

No. 07-094

In the Supreme Court of the United States

RICK MIDDLETON, BOB DOSS, RONN ENGLISH, PERRI NEW-
ELL, and SOUTH BAY TEAMSTERS AND EMPLOYERS HEALTH
AND WELFARE AND RELATED BENEFITS TRUST FUND,

Petitioners,

v.

TRUSTEES OF THE SOUTHERN CALIFORNIA BAKERY DRIVERS
SECURITY FUND, and DIRK GEERSEN,

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

KATHRYN J. HALFORD
*Wohlner Kaplon Phillips
Young & Cutler
15456 Ventura Blvd.
Sherman Oaks, CA 91403
(818) 501-8030*

KENNETH S. GELLER
DAVID M. GOSSETT
LINDA KAY SHORE
*Mayer, Brown, Rowe &
Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000*

MICHAEL A. VANIC
Counsel of Record
JOSEPH C. FAUCHER
*Reish Luftman Reicher &
Cohen
11755 Wilshire Blvd., 10th
Floor
Los Angeles, CA 90025
(310) 478-5656*

Counsel for Petitioners

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. Certiorari Is Warranted To Correct The Ninth Circuit’s Holding That Payments Made By An ERISA Plan To Another Entity For Products Or Services Remain “Plan Assets” Subject To Recoupment.....	2
II. Certiorari Is Also Warranted Because The Ninth Circuit’s Holding Is Based On The Erroneous Conclusion That ERISA Multiemployer Plans Must Segregate Plan Assets And May Not Use Them For The Benefit Of All Plan Participants.....	6
CONCLUSION	10

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Berkshire Hathaway, Inc. v. Textile Workers Pension Fund</i> , 874 F.2d 53 (1st Cir. 1989).....	10
<i>Ganton Techs., Inc. v. Nat’l Indus. Group Pension Plan</i> , 76 F.3d 462 (2d Cir. 1996)	10
<i>John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank</i> , 510 U.S. 86 (1993)	5
<i>Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co.</i> , 698 F.2d 320 (7th Cir. 1983)	5
<i>Stinson v. Ironworkers Dist. Council of S. Ohio and Vicinity Benefit Trust</i> , 869 F.2d 1014 (7th Cir. 1989).....	10
STATUTES AND REGULATIONS	
Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1001 <i>et seq.</i> ,	<i>passim</i>
ERISA § 3(7), 29 U.S.C. § 1002(7).....	7
ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1).....	4
ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2).....	<i>passim</i>
ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2)	2
Consolidated Omnibus Budget Reconciliation Act of 1985, PUB. L. NO. 99-272, § 11018(d) (Apr. 7, 1986).....	3
Labor Management Relations Act (“LMRA”) § 302(c)(5), 29 U.S.C. § 186(c)(5)	10

TABLE OF AUTHORITIES—continued

	Page(s)
Dep't of Labor, Final Regulation Relating to Definition of Plan Assets ("Plan Asset Regulation"), 51 Fed. Reg. 41,262 (Nov. 13, 1986).....	4, 5
 MISCELLANEOUS	
R. Eccles & D. Gordon, <i>Ninth Circuit Rules that Businesses Doing Business with Multiemployer Plans Must Return Profits from Such Business Dealings to the Plans</i> , 15(1) ERISA LITIG. RPTR. 12, 14 (Feb.–Mar. 2007).....	4
U.S. Dep't of Labor, Pension & Welfare Benefits Office of Regulations & Interpretations, Advisory Op. 92-02A (Jan. 17, 1992), available at http://www.dol.gov/ebsa/programs/ori/advisory92/92-02a.htm	3

As we explained in the petition, the Ninth Circuit’s decision warrants review for two distinct reasons. First, the court of appeals held that fees an ERISA plan pays to another entity for products or services may remain plan assets, a rule that ignores basic principles of contract law, finds no support in the text of ERISA, and has profoundly destabilizing implications for all entities that contract with ERISA plans. Second, the court of appeals effectively held that multiemployer employee welfare plans must earmark contributions made on behalf of any given group of participants for the benefit of those participants alone, a rule that creates a circuit split and undermines the smooth functioning of all multiemployer ERISA plans.

