No. 14-1331

# In the Supreme Court of the United States

KENNETH KIRSCHENBAUM, CHAPTER 7 TRUSTEE OF THE ESTATE OF THE ROBERT PLAN CORPORATION, PETITIONER

*v.*

UNITED STATES DEPARTMENT OF LABOR

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

**BRIEF FOR THE RESPONDENT IN OPPOSITION**


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## QUESTIONS PRESENTED

Under 11 U.S.C. 704(a)(11), a Chapter 7 bankruptcy trustee is required in some circumstances to assume the obligations of the administrator of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq*. The questions presented are as follows:

1. Whether a bankruptcy trustee's request for compensation for services provided in performing the obligations of an ERISA plan administrator gives rise to either a core or non-core proceeding within a bankruptcy court's authority under 28 U.S.C. 157(b) or (c), when the trustee requests payment from the assets of the ERISA plan rather than from the bankruptcy estate.

2. Whether a bankruptcy trustee is entitled to "derived judicial immunity" when the performance of his duties under 11 U.S.C. 704(a)(11) as an ERISA plan administrator is directed, approved, or authorized by the bankruptcy court.

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 777 F.3d 594. The opinion of the district court (Pet. App. 9a-34a) is reported at 508 B.R. 257. An earlier opinion of the district court granting leave to file an interlocutory appeal (Pet. App. 35a-45a) is not published in the *Federal Supplement*, but is available at 2013 WL 1451980. The opinions of the bankruptcy court (Pet. App. 46a-88a, 89a-123a) are reported at 493 B.R. 674 and 439 B.R. 29.

## JURISDICTION

The judgment of the court of appeals was entered on February 5, 2015. The petition for a writ of certiorari was filed on May 6, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. a. "When a district court refers a case to a bankruptcy judge, that judge's statutory authority depends on whether Congress has classified the matter as a '[c]ore proceedin[g]' or a '[n]on-core proceedin[g].'" *Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932, 1940 (2015). Congress has provided "a non-exclusive list of 16 types of [core] proceedings," *ibid.*, most of which expressly refer to the administration or liquidation of the bankruptcy estate, 28 U.S.C. 157(b)(2). But the bankruptcy court is authorized more generally to "hear and determine * * * all core proceedings *arising under* [the Bankruptcy Code], or *arising in* a case under [the Bankruptcy Code] * * * and may enter appropriate orders and judgments" in such proceedings. 28 U.S.C. 157(b)(1) (emphases added). In non-core proceedings, by contrast, in the absence of consent from the parties, a bankruptcy court may only "submit proposed findings of fact and conclusions of law to the district court." 28 U.S.C. 157(c)(1). A non-core proceeding is "a proceeding that is not a core proceeding but that is otherwise *related to* a case under [the Bankruptcy Code]." *Ibid.* (emphasis added).

b. In 2005, Congress amended the Bankruptcy Code to provide that, "if * * * the debtor (or any entity designated by the debtor) served as the administrator (as defined in Section 3 of the Employee Retirement Income Security Act of 1974 [(ERISA), 29 U.S.C. 1001 *et seq.*]) of an employee benefit plan" at the commencement of the bankruptcy case, then the bankruptcy trustee shall "continue to perform the obligations required of the administrator." 11 U.S.C. 704(a)(11); see Pet. App. 10a n.2.

2. In 2008, The Robert Plan Corporation and The Robert Plan of New York Corporation filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Pet. App. 2a. In 2010, the proceedings were converted to Chapter 7 cases, and petitioner was appointed the bankruptcy trustee for both cases, which were later consolidated. *Id.* at 2a-3a.

Pursuant to Section 704(a)(11), petitioner, as the bankruptcy trustee, assumed the role of administrator of a 401(k) pension plan for The Robert Plan Corporation's employees and their beneficiaries. Pet. App. 3a. Under ERISA, the assets of that plan are to be held in a separate trust for the exclusive benefit of the plan's participants and beneficiaries, 29 U.S.C. 1103(a), and the Bankruptcy Code specifies that the plan's assets are not included within the property of the bankruptcy estate, 11 U.S.C. 541(b)(7). See Pet. App. 6a, 93a.

