

NATIONAL PENSION ASSISTANCE RESOURCE CENTER

Pension Basics Training New England Pension Assistance Project

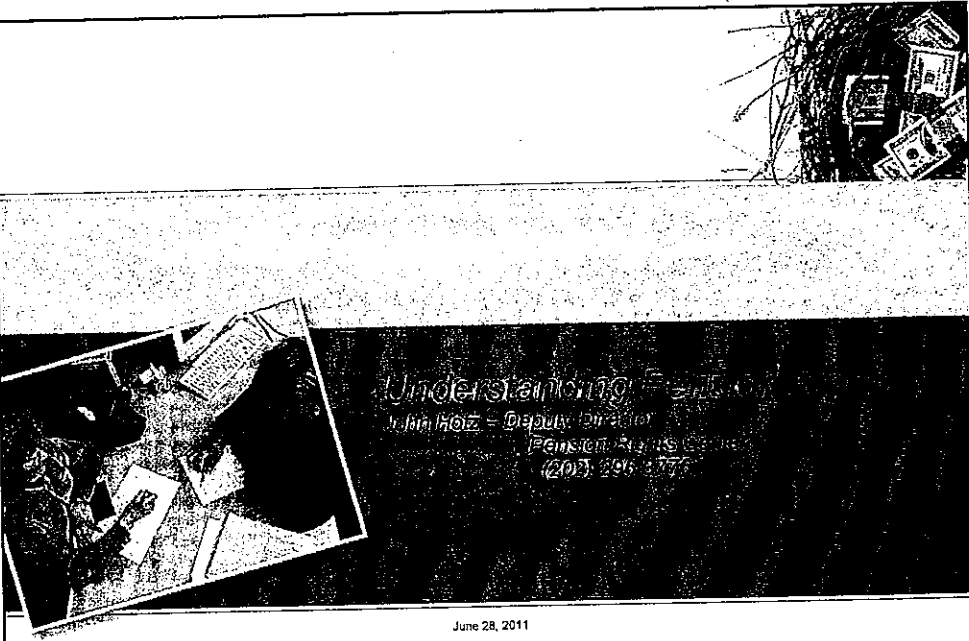
June 28-29, 2011
UMASS Boston - Wheatley Building, 3rd Floor, Rm. 125

DAY ONE – TUESDAY, JUNE 28, 2011

9:00 – 10:15	OVERVIEW, GOVERNING LAW, PLAN TYPES, SPONSOR TYPES
10:15 - 10:30	MORNING BREAK
10:30 – 12:00	PARTICIPATION, VESTING, BREAKS IN SERVICE AND ACCRUAL
12:00 – 1:00	LUNCH
1:00 - 2:00	CURING BREAKS IN SERVICE
2:00 – 3:00	SPOUSAL PROTECTIONS & QDROS

DAY TWO – WEDNESDAY, JUNE 29, 2011

9:00 – 10:15	GETTING DOCUMENTS, MAKING BENEFIT CLAIMS, APPEALING DENIALS
10:15 - 10:30	MORNING BREAK
10:30 – 12:00	PLAN TERMINATIONS AND PBGC CLAIMS
12:00 – 1:00	LUNCH
1:00 – 1:30	PLAN TERMINATIONS NOT INVOLVING THE PBGC
1:30 – 2:30	LOST PLANS AND OMITTED PARTICIPANTS
2:30 – 3:00	PUBLIC PLANS



Understanding Pension
John Hoz - Deputy Director
Pension Rights Center
(203) 496-1377

June 28, 2011

AOA ADMINISTRATION ON AGING PRC PENSION RIGHTS CENTER



- Employer type:
 - Private: When were you LAST employed?
 - before or after January 1, 1976
 - Government: When were you FIRST employed?
 - federal (civilian, military or railroad)
 - CSRS or FERS? - before or after January 1, 1984
 - Military service
 - Railroad service after 1934
 - state, county or municipal
 - Church Plans:
 - Think: hospitals, schools, and religious conferences
 - Requires and *irrevocable* IRC §410(d) election

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AQA ADMINISTRATIVE QUALITY ASSURANCE PENSION RIGHTS CENTRAL

In determining whether you are due a benefit from a particular employer, the first question you will need to answer is what type of an employer did you work for? Another very important question is when did you work for that employer?

Private company and union plans: These plans are governed by the Employee Retirement Income Security Act of 1974, ERISA (29 U.S.C. §1001 et. seq.; 26 U.S.C. §410 et. seq.). ERISA does not mandate the provision of any plan, or of any level of benefits once a plan is provided. Before ERISA, protections were minimal for participants. In these pre-ERISA plans, look to the plan to determine the majority of your "rights."

Other Federally Governed Plans

Civil Service Retirement System (CSRS); For federal employees hired prior to January 1, 1984. Note: CSRS Offset Plan for employees separated before and returned after 1983. (5 U.S.C.A. §8301 et. seq.)

Federal Employee Retirement System (FERS); 5 U.S.C.A. §8401 et. seq.: Covers federal civil service employees hired on or after January 1, 1984.

Military Retirement System; 10 U.S.C.A. §1204 et. seq.; 32 CFR Part 63: For Army, Navy, Air Force, and Marine Corps. Members. Many provisions of apply to members of the Coast Guard and officers of the National Oceanic and Atmospheric Administration and Public Health Service. Timing under the military pension system also determines the level of benefit.

Final Pay: Before September 8, 1980

High 3: September 8, 1980 to July 31, 1986

Career Service Bonus / REDUX: After July 1, 1986

Railroad Retirement; 45 U.S.C.A. §231 et. seq.; 42 U.S.C.A. §402 et. seq.: For most union and non-union employees associated with the operation of railroads. Local transit systems are not covered.

Church Plans: A church plan, as defined in ERISA Section 3(33) is not subject to Title I of ERISA. A church plan is a plan established/maintained by a church or a convention or association of churches (and it is exempt from tax under Code Section 501). A church plan definition includes some fairly specific requirements for identifying church employees and for identifying any employees under an unrelated business. Sometimes church-controlled organizations might be able to qualify for the church exemption. See ERISA sections 3(33) and 4(b)(2). If a church or convention or association of churches that maintains any church plan makes an election under Code Section 410(d), then various Code requirements, including participation, vesting, and funding requirements, would apply. Such an election, if made, is irrevocable.



- Defined benefit plans (pooled assets)
 - *Pensions*: traditional, hybrid, various formulas
- Defined contribution plans (individual accounts)
 - *Pensions*:
 - money purchase, target benefit (age-weighted)
 - *Profit Sharing Plans*:
 - age-weighted plans; 401(k) features
 - Stock Bonus Plans:
 - ESOPs
- What's the difference?
 - Funding, payout options, important spousal protections, investment risk, PBGC insurance

AOA ADMINISTRATION ON AGING PENSION RIGHTS CENTER

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Defined Benefit: A traditional pension, with pooled assets held in trust, offering a set income (or defined benefit) for life.

Flat Benefit Formula: A flat benefit formula may either be a **flat-amount formula**, such as a formula providing \$200 per month to every retiree, or a **flat-percentage formula** providing as a retirement benefit the same percentage of preretirement pay for each employee. On attaining 25 years of service, \$1,000 monthly. For service less than 25 years, the benefit is pro rated. On attaining 25 years of service, 50% of average compensation over the 3 highest earning years. For service less than 25 years, the benefit is pro rated.

Unit Benefit: 1% of final average annual compensation multiplied by years of service [some plans may limit benefits to a maximum of 50% of final average compensation]; or \$10 per year of service.

Cash Balance: 4% of annual pay to a "hypothetical account" which earns a "hypothetical annual interest credit." Actually, there is no account; rather all funds reside in a group trust.

Defined Contribution: This type of plan mandates individual accounts to which the employer contribute for each employee. Some defined contribution plans are retirement savings plans, allowing the employee to contribute to the plan as well. Contribution limits are set by each plan and must be within the limits of section 415 of the Internal Revenue Code. This set amount is the defined contribution.

Profit Sharing & Stock Bonus Plans: Discretionary employer contributions to individual accounts made in cash (PS) or employer stock (SB). 401(k) plans can be features of plans in this category.

