation of authority to the plan sponsor is consistent with the common law of trusts which not only allows the settlor to provide for the method

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[4] Because a plan administrator must comply with plan terms in implementing a plan termination, the panel erred by holding that Crown waived any argument regarding the terms of the pension plan. 427 F.3d at 674. In our view, the issue whether the plan terms permitted merger as a means of asset distribution was not one for Crown to waive, it was plaintiffs' burden to establish in the first instance. Moreover, even if the argument is new and Crown was required to make it, it is issues that are waived, not arguments. LeBron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 965 (1995) ("parties are not limited to the precise arguments made below"); U.S. v. Pallares-Gallan, 359 F.3d 1088, 1095 (9th Cir. 2004) (appeals court will consider new, alternative argument in support claim made below). Certainly, Crown's denial of any fiduciary obligation in terminating the plans and its assertion that the termination was a business decision not subject to fiduciary obligation (preserved before the bankruptcy court, ER 403), encompass the more limited argument that the plan does not permit merger as a means of plan asset distribution upon such termination.

[5] The plan provides in section 12.4, "Form of Distribution," that "distributions from the Retirement Fund required to be made in accordance with the foregoing paragraphs [relating to termination and allocation of fund assets upon termination] may be effectuated in the discretion of the Plan Administrator by the purchase of nontransferable annuities, or by continuing the Retirement Fund in existence, or by a cash settlement with any Member with the Member's consent." ER 386.

of final distribution, but obligates the trustee to obey such direction. Restatement (Second) of Trusts, § 347 ("if upon the termination of the trust there are several beneficiaries among whom the trust estate is to be distributed, whether the trustee is under a duty to convey the property to the beneficiaries as tenants in common, or to divide the property and distribute it in kind, or to sell it and distribute the proceeds, depends upon the terms of the trust . . .); Scott, The Law of Trusts, §347.1 (4th ed.) ("whether on termination of the trust it is the duty of the trustee to transfer the trust property in kind. . . or sell and pay over the proceeds depends primarily on the terms of the trust. There is no difficulty where there is an express and unambiguous provision in the trust instrument"); Bogert, The Law of Trusts and Trustees, § 1010 (rev. 2d ed.) ("If the trust is ended by the exercise of a power of revocation or termination, it will clearly be the duty of the trustee to surrender the possession of the trust property to the party or parties according to the terms of the trust instrument on that contingency, and to execute and deliver such instruments of conveyance as the settler had required").

Accordingly, Crown had the right to merge its twelve overfunded plans into one, purchase an annuity to fund accrued benefits, and obtain the reversion. This decision was no different than its other business decisions generally, and in particular, its relinquishment of its other pension liabilities, namely, having five other pension plans revert to a prior plan sponsor and another plan assumed by a

mill purchaser.[6] Together, these various actions resulted in a reversion of $5 million to the company (ultimately for the benefit of its creditors), but Crown had every right to pursue these business strategies in order to obtain a reversion, provided the benefits which the participants were entitled to under the plan were secured by the purchase of an annuity. Indeed, the panel's own opinion states as much in its twin observations that "Crown's fiduciary obligation was to assure the payment of the promised defined benefits with as little risk of nonpayment as possible, not to use the fund's total assets to the beneficiaries' optimum benefit," 427 F.3d at 677, citing Hughes Aircraft, 525 U.S. at 440; and second, that the choice of The Hartford as the annuity provider was sound. Beck v. Pace Internat'l Union, 427 F.3d at 677.[7] Thus, given that the participants' interest extended only to receiving benefits promised under the plan, Hughes Aircraft, 525 U.S. at 439 (participants had "no interest" in surplus of defined benefit plan), the Crown board was acting as a plan sponsor, not a fiduciary, in refusing to fully investigate Pace's merger proposal and in selecting the annuity option.

Contrary to the panel's opinion, this Court's precedent does not require fiduciaries to consider other options to termination, such as merger proposals, in

[6] There is no allegation of fiduciary breach regarding these other plans, even though Pace initially proposed merging with five of the plans, plainly leading to the conclusion that at stake here is ownership of the $5 million reversion.