Petitioner announced that he intended to terminate the ERISA plan and distribute its funds to the plan participants. Pet. App. 3a. He sought authorization from the bankruptcy court to retain a pension consultant, an accounting professional, and his own law firm to assist him, and he also sought authorization to pay himself and those professionals from the plan's assets. *Id.* at 3a, 12a, 89a, 91a. The Department of Labor objected, arguing that the bankruptcy court lacked statutory authority to approve payments that used the ERISA plan's assets. *Id.* at 89a-90a.

On October 26, 2010, the bankruptcy court issued an opinion concluding that it had authority to consider the request for fees, but reserving the question whether the plan's assets could be used for that purpose. Pet. App. 108a, 120a. Petitioner and his retained professionals then submitted fee applications,

requesting that they be paid from the plan's assets, and with assets of the bankruptcy estate to the extent that the plan's assets proved insufficient. *Id.* at 47a. The Department of Labor again objected.[1] On August 20, 2012, however, the bankruptcy court granted the fee applications and ordered that the fee awards be paid from the plan's assets until they were exhausted and thereafter by the bankruptcy estate. *Id.* at 88a.

3. The Department of Labor sought leave to bring an interlocutory appeal. Pet. App. 35a-36a. The district court granted leave to appeal, but only to the extent that the Department sought review of the bankruptcy court's holding that it had authority to order the payment of fees from the assets of the ERISA plan. *Id.* at 45a. The court denied the Department's request to appeal any other issue regarding the compensation awards. *Ibid.*

On March 31, 2014, the district court reversed the bankruptcy court's 2012 decision. Pet. App. 8a-34a. The district court held that the bankruptcy court lacked statutory authority under the Bankruptcy Code to award fees to the trustee using assets of the ERISA plan. *Id.* at 27a-32a. It reasoned that, although the Bankruptcy Code requires the trustee to continue performing the duties of the ERISA plan administrator, "the substantive rights and obligations of the [administrator]" are "establish[ed] and control[led]" by ERISA and the plan documents. *Id.* at 28a. Because the plan-administration obligations "are

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[1] In addition to contending that the bankruptcy court lacked authority over the matter, the Department objected to use of the formula provided in 11 U.S.C 326(a), which bases fees on a percentage of assets disbursed during the bankruptcy, rather than a reasonable hourly rate. See Pet. App. 44a.

created by ERISA and exist outside of the bankruptcy," the court concluded that they do not arise under the Bankruptcy Code or arise in a bankruptcy case for purposes of making the payment requests a core proceeding under 28 U.S.C. 157. Pet. App. 28a-29a.

The district court also addressed whether a compensation dispute could be related to a bankruptcy case and therefore be a non-core proceeding. Pet. App. 29a-33a. In that regard, the court distinguished between petitioner's actual application (which requested a payment of fees from the ERISA plan assets) and a potential application for fees to be paid from the bankruptcy estate. *Id.* at 30a. It concluded that the request to be paid from ERISA plan assets—a request authorized and governed by ERISA—was not related to the bankruptcy case because it "could have no conceivable effect on the bankruptcy estate or its allocation." *Ibid.* The court further explained that, although a request for funds from the bankruptcy estate itself "would undeniably affect the bankruptcy estate," and therefore would constitute a non-core proceeding, petitioner had not actually made an application "to the Bankruptcy Court for a specified dollar amount to be awarded from the bankruptcy estate." *Id.* at 33a.

4. On February 5, 2015, the court of appeals affirmed. Pet. App. 1a-7a. The court of appeals addressed only the bankruptcy court's authority over a request by the trustee to be paid with ERISA plan assets, and it declined to consider "whether the Bankruptcy Court would have jurisdiction over an application from [petitioner] * * * seeking payment from the [bankruptcy] estate[] for services rendered in administering the [p]lan." *Id.* at 6a n.3.

The court of appeals held that the question of compensation from ERISA plan assets does not arise under the Bankruptcy Code because a fee application seeking funds from the plan does not "clearly invoke substantive rights created by federal bankruptcy law." Pet. App. 5a (quoting *MBNA Am. Bank, N.A.* v. *Hill*, 436 F.3d 104, 108-109 (2d Cir. 2006)). Although a bankruptcy provision, 11 U.S.C. 704(a)(11), places the trustee in the role of plan administrator, it does not alter the administrator's substantive duties or create new substantive rights. It merely "provides the 'procedural vehicle for the assertion of a right conferred by some other body of law'—in this case, ERISA." Pet. App. 5a-6a (quoting *In re United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997)). The court similarly concluded that the question does not arise in a bankruptcy case because the payment of compensation to ERISA plan administrators neither depends upon bankruptcy for its existence nor involves an administrative matter that arises only in bankruptcy cases, but rather typically arises outside of bankruptcy. *Id.* at 6a.

