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Office of the General Counsel

B-284479

January 27, 2000

The Honorable Christopher S. Bond
Chairman, Small Business Committee
United States Senate

Subject: Fiduciary Duties of Pension Benefit Guaranty Corporation

Dear Mr. Chairman:

This is in response to the December 8, 1999, letter, signed jointly by you and Chairman Charles E. Grassley of the Special Committee on Aging, concerning the Pension Benefit Guaranty Corporation (PBGC). You refer to a 1986 decision of ours in which we said that, when serving in its trustee capacity, "PBGC is treated as if it were a private fiduciary . . . and possesses the same authority and duty to act as would a nongovernmental party if it were appointed to that position."¹ In light of that statement, you asked us to determine whether "PBGC, as a government corporation, is held to the same fiduciary standard as other entities covered by [the applicable statute]" in protecting the assets of pension plans taken over by it.²

When acting as trustee, PBGC is not held to the same fiduciary standards applicable to other trustees; the law exempts PBGC from those standards to the extent they are inconsistent with its functions as guarantor of benefits for participants in covered pension plans. Our 1986 decision is consistent with that conclusion. In that case, we held only that, when acting as trustee, PBGC could take an action that it would not otherwise have been permitted to take. To reach that conclusion, we did not need to

¹ *Pension Benefit Guaranty Corporation's Use of Contingent Fee Arrangements with Outside Counsel*, B-223146, October 7, 1986.

² Your question refers specifically to PBGC's role in protecting the "non-limitation trust funds." This term, which derives from the annual statutory funding mechanism for PBGC, refers to assets of terminated pension plans that PBGC holds in trust, and that the law permits to be used for specified purposes without regard to the ceiling on use of other PBGC funds for "administrative expenses."

consider whether PBGC's fiduciary responsibilities are in all circumstances the same as those of other trustees; consequently, the decision does not support the inference that they are.

A more detailed explanation of our conclusions follows. At the outset, a description of the structure of the governing statute, the Employee Retirement Income Security Act (ERISA), as it pertains to the duties of trustees, including PBGC when it serves in that capacity, will provide a framework for answering your question.

Title I of ERISA generally sets standards for employee benefit plans, including reporting, funding, vesting and participation, and fiduciary responsibilities. Under Title I, every employee benefit plan covered by the law must have a named fiduciary to manage it.³ The Title I fiduciary's duties are defined by ERISA; for example, the fiduciary must act solely in the interest of participants and beneficiaries, and as a prudent person would in the same circumstances.⁴

Title IV of ERISA creates a termination insurance program administered by PBGC, a wholly-owned government corporation within the Department of Labor. Under Title IV, PBGC acts as guarantor of benefits for employees. Using primarily insurance premiums, assets of terminated plans, recoveries of amounts for which plan sponsors are found to be liable, and investment income, PBGC pays benefits to participants and beneficiaries of plans that are unable to meet their obligations.⁵

PBGC may be appointed as a trustee under Title IV but, because of specific exceptions in ERISA, it may serve in that capacity without necessarily being subject to the fiduciary responsibilities applicable to trustees under Title I. Under authority in Title IV, a trustee, commonly PBGC, is appointed for a plan found unable to meet its present or future obligations. At the same time, in its guarantor role under Title IV, PBGC is authorized to act in ways that might be inconsistent with the duties of a fiduciary.⁶ For example, PBGC can pool assets of terminated plans for "such

³ 29 U.S.C. § 1102(a).

⁴ 29 U.S.C. § 1104(a). An exception exists to these requirements: a Title I fiduciary's duties are superseded to the extent inconsistent with specific provisions of ERISA, dealing generally with asset allocation and distribution, and the mechanics of plan termination. As discussed below, a significantly broader exception exists for trustees under Title IV.

⁵ The descriptions here and below of PBGC's functions are generally of its single-employer program. Multi-employer plans are treated differently, but the differences are not significant in this context.

