

**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. |) |

**MEMORANDUM OF LAW IN SUPPORT OF THE
PENSION BENEFIT GUARANTY CORPORATION’S
MOTION TO SEVER, OR IN THE ALTERNATIVE,
TRY SEPARATELY ENDODONTIC’S THIRD-PARTY CLAIMS**

Plaintiff, Pension Benefit Guaranty Corporation (“PBGC”), moves pursuant to Fed. R. Civ. P. 14(a)(2) to sever the third-party claims asserted by Defendant/Third-Party Plaintiff, Endodontic Specialists of Colorado, P.C. (“Endodontic”), against Third-Party Defendant, TPA Services, Inc. (“TPA”). In the alternative, PBGC requests that the third-party claims be tried separately from PBGC’s claims against Endodontic.

PBGC filed this action against Endodontic in order to enforce its administrative determination concerning the standard termination of the Endodontic Specialists of Colorado,

P.C. Defined Benefit Pension Plan (the “Plan”). Thereafter, Endodontic filed a Third-Party Complaint against TPA asserting negligence and breach of contract in connection with TPA’s administration of the Plan. Although both complaints reference the Plan and its termination, Endodontic’s third-party claims are not derivative of the underlying action between PBGC and Endodontic, and the outcome of those third-party claims is not dependent upon the outcome of PBGC’s action. Simply stated, the third-party claims are based on Endodontic’s independent causes of action against TPA. Moreover, the third-party claims would unduly delay a determination on PBGC’s administrative record. Finally, severing the third-party claims, or trying them separately, would promote judicial efficiency and not prejudice any party. Accordingly, PBGC respectfully requests that the Court sever the third-party claims of Endodontic, or in the alternative, try those claims separately.

Pursuant to D.C.COLO.LCivR 7.1(a), PBGC has conferred with counsel for Endodontic, who opposes the relief requested in PBGC’s motion. At this time, TPA has not answered Endodontic’s Third-Party Complaint, or otherwise appeared in this action. Therefore, PBGC has been unable to confer with TPA or its counsel about the relief requested in this motion.

BACKGROUND

PBGC is a wholly owned United States government corporation established under 29 U.S.C. § 1302(a) to administer the provisions of the pension insurance program under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”).¹ Title IV of

¹ 29 U.S.C. §§ 1301-1461.

ERISA provides that a pension plan with sufficient assets to pay all benefit liabilities may be terminated in a “standard termination” under 29 U.S.C. § 1341(b). Pursuant to 29 U.S.C. § 1303(a), PBGC is required to audit a statistically significant number of standard terminations under 29 U.S.C. § 1341(b) to determine whether participants and beneficiaries have received their full plan benefit.

Endodontic is the contributing sponsor of the Plan.² Effective May 15, 2009, Endodontic terminated the Plan in a standard termination under 29 U.S.C. § 1341(b). PBGC subsequently audited the Plan’s standard termination and determined that violations of Title IV of ERISA and the Plan had occurred. PBGC filed the instant action against Endodontic to enforce its administrative determination on April 24, 2014. PBGC’s determination is based solely on the administrative record. Endodontic, as the Plan’s contributing sponsor and administrator, is responsible for remedying violations of Title IV of ERISA and the Plan that have occurred with respect to the standard termination of the Plan. Thus, Endodontic is liable for additional distributions to certain Plan participants and beneficiaries, in accordance with PBGC’s audit determinations pursuant to 29 U.S.C. §§ 1303 and 1341. Endodontic filed its Answer and Third-Party Complaint on May 29, 2014.

ARGUMENT

Federal Rule of Civil Procedure 14(a)(4) provides that “[a]ny party may move to strike the third-party claim, to sever it, or try it separately.” The Court has sound discretion in granting

² 29 U.S.C. § 1301(a)(13).

such relief.³ Federal Rule 14 is intended to resolve related matters within one litigation “and obtain consistent results from identical or similar evidence, thus preventing a duplication of effort for the courts and serving the interests of judicial economy.”⁴ While Federal Rule 14 should be construed liberally, it is not a catchall for independent litigation.⁵

Federal Rule 14(a) permits third-party practice where the third-party defendant is or may become liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.⁶ “This standard contemplates that a third-party claim is derivative of an original claim in the action.”⁷ Specifically, 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.”⁸ In addition, the third-party claim must depend, at

³ *First Nat’l Bank of Nocona v. Duncan Savs. & Loan Ass’n*, 957 F.2d 775, 777-78 (10th Cir. 1992).

⁴ *Patten v. Knutzen*, 646 F. Supp. 427, 429 (D. Colo. 1986).

⁵ *U.S. Fidelity & Guar. Co. v. Perkins*, 388 F.2d 771, 773 (10th Cir. 1968) (holding that “[i]f 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”) (internal quotes and citation omitted).

⁶ *Maxfour Eng’rs & Architects, LLC v. ARB, Inc.*, 233 F.R.D. 602, 605 (D. Colo. 2006).

⁷ *Country Mut. Ins. Co. v. Rocky Mountain Constr. Co.*, 2013 WL 438940, *1 (D. Colo. Feb. 5, 2013) (citing *King Fisher Marine Serv., Inc. v. 21st Phoenix Corp.*, 893 F.2d 1155, 1158 n. 1 (10th Cir. 1990)).