[7] The Hartford remains the annuity provider for the Merged Plan.

order to meet ERISA's strict standards of loyalty and prudence. In both Pilkington PLC v. Perelman, 72 F.3d 1396 (9th Cir. 1995) and Waller v. Blue Cross of California, 32 F.3d 1337 (9th Cir. 1994), relied upon by the panel, the breach of fiduciary duty related to the selection of a particular annuity provider, not to the decision to purchase an annuity in the first instance.[8] In those cases, the sponsor had made its non-fiduciary decision to terminate the plan through the purchase of annuities based upon its own business interests. The issue was not whether the decision to terminate and buy annuities was proper, but rather whether the implementation of that decision had conformed to ERISA's strict fiduciary requirements. While the decision to terminate through the purchase of annuities was clearly a non-fiduciary settlor decision, the implementation of that decision through the expenditure of plan assets was a fiduciary act. As the Waller court explained, "the choice of an annuity provider is the quintessential exercise of 'discretionary control'" over plan assets. 32 F.3d at 1342. See also, 29 C.F.R. § 2509.95-1 Interpretative Bulletin relating to fiduciary standard under ERISA when selecting an annuity provider.

When an employer decides to terminate a plan, it acts solely in its capacity as a plan sponsor, not as a fiduciary. The plan's fiduciaries, however, have a

[8] The Department of Labor participated in both cases as an amicus on behalf of the plan participants. The Waller court correctly recognized that DOL's construction of Title I of ERISA is entitled to deference. 32 F.3d at 1343 n.12.

responsibility to ensure, consistent with their duties of prudence and loyalty, that the plan assets are properly expended on an annuity that will ensure that participants receive all of the benefits that they were promised. Here, there does not seem to be any dispute that the annuity secured for the participants all of the benefits they were promised. The panel's opinion erred by suggesting that, even if the defendants properly assured that the participants would receive everything they were promised, they should also have considered reversing the settlor's decision to terminate the plan, redesigning the plan's entire structure by merging it into a different ongoing plan with its own separate terms and benefits, and effectively altering the benefits established by the plan sponsor (e.g., through the addition of the "thirteenth check").[9] It is not the fiduciary's job, however, to revisit or usurp the settlor's decision to terminate the plan through the purchase of a secure annuity which guarantees the payment of all promised benefits.

Whether to terminate a plan or merge it with another one is not an exercise of fiduciary control over plan assets, but rather, the exercise of the sponsor's

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[9] The panel described Crown's fiduciary obligation as "to assure the payment of the promised defined benefits with as little risk of nonpayment as possible, not to use the fund's total assets to the beneficiaries' optimum benefit." 427 F.3d at 677. It is worth noting that the bankruptcy court did not find that merger with PIUMPF would improve the participants' chances of receiving what they were promised, nor did the plaintiffs even allege this. The panel therefore imposed a duty to investigate an option that no one contends would "assure the payment of the promised defined benefits with as little risk of nonpayment as possible."

fundamental choice regarding the future of the plan and participant coverage, and therefore is not subject to ERISA's fiduciary obligations. See Sengpiel, 156 F.3d at 666 (company's adoption and ministerial application of percentage classification system to implement its business decision did not amount to an exercise of discretion of a fiduciary nature). Accordingly, the panel's reliance on these cases is misplaced.

CONCLUSION

The two government agencies responsible for interpreting and enforcing the statutory provisions at issue in this case believe the panel has committed serious error. The panel should reconsider and reverse its opinion in light of these agencies' views.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief as Amicus Curiae in Support of the Petition for Rehearing with Suggestion for Rehearing en banc was served by Federal Express, this 15th day of December, 2005, upon:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached Secretary of Labor's Amicus Curiae Brief in Support of Petition for Rehearing with Suggestion for Rehearing En Banc is proportional spaced, using Times New Romans typeface of 14 point and contains 3,861 words.

Dated: December 14, 2005

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