

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

**Case No. 1:14-cv-01163-RPM**

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PENSION BENEFIT GUARANTY	)
CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)
	)
ENDODONTIC SPECIALISTS OF	)
COLORADO, P.C.,	)
	)
Defendant and Third-Party Plaintiff,	)
	)
v.	)
	)
TPA SERVICES, INC.,	)
	)
Third-Party Defendant.	)

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**PBGC’S REPLY IN SUPPORT OF ITS MOTION TO SEVER,  
OR IN THE ALTERNATIVE, TRY SEPARATELY  
ENDODONTIC’S THIRD-PARTY CLAIMS**

The Pension Benefit Guaranty Corporation (“PBGC”) files this reply in support of its motion to sever, or alternatively, try separately Endodontic Specialists of Colorado, P.C.’s (“Endodontic”) third-party claims against TPA Services, Inc. (“TPA”). Endodontic’s response confirms why it is appropriate for the Court to address the third-party claims separately. PBGC seeks to enforce its administrative determination that Endodontic failed to pay all required benefits during the termination of its pension plan. Endodontic’s third-party claims against TPA assert breach of contract and negligence. Although both sets of claims concern Endodontic’s

pension plan, resolution of the third-party claims will require different factual findings, a different legal analysis, and, ultimately, a different standard of review. Accordingly, the Court should grant PBGC's motion.

## **BACKGROUND**

PBGC is a wholly owned United States government corporation and federal agency established to administer the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").<sup>1</sup> Endodonic sponsored the Endodonic Specialists of Colorado, P.C. Defined Benefit Pension Plan (the "Plan"), a defined-benefit pension plan covered by Title IV of ERISA. After Endodonic terminated the Plan, PBGC audited that termination to determine compliance with Title IV of ERISA. PBGC determined that Endodonic had failed to pay certain participants their full benefits as required under the Plan and ERISA, and filed this action to enforce its administrative determination.<sup>2</sup> In addition to answering PBGC's Complaint, Endodonic filed the Third-Party Complaint against TPA, which alleges negligence and breach of contract in connection with TPA's administration of the Plan and its termination. PBGC moved to sever the third-party claims, and Endodonic filed its response.<sup>3</sup>

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<sup>1</sup> 29 U.S.C. §§ 1301-1461 (2012).

<sup>2</sup> PBGC has filed the administrative record supporting its determination against Endodonic. *See generally* Administrative Record, Docket No. 11.

<sup>3</sup> Based on the Court's local rules, Endodonic's response appears to be untimely. PBGC filed its motion on July 1, 2014, and Endodonic filed its response on July 24, 2014. *See* Docket Nos. 16, 19. Pursuant to the Court's local rules, "[t]he responding party shall have 21 days after the

## ARGUMENT

### I. The Third Party Claims Are Not Dependent on PBGC's Administrative Enforcement Action.

In its response, Endodontic argues that the Court should deny PBGC's motion to sever because the third-party claims are dependent upon the Court's decision in PBGC's administrative enforcement action. Endodontic broadly declares that it "seeks indemnification from TPA for any liability it incurs from PBGC's action."<sup>4</sup> This argument overlooks the separate nature of the third-party claims.

A third-party complaint may only be asserted "when the third-party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant."<sup>5</sup> While both PBGC's enforcement action and Endodontic's third-party claims reference the Plan and its termination, Endodontic's third-party claims are not derivative of the PBGC claim, nor is there any secondary liability.<sup>6</sup> PBGC seeks to enforce its administrative

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date of service of a motion . . . in which to file a response." D.C.COLO.LCivR. 7.1(d). To determine the date of service, the rules provide that "[w]hen a pleading or paper is filed it is served electronically [as it was here,] . . . [and t]he time to respond . . . is calculated from the date of electronic service, regardless of whether other means of service are used." D.C.COLO.LCivR 5.1(d).

<sup>4</sup> Resp. to Pl.'s Mot. to Sever, or in the Alternative, Try Separately Endodontic's Third-Party Claims (hereinafter "Endodontic Resp."), Docket No. 19, at 3.

<sup>5</sup> *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1309 (D. Colo. 1984).

<sup>6</sup> See *L & W Innovations, LLC v. Linli Constr. Inc.*, No. 07-00563, 2009 WL 189942, at \*2 (D. Colo. Jan. 27, 2009) (noting that third-party practice is only appropriate where the third-party defendant will be derivatively or secondarily liable to the defendant) (citation omitted).

determination that Endodontic failed to pay certain participants their full Plan benefit as required under the Plan and Title IV of ERISA.<sup>7</sup> This claim will be determined pursuant to a review of PBGC's administrative record under 5 U.S.C. § 706.<sup>8</sup> If the Court enforces PBGC's determination, then Endodontic, as the Plan's administrator and contributing sponsor, will be solely responsible for paying the additional Plan benefits.<sup>9</sup>

In contrast, Endodontic's third-party claims are based upon TPA's alleged liability for breach of contract and negligence. To prevail on these claims, Endodontic must establish all of the elements of negligence and breach of contract against TPA.<sup>10</sup> TPA's duties and obligations must be established, and the means by which TPA carried out such duties and obligations must be examined. Consequently, it is not axiomatic that if Endodontic owes Plan participants additional benefits, TPA is responsible. Accordingly, given the separate nature of these claims, the Court should grant PBGC's motion.

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<sup>7</sup> See generally PBGC Compl., Docket No. 1, at 6-10.

<sup>8</sup> See 5 U.S.C. § 706(2); see also *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579-80 (10th Cir. 1994).

<sup>9</sup> See, e.g., 29 U.S.C. §§ 1341(b), 1344(a); 29 C.F.R. §§ 4041.22, 4041.28.

<sup>10</sup> See, e.g., *Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo. 2002) (providing the elements of a negligence claim); *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (providing the elements of a breach of contract claim). For its negligence claim, Endodontic must establish that TPA owed Endodontic a legal duty of care, breached that duty of care, and that Endodontic was injured as a result. See *Ryder*, 54 P.3d at 889 (citation omitted). For its breach of contract claim, Endodontic must show the existence of a contract, performance by Endodontic, a failure to perform by TPA, and resulting damage. *W. Distrib.*, 841 P.2d at 1058.

## **II. Severing the Third-Party Claims, or Trying those Claims Separately, Will Support Judicial Economy.**

Endodontic further argues that combining PBGC's administrative enforcement action and the third-party claims is appropriate because both cases require a determination of "whether the Plan was properly terminated and whether TPA applied the correct formula for determining the amounts due certain plan participants."<sup>11</sup> Endodontic asserts that such claim cannot be resolved without scrutinizing TPA's actions. For example, Endodontic alleges that TPA failed "to timely advise [Endodontic] about and/or provide the Plan amendment" necessary to amend the Plan's actuarial assumptions for calculating lump sum payments.<sup>12</sup> As a result, Endodontic suggests that it is logical to include TPA in adjudicating PBGC's enforcement action.

Contrary to Endodontic's assertions, the Court's analysis of PBGC's enforcement action does not depend upon any scrutiny of TPA's actions. PBGC's action depends upon whether the administrative record supports its determination that Endodontic failed to provide certain Plan participants their full benefit as required under the terms of the Plan and Title IV of ERISA. So, although TPA's advice to Endodontic with respect to amending the Plan will likely be critical to the Court's assessment of Endodontic's third-party claims for negligence and breach of contract,

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<sup>11</sup> Endodontic Resp. at 4.

<sup>12</sup> Answer and Third Party Compl., Docket No. 9, at 12 ¶ 37.

those claims will require discovery and findings that are wholly independent from any issue necessary to consider in deciding PBGC's enforcement action on an administrative record.<sup>13</sup>

As a final note, PBGC is not seeking to have Endodontic's third-party claims dismissed or stricken. PBGC is only seeking to have the third-party claims severed from this action or otherwise tried separately. There is no legitimate dispute that proceeding with the third-party claims simultaneously will complicate the resolution of PBGC's claims against Endodontic. The third-party claims involve different facts, separate legal issues, and may ultimately require a trial.<sup>14</sup> As a result, including the third-party claims will delay resolution of PBGC's enforcement action, and thereby delay Endodontic's payment of additional benefits to the Plan participants.

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<sup>13</sup> Endodontic also references all issues being "decided expeditiously and simultaneously on the same record," but overlooks the fundamental differences between PBGC's enforcement action (which will be determined on the administrative record) and Endodontic's tort and contract claims (which will require discovery). Endodontic Resp. at 1. *See U.S. Fidelity & Guar. Co. v. Perkins*, 388 F.2d 771, 773 (10th Cir. 1968) ("If impleading a third party defendant would require the trial of issues not involved in the controversy between the original parties without serving any convenience, there is no good reason to permit the third-party complaint to be filed.").

<sup>14</sup> *Saine*, 582 F. Supp. at 1309 (D. Colo. 1984) (determining that a third-party matter should not be allowed to proceed if it would prejudice the plaintiff and would unduly complicate the trial).

## CONCLUSION

Accordingly, PBGC requests that the Court grant its motion and sever Endodontic's third-party claims, or in the alternative, try those claims separately.

Respectfully submitted,

Dated: August 6, 2014.  
Washington, D.C.

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