Money Purchase & Target Benefit: MP plans are similar to profit sharing plans, but contributions are not dependent on profits. TB plans use a DB-type formula, however, contributions are made to individual accounts. IRC §415(c)

Differences: DB plans are funded by the employer and are insured by the federal government. DB assets are held in trust with the investment risk held by the employer. DC plans are discretionary and may require employee contributions. DC assets are held in individual accounts, are largely uninsured and the investment risk falls on the employee.



- Traditional defined benefit plans
 - Examples of benefit formulas
 - Compensation-based formulas: Final Pay, Final Average Pay, Career Average Pay
 - Non-compensation formulas: $\$100/\text{year} \times \text{YOS}$; $\$30 / \text{YOS}$ to a max of $\$1000$
 - Many variations
 - Traditional defined benefit plans reward older and long-service employees



Defined-Benefit Plans (Cont'd)

- Cash-Balance Plans

- Each employee assigned "hypothetical" account balance
- Credited each month
 - Pay credits (percentage of pay)
 - Interest credits
- Participants may take the account balance in a lump sum at termination or convert the balance to an annuity at retirement at then prevailing interest rates.
- Has look and feel of defined contribution plan, even though no true individual accounts

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- Conversions of traditional defined benefit plans to cash balance plans
 - Results in loss of projected benefits for older, long-service employees
 - Effects often not understood by employees
 - PPA eliminates some CB problems:
 - Wearaway: opening cash balance must equal accrued benefit to date under old plan.
 - Whipsaw: interest rate projecting benefit to age-65 must equal interest rate reducing benefit to present value for lump sum distributions

0



- Benefits are determined by the benefit formula:
 - $\text{Contribution Rate} \times \text{Final Average Compensation} \times \text{Years of Service} = \text{Annual Benefit}$
- Traditional compensation-based formulas:
 - $1\% \times \text{Final Average Compensation} \times \text{Years of Service}$
 - $1\% \times \$50,000 \times 25 \text{ years} = \$12,500 (\$1,042.66)$
 - Career average formulas
- Non-compensation formulas:
 - $\$100/\text{year} \times \text{Years of Service}$
 - $\$30 \times \text{Years of Service}$ to a max of \$1000
- Cash Balance Plans
 - Career average formula in a "hypothetical" account
 - 3% of annual compensation + 3% interest
 - Designed to sound like a defined contribution plan

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AOA

Association for the Study of Pension Plans



PENSION RIGHTS
CENTER



- Profit-Sharing Plan.
 - Age-Weighted Profit-Sharing Plan
- Money-Purchase Pension Plan
 - Target Benefit Plan
- 401(k) Plan
- Stock Bonus Plan/ESOP

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- Originally designed to share employer profits with employees on deferred basis
 - No longer tied to profits
 - Deductions limited to 25% of compensation (formerly 15%)
 - Traditional distinctions between profit-sharing and other defined contribution plans no longer significant
- Not traditionally a retirement plan (permitted in-service distributions)
- No funding obligation
 - employer may reserve discretion as to annual contribution



ADMINISTRATION IN ALABAMA

PENSION RIGHTS CENTER



- Profit-sharing plan with formula based partly on age (some plans are based on period of service)
- Nondiscrimination testing based on converting contributions into "benefits" in defined contribution plan (cross-testing)
- Formula can permit dramatically higher benefits for older employees
 - Assume 55-year old doctor, with 25 year old nurse
 - Doc earns \$150,000, nurse \$25,000.
 - Can make \$30,000 contribution for doctor (20% of comp), \$750 contribution for nurse (3% of comp).



Money Purchase Pension Plan

- Defined contribution plan designed to provide retirement income
- In-service distributions generally prohibited
- Typical formula based on percentage of pay, i.e., 5% of each employee's compensation contributed each year to employee account
- Effective contribution cap for an employee is 25% of compensation



- Hybrid Plan
- Establishes a "target benefit"
- Makes actuarially determined contributions to individual accounts, but investment risk on employee
- Permits somewhat larger annual benefits for older employees



- A *feature* of some profit-sharing plans
- Employee may choose immediate or deferred compensation
 - Attractive feature to employers, who don't have to provide deferred compensation to employees who don't adequately value dc
- Deferral limit per employee is indexed to inflation
- Special non-discrimination rules, including increasingly liberal safe harbors



- Other special rules, including hardship withdrawal rules for in-service distributions
- Employers can make direct or matching contributions
- Policy concerns:
 - moderate income employees less likely to participate than in traditional plans
 - Only those who can afford to contribute take advantage of employer match



- Profit-sharing type plans designed to invest primarily in employer securities
- Policy considerations
 - may increase employee productivity by creating stake in firm
 - question whether employees human and investment capital should be in same basket



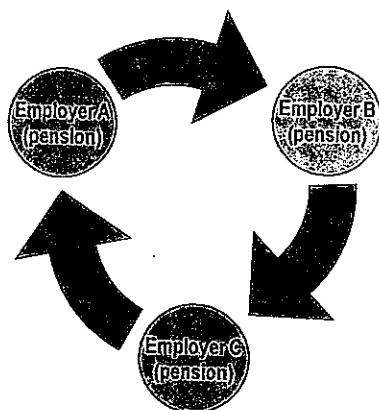
- Benefits are determined by the contributions and investment performance
 - ER contributions + (EE contributions) +/- Interest-to-date = Account Balance
- Profit-Sharing Plan
 - 3% of annual compensation - discretionary
- Money-Purchase Pension Plan
 - 5% of annual compensation
- Target Benefit Plan
 - Money purchase plan; funded like a defined benefit plan
- 401(k) Plan
 - Employee contributes to the profit sharing plan
- Stock bonus plans and ESOPs
 - Built to hold employer securities exclusively



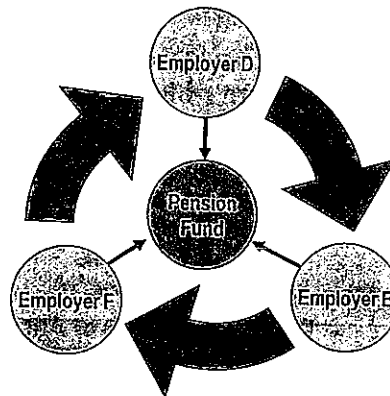
- Funding
 - DB: primarily ER; DC: primarily EE (possible match)
- Investment obligation and risk
 - DB: ER bears the risk; DC EE bears the risk
- Default form of distributions
 - DB: Life Annuity; DC Lump Sum
 - Mortality / longevity risk
 - ERISA protections
- Spousal Protections
 - DB: Joint & Survivor Annuity / Pre-retirement survivor annuity; Waiver & Consent requirements
 - DC: Consent to distributions; Balance to spouse on death



Single-Employer Arrangement

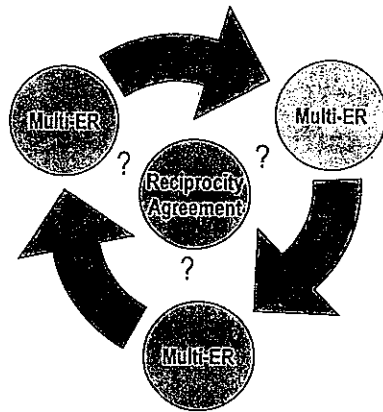


Multi-Employer Arrangement

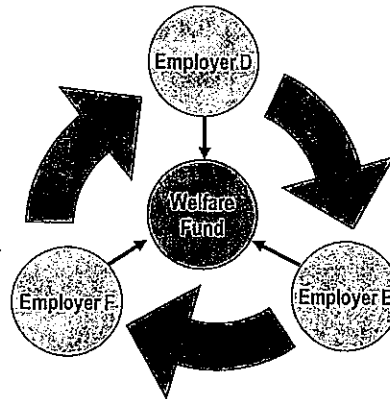




Multiple Multi-Employer Plans



Multiple-Employer Welfare Arrangement



Roger Curme & Gary Partridge



- Right place:
 - working for a covered employer (negotiated)?
 - plan contributions required for bargaining unit per CBA
 - working in covered employment?
 - division, department, job class, bargaining unit, etc.

Private plans:

Covered employment: Both the employee, and in "multi-employer" plans the employer, must be covered under the plan.



