No. _____

In the Supreme Court of the United States

PEGGY A. BERG,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Bankruptcy Code Section 553(b), regarding when "a creditor offsets a mutual debt owing" and "the date of such setoff," does this require that the debt be "absolutely owed" (as the Fifth Circuit held) or can a setoff occur at some earlier time, even where conditions such as continued disability and survival through a later date have not yet occurred (as the Third and Seventh Circuits held)?

PARTIES TO THE PROCEEDING

Petitioner, Debtor-Appellant below, is Peggy Berg. Respondent, Appellee below, is the Social Security Administration, an agency of the federal government.

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JURISDICTION

The Seventh Circuit opinion that should be reviewed is dated August 17, 2018. *Id.* This Court has jurisdiction to issue a writ of certiorari to Seventh Circuit pursuant to 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. Section 553(b):

> (1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—
>
> > (A) 90 days before the date of the filing of the petition; and
> >
> > (B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

(2) In this subsection, "insufficiency" means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

STATEMENT OF THE CASE

The parties agreed and stipulated as follows:

The facts in this case are undisputed. The only dispute is the legal effect of those facts, and so all that is needed is legal argument for the Court to make its determination.

SSA paid Berg benefits from June 1994 through December 2003, although Berg notified SSA of her re-employment in mid-2002. That resulted in an overpayment of $25,690.60 as of December 2003; pursuant to a payment plan, Berg paid that debt down to $19,400 as of July 2014. Berg petitioned for bankruptcy relief on August 7, 2014. Berg made a separate claim for benefits in the first half of 2014, and SSA awarded Berg forward benefits (that are not at issue) plus $20,307 in back-paid benefits – but SSA did not pay that full amount, but rather subtracted the prior debt of $19,400, paying the difference of $907.

The question present is whether or not SSA owes Berg that $19,400. Was the debt discharged pursuant to the Court's Chapter 7 discharge order entered January 9, 2015? Do Sections 553(b) and 522(h) apply to allow Berg to recover that insufficiency setoff, or do those provisions not apply in this situation? Berg asserts that she is entitled to recover that

> $19,400. SSA asserts that it was entitled to take that setoff.

Appendix B. The lower courts had jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334.

REASONS FOR GRANTING THE PETITION

I. There is a conflict among the Circuits.

There is a conflict between the Third, Fifth, and Seventh Circuits' interpretation of Section 553(b), specifically, when a prior debt becomes "owing" and thus subject to the section's offset prohibitions. The Fifth Circuit's rule is that a debt must be "clearly owed" and "absolutely owed" to come within Section 553(b).[1] The Third[2] and Seventh Circuit[3] hold that clear or absolute liability is not required, that even a "contingent" debt is already "owing."

The Fifth Circuit's rule is also the law in a state court of appeals and U.S. District Courts which wrote that "substantial case law" and a "significant amount of legal authority" holds that "owing" debts for Section 553(b) purposes must be "absolutely owing," that is, when a "definite liability has accrued."[4]

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[1] *Braniff Airways, Inc. v. Exxon Co., U.S.A.*, 814 F.2d 1030, 1036 (5th Cir. 1987).

[2] *Lee v. Schweiker*, 739 F.2d 870, 877 (3d Cir. 1984).

[3] The opinion below: Appendix A, 12-13.

[4] *Scott v. Majors*, 980 P.2d 214, 219-20 (Ct. App. Utah, 1999); *In re Pleasant*, 320 B.R. 889, 892 (Bankr. N.D. Ill. 2004) (*citing in re Eggemeyer*, 75 B.R. 20, 21-22 (Bankr. S.D. Ill. 1987)); *in re Rozel*

A bankruptcy court in the Fourth Circuit not only uses this "absolutely owing" test but also did so with essentially the same operative facts and came to the opposite conclusion as the opinion below.[5] That case, *in re Goodman*, held that the SSA's offset occurred upon the SSA's decision and notice of offset.[6] Berg argues that this is the correct interpretation.

II. Cases of this kind are common but involve small amounts of money and so are rarely litigated through appeals. As such, this issue merits the Court's review.

This issue is important because it involves the SSA's nationwide administration regarding billions of dollars of overpayments. Still, because of the small monthly payments due to any individual, few are motivated to litigate or prosecute an appeal – making this case an uncommon opportunity to give guidance on an issue rarely addressed by appeals courts.

According to the SSA's own statistics for 2016 (the most recent year of record), nationwide the SSA's overpayments (called supplemental security income or "SSI") totaled $4,323,930,000.[7] This is 7.62% of the

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Ind., Inc., 120 B.R. 944, 949 (Bankr. N.D. Ill. 1990) (*citing* 4 Collier on Bankruptcy, ¶ 553.10(2 (15th ed. 1982)); *in re Goodman*, Case No. 11-02760-8-JRL, Dkt. #51 (2012 Bankr. LEXIS 546) (E.D.N.C. Bankr., filed Feb. 17, 2012).