Finally, the court of appeals held that the proceeding was not related to a bankruptcy case to the extent that the trustee sought payment only from the assets of the ERISA plan. Pet. App. 6a. Because another provision of the Bankruptcy Code, 11 U.S.C. 541(b)(7), "explicitly excludes ERISA plan assets from a debtor's bankruptcy estate," "the outcome of the proceeding relating to compensation could not conceivably have had any effect upon the [bankruptcy] estate[]." Pet. App. 6a. The court concluded that, because petitioner's request for compensation from the ERISA plan assets was neither a core proceeding nor a non-

core proceeding, that request was outside the bankruptcy court's authority. *Id.* at 2a.

**ARGUMENT**

The court of appeals' decision, arising in the context of a limited interlocutory appeal, is correct, and petitioner does not suggest that it conflicts with any decision of this Court or of another court of appeals. Instead, petitioner contends (Pet. 9-10) that the Court should provide guidance on several issues, most of which were not addressed by the decision below, and all of which have otherwise been addressed only by a handful of bankruptcy courts. Further review is not warranted.

1. Petitioner contends (Pet. 9) that a bankruptcy court has "core jurisdiction"[2] over "the conduct and actions of" a bankruptcy trustee when the trustee is discharging his obligation under 11 U.S.C. 704(a)(11) to serve as the administrator of an ERISA plan previously administered by the debtor. The court of appeals, however, did not announce a comprehensive rule governing that subject. Rather, the court addressed only the narrower question whether a bankruptcy court has authority "to award compensation to

[2] Like the decisions below and both sides' briefs in the courts below, the petition for a writ of certiorari describes the relevant issues as pertaining to the bankruptcy court's "jurisdiction." After this case began, however, this Court clarified that the allocation of authority between a district court and bankruptcy court under 28 U.S.C. 157 does not "implicate questions of subject matter jurisdiction." *Stern* v. *Marshall*, 131 S. Ct. 2594, 2607 (2011). Accordingly, this brief generally describes the issues as relating to the bankruptcy court's "statutory authority." Cf. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (describing the Court's recent efforts "[t]o ward off profligate use of the term 'jurisdiction'").

a Chapter 7 trustee and his retained professionals *out of assets in a 401(k) plan* governed by [ERISA]." Pet. App. 2a (emphasis added).

a. As the court of appeals explained, the Bankruptcy Code excludes the assets of an ERISA plan from the property of the bankruptcy estate, and the obligations of the plan administrator with respect to those assets (as well as his ability to seek compensation) are governed by ERISA rather than by bankruptcy law. Pet. App. 5a-6a. Petitioner correctly observes (Pet. 9) that the Bankruptcy Code required the Chapter 7 bankruptcy trustee in this case to assume the duties of an ERISA plan administrator. Nevertheless, petitioner does not dispute the general proposition that, for purposes of defining what constitutes a core proceeding, an action arises under the Bankruptcy Code only when "the Code itself is the source of the claimant's right or remedy, rather than just the procedural vehicle for the assertion of a right conferred by some other body of law." *In re United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997).

Here, the court of appeals applied that general principle in concluding that questions about compensation for ERISA-plan-administrator services from assets of an ERISA plan arise under ERISA rather than under the Bankruptcy Code. See Pet. App. 6a (quoting *United States Brass Corp.*). Many other courts of appeals have recognized the same general principle in evaluating whether a claim "arises under [the Bankruptcy Code]" for purposes of the definition of core proceedings in 28 U.S.C. 157(b)(2).[3] Other

[3] See, *e.g.*, *In re Ray*, 624 F.3d 1124, 1131 (9th Cir. 2010); *In re Farmland Indus., Inc.*, 567 F.3d 1010, 1018 (8th Cir. 2009); *In re Middlesex Power Equip. & Marine, Inc.*, 292 F.3d 61, 68 (1st Cir.

courts of appeals have used similar tests in evaluating whether a claim "arises in" a bankruptcy case for purposes of the same provision.[4]

b. Petitioner does not suggest that there is anything remarkable about the court of appeals' test for determining whether a claim is "related to" a bankruptcy case for purposes of the definition of a non-core proceeding. "[W]hatever test is used," the courts of appeals agree that bankruptcy courts lack authority "over proceedings that have no effect on the estate of the debtor." *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 309 n.6 (1995). In this case, the court below correctly recognized that, to the extent that petitioner had requested payment from ERISA plan assets, "the outcome of the proceeding relating to compensation

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2002); *In re Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999); *In re The Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1178 (3d Cir. 1996); *In re Wolverine Radio Co.*, 930 F.2d 1132, 1144 (6th Cir. 1991), cert. dismissed, 503 U.S. 978 (1992); *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987).