⁶ See generally Title IV of ERISA, 29 U.S.C. §§ 1301-1461.

other purposes as it determines to be appropriate in the administration of [Title IV].”⁷ The pooling of assets from separate plans, for purposes that may not be related to the purpose of the trust, is generally not consistent with the duties of a fiduciary under Title I.

ERISA resolves such potential conflicts in favor of PBGC’s guarantor role. It provides expressly that, in pooling plan assets, PBGC can act “[n]otwithstanding any other provision of [Title IV].”⁸ More generally, in the event that a fiduciary responsibility under Title I is inconsistent with any provision of Title IV, the Title IV provisions take precedence.⁹

Our 1986 decision does not support a different conclusion about PBGC’s fiduciary responsibilities. In that case, PBGC, acting as trustee for terminated plans, had hired outside counsel, for an hourly fee, to represent it in seeking recovery from employers on behalf of participants. In order to avoid large legal bills in the event it lost the case or could not settle it on favorable terms, PBGC sought to substitute a contingent fee, under which the lawyers’ compensation would depend on how much was recovered from the employer. However, the Anti-deficiency Act,¹⁰ which generally prohibits federal officers and employees from entering into obligations that may exceed available funds, would, if applicable, have precluded such an arrangement. PBGC asked whether it might, as trustee, nevertheless agree to a contingent fee.

In response, we observed that PBGC has “two fundamentally different duties” under ERISA. In its corporate capacity as an insurer of benefits to participants in covered plans, PBGC is subject to provisions of law applicable to wholly-owned government corporations; since that would include the Anti-deficiency Act, PBGC could not enter into a contingent fee contract in that capacity. However, in its other role, as trustee for a terminated plan, PBGC, we said, has the same authority a private trustee would have to contract on a contingent fee basis.

In a pending lawsuit, the plaintiffs, relying in part on our 1986 decision, claim that PBGC, in its capacity as statutory trustee with respect to their terminated pension

⁷ 29 U.S.C. § 1342(a).

⁸ *Id.*

⁹ 29 U.S.C. § 1342(d)(3) provides that a trustee appointed under Title IV is a fiduciary within the meaning of the Title I definition “except to the extent that the provisions of [Title IV] are inconsistent with the requirements applicable under [the portion of Title I that prescribes fiduciary duties].”

¹⁰ 31 U.S.C. § 1341.

plan, has failed to perform various fiduciary duties owed to them and the plan.¹¹ The court will answer the questions raised in that case concerning specific fiduciary duties of PBGC, and its answers will be binding on the parties. However, we can speak with authority with respect to our own decision: it does not stand for the proposition that PBGC's fiduciary responsibilities as statutory trustee under Title IV are coextensive with those of other trustees under Title I of ERISA.¹²

The sentence that you quote from the decision—"When serving in its trustee capacity, PBGC is treated as if it were a private fiduciary . . . and possesses the same authority and duty to act as would a nongovernmental party if it were appointed to that position."—does not support an inference that PBGC's duties are in all cases the same as those of other trustees. We had not been asked to address that question, only to decide whether, on the facts presented, PBGC could undertake one particular activity, the contingent fee contract. In that context, the quoted sentence is a description of the source of PBGC's authority to enter the contract, not a broad delineation of PBGC's fiduciary duty in other circumstances.

If you or your staff have any questions about this, please call me at (202) 512-5400 or Barry Bedrick at (202) 512-8203.

This letter is also being sent to Senator Charles E. Grassley.

Sincerely yours,



Robert P. Murphy
General Counsel

¹¹ *Pineiro v. Pension Benefit Guaranty Corporation*, No. 96 Civ. 7392(AP), 1997 WL 739581, (S.D. N.Y. November 26, 1997), modified No. 96 Civ. 7392(LAPV), 1999 WL 195131 (April 7, 1999).

¹² The decision is limited to its facts; it does not imply that, whenever PBGC is acting in its trustee capacity, it is free of any restrictions that might be applicable to it as a government agency.