- Right time: Eligibility for participation
 - *After the later of 1 year of service*
 - 1000 hours within 1 year (from the 1st hr of service)
 - *Or the attainment of 21 years of age*
 - *Then a participant on the earlier of 6 months or next plan year*
- Automatic enrollment
 - Immediate participation with a notice to opt out (90 days)

AoA ADMINISTRATIVE PLAN PENSION RIGHTS CENTER

Private plans:

A year of service: For purposes of determining whether the employee is eligible to participate in the plan, service is measured from the employee's date of hire. The employee must accumulate 1000 hours of service within the one year period following the first hour of service. Then, look to the number of hours credited in each "plan year" to determine continued eligibility.

Age requirement: Plans need not credit time prior to age 18, but must credit all time after age 21. Tax exempt educational institutions under IRC §501(a) may use a 26 year figure, provided that the participant becomes 100% vested on the first anniversary of the first year of service

Coverage must begin: at the earlier of the first day of the next plan year or 6 months after satisfying the age and service requirements,

Government plans: Usually completion of the introductory employment or probation period satisfies the requirements for participation and coverage.

Elective plans: Both private and governmental plans may be elective (401(k) plans, federal thrift Savings Plan). Benefits will not accumulate unless the participant elects to participate. Many employees are technically "covered" by these types of plans; however, due to economic or other considerations, they may not be participating.



- Right time?
 - Vesting = a right to a benefit, possibly deferred
 - Year of Service
 - 1000 hrs in any 12-month period designated by the plan
 - Hours paid or entitled to payment for performance of duty
 - Hours when no duties were performed (vacation, holiday, illness, leave of absence, etc.) earn up to 501 hours toward vesting.
 - Note equivalency methods and elapsed time method
 - Before ERISA: look to the plan.

Vesting: When a participant has a vested (non-forfeitable) right to accrued benefits, it means the participant has a claim to payment on either an immediate or deferred basis, of at least a percentage of his or her accrued benefits, which is unconditional, and legally enforceable against the plan.

Pre-ERISA: Look to the plan to determine the particular vesting schedule that applies.

SCPRP Counting Service Cases

Case 1: Client started work for UPS in 1976 and left at the end of 1986. She was age 17 when she started and worked initially in a part-time capacity. When client questioned UPS at the time she left the company, she was told that she didn't qualify for a pension because she had to be age 21 to participate and thus she didn't have the required 10 years of service. SCPRP contacted UPS by letter and requested a copy of the relevant SPD and the client's benefits file. UPS responded with a copy of an SPD effective Jan. 2007 and a letter stating that client was eligible for a benefit. In essence, UPS elected to go with the 2007 SPD which required only five years of service which thus qualified client for a monthly benefit of \$342.39 at age 65. Client is currently age 53. SCPRP is in the process of confirming the eligibility of client to receive this benefit, i.e., was she grandfathered into being benefit eligible through a plan amendment?

Case 2: Client worked for Continental Insurance Co. from 1960 – 1967 and then for Harbor Insurance from 1976 – 1981. Prior to client contacting the SCPRP, he had contacted CNA which had acquired the two aforementioned insurance companies. He had asked for a pension benefit based on the fact that both companies were now owned by CNA but CNA denied client a benefit because they said that at the time client worked for the companies, each had their own separate retirement program and each required 10 years of service, i.e. "...your service under each company must be assessed separately and cannot be bridged." The letter invited client to file an appeal if he wished. Client then contacted the SCPRP and the project requested the usual SPD as well as a copy of client's benefits file. CNA treated our request for information as an appeal and responded with copies of plans for both companies and a letter stating, in part, **"...we estimate that he was employed by the Continental Insurance Company (CIC) from 1960 through 1967 and with Swett & Crawford, an affiliate of Harbor Insurance, from 1977 through 1982. After further review we have determined that Mr. Conn had 14 years of Active Service under the CIC Plan; eight years of service for the time that he worked for CIC and six years of service for the time that he worked for Swett & Crawford. We have determined that Mr. (Client) is entitled to a monthly annuity benefit under the plan in the amount of \$96.56."** While client was given credit for his service with CIC in order to meet the 10 year requirement; those years of service with CIC were not counted in the calculation of client's benefit.

SOUTH CENTRAL PENSION RIGHTS PROJECT

4232 Forest Park Ave.
St. Louis, MO 63108
Toll free: 1-800-443-2528
FAX: 314-534-1028
Email: spicer@scprp.org
www.southcentralpension.org

HELPING INDIVIDUALS UNDERSTAND AND EXERCISE THEIR PENSION RIGHTS

September 1, 2010

Monsanto Co.
Attn: Karen Wishart
800 N. Lindbergh Blvd., G5EE
St. Louis, MO 63141-7843

RE: Mrs. [REDACTED], surviving spouse of [REDACTED], File#W01 [REDACTED]
27APR10

Dear Ms. Wishart:

The South Central Pension Rights Project (SCPRP) is a non-profit legal assistance program that helps individuals understand and exercise their pension rights. We do not charge for our services. Mrs. [REDACTED] has engaged our Project to provide legal counsel related to her eligibility for survivor pension benefits. A copy of her authorization is enclosed. Please forward any communication about this matter to me as her authorized representative.

Mrs. [REDACTED] born [REDACTED], 1930, married Mr. [REDACTED] in November 1954. He was working at Monsanto at the time. He continued to work for Monsanto until late 1985, when he began drawing his pension. Mrs. [REDACTED] has tried contacting Fidelity numerous times for information in regards to her eligibility for a survivor benefit. While she did receive the enclosed document, Fidelity did not provide any supporting documentation. As she pointed out in subsequent letters to Fidelity, there is certainly reason for her to question the form of benefit chosen by Mr. [REDACTED].

As the enclosed Benefit Statement shows, in January 1985 his estimated pension benefit before age 65 paid as a single life annuity was \$1628. He worked at least several months into 1985, so if he had elected a single life annuity it would follow that his checks would have been greater than \$1628 per month; somewhere between \$1628 and his normal retirement age pension of \$1817. Instead his checks were \$1603.40 per month; between the estimated pre-age 65 joint and survivor benefit of \$1463 and the normal retirement age joint and survivor benefit of \$1615. There were perhaps a couple of times through the years that pensioners received an increase in their pensions, so his benefit started out smaller. As a result, according to the documents that Mrs. [REDACTED] has, it appears much more likely that Mr. [REDACTED] elected a 50% joint and survivor benefit. That is in addition to the fact that he told her he elected the survivor benefit form of pension.

SCPRP is a program of Texas Legal Services Center, in cooperation with Legal Services of Eastern Missouri.
SCPRP is funded, in part, by a grant from the U.S. Administration on Aging.

I realize that the Benefit Statement provided to Mr. [REDACTED] in 1985 was an estimate. So, in order for us to help Mrs. [REDACTED] understand her benefit rights, please provide the following information:

- The plan documents, summary plan description and material modifications to the plan in effect during Mr. [REDACTED] last hour of service.
- The complete benefit file of Mr. [REDACTED] including his benefit election form and benefit calculation statement.

This request for information is made pursuant to Section 104 of the Employee Retirement Income Security Act of 1974 and applicable Department of Labor regulations. I am directing this inquiry to you rather than Fidelity because I know from previous experience there are certain documents and information that they do not provide. We are just trying to help Mrs. [REDACTED] understand her rights. Thank you very much for your assistance in this matter. If you have any questions, please do not hesitate to call.

Sincerely,

Robin B. Price
Legal Assistant

Enclosure

SOUTH CENTRAL PENSION RIGHTS PROJECT

HELPING INDIVIDUALS UNDERSTAND AND EXERCISE THEIR PENSION RIGHTS

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St. Louis, MO 63108
Toll free: 1-800-443-2528
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Email: rprice@scprp.org
www.southcentralpension.org

September 1, 2010

Mrs. [REDACTED]
[REDACTED]
[REDACTED]

Re: Your pension case

Dear Mrs. [REDACTED]

I have enclosed a copy of the letter that I sent to Monsanto on your behalf. This copy of the letter is for your records. The company has 30 days in which to respond. I will contact you when there are new developments in your case. In the meantime, please feel free to contact me with any questions or concerns.