Respondents deny that certiorari is warranted, but their rejoinders have no merit and are based on mischaracterizing or disregarding our arguments to minimize the significance of the issues presented. As to our first ground for certiorari—the plan-asset issue—respondents never disagree that, if the Ninth Circuit’s decision means what we say, the decision would be deeply disruptive and would warrant this Court’s review. Rather, respondents attempt to reinterpret the court of appeals’ decision to limit its implications for the identification of plan assets in routine plan transactions, but in so doing invent a new construct—a “guaranteed benefit policy” issued by a non-insurer—and completely ignore the Department of Labor Advisory Opinions and other authority we cited to support our argument.

Respondents’ attempt to rebut our second ground for certiorari—the earmarking issue—is equally incredible. Respondents assert that the Common Participants were never members of the South Bay Fund, and thus that requiring South Bay Fund to use a subset of its assets solely for the benefit of the Common Participants does not conflict with the many decisions of this Court and other circuit courts to which we referred, all of which hold that multiemployer funds may use pooled assets for the benefit of all partici-

pants. But the parties to this litigation have acknowledged that the Common Participants were members of the South Bay Fund ever since the Trust to Trust Agreement, drafted by respondents' counsel of record, went into effect on August 1, 1987. Indeed, respondents' complaint plainly specifies that the Common Participants are members of the South Bay Fund, a characterization that respondents repeated in later pleadings. Thus, it is far too late for a cavalier revision of history by respondents, especially when their attempted recharacterization is a blatant attempt to avoid certiorari by arguing that the pernicious implications of the Ninth Circuit's decision are somehow limited to this one case.¹

I. Certiorari Is Warranted To Correct The Ninth Circuit's Holding That Payments Made By An ERISA Plan To Another Entity For Products Or Services Remain "Plan Assets" Subject To Recoupment.

1. The fundamental problem with the Ninth Circuit's decision is that the court of appeals made the fallacious logical leap from holding that the Trust-to-Trust Agreement between Bakery Drivers Fund and the South Bay Fund did not create a "guaranteed benefit policy" as defined in ERISA § 401(b)(2), 29 U.S.C. § 1101(b)(2), to concluding that as a result the monies paid by Bakery Drivers Fund to South Bay Fund pursuant to that Agreement therefore remained plan assets of Bakery Drivers Fund. See Pet. 15–17. As we demon-

¹ Respondents are correct that our petition indicates that Bakery Drivers Fund is itself a party to this litigation, rather than the trustees of that fund (and, as we correctly noted, a participant in that fund). See Br. in Opp. ii, 2 n.1. More precisely, the trustees and the participant filed the claim for breach of fiduciary on behalf of the Bakery Drivers Fund, as required under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). But although respondents assert that "[t]he identity of the parties is critical to this case," Br. in Opp. ii, they never explain why this distinction would make any difference—and it does not. Thus, we will continue to refer occasionally to respondents as the "Bakery Drivers Fund."

strated in the petition, certiorari is warranted because there is no basis upon which to distinguish this contract from any other contract for products or services into which an ERISA plan might enter, and thus the lower court's decision necessarily implies that funds paid by ERISA plans pursuant to *any* contract that does not specifically fit within the guaranteed benefit policy provision or another specific investment provision of ERISA remain plan assets even after being paid over to the other contracting party. That conclusion is unsupported by the statute or Department of Labor regulations and opinions defining plan assets, and would be extremely disruptive. See Pet. 18–19.

2. Respondents reply by stressing again the uncontroverted fact that this case involves a transaction that resembles but does not fall within the guaranteed benefit policy provision of ERISA § 401(b)(2), see Br. in Opp. 13–15, and arguing that “there is nothing extraordinary in holding that the failure to qualify for an exception means that a party cannot take advantage of that exception.” Br. in Opp. 13. But although each of those statements is true, they in no way support the Ninth Circuit's decision.

Respondents and the Ninth Circuit start from the false assumption that absent fitting into a specific statutory exemption, all assets paid to a third party remain plan assets. But as we discussed in the petition (at 16–17), the court of appeals instead was required to start with the Department of Labor's repeated admonition that “the assets of a plan generally are to be identified on the basis of *ordinary notions of property rights* under non-ERISA law.” U.S. Dep't of Labor, Pension & Welfare Benefits Office of Regulations & Interpretations, Advisory Op. 92-02A, at 3 (Jan. 17, 1992) (emphasis added)²; see also Pet. 16–17 & n.13 (collecting authorities).