⁸ *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1309 (D. Colo. 1984) (determining that a third-party complaint must be dismissed in its entirety because it did not derive from the original complaint and liability did not depend on the outcome of the underlying action).

least in part, upon resolution of the primary action.⁹ Finally, the third-party claim must be based on the same set or core facts as the primary dispute.¹⁰

PBGC is not requesting that the Court strike or dismiss Endodontic's Third-Party Complaint against TPA. Rather, PBGC requests that the Court sever the third-party claims, or alternatively, try the third-party claims separately. PBGC seeks to enforce a final agency determination against Endodontic based on a review of PBGC's administrative record pursuant to 5 U.S.C. § 706.¹¹ Specifically, PBGC asserts that Endodontic is liable to certain Plan participants and beneficiaries for additional benefits due to violations of Title IV of ERISA in connection with Endodontic's standard termination of the Plan.¹² Endodontic's third-party claims against TPA are based upon a contract between Endodontic and TPA and the common law of torts.¹³ These claims are not derivative of PBGC's claims against Endodontic, which arise under Title IV of ERISA and the Administrative Procedures Act.¹⁴

Moreover, the resolution of PBGC's claims against Endodontic and the third-party claims will require the Court to review different sets of facts. PBGC's claims against Endodontic will be reviewed against the administrative record, which PBGC has filed with the Court.

⁹ *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978).

¹⁰ WRIGHT, MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE, Civil 2d § 1444.

¹¹ *See generally* Compl. ¶¶ 2-3.

¹² *See generally* Compl. at 6-9.

¹³ *See generally* Answer and Third-Party Complaint ¶¶ 31-42.

¹⁴ Endodontic's third-party claims do not arise under Title IV of ERISA or the Administrative Procedure Act.

Endodontic's third-party claims against TPA will require discovery, and may involve findings of fact that are separate and independent from PBGC's administrative record. Just as the facts in PBGC's administrative record may have little bearing on the ultimate resolution of Endodontic's breach of contract and negligence claims against TPA, any discovery conducted in connection with those third-party claims will not assist in the Court's resolution of the PBGC's claims against Endodontic.

Similarly, Endodontic's third-party claims against TPA are neither dependent on the outcome of the underlying action, nor is TPA secondarily liable to Endodontic. If the Court issues a decision enforcing PBGC's administrative determination against Endodontic, Endodontic must still prove all of the elements of negligence and breach of contract in its third-party claims against TPA.¹⁵ And, a decision in favor of PBGC will not make TPA automatically liable to Endodontic under ERISA or the Plan; nor will it make TPA automatically liable to Endodontic because of any indemnification or contribution.¹⁶ Pursuant to Title IV of ERISA, Endodontic alone is responsible for resolving any issues with the Plan's termination.¹⁷

¹⁵ *Ryder v. Mitchell*, 54 P.3d 885, 889 (Colo. 2002) (providing the elements of a negligence claim); *see also W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (listing the elements a party must prove to recover on a claim for breach of contract).

¹⁶ *See L & W Innovations, LLC v. Linli Constr. Inc.*, No. 07-00563, 2009 WL 189942, at *2 (D.Colo. Jan. 27, 2009) (citing *Indep. Liberty Life Ins. Co. v. Fiduciary & Gen. Corp.*, 91 F.R.D. 535, 539 (W.D. Mich. 1982)) (holding that prior to being added as a third-party defendant, it must be established that such third-party defendant will be secondarily or derivatively liable for any loss suffered by the principal defendant in the primary dispute); *see also Am. Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800, 805 (6th Cir. 2008) (opining that "[r]ule 14(a) does not allow a third-party complaint to be founded on a defendant's independent cause of action against a third-party defendant, even though arising out of the same occurrence underlying plaintiff's claim, because a third-party complaint must be founded on a third party's actual or

Finally, allowing the third-party claims to proceed in this action will unduly complicate the resolution of PBGC's claims, and will not promote judicial economy.¹⁸ The third-party claims will require discovery in a case that will be otherwise decided on the now-filed administrative record. The third-party claims may further require a trial on the issues of negligence and breach of contract, whereas PBGC's claims against Endodontic will be decided on briefing for review of agency action. This will result in inconvenience to PBGC, and to the Plan participants and beneficiaries who are owed additional benefits pursuant to PBGC's administrative determination.¹⁹ Accordingly, the Court should sever the third-party-claims in order to promote judicial efficiency and to avoid complicating the issues.

potential liability to the defendant for all or part of the plaintiff's claim against the defendant... . The third-party complaint is in the nature of an indemnity or contribution claim.”); *United States v. Sensient Colors Inc.*, No. 07-1275, 2009 WL 394317, at *11-12 (D.N.J. Feb. 13, 2009) (holding that the proposed third-party complaint was procedurally improper because the proposed third-party defendants could not be liable under the statute in question, so these parties could not be liable for contribution).

¹⁷ *See, e.g.*, 29 U.S.C. §§ 1303, 1341.

¹⁸ *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); *see also U.S. Fidelity & Guar. Co. v. Perkins*, 388 F.2d 771, 773 (10th Cir. 1968) (concluding that there is no good reason to permit the third-party complaint to be filed if that action would require the trial of issues not involved in the controversy between the original parties).

¹⁹ *See generally U.S. Fidelity & Guar. Co.*, 388 F.2d at 773; *see also Saine*, 582 F. Supp. at 1309 (D. Colo. 1984).

CONCLUSION

Accordingly, for the reasons stated above, PBGC respectfully requests that the third-party claims be severed, or in the alternative, tried separately.

Respectfully submitted,

Dated: July 1, 2014.
Washington, D.C.

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