Sincerely,

Robin B. Price
Legal Assistant

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MONSANTO



October 4, 2010

[REDACTED]

Re: Monsanto Company Pension Plan -- [REDACTED]
W04 [REDACTED] -01OCT10

Dear [REDACTED]

As you have requested, I have enclosed a copy of [REDACTED] Monsanto Pension Plan Payment Election Form (PEF). The enclosed PEF verifies that your husband elected a 50% Joint and Survivor annuity. Therefore, you are entitled to 50% of his monthly pension annuity, as of his date of death 04/17/2010.

We apologize for the inconvenience this oversight may have caused you.

If you have questions, please call the Benefits Center at 1-800-338-3308, any business day (excluding New York Stock Exchange holidays), between 7:30 A.M. and 11:00 P.M. Central time to speak with a service representative.

Monsanto Benefits Center

Enclosure

I realize that the Benefit Statement provided to Mr. [REDACTED] in 1985 was an estimate. So, in order for us to help Mrs. [REDACTED] understand her benefit rights, please provide the following information:

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September 1, 2010

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[REDACTED]
[REDACTED]

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MONSANTO



October 4, 2010

[REDACTED]

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Monsanto Benefits Center

Enclosure

Monsanto

MONSANTO PENSION PLAN

PENSION OPTION
ELECTION

Use this form to tell how you want your benefits paid under the Monsanto Pension Plan. Do not use it for an election during disability.

NAME (LAST - FIRST - MIDDLE INITIAL)	LOCATION	☐ Hourly ☒ Salaried	SOCIAL SECURITY NUMBER	☒ Male ☐ Female
[REDACTED]	ST. LOUIS - CSIC		[REDACTED]	
Retirement Date	HOME ADDRESS - STREET	CITY	STATE	ZIP CODE
12-1-85	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

PENSION OPTION INFORMATION: You have several options as to how you want your pension paid. These are listed below and explained on the reverse side. Also, your pension estimate shows option amounts payable. Review all information and elect the payment option you want.

If you are married, the law provides that if you elect either (A) the 50% Joint and Survivor Annuity or (B) the 50%, 75%, or 100% Contingent Annuity option with your spouse as beneficiary, then your spouse does not need to complete the consent section below.

However, if you are married and select any other option - and
(A) your spouse does sign the consent section, then your election will be legally binding and your pension will be paid as elected, OR
(B) your spouse does not sign the consent section, your pension will automatically be paid as a 50% Joint and Survivor Annuity with your spouse as beneficiary.

INITIAL ONE BOX INSTRUCTIONS: Select one option, put your initials in the box to its left, complete the information for that option.

☒	50% JOINT AND SURVIVOR ANNUITY. After my death, payments shall be made to my spouse - [REDACTED] (Name) [REDACTED] (Social Security Number) [REDACTED] (Date of Birth - Month-Day-Year)
☐	SINGLE LIFE ANNUITY. Under this option, no payments will be continued to another person after my death.
☐	CONTINGENT ANNUITANT. After my death, the percent of continuation shall be 25, 50, 75, 100 % and payments shall be made to my [REDACTED] (Name) [REDACTED] (Relationship) [REDACTED] (Social Security Number) [REDACTED] (Date of Birth - Month-Day-Year)
☐	TEN YEARS CERTAIN AND CONTINUOUS. Primary beneficiary: my [REDACTED] (Name) [REDACTED] (Relationship) [REDACTED] (Social Security Number) Secondary beneficiary: my [REDACTED] (Name) [REDACTED] (Relationship) [REDACTED] (Social Security Number)
☐	LEVEL INCOME TO AGE (52 or 55). Under this option, no payments will be continued to another person after my death.
☐	LEVEL INCOME TO AGE (52 or 55) - COMBINED WITH THE TEN YEARS CERTAIN AND CONTINUOUS OPTION. Primary beneficiary: my [REDACTED] (Name) [REDACTED] (Relationship) [REDACTED] (Social Security Number) Secondary beneficiary: my [REDACTED] (Name) [REDACTED] (Relationship) [REDACTED] (Social Security Number)
☐	LEVEL INCOME TO AGE (52 or 55) - COMBINED WITH THE CONTINGENT ANNUITANT OPTION. After my death, the percent of continuation shall be 25, 50, 75, 100 % and payments shall be made to my [REDACTED] (Name) [REDACTED] (Relationship) [REDACTED] (Social Security Number) [REDACTED] (Date of Birth - Month-Day-Year)

EMPLOYEE'S MARITAL STATUS AND SIGNATURE

I am married. [REDACTED] (Spouse's Name - Type or Print)
This election cancels any prior election/beneficiary designation made under the Plan and can be changed up to my retirement date. If I am married on my retirement date and elect certain payment options, my spouse must sign the consent below to make my election legally binding.
[REDACTED] (Employee's Signature - Print) 11/19/85 [REDACTED] (Monsanto Benefit Representative's Signature)

CONSENT OF SPOUSE INFORMATION: If you sign below, you are agreeing with the option elected by your spouse which may, in some instances, provide either no pension payment or a reduced payment to you after your spouse's death. If you do not sign below, the law provides that you will automatically receive at least a 50% Joint and Survivor Annuity after your spouse's death.

CONSENT OF SPOUSE

I have reviewed both sides of this form and the pension option estimate. I agree with the option elected by my spouse.

[REDACTED] (Signature of Spouse - Print) 11-19-85 [REDACTED] (Witness - Monsanto Benefit Representative or Attorney)

SOUTH CENTRAL PENSION RIGHTS PROJECT

HELPING INDIVIDUALS UNDERSTAND AND EXERCISE THEIR PENSION RIGHTS

4232 Forest Park Ave.
St. Louis, MO 63108
Toll free: 1-800-443-2528
FAX: 314-534-1028
Email: office@scprp.org
www.southcentralpension.org

December 7, 2010

Ms. [REDACTED]

Dear Ms. [REDACTED]

Thank you for contacting the South Central Pension Rights. We have completed our investigation into your eligibility for a survivor pension benefit through your deceased husband's work at Monsanto.

I went over all of the paperwork that you provided and saw that it was very likely that your husband had elected a survivor benefit based on the amount of his monthly benefit. The Project contacted Monsanto about your concerns, and shortly thereafter you received the news that you were in fact entitled to a benefit. You received a retroactive payment of \$5611.90 and your monthly benefit of \$801.70 began this month.

Because we have concluded our investigation, we will be closing your case. There has been no charge for our services. Please take a moment to fill out the enclosed Client Satisfaction Survey and return it in the self-addressed, stamped envelope. Please do not hesitate to call with any questions or if we can be of any assistance in the future. Please feel free to tell your friends about our pension services.

Best Wishes,

Robin B. Price
Legal Assistant

Enclosure



Suspension of Benefits Cases

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29 U.S.C. 1053(a)

- Generally, ERISA prohibits a pension plan from failing to make payments to a participant who has reached normal retirement age, see ERISA Section 203(a). However, that same section created a limited exception for eligible participants who have reached normal retirement age but have continued to work.

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Pension Rights
PROJECT



29 U.S.C. Sec. 1053(a)(3)(b)

- “A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of the payment of such benefits...
- (ii) in the case of a multiemployer plan, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.”



29 CFR 2530.203-3

- ...A plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for any reemployment...to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age...

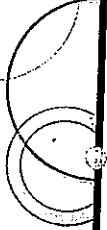
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Central States Suspension of Benefits Rules

- The Central States pension plan sets forth suspension of benefits rules in Section 4.13 (g)(3) as follows:
- Restricted reemployment means and includes any of the following...:
 - (A) Reemployment in a Core Teamster Industry (as defined in paragraph 4.13(g)(4)), except that a pensioner who has reached age 65 may work a maximum of 40 hours per month in such a position;
 - (B) Reemployment by a Contributing employer...
 - (C) Reemployment in any position...that is covered by a Teamster contract...
 - (D) Reemployment in any position in the same industry in which the Pensioner earned Contributory Service Credit while covered by the Pension Fund...
 - (E) Reemployment in any position in the same job classification as any other Participant then employed by a Contributing Employer located within 100 miles of the position, except that a Pensioner that has reached age 60 is not subject to this subparagraph (e).

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Three Central States Cases

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The Case of Mr. Fabricator

- Mr. Fabricator worked as a Teamster truck mechanic for many years. He also worked part-time for his father doing sales at the same time. His father had his own business manufacturing covers for outdoor generators. Mr. Fabricator retired from the mechanic job and became the president of the family business. He also applied for and started receiving his Central States pension.