² The Department of Labor has long been charged by Congress with the responsibility for defining “plan assets” for ERISA purposes. See Consolidated Omnibus Budget Reconciliation Act of 1985, PUB. L. NO. 99-272, § 11018(d) (Apr. 7, 1986); see also

By failing to do this and instead focusing only on whether the payments to South Bay Fund fit within the “guaranteed benefit policy” provision, the court of appeals’ decision erroneously suggests that unless a contract fits within a specifically described provision of ERISA, the funds used for that contract remain plan assets.

That analytic framework, which is directly contrary to the one mandated by the Department of Labor, is what causes the decision below to have the pernicious, far-reaching implications that we discussed in the petition. See Pet. 18–19; see also R. Eccles & D. Gordon, *Ninth Circuit Rules that Businesses Doing Business with Multiemployer Plans Must Return Profits from Such Business Dealings to the Plans*, 15(1) ERISA LITIG. RPTR. 12, 14 (Feb.–Mar. 2007). Remarkably, respondents simply ignore these Department of Labor Advisory Opinions and the cases that rely on them, never even advertent to these authorities in their brief.

3. Respondents also seek to castigate us for relying not only on ERISA § 401(b)(2) but also on ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), which they describe as a “completely different exception.” Br. in Opp. 14. But we cited this exception simply to make our central point that the “guaranteed benefit policy” exception, like the registered investment company exception, are used to address specific types of “collective investment arrangements” that Congress believed should not be treated as giving rise to “plan assets” in the hands of the insurer or mutual fund, respectively. See Plan Asset Regulation, 51 Fed. Reg. at 41,262.³ Thus, as we dis-

Dep’t of Labor, Final Regulation Relating to Definition of Plan Assets (“Plan Asset Regulation”), 51 Fed. Reg. 41,262, 41,264 n.12 (Nov. 13, 1986).

³ The preamble to that regulation explains that:

Although ERISA does deal not explicitly define “plan assets,” it does deal specifically with certain kinds of collective investment arrangements. Section 401(b)(1) of ERISA provides that, in the case of a plan which invests

cussed in the petition (at 15), the Ninth Circuit erred in relying on *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and the plan-asset regulation, which are only applicable to plan *investments*. Here, there was no plan investment—only a contract for the provision of a product or service.⁴

4. Respondents never dispute our contention that based on “ordinary notions of property rights,” the parties here entered into a contract for a product or service and that under such an analysis the funds respondents paid to the South Bay Fund did not remain plan assets of Bakery Drivers Fund. We

in any security * * *, the assets of the plan will be deemed to include such security, but will not, solely by reason of the plan’s acquisition of the security, be deemed to include any assets of the investment company. Similarly, section 401(b)(2) of ERISA provides that when a plan acquires a “guaranteed benefit policy” from an insurance company, the assets of the plan include the policy, but do not include any of the underlying assets of the insurance company issuing the policy.

Ibid.

⁴ Neither *John Hancock* nor *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320 (7th Cir. 1983), supports respondents’ contention (Br. in Opp. 16–17) that the fees they paid to South Bay Fund remained plan assets of Bakery Drivers Fund. Both cases deal with the fact that just because the funds used to purchase a guaranteed benefit policy do not remain plan assets, *other funds* transferred to the provider, over which the recipient has discretionary investment authority, nonetheless do remain plan assets. See Pet. 15 n.11; *Peoria Union*, 698 F.2d at 327 (“The pension trustees did not buy an insurance contract with a fixed payout; they turned over the assets of the pension plan to Penn Mutual to manage with full investment discretion, subject only to a modest income guaranty.”). Indeed, both cases involved purchases of annuity contracts by pension plans as a form of plan capital investment.

discussed at length in the petition all of the ways in which neither respondents nor petitioners ever treated these funds as plan assets of Bakery Drivers Fund. See Pet. 4–6. And we also explained that South Bay Fund had the full funding risk with regard to the death benefits for the Common Participants, and could not have sought additional contributions from Bakery Drivers Fund if benefits paid exceeded contributions received for the Common Participants. *Id.* at 5. Respondents simply ignore this discussion. But wishing away inconvenient facts is a superficial and unsuccessful stratagem. Respondents give no reason why they, the Ninth Circuit, or this Court should ignore the fashion in which respondents themselves long treated these funds.

