

Pension Benefit Guaranty Corporation

79-9

May 7, 1979

REFERENCE:

[\*1] 4022 Benefits Guaranteed  
4042 Termination by PBGC  
4042(b) Termination by PBGC. Appointment of Trustee  
4042(d) Termination by PBGC. Powers of Trustee

OPINION:

I am answering your correspondence regarding the proposed assignment of a claim filed \*\*\* against \*\*\* to the Pension Benefit Guaranty Corporation (the "PBGC"). The claim is one for unpaid employer contributions to the Plan and was filed in \*\*\* bankruptcy reorganization case referred to above.

We believe the PBGC, as plan trustee, is an appropriate party to press an assigned claim for unpaid employer contributions, and the PBGC is willing to assume the claim of \*\*\* Trust in accordance with Bankruptcy Rule 10-401(c). Although the PBGC cannot guarantee that a court in bankruptcy will allow Trust's claim in full, if the claim is assigned, we intend to prosecute the claim fully although we reserve the right to compromise or settle it.

It is our opinion that the claim of \*\*\* Trust will not be impaired by an assignment to PBGC. Upon execution of the proposed assignment, the PBGC will succeed to the position of \*\*\* Trust on the claim and, as a common law assignee, will rely primarily upon powers and remedies presently available [\*2] to \*\*\* Trust in order to prosecute the claim. Our brief research indicates that a court in bankruptcy usually will fully allow a claim which has been transferred after commencement of a reorganization case in the absence of fraud misrepresentation, or overreaching. 13A Collier on Bankruptcy P10-401.05 (14th ed.).

\*\*\* the reorganization trustee, may believe employer liability is the exclusive remedy available to the PBGC. However, it is our view that § 4062 of the Employee Retirement Income Security Act of 1974 ("ERISA") does not affect our ability to file a claim for unpaid employer contributions within the period permitted by a court or assert an assigned claim when the PBGC serves as an ERISA trustee.

Although Congress intended the primary role of the PBGC to be as an insurer of guaranteed benefits, PBGC has an additional role in this case as an ERISA trustee appointed pursuant to a court order of the Honorable Dick Yin Wang, Bankruptcy Judge, on October 25, 1977. See ERISA § § 4022 and 4042.

ERISA trustees are appointed to administer plans which may be or have been terminated. Appointments are made either by courts or agreements between the PBGC and plan administrators. [\*3] See ERISA § § 4042(b) and (c). Anyone may be appointed by the appropriate court as an ERISA trustee, but the PBGC may request that it be appointed in any case. ERISA § 4042(b). Also see H.R. Rep. No. 93-1280, 93rd Cong., 2d. Sess. 373 (1974). However, there is nothing which requires the PBGC be appointed.

The duties of an ERISA trustee are defined in § 4042 of ERISA and include those which Congress imposes upon trustees in bankruptcy and are codified in the Bankruptcy Act § 47, 11 U.S.C. 75 (1976); ERISA § 4042(d)(3). One duty of a bankruptcy trustee is to:

collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest. 11 U.S.C. 75(a)(1).

The duties of an ERISA trustee also include those of a fiduciary. ERISA § 4042(d)(3). Fiduciary duties of care, skill, and loyalty, may also compel an ERISA trustee to seek to collect past due contributions.

In order to carry out these duties, Congress granted several powers to ERISA trustees. Among these are the powers:

(i) to do any act authorized by the plan or (Title [\*4] IV) to be done by the plan administrator or any trustee of the

plan;

(ii) to require the transfer of all (or any part) of the assets . . . of the plan to himself as (an ERISA) trustee;

Congress also provided ERISA trustees with other relevant powers. Among these is the power:

(iii) to collect for the plan any amounts due the plan;

Congress did not limit the remedies available to an ERISA trustee when the PBGC serves in that capacity. The PBGC has the same rights and remedies as others when it serves as an ERISA trustee because it bears the same fiduciary duties to collect and liquidate plan property.

Moreover, as Congress empowered the PBGC to serve both as an insurer of guaranteed benefits and as an ERISA trustee, I believe the district court's opinion in the Matter of Multiponics, at 436 F. Supp. 1065 (E.D. La. 1977), is inapposite.

In your letter, you also asked us to clarify the relationship between PBGC and \* \* \* Trust, and the relative functions of \* \* \* Trust under the Trust Agreement and PBGC under the order appointing it as an ERISA trustee. PBGC, as an ERISA trustee, continues the services of the plan trustee in some cases, and PBGC understands that \* \* \* Trust [\*5] continues to operate under the Trust Agreement, as amended, which it entered on September 30, 1962.

I have also redrafted the proposed assignment and consent order to incorporate several changes which were agreed to by you and \* \* \* of this Office during telephone conversations on May 1, 1979. In addition, I have signed both documents on behalf of PBGC; please find them enclosed.

I hope this explanation of our position has been of assistance. \* \* \* will be handling this matter and can be contacted by telephone at \* \* \* or at the above address.

Henry Rose  
General Counsel