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Suspension due to Same Job Class within 100 Miles

- Mr. Fabricator's pension benefits were suspended because he was reemployed in the **same job classification** as other Participants employed by Contributing Employers **within 100 miles of the position**. Central States noted that Mr. Fabricator's **activities** included oversight of the engineering, production, sales and the accounts payable and receivable areas as well as overseeing the company's day to day operations.

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PROJECT



Job Class Not Defined

- The Central States rules do not define the term “Job Classification”
- The Central States rules do not include a list of job classifications
- In practice, Central States focuses on job **activities**, and if any job activity is the same of that of another participant, they consider that to be a violation of the rules

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CFR Sec. 2560.503-1(h)(2)(iii)

- Client has the right to access documents relevant to the claim
- CFR Sec. 2560.503-1(m)(8) defines relevant to include documents relied on by the plan administrator in making the benefit determination, or those submitted, considered or generated in the course of making the benefit determination.

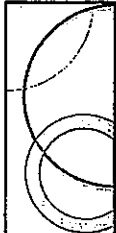
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We Ask for Everything

- Before drafting and filing the appeal, we requested everything Central States relied upon to make the decision, including the participating employers within 100 miles, and the job classifications of the participants deemed to be in the same job classification as Mr. Fabricator

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PROJECT



The Response

- Central States replied with a list of employees asserted to be within 100 miles of Mr. Fabricator's position and in the same job classification. The list included salespersons and working foremen, production employees, and salespersons employed throughout the state. They concluded with a general category: "Lastly, the employees of local unions within the surrounding area are participants of the Pension Fund and perform general office work, which include accounts payable and receivable, as well as overseeing day to day operations."

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Client is The President

- We argued that client's job was not that of production employee, salesperson, or general office worker. His job is President, a salaried, executive job classification.

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We Used Industry Standards

- As a salaried worker, client's job is classified by the U.S. Department of Labor as Executive, and exempt from the wage and hour restrictions of the Fair Labor Standards Act. See Fact Sheet #17; Exemption for Executive... Employees under the Fair Labor Standards Act (FLSA); and Minimum Wage and Overtime Pay Employment Law Guide, printed from the U.S. Department of Labor website, www.dol.gov.

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Activities of the Job are not Job Classes

- Individual activities do not necessarily define a job classification. Every job includes a variety of tasks. Qualifications, training, responsibilities and degree of independence define job classifications. Even though Mr. Fabricator spent time doing sales, accounts payable and receivable, and overseeing production and engineering, these individual tasks did not define his overall job classification. His responsibility for oversight of the entire company as president defined his job classification as executive.

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PROJECT



We WIN. Client gets pension
reinstated with retroactive pay.

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Pension Rights
PROJECT



Mr. Driver

- Client worked for UPS for 36 years. After he retired, he asked his Teamsters local about working part-time for a car dealership driving individual cars for trades, special orders, or other reasons. The local advised client that this job would not violate the reemployment rules, and client accepted the job.

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PROJECT



Central States Disagrees

- Mr. Driver got a letter stating that his employment constituted Restricted Reemployment in (1) a **Core Teamster Industry (car haul)**, and (2) the **same job classification** as other Participants then employed by Contributing Employers located **within 100 miles** of his position.”

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PROJECT

Core Teamster Industries are listed (but not defined) in the plan rules as follows:

- trucking and/or freight;
- small package and/or parcel delivery;
- **car haul;**
- tank haul;
- warehouse;
- food processing and/or distribution (including grocery, dairy, bakery, brewery and soft drink);
- building material and/or construction.

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PROJECT



We Ask for Everything

- Again, we asked Central States to provide us with everything they used to make the decision, including identities and locations of the participating employers and participants working in the same job classification within 100 miles of Mr. Driver.

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PROJECT



The Response

- Central States provided a list of the names of contributing employers engaged in car haul but no addresses. They also listed union locals. None of the union locals named in that letter was within 100 miles of Mr. Driver's place of employment.

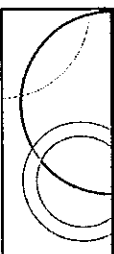
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Pension Rights
PROJECT



The Response continued

- Central States also refused to detail job classifications of plan participants who were supposedly within 100 miles of Mr. Driver. They stated that they did "not know the locations of all of these companies' facilities or the locations of their customers' plants (where they pick up vehicles)." Their decision was "based on its members' combined knowledge and experience", and they concluded that some or all of these Contributing Employers employ Participants whose job duties include delivering individual vehicles to within 100 miles of Mr. Driver.

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Pension Rights
PROJECT



Arguments on Appeal

- The use of the word “haul” connotes the use of a vehicle that pulls or drags a trailer loaded with freight, not driving an individual car.
- The Teamsters website explains that a Commercial Drivers License is a requirement for obtaining a Teamsters car haul position. Mr. Driver has no such license.
- The collective bargaining agreements detail requirements for drivers with regard to the loading and delivery of cars on trailers.

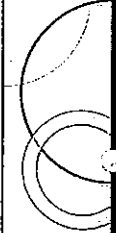
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Help from the Local

- The Office Manager of Mr. Driver's local wrote in a letter to Central States that no car haul was being performed by pension plan participants in the 13 counties covered by her office, well over a one-hundred mile radius.
- She also wrote that client's job was not "car haul."

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We Win. Client gets to keep his
job and his pension.

Mid-America
Pension Rights
PROJECT



Mr. Warehouse

- Mr. Warehouse left his teamster job in Indiana and moved to Kentucky. He got a production job in a non-union factory which manufactures automobile components.
- Central States advised Mr. Warehouse in 2006 that his current employment was restricted reemployment under the plan, but that “you may perform this work for an unlimited number of hours per month at age 60 and still receive your pension benefit.”

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PROJECT



Teamsters Send Client a List Acceptable Jobs

- "The following examples of reemployment are generally permitted for 80 hours per month if you are 57-59 and for unlimited hours if you are 60 or older. **Under the old rules**, these jobs would generally not be permitted at all.
- Retail clerk (not in warehouse)
- **Manufacturing work**
- Office work
- Work in an airline
- Shuttle bus, motor coach or limo driver
- Local delivery of retail products via car or light truck (e.g. auto parts, prescriptions)"

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Flip Flop

- Mr. Warehouse turns 60 and applies for his pension.
- Central States asks for a job description, circles the work “forklift” on client’s description of his production duties, and writes the words “Warehouse-Deny” on client’s application.
- Central States also claims same job class within 100 miles of Mr. Warehouse.

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Pension Rights
PROJECT



We Ask for Everything

- In preparation for appeal, we ask Central States for everything they relied to make the decision, including the identities and locations of participating employers within 100 miles, and the details of the jobs of participants allegedly in the same job classifications.

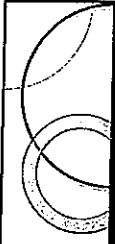
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PROJECT



The Response

- Central States answers with three participating employers. We check the mileage on Mapquest, and it comes up as over 100 miles. We check the mileage according to geographical coordinates, and it comes back as under 100 miles. We write back and request their method of determining distance.

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PROJECT



Central States Backtracks

- Upon further review using GPS coordinates, Central States determines that the examples they gave fall do not fall within 100 miles, and apologize for any confusion or inconvenience.



Central States Compares Job Tasks, not Classifications

- Central States notes that Mr. Warehouse's tasks include picking up and inspecting parts, packing service orders, making and applying labels, and loading and unloading service part trucks.
- Central States identifies one freight company within 100 miles of client, noting that the Collective Bargaining Agreement covers employees who do checking, stacking, unloading, handling, receiving, assembling and allied work.

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Central States' Conclusion

- “The Benefit Claim Appeals Committee found Mr. Warehouse’s **essential job duties and responsibilities** correspond with those described in the above Agreements; therefore, he is working within the **same job classification** as other participants working for Contributing Employers within 100 miles of his position.”

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Arguments

- The Central States reemployment rules limit restricted reemployment to the warehouse industry, and Mr. Warehouse's job is in production
- The Central states reemployment rules specifically allow manufacturing jobs
- The "same job class within 100 miles" rules does not apply to participants over 60 years of age, and should not have been cited as a reason to deny Mr. Warehouse's pension.