[4] See *Ray*, 624 F.3d at 1131 ("A proceeding 'arises in' a case * * * if it is an administrative matter unique to the bankruptcy process that has no independent existence outside of bankruptcy and could not be brought in another forum, but whose cause of action is not expressly rooted in the Bankruptcy Code."); *Stoe* v. *Flaherty*, 436 F.3d 209, 218 (3d Cir. 2006) ("[C]laims that 'arise in' a bankruptcy case are claims that by their nature, not their particular factual circumstance, could only arise in the context of a bankruptcy case."); *Middlesex Power Equip. & Marine*, 292 F.3d at 68 ("'Arising in' proceedings generally are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.") (citation omitted); see also, *e.g.*, *Farmland Indus.*, 567 F.3d at 1018; *Toledo*, 170 F.3d at 1345; *Wolverine Radio Co.*, 930 F.2d at 1144; *Wood*, 825 F.2d at 97.

could not conceivably have had any effect on the [d]ebtors' estates." Pet. App. 6a.

Petitioner contends that questions about "[t]he allocation of payments between" the bankruptcy estate and the assets of the ERISA plan will have "a substantial impact on the administration of the Estate." Pet. 11. He points out that, if the plan assets prove to be insufficient, he has been "authorized [by the bankruptcy court] to utilize the Estate assets" to pay for plan-administration services. *Ibid.* Petitioner elides the facts that (a) the court of appeals issued its ruling in the context of a limited interlocutory appeal, and (b) the court explicitly declined to address the proper treatment of a potential application seeking fees out of the bankruptcy estate. See Pet. App. 6a n.3 ("[W]e express no view about whether the Bankruptcy Court would have jurisdiction over an application from [petitioner] * * * seeking payment from the Debtors' estates for services rendered in administering the" ERISA plan.). Those facts alone would make this case a poor vehicle for considering when compensation disputes are non-core proceedings. See *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ours is a court of final review and not first view. Ordinarily, we do not decide in the first instance issues not decided below.") (citations and internal quotation marks omitted).[5]

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[5] Petitioner asserts that the Bankruptcy Code will preclude him from receiving any compensation in the absence of "an order fixing compensation upon notice and a hearing." Pet. 11. That assertion appears to be based on 11 U.S.C. 330. See Pet. 3-4. But several courts have read Section 330 as applying only to payments made from the estate itself—*i.e.*, precisely the kind of payments that the court of appeals declined to consider. See *Barron* v. *Countryman,*

c. Petitioner concedes (Pet. 15) that the decision below is the only court of appeals decision that has considered whether bankruptcy courts have authority over disputes about compensation for a trustee's actions as an ERISA plan administrator. Indeed, the "very few reported decisions which address these issues" (Pet. 11) do not even include any *district*-court decisions. Instead, petitioner alleges only that the decision below conflicts with some (but not all) of the six bankruptcy-court decisions that have addressed trustees' applications for compensation for services as an ERISA plan administrator. See Pet. 15-21 (discussing *In re Negus-Sons, Inc.*, No. 09-82518, 2013 WL 4674917 (Bankr. D. Neb. Aug. 30, 2013); *In re Franchi Equip. Co.*, 452 B.R. 352 (Bankr. D. Mass. 2011); *In re Mid-States Express, Inc.*, 433 B.R. 688 (Bankr. N.D. Ill. 2010); *In re NSCO, Inc.*, 427 B.R. 165 (Bankr. D. Mass. 2010); *In re Trans-Indus., Inc.*, 419 B.R. 21 (Bankr. E.D. Mich. 2009); *In re AB & C Grp.*,