* * * * *

Thus, nothing in respondents’ brief rebuts our argument—or silences the commentators’ concern—that the necessary implication of the Ninth Circuit’s decision is that the payments made by ERISA plans for the panoply of non-investment contracts remain plan assets, leading the contractors to be treated as ERISA fiduciaries with respect to the plan and, apparently, permitting those contracts to be voidable at will by the ERISA plan. Certiorari is plainly warranted to avoid this result. At a minimum, this Court should seek the views of the Solicitor General as to whether the decision below merits review.

II. Certiorari Is Also Warranted Because The Ninth Circuit’s Holding Is Based On The Erroneous Conclusion That ERISA Multiemployer Plans Must Segregate Plan Assets And May Not Use Them For The Benefit Of All Plan Participants.

1. Respondents’ primary rejoinder to our second ground for certiorari—that the Ninth Circuit’s decision requires multiemployer plans to segregate assets for different subgroups of plan members, thus creating a circuit split with the decisions of numerous other courts of appeals—is to claim that the Common Participants “were never participants

of the South Bay Fund at all.” Br. in Opp. 12.⁵ This assertion is truly remarkable, especially given respondents’ own allegations and written representations.

Respondents have repeatedly acknowledged that the Common Participants were participants in South Bay Fund during the term of the Trust-to-Trust Agreements. Most critically, they so allege in both their initial and first amended complaints. Paragraph 11 of each complaint states that:

The participants of the [Bakery Drivers Fund] for whom payments were made to the South Bay Fund under the [Trust-to-Trust] Agreement thereby *became participants of the South Bay Fund*, as defined in ERISA § 3(7), 29 U.S.C. § 1002(7), and shall be referred to here as the “Common Participants.”

I ER 5, 40 (emphasis added). Similarly, Paragraph 7 of each complaint alleges that:

[Respondent Geersen] is, and has been a participant in the [Bakery Drivers Fund] since 1991. [Geersen] has also been a participant in the South Bay Fund, based on contributions made on his behalf * * *.

I ER 3, 38.

The only justification respondents provide for attempting to escape these binding assertions is to state in a footnote in their brief in opposition that the complaints referred to “common participants” only because “the *First Claim*,” which the

⁵ As we explained in the Petition, we believe the best characterization of the Trust-to-Trust agreement, and of the Ninth Circuit’s decision, is that the parties entered into a contract by which South Bay Fund provided a product or service to Bakery Drivers Fund. See Pet. 19. But as discussed, that characterization necessarily means that the decision below undermines the enforcement of all contracts entered into with ERISA plans. The only other plausible characterization of the decision below is that the Trustees of South Bay Fund violated their ERISA fiduciary duties by failing to segregate assets by subgroup.

District Court rejected and which respondents thereafter dropped, “was based on the assertion that the Bakery Drivers Fund participants became South Bay Fund participants.” Br. in Opp. 2 n.3 (emphasis added). But respondents specifically “incorporate[d]” this factual assertion into their *second claim*, too—the active claim. See I ER 43 ¶ 20. In fact, Paragraph 25 of the first amended complaint—in which respondents delineated the relief they sought on their second claim—states that “[t]he [Bakery Drivers Fund] Trustees, in their capacity as fiduciaries of the [Bakery Drivers] Fund, and Participants, *as participants in both funds*, seek appropriate relief to remedy [the alleged] breach of fiduciary duty.” I ER 44 ¶ 25 (emphasis added).