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Evidence in Support

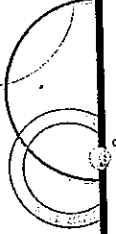
- Industry standards: The North American Industry Classification System (NAICS), a standard used by Federal statistical agencies for business classification, defines warehouses as “establishments **primarily engaged** in operating merchandise warehousing and storage facilities.”
- Detailed descriptions of employer’s Kaizen production system, which follows the Toyota Production Service (TPS) model for manufacturing. One of the many goals of TPS is to eliminate the need for costly warehouses; this factory intentionally manufactures their products to avoid storing them for lengthy periods of time.
- Central States website listings for warehouse jobs includes two grocers, one of them a wholesale grocer, and a sporting good retailer. There are no warehouse jobs on the list that are in any way associated with any type of manufacturing facility.

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Stay tuned for the result...

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Other Issues

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Deference to the Administrator

- If your issue is not directly addressed by plan rules, you may be out of luck. Great deference is given to the plan administrator as to interpretation of plan rules, as long as the interpretation is reasonable and participants are treated similarly.



Recoupment

- Treas. Regs. Sec. 1.401(a)-13(c)(2)(iii) allow plans to recover the overpayment of benefits made to a participant without violating the anti-alienation rule.
- Recoupment is sometimes waived if the client had good reason to believe that the reemployment was not in violation of the rules. Always ask for the procedure to request a waiver if your client gets stuck with recoupment.

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PROJECT



Strategies

- Ask the Plan Administrator to give you everything they relied on to make the decision.
- In addition to the general request, also ask for the specifics indicated in the rules, including the addresses of the participating employers, the job classes of participants within 100 miles of client and what they do, and what method they use to determine mileage for Central States cases.

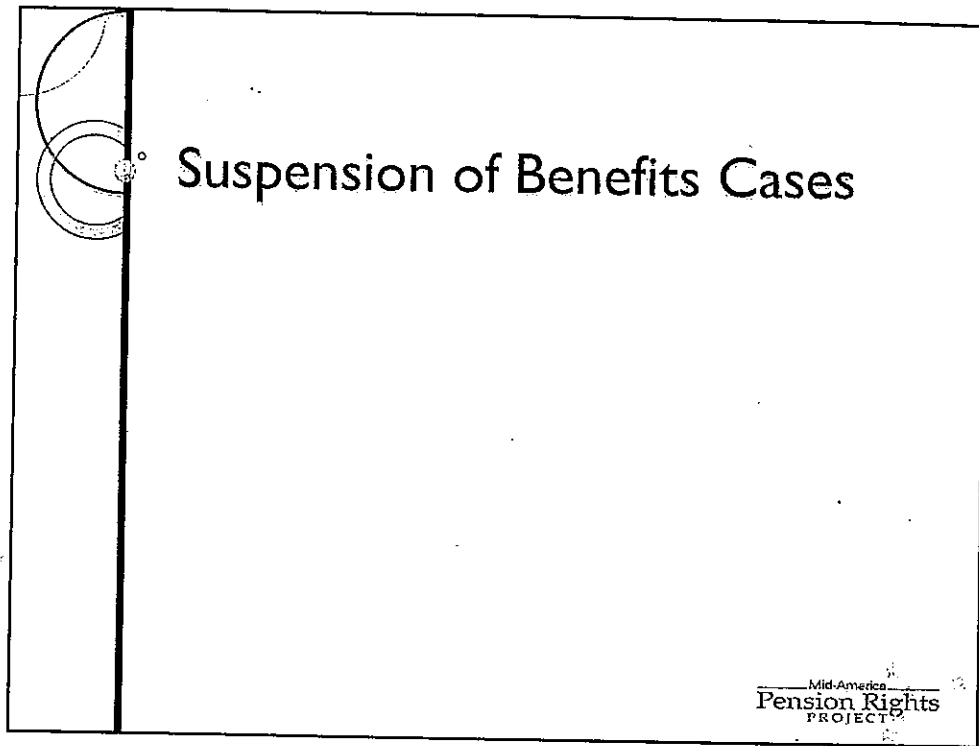
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Strategies continued

- There is very little case law interpreting these rules, since few cases are litigated. Don't be afraid to rely on outside information, particularly Central States website resources, collective bargaining agreements, industry standards, employment classifications, and anything else you can find.
- Don't let the plan distract you with similar job activities language or other language that is not in the rules.

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**SURVIVOR BENEFITS
AND
MATRIMONIAL DISPUTES**

Tales of Love, Loss and Betrayal

- Chris Dagg, Staff Attorney, South Brooklyn Legal Services, Mid-Atlantic Pension Counseling Project

Survivor Benefits – Love and Loss

- Pre-Retirement Survivor Annuity:
 - surviving spouse of vested participant who died prior to reaching retirement
 - payable at date at which participant would have retired (usually at 65)
 - Survivor annuity payable for lifetime of surviving spouse
 - Amount is typically 50% of amount accrued at time of participant's death

Survivor Benefits

☐ Joint and Survivor Annuity

- Benefits are paid to participant during couple's joint lives
- Survivor annuity for lifetime of surviving spouse
- Amount is percentage of the joint annuity paid during the joint lives of the married couple
 - ☐ E.g., Survivor receives 50% or 75% of the amount paid while the retired participant was alive

Joint and Survivor Annuity

- Required by Retirement Equity Act where participant is married at time of retirement, 29 U.S.C. § 1055
- Policy
 - ☐ Recognition of marriage as economic partnership
 - ☐ Protect widows from falling into poverty upon death of husband
- Plan administrator must explain Pre-retirement and Post-retirement survivor benefits and provide the amount of benefits under each form of payment
- Spouse must consent to any other form of payment or to designation of someone else as beneficiary
 - Technical requirements of consent set forth in 29 U.S.C. § 1055(c)(2):
 - The consent must be in writing
 - The consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public,
 - or it is established to the satisfaction of a plan representative that the consent may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.
- Anti-gold-digger rule – 26 C.F.R. § 1.401(a)-11(d)(3)
 - ☐ A plan may provide that a spouse is not entitled to survivor benefits if the marriage occurred less than one year prior to benefit commencement date
- Slayer rule
 - ☐ Common law rule that a plan may refuse to pay survivor benefits to spouse who killed participant spouse

Betrayals

- ☐ Falsely certifying to plan administrator that he/she is not married or cannot locate spouse
 - REA provides a safe harbor if a plan administrator relies in good faith on such a representation
- ☐ Forged signatures on consent forms
- ☐ Remedies
 - Arguing the plan administrator knew/should have know of marriage because of information in personnel file
 - Pre-emption by notifying plan of marriage
 - Changing to proper joint and survivor annuity, offsetting the cost by withholding benefits from participant

Public retirement systems and survivor benefits

- Public retirement system counterparts usually provide joint and survivor annuities as optional forms of payment
- REA protections do not apply
 - States vary on survivor protections –AARP study
 - Some have REA counterpart requiring spousal consent
 - Others simply notify spouse of participant's decision of option that does not provide survivor benefits or designation of someone else as beneficiary
 - Of these, some systems require acknowledgment of receipt of notice by spouse
 - In some states, this permits the spouse to block the election by refusing to sign acknowledgment
 - The remaining states require neither notification nor consent

Cost of Survivor Benefits

- Actuarial adjustment of benefits to reflect longer period of payments
 - E.g., Participant entitled to single lifetime annuity of \$1000 a month
 - As 50% Joint and Survivor Annuity, participant might receive only \$900 a month
 - Surviving spouse would receive \$450 a month for his or her lifetime
-

□ PENSIONS AND MATRIMONIAL
DISPUTES – More betrayal

Distribution of Pensions in Divorce
or Separation

Qualified Domestic Relations Orders ("QDROs")

- ☐ An exception to anti-assignment and alienation provisions in ERISA
 - Originally developed in common law
 - Ratified by the Retirement Equity Act of 1984
 - Federal and most state & local retirement systems have similar counterparts
- ☐ For federal systems: Court Order Acceptable for Processing ("COAP")

Domestic Relations Law and Retirement Benefits

- ☐ New York Domestic Relations Law
- ☐ **Separate property:** includes compensation for personal injuries and property described as separate property by written agreement of the parties.
- ☐ **Marital property:** all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action.
- ☐ Retirement benefits earned during the marriage are recognized as marital property
 - Marriage recognized as an economic partnership
 - Prevent impoverishment of dependent spouses

New York Domestic Relations Law and Retirement Benefits cont'd

☐ **Automatic injunctions** on both parties
during the action:

- Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keough accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court.