[5] *In re Goodman*, Case No. 11-02760-8-JRL, Dkt. #51 (2012 Bankr. LEXIS 546) (E.D.N.C. Bankr., filed Feb. 17, 2012)

[6] *Id.* at *6.

[7] www.ssa.gov/improperpayments/SSI_progStats.html

total payments made.[8] This is worse than the prior two years: overpayments totaled $3.4 billion (6.06%) in 2015 and $3.9 billion (6.95%) in 2014.[9] These overpayments accrue and remain subject to recoupment indefinitely.[10] A major cause of such overpayments is a under-estimation of the recipient's wage income, where the SSA's payments did not decrease to properly take that into account.[11] This is the same issue that impacted Berg.[12] These overpayments are spread over a very large number of people: standard monthly payments are $771 for individuals and $1,157 for couples.[13] Depending on the precise amounts per month and number of months, this amounts to hundreds of thousands or millions of people becoming liable for overpayments each year.

There are hundreds of thousands of individuals filing for Chapter 7 (no-asset) bankruptcy each year.[14] Chapter 7 (no-asset) bankruptcy filers are disproportionately those receiving SSI: by their nature,

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[8] *Id.*

[9] *Id.*

[10] *See* 42 U.S.C. § 404(a)(1)(A) (requiring repayment from "such overpaid person or his estate" such as via recoupment/offset from future SSI payments or even tax refunds).

[11] www.ssa.gov/improperpayments/SSI_majorCauses.html

[12] Appendix B

[13] www.ssa.gov/oact/cola/SSI.html

[14] www.uscourts.gov/news/2018/04/26/bankruptcy-filings-continue-decline

SSI is paid only to those with little or no wages and little or no assets.[15] All SSI recipients are subject to *at least* a 6-month waiting period, after applying for benefits and before being eligible for any payments.[16]

This equates to thousands of people per year who would benefit from the Court's guidance, under the assumptions that 10% of the hundreds of thousands of Chapter 7 (no-asset) bankruptcy filings per year are liable to repay an SSI overpayment, and 10% of those are being pursued for the overpayment. Though this analysis is imprecise, the conclusion is that this is a widespread problem.

Perhaps the most important takeaway from these statistics is the small amounts at issue in each case, giving little incentive for benefit recipients to exhaust their litigation options with result to such matters. It takes a clear case with undisputed facts, like this one, for the circumstances to reasonably permit the prosecution of appeals. The Court should take this opportunity to provide guidance on this topic.

A finding in Berg's favor would yield benefits to perhaps thousands of the poorest citizens of our nation each year. Even if the Court takes this case and affirms, the clarity provided would be valuable to a host of SSI-benefit recipients in similar circumstances. A uniform rule would also assist the SSA by

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[15] *See id.* (Payments are improper when an individual has more than $2000 in resources available. Actual wages also decrease SSI payments. Still, both of these remain major causes of SSI overpayments.)

[16] 42 U.S.C. § 423(a)(1), (c)(2); 20 C.F.R. § 404.320(b)(4).

harmonizing the treatment of SSI recipients nationwide, rather than subjecting different people to different rules depending on where they live.

III. The Seventh Circuit's rule conflicts with the statutory language.

The effects of when "a creditor offsets" depends on "the date of such setoff." 11 U.S.C. § 553(b). The Seventh Circuit's rule practically eliminates this consideration. This erroneous rule ignores the reality that recipients are not entitled to any benefits unless and until they wait and survive until the end of a 6-month waiting period.[17] This erroneous rule ignores the fact that the SSA did not give any notice of benefits or notice of setoff until the opening of the same 90-day window,[18] thus failing to give any meaning to Section 553(b)'s language being triggered when "a creditor offsets."

The rule is also inconsistent with *dicta* in this and other courts' rulings noting that a setoff requires some amount of action or notice by the offsetting party. *Ames v. Quimby*, 106 U.S. 342, 343 (1882) (noting in a non-bankruptcy case that a setoff is taken "with a notice of setoff"); *Bible v. United Student Aid Funds, Inc.*, 799 F.3d 633, 648 (7th Cir. 2015) (summarizing federal offset programs that require notice before the taking of a setoff); *in re Radcliffe*, 563 F.3d 627, 631 (7th Cir. 2009) (noting a creditor announced its offset decision via letter giving notice). These are not direct conflicts,

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[17] 42 U.S.C. § 423(a)(1), (c)(2); 20 C.F.R. § 404.320(b)(4).

[18] Appendix B.

but they support the need for the Court's guidance in this area.

CONCLUSION

The Court should review the underlying decision to resolve a circuit split and provide guidance on this important issue affecting thousands of people nationwide each year.

Respectfully Submitted,

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