

**CASE NO. 11-15079**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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Durango-Georgia Paper Company, *et al.*,  
Appellants,

vs.

H.G. Estate, LLC *et al.*  
Appellees.

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On Appeal from the United States District Court  
For the Southern District of Georgia, Brunswick Division

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LETTER BRIEF OF AMICUS CURIAE  
PENSION BENEFIT GUARANTY CORPORATION

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December 9, 2013

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**CERTIFICATION UNDER FRAP 26.1 AND 11<sup>TH</sup> CIRCUIT R. 26.1-1**

Undersigned counsel for *amicus curiae* Pension Benefit Guaranty Corporation (“PBGC”) certifies that PBGC is an agency and wholly owned corporation of the United States government and has no subsidiaries, affiliates, or shareholders. To the best of PBGC’s knowledge and belief, the only entities with an interest in the outcome of this appeal are those identified by the principal parties in their briefs to the Court.



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Office of the Chief Counsel

John Ley, Clerk of Court  
United States Court of Appeals  
for the Eleventh Circuit  
56 Forsythe Street N.W.  
Atlanta, GA 30303

**Re: November 12, 2013 Letter Brief Request in *Durango-Georgia Paper Co., et al. v. H.G. Estate, et al.*, Appeal No. 11-15079**

Dear Mr. Ley:

On November 12, 2013, the Court issued a bench memorandum asking that the parties file letter briefs addressing the following question:

Whether 29 U.S.C. § 1370 authorizes a bankruptcy trustee to recover for the benefit of the bankruptcy estate and its unsecured creditors money a predecessor contributing sponsor owes, pursuant to 29 U.S.C. § 1369, to the Pension Benefit Guaranty Corporation as the terminated pension plan's insurer and trustee?

The Pension Benefit Guaranty Corporation ("PBGC") is the federal agency Congress established to administer and enforce the nation's pension insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"). As the agency responsible for administering the statutory

provisions in question, PBGC believes it will be helpful for the Court to have PBGC's views.<sup>1</sup> As the Supreme Court has noted:

We have traditionally deferred to the PBGC when interpreting ERISA, for “to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass.” *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 725-726 (1989) (internal quotation marks omitted); see also *LTV Corp.*, 496 U.S., at 648, 651.<sup>2</sup>

The short answer to the question posed by the Court is that 29 U.S.C. § 1370 authorizes the bankruptcy trustee (the “Trustee”) to use 29 U.S.C. § 1369 to seek equitable relief, but any monetary recovery ultimately resulting from a successful assertion of section 1369 is payable solely to PBGC under 29 U.S.C. § 1362.

This conclusion, which both parties recognize in their letter briefs, is compelled by the plain language of, and relationship between, sections 1362, 1369, and 1370,<sup>3</sup> as PBGC explains below.

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<sup>1</sup> As an agency of the United States, PBGC may file an *amicus curiae* brief without leave of Court. Fed. R. App. Proc. 29(a). Through its independent litigating authority, PBGC may represent itself. 29 U.S.C. § 1302(b)(1).

<sup>2</sup> *Beck v. PACE Int'l Union*, 551 U.S. 96, 104 (2007).

<sup>3</sup> Statutory references such as “section 1362” refer to provisions of Title 29 of the U.S. Code. Narrative references to a “Title” of ERISA refer to the public law titles. Title IV of ERISA is codified at 29 U.S.C. §§ 1301-1461. Title I of ERISA is codified at 29 U.S.C. §§ 1001-1191c.

## 1. Section 1362

Section 1362 is the principal employer liability provision of Title IV of ERISA. When a pension plan that is covered by Title IV terminates with insufficient assets to cover its benefit liabilities, the contributing sponsor of the plan and each member of its “controlled group” are jointly and severally liable to PBGC.<sup>4</sup> Under section 1362(b), “the liability to the corporation . . . shall be the total amount of the unfunded benefit liabilities.”

Because Durango-Georgia Paper Company’s (“Durango”) pension plan (the “Pension Plan”) terminated during Durango’s bankruptcy, PBGC asserted claims in Durango’s bankruptcy, including a claim for the pension plan’s underfunding under section 1362(b). Those claims, which are still pending in the bankruptcy court, assert liability jointly and severally against Durango and each member of its controlled group. Durango then filed suit against the former owners of Durango, alleging that under section 1369, they, too, were liable for the plan’s termination liability.

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<sup>4</sup> A “controlled group” is two or more trades or businesses under common control, often in a parent-subsidary or brother-sister relationship. *See* 29 U.S.C. § 1301(a)(14); I.R.C. § 414(b) & (c); 29 C.F.R. § 4001.3; 26 C.F.R. § 1.414(c)-1 *et seq.*

## 2. Section 1369

Section 1369, where applicable, adds parties to the entities that are jointly and severally liable to PBGC under section 1362. Section 1369(a) provides that:

If a principal purpose of any person in entering into any transaction is to evade liability to which such person would be subject under this subtitle and the transaction becomes effective within five years before the termination date of the termination on which such liability would be based, then such person and the members of such person's controlled group . . . shall be subject to liability under this subtitle in connection with such termination as if such person were a contributing sponsor of the terminated plan as of the termination date.<sup>5</sup>

Thus, successful assertion of section 1369(a) effectively makes parties that left the controlled group liable (or potentially liable) under section 1362. And, as noted, section 1362(b) provides that “liability to the corporation . . . shall be the total amount of the unfunded benefit liabilities.” Thus, as the parties agree, any recovery on that liability inures solely to the benefit of PBGC.

In this case, on the Pension Plan’s termination date, Durango’s former owners were no longer under common control with Durango. But the Pension Plan terminated within five years of the sale of Durango, so the predecessor is

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<sup>5</sup> 29 U.S.C. § 1369(a).

potentially liable under section 1362, via the operation of section 1369, *if* it can be established that a principal purpose of the sale of Durango was to evade the Title IV liabilities associated with the Pension Plan.

### **3. Section 1370**

Section 1370 is a general civil enforcement provision of Title IV of ERISA. It applies to actions other than those to which PBGC is an original party.<sup>6</sup> Actions brought under section 1370 are aimed at enforcing or vindicating six other sections of Title IV of ERISA:

- sections 1341 and 1342, which concern the process of pension plan termination by plan sponsors and PBGC, respectively;
- sections 1362, 1363, and 1364, which concern liability for pension obligations; and
- section 1369, which provides special rules for determining the composition of entities that are liable for the obligations of a terminated pension plan.

Section 1370(a) also specifies the persons that may bring an action under that section -- the plan sponsor (including members of its controlled group), plan participants and beneficiaries, and plan fiduciaries.

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<sup>6</sup> Actions in which PBGC is an original party are governed by 29 U.S.C. § 1303(e) and (f). PBGC may also intervene in any action that is brought under section 1370. 29 U.S.C. § 1370(d).

Thus, section 1370 broadly authorizes certain of a pension plan's private stakeholders, when "adversely affected" by another party's act, to enforce several sections of Title IV. This network of civil enforcement is part of ERISA's "comprehensive and reticulated" enforcement scheme.<sup>7</sup> In this case, the Trustee, as the successor to the plan sponsor and plan administrator,<sup>8</sup> is authorized to bring an action to enforce section 1369.

A key aspect of section 1370 is its limitation of the relief available. The three forms of relief available under section 1370 are (i) an injunction against any act or practice that violates any provision of the above-listed sections of the statute, (ii) appropriate equitable relief to redress such a violation, and (iii) appropriate equitable relief to enforce one of these provisions. The inability to recover money for itself, however, does not in itself preclude enforcement of section 1369 by a party authorized to do so under section 1370.

#### **4. Conclusion**

Section 1370 authorizes the Trustee to bring an action under section 1370 and 1369 for equitable relief. If, as a result, Appellees become liable under section 1362, any payment of that liability would run solely to PBGC, and not to the Trustee or the bankruptcy estate. That the Trustee is limited by section 1370 to

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<sup>7</sup> *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

<sup>8</sup> *See* 11 U.S.C. § 704(a)(11).

injunctions or other equitable relief does not mean that the Trustee is without standing. If the Trustee succeeds in obtaining equitable relief enforcing section 1369, it might benefit PBGC or the other creditors of the estate.

Respectfully Submitted,

Dated: December 9, 2013

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**CERTIFICATE OF SERVICE**

I, Nathaniel Rayle, certify that on December 9, 2013, true and correct copy of the Pension Benefit Guaranty Corporation letter brief was served via the Court's CM/ECF filing system.

/s/ Nathaniel Rayle  
Nathaniel Rayle