New York Domestic Relations Law and Retirement Benefits cont'd

☐ **Compulsory financial disclosure.**

- In all matrimonial actions and proceedings in which alimony, maintenance or support is in issue

☐ **Statement of net worth**

- all income and assets on hand
- all assets transferred during the preceding three years, or the length of the marriage, whichever is shorter

☐ **Date or dates to use for the valuation of each asset usually one of the following:**

- date of marriage
- date of separation agreement
- date stipulated by the parties
- date of commencement of action
- date of judgment of divorce

New York Domestic Relations Law
and Retirement Benefits cont'd

☐ **Disposition of property, including pensions**

- a. By agreement of the parties or by order of the court in the final judgment.
- b. Separate property remains separate.
- c. Marital property is distributed equitably.

Coverture formula

- ☐ The Marital portion
 - Retirement benefits that accrued during the marriage are marital property subject to equitable distribution
- ☐ Separate Property
 - Retirement benefits accrued before or after the marriage belong to participant alone

Marital Portion

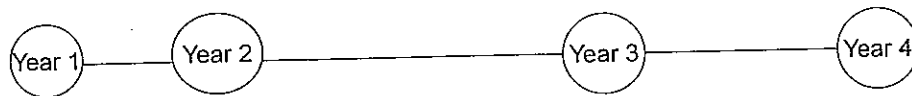
Year 1: Participant starts employment

Year 2: Participant marries spouse

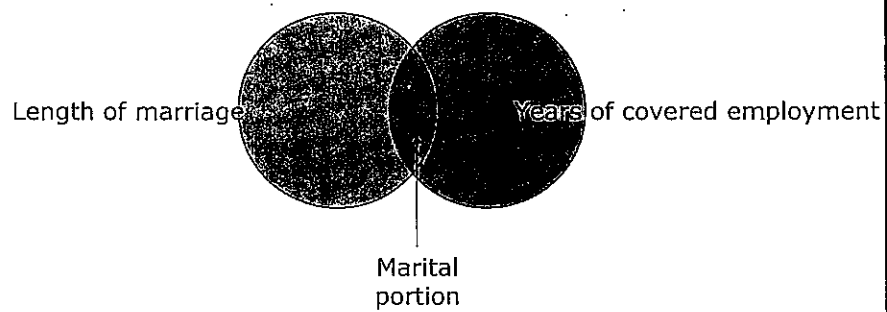
Year 3: Participant divorces spouse

Year 4: Participant retires

Marital Portion: Benefits that accrued
between Years 2 and 3



Marital Portion – another view



The Alternate Payee's (Non-Employee's) Share – form of payment

- ☐ As offset against other marital property or in cash
 - Defined Contribution Plans
 - ☐ Contributions and earnings or losses during the marriage offset against other property
 - Defined Benefit Plans: requires actuary to determine present value of retirement benefits
 - ☐ By Qualified Domestic Relations Order
-

Qualified Domestic Relations Orders

- ☐ Order issued by judge
- ☐ Directs the plan administrator to pay part of the pension directly to non-employee spouse ("Alternate Payee")
- ☐ Advantages of QDRO to both parties:
 - Participant not liable for taxes on full amount of pension
 - Alternate Payee does not have to rely on participant to receive share of benefits

Qualifying the QDRO (ERISA only)

- ☐ Before drafting a DRO, obtain
 - SPD, etc.
 - Plan's QDRO processing procedures (each plan is required to have these)
 - Plan's model QDRO, if any
- ☐ To be qualified, a DRO may not
 - provide to the Alternate Payee any type or form of benefit or any option not otherwise available to the Participant under the Plan
 - provide the Alternate Payee with a joint and survivor annuity with respect to the Alternate Payee and her subsequent spouse;
 - provide to the Alternate Payee increased benefits (determined on the basis of actuarial value); or
 - pay any benefits that are required to be paid to another alternate payee under another order previously determined to be a QDRO
- ☐ Non-ERISA plans have their own requirements for acceptance and many have model DROs as well

19

"Qualification" as an ERISA term of art; technically, DROS directed to, e.g., NYCERS, aren't "qualified," but are approved or disapproved

Qualifying the QDRO (cont'd)

- ☐ Many plans will "pre-approve" a proposed QDRO prior to its filing in court
 - Avoids need to amend an order rejected by plan
 - FERS/CSRS will not pre-approve DROs
- ☐ Many courts prefer a pre-approval letter from the plan administrator

Calculation and Payment of Benefits

- ☐ DRO can assign a specified dollar amount to Alternate Payee
 - Much simpler and often used for Defined Contribution Plans
 - ☐ Especially when older account statements are unavailable
 - But precludes COLAs, survivor benefits, etc.
- ☐ For Defined Benefit Plans, DRO can use the Coverture formula
- ☐ For Defined Contribution Plans, DRO can order value of account on date of commencement of action less value of account on date of marriage

"Coverture"

- "The condition or state of being a married woman. Sometimes used elliptically to describe the legal disability which formerly existed at common law from a state of coverture whereby the wife could not own property free from the husband's claim or control. Such restrictions were removed by state Married Woman's Property Acts."
- Black's Law Dictionary, abridged 6th ed.

QDROs: The Coverture Formula

- ☐ For Defined Benefit Plans
- ☐ Formula assigns a percentage of the marital portion of the pension to the Alternate Payee using the "Coverture fraction"

DROS: *The Majauskas* Formula- one formulation

This Order assigns to the Alternate Payee an amount
equal to the actuarial equivalent of fifty percent (50%) of
the marital portion of the Participant's accrued benefit a
of the Participant's benefit commencement date, or the
Alternate Payee's benefit commencement date, if earlier.
The marital portion shall be determined by multiplying
the Participant's accrued benefit by a fraction (less than or
equal to 1.0), the numerator of which is the number of
months of the Participant's participation in the Plan earned
during the marriage (from date to date) , and the
denominator of which is the total number of months of the
Participant's participation in the Plan as of the earlier of his
date of cessation of benefit accruals or the date that the
Alternate Payee commences her benefits hereunder.

DROS: *The Majauskas* Formula –another formulation.

The Alternate Payee's interest under the Plan is to be determined
As follows:

- ~~Alternate Payee is awarded from the Fund as her sole and separate property.~~

One-half of that fraction of the Participant's vested accrued benefit under the Plan, all calculated as of the Determination Date (as defined below), which fraction shall be determined by the formula (a/b) , where

a = x years (number of years of credited service accrued during the marriage); and

b = the number of years of vested Service Credit earned by the Participant under the Plan, in total, up to the date the Alternate Payee elects in accordance with Plan procedures and this Order to commence receiving her share of the Participant's vested accrued benefit under the Plan ("Determination Date").

- The balance of the Participant's accrued benefit in the Fund is to be the sole and separate property of the Participant.