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432 F.3d 590, 595 (5th Cir. 2005) ("Importantly, § 330 is not applicable to attorney fees derived from a source other than the debtor's estate."); *In re Engel*, 124 F.3d 567, 571-572 (3d Cir. 1997) (Review of an application for compensation "must be made under § 330[] when the estate has been benefited and is to pay for the beneficial services."); *David & Hagner, P.C.* v. *DHP, Inc.*, 171 B.R. 429, 437 (D.D.C. 1994) ("[T]he bankruptcy court has no authority to award compensation from sources other than the estate."), aff'd, 70 F.3d 637 (D.C. Cir. 1995); *In re McDonald Bros. Constr., Inc.*, 114 B.R. 989, 994 (Bankr. N.D. Ill. 1990) ("[A]n award of compensation under Section 330 is necessarily payable from the estate."); but see *In re 5900 Assocs., Inc.*, 468 F.3d 326, 330 (6th Cir. 2006) (finding that Section 330 is not limited to "fees that will be drawn from the bankruptcy estate").

*Inc.*, 411 B.R. 284 (Bankr. N.D. W. Va. 2009)).[6] Such a conflict generally does not warrant this Court's review. See Sup. Ct. R. 10(a).

2. Petitioner further contends (Pet. 21-25) that the Court should address whether a Chapter 7 trustee is entitled to "derived judicial immunity" in connection with his performance of duties as an ERISA plan administrator. In petitioner's view, the threat of potential liability and of a six-year statute of limitations under ERISA might make trustees "hesitant to make final distributions" and close bankruptcy cases. Pet. 23. But petitioner identifies only one decision as having "squarely addressed the issue of the Trustee's derived judicial immunity in connection with the performance of his 11 U.S.C. § 704(a)(11) duties." Pet. 19. That decision concluded that "a trustee's discharge does *not* relieve him from potential liability for breach

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[6] Petitioner contends that four of the six bankruptcy-court decisions conflict with the decision below. Pet. 18-21. But two of the allegedly conflicting decisions involved authority over applications for compensation *from the bankruptcy estate* and are therefore distinguishable. See *NSCO*, 427 B.R. at 171 (noting that the Department of Labor did not dispute the bankruptcy court's jurisdiction because the fees and expenses of terminating the ERISA plan were "being borne by the bankruptcy estate"); *Trans-Indus.*, 419 B.R. at 30-31, 33 (holding that the proceeding was not a core proceeding but was sufficiently "related to" the bankruptcy case to be a non-core proceeding, because the trustee had already used estate assets to pay for plan-administration services and the plan could ultimately be required to reimburse the bankruptcy estate); see also *Negus-Sons*, 2013 WL 4674917, at *2-*3 (discussing other bankruptcy-court decisions and finding, in the absence of "contrary guidance from a higher court," that a bankruptcy court may "order payment of the professional expenses from ERISA assets"; further rejecting union's objection to "the use of funds of the bankruptcy estate to pay expenses related to the ERISA plans").

of his fiduciary duties in administering estate assets," and that "[a]ctions arising out of [the trustee's] performance of his duties under § 704(a)(11) *may be brought* even after the bankruptcy is closed." *NSCO*, 427 B.R. at 182-183 (emphases added).[7]

In any event, the court of appeals did not consider when a trustee would be able to receive immunity for performing ERISA-plan-administration obligations, and the question was addressed only briefly by the district court, as part of its discussion of non-core jurisdiction. See Pet. App. 31a-32a. There is accordingly no conflict between the decision below and that of any other court, and no reason for this Court to depart from its usual practices by addressing the question in the first instance.[8]

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[7] As noted above (see note 6, *supra*), *NSCO* involved payment of plan-administration expenses from the bankruptcy estate, not from the assets of the plan.

[8] There is likewise no sound reason for the Court to hold the petition pending its disposition of *Campbell-Ewald Co.* v. *Gomez*, No. 14-857 (to be argued Oct. 14, 2015). The Court granted review in *Campbell-Ewald* to decide, *inter alia*, whether a government contractor is entitled to "derivative sovereign immunity" under the circumstances of that case. See 14-857 Pet. i. Although petitioner's assertion that he possesses "derived judicial immunity" bears at least an attenuated relation to that issue, this case does not involve any actual suit against petitioner; the court of appeals did not address whether petitioner could assert "derived judicial immunity" from such a suit; and the case arises out of a limited interlocutory appeal on a narrow question of bankruptcy-court authority. There is consequently no meaningful prospect that the Court's decision in *Campbell-Ewald* will shed light on the proper disposition of petitioner's appeal.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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