Furthermore, respondents have acknowledged that the Common Participants were participants in the South Bay Fund in numerous other parts of the record besides the complaints. For example:

- Respondents’ counsel of record—who has represented the Bakery Drivers Fund since 1975 and who drafted the Trust-to-Trust Agreement, see III SER 527–528, IV SER 609—noted at the time he presented the Trust-to-Trust Agreement to South Bay Fund that the agreement caused the Common Participants to become members of the South Bay Fund. See II SER 356 (“With this letter I am enclosing the draft of [the Trust-to-Trust Agreement]. The thrust of the agreement is to indicate that Bakery Drivers Fund participants will *participate in the death benefit plan maintained by South Bay * * **.”) (emphasis added).
- Bakery Drivers Fund also recognized this fact nearly 15 years later in its January 10, 2002, letter sent after the termination of the Trust-to-Trust Agreement, which it sent shortly before commencing this litigation. See II SER 337 (“As a result of [the Trust-to-

Trust] arrangement, [the Common Participants] have enjoyed the status of participants in South Bay.”).⁶

- Respondents noted that the Common Participants were participants in the South Bay Fund in other pleadings they filed in the District Court. See, *e.g.*, I SER 28 (“Geersen was unquestionably a South Bay Participant”).

Thus, even if there could be any doubt that the Common Participants were participants in the South Bay Fund, which there is not given the Trust-to-Trust Agreement, respondents have litigated this entire case based on that assertion and cannot now rely on the contrary proposition to reinterpret the Ninth Circuit’s decision.

2. Respondents also argue that Bakery Drivers Fund “is not a contributing employer or group of employers” to South Bay Fund. Br. in Opp. 10; see also *id.* at 10–12. But although unquestionably true (as Bakery Drivers Fund is not an employer at all), this fact is simply irrelevant. That *Bakery Drivers Fund* is not a “contributing employer” to the South Bay Fund does not mean that the *Common Participants* were not members of both Bakery Drivers Fund (by means of the contractual agreements between that Fund and its contributing employers) and South Bay Fund (by means of the Trust-to-Trust Agreement). By the Bakery Drivers Fund’s own admission prior to the litigation, it was the conduit through which contributions from the Common Participants’ employers were transmitted to South Bay Fund for the participation therein of the Common Participants. See II SER 337.

Therefore, although respondents are correct that the decisions we cited in the petition to demonstrate the existence of a circuit split, see Pet. 22–23, all “involved a withdrawal

⁶ The record reflects that, although this letter was signed by Bakery Drivers Fund’s third-party administrator, Linda Tonnancour, it was in fact written by respondents’ counsel of record. See III SER 564, IV SER 635–636.

by one or more employers from a multi-employer plan, not a transfer of money between two multi-employer plans,” Br. in Opp. 10 n.9, this distinction in no way negates the existence of a conflict among the lower courts. The relevant point is that the Ninth Circuit held that multiemployer plans must segregate contributions for a subset of plan participants, whereas other circuits have followed this Court’s lead and have held that multiemployer plans that pool contributions may use those contributions for the benefit of all participants. See, e.g., *Ganton Techs., Inc. v. Nat’l Indus. Group Pension Plan*, 76 F.3d 462, 467–468 (2d Cir. 1996); *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d 53, 55 n.2 (1st Cir. 1989); *Stinson v. Ironworkers Dist. Council of S. Ohio and Vicinity Benefit Trust*, 869 F.2d 1014, 1022 (7th Cir. 1989).⁷ That circuit split warrants this Court’s review.

3. Finally, it is worth noting that respondents never defend a rule under which a multiemployer ERISA fund may be required to segregate contributions for subsets of participants, nor deny that such a rule would be profoundly disruptive to the smooth operations of such plans. Because that is what the Ninth Circuit’s decision suggests, certiorari is plainly warranted to correct the lower court’s error.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

⁷ Respondents seek to distinguish *Stinson* on the ground that “[i]t was decided under LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5), not ERISA” Br. in Opp. 10 n. 9. But the plan at issue in *Stinson* was an ERISA multiemployer plan, and the legal issue presented here—whether such plans may be required to segregate funds—is identical whether framed under the LMRA or under the fiduciary obligations of ERISA.

Respectfully submitted.

KATHRYN J. HALFORD
*Wohlner Kaplon Phillips
Young & Cutler
15456 Ventura Blvd.
Sherman Oaks, CA 91403
(818) 501-8030*

KENNETH S. GELLER
DAVID M. GOSSETT
LINDA KAY SHORE
*Mayer, Brown, Rowe &
Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000*

MICHAEL A. VANIC
Counsel of Record
JOSEPH C. FAUCHER
*Reish Luftman Reicher &
Cohen
11755 Wilshire Blvd., 10th
Floor
Los Angeles, CA 90025
(310) 478-5656*

Counsel for Petitioners

SEPTEMBER 2007