What that all means

□ The Coverture fraction

Credits earned during the marriage
Total credits at retirement

X 50%

= AP's Share

QDROs and Survivor Benefits

- ☐ Pre- and post-retirement survivor benefits are subject to equitable distribution under New York law
- ☐ These benefits should be explicitly provided for in the judgment of divorce, stipulation and DRO
- ☐ The DRO can direct the participant to designate the Alternate Payee as the surviving spouse

QDROs and Survivor Benefits continued

- Accounting for the actuarial reduction resulting from joint and survivor annuity
 - The "cost" can be borne between the parties pro rata, or entirely by one of the parties (often by the alternate payee)

COLAs

- ☐ Cost of Living Adjustments are subject to equitable distribution under New York caselaw
- ☐ COLAs should be included in the DRO

Loans

- How reduction in value of pension because of outstanding loan will affect the Alternate Payee
 - If the loan was taken for the benefit of the parties while married, the reduction may fairly be shared using the Coverture fraction
 - If the loan benefited only the Participant, the Participant should bear the entire cost

Calculating the Alternate Payee's Share

Two formulas:

☐ **"Full" coverture formula**

- The Alternate Payee is entitled to share in the pension as it is ultimately determined
- This method includes post-marriage accruals
- Based on notion that future accruals earned after the marriage are bounded upon accruals earned during the marriage

☐ **"Frozen" coverture formula**

- The Alternate Payee's share of the pension valued as of the cut-off date (i.e., date of separation or agreement or as provided in judgment of divorce)

Comparison of frozen and full QDROS

Year	Compensation	Event	Annual Accrued Pension	AP's share		
	with 5% annual increases		Formula = 5% Compensation x Years of Service	= Pension x Majauskas fraction x 50%		
1	\$ 10,000.00	DOH & DOM	\$500.00			
2	\$ 10,500.00		1050			
3	\$ 11,025.00		1653.75			
4	\$ 11,576.25		2315.25			
5	\$ 12,155.06	DOD	\$3038.75	1519.37 ("Frozen" QDRO)		
6	\$ 12,762.81		3828.84			
7	\$ 13,400.95		4690.33			
8	\$ 14,070.99		5628.39			
9	\$ 14,774.53		6648.53			
10	\$ 15,513.25	LDW	\$ 7756.62	3878.31 ("Full" QDRO)		
						32

DROs and Disability Pensions

- ☐ In New York, presumption that entire pension paid at disability of participant is subject to equitable distribution
- ☐ The participant can overcome presumption by showing how much of the pension represents compensation for injuries (separate property) instead of deferred compensation (marital)

Shared vs. Separate Interest DROs

☐ Shared interest

- Alternate payee's benefits are carved out of participant's benefits
- Alternate payee begins receiving benefits only when participant begins receiving benefits
- Alternate payee is entitled to survivor benefits only if participant designates AP as survivor
 - ☐ DRO can direct participant to elect joint and survivor annuity and designate AP as beneficiary
- This is the only interest available in public retirement systems

Shared vs. Separate Interest

☐ Separate Interest:

- Alternate payee can commence benefits at earliest age participant could commence benefits, even if participant is still working
 - ☐ Alternate Payee's share will not increase for accruals after separate interest share's commencement date
- Alternate payee's benefits are payable for AP's lifetime
 - ☐ Participant's death has no effect
 - ☐ Alternate payee's benefits are calculated based on AP's life expectancy
- Usually not available if participant already retired at time of filing of DRO

Filing the DRO

- ☐ File it as soon as possible
 - ERISA plans will segregate funds for alternate payee while reviewing a *signed* DRO
 - ☐ ERISA § 206(d)(3)(H)
- ☐ In New York, six-year statute of limitations to file DRO commences when participant reaches pay status
- ☐ Potential damage to alternate payee from late filing (and potential attorney malpractice)
 - Loss of share of benefits paid prior to filing
 - ☐ Lump-sum retroactive payment usually unavailable
 - ☐ Possibility of temporary reduction of participant's benefits paid to alternate payee to recover the missed benefits
 - Death of participant might cut off all benefits to alternate payee
 - Retirement of participant might restrict benefits available to alternate payee
 - ☐ E.g., preclude separate interest DRO and/or survivor benefits
 - ☐ Reason: once payments commence, option under which they are paid is generally irrevocable

Retirement Benefits Checklist

See Instructions for each line number. *Italicized terms* are defined in the Instructions.

1. *Participant*

Name:

Address:

Social Security Number:

Date of Birth:

2. *Alternate Payee*

Name:

Address:

Social Security Number:

Date of Birth:

3. Marital information

Date of Marriage

Date of commencement of divorce

Date of divorce judgment

Is there a separation agreement/property stipulation?

☐ Yes

☐ No

4. Employment information

Name of Employer(s)

Date of hire

Date of termination

Compensation for past 5 years

5. Plan information

Name: _____

Address: _____

Type of Plan:

☐ *ERISA*

☐ *Non-ERISA*

☐ *Defined Benefit*

☐ *Defined Contribution*

6. Plan Documents to obtain:

- ☐ Summary Plan Description (SPD)
- ☐ Plan's DRO processing procedures
- ☐ Plan's model DRO

7. Benefit information

Months of Credited Service during marriage: _____

Total Months of Credited Service (if known: _____

Payment status of retirement benefits

- ☐ Not yet in pay status
- ☐ Being paid

Amount of benefits paid (if applicable): \$_____

Form in which benefits are being paid (if applicable):

- ☐ *Single-life annuity*
- ☐ *Joint & survivor annuity*

Beneficiary name and relationship to Participant: _____

- ☐ Normal Retirement
- ☐ Early Retirement
- ☐ Disability
- ☐ Other

- If benefits are already being paid, will Alternate Payee be entitled to retroactive benefits dating back to the commencement date of the pension?

- ☐ Yes
- ☐ No

- Is there an earlier DRO for a previous spouse?

- ☐ Yes
- ☐ No

8. Protecting the non-employee spouse's rights

Is a stay appropriate to prevent the employee spouse from withdrawing funds, taking a loan against the funds, retiring, or selecting a particular form of payment?

- ☐ Yes
- ☐ No

9. Method of distribution

- ☐ Lump-sum (cash): \$_____

- ☐ In exchange for another asset
- ☐ Equitable distribution

Set amount: \$ _____

Formula:

10. Survivor Rights

- ☐ *Pre-retirement survivor annuity*
To full extent or to *Majauskas* share? (circle one)
- ☐ *Post-retirement (joint and survivor) annuity*
To full extent or to *Majauskas* share? (circle one)

Survivor annuity adjustments:

- ☐ Will the non-employee's share of benefits paid during employee-spouse's lifetime be calculated as a share of the reduced joint and survivor annuity or
- ☐ Will the non-employee spouse's share of pension during employee-spouse's lifetime be calculated as though the employee-spouse had elected an option providing for the highest payment so the non-employee's share would not be impaired (but the employee's share would be impaired)
- ☐ *Other survivor benefits:*
E.g., employer-provided life insurance

11. Timing Issues

Commencement of Alternate Payee's benefits:

- ☐ As soon as Participant is eligible
- ☐ When Participant collects

Duration of benefits

- ☐ Lifetime of Participant
- ☐ Lifetime of Alternate Payee
- ☐ Term certain (e.g., 24 months): _____

12. Additions to benefits

- ☐ *Cost of Living Adjustments* or other *ad hoc* increases
- ☐ *Subsidies or supplements*

13. Reductions

Optional forms of benefits

Will the Participant be required by stipulation or otherwise to elect a particular option?

- ☐ Yes
☐ No

If yes, what is the option: _____

Will the Alternate Payee's share be determined prior to any actuarial reduction for an optional form of payment?

- ☐ Yes
☐ No

Loans

Does the plan provide for loans:

- ☐ Yes
☐ No

Has the Participant taken out a loan

- ☐ Yes
☐ No

If so, when and how much: _____

will the Alternate Payee's share be determined prior to any reduction for any loan

- ☐ Yes
☐ No

Withdrawals of employee contributions

Does the plan provide for withdrawal of employee contributions

- ☐ Yes
☐ No

If yes:

- ☐ Provide that the Alternate Payee will receive a pro rata share of the refund of employee contributions;
☐ Or forbid the Participant from obtaining refund of contributions/withdrawing from the plan

14. Taxes

Will Alternate Payee be responsible for taxes on her share of
benefits

- ☐ Yes
- ☐ No

Instructions and Definitions

1. **Participant:** the spouse whose employment has entitled or may entitle him or her to retirement benefits.
2. **Alternate Payee:** the non-participant spouse who may be eligible to a portion of the Participant's retirement benefits under the Domestic Relations Law.

3. **Marital information**

In drafting a Domestic Relations Order or a Qualified Domestic Relations Order that assigns a share of retirement benefits to an Alternate Payee, the drafter is normally confined to the terms of a separation agreement or judgment of divorce.

4. **Employment information**

Note that a participant may have had several jobs during the marriage. Each one might have its own retirement benefits. List every job. Dates of employment and compensation may determine the value of the benefits.

5. **Plan information**

There may be more than one retirement benefits plan. Some employers offer more than one plan (e.g., a defined benefit plan and a 401k), or the Participant may have held different jobs during the marriage. IRAs and employer-provided health insurance might also be part of the marital assets, even though they are not distributable by a DRO or QDRO.

ERISA Plans are maintained by private employers either alone or as a result of collective bargaining agreements with unions. By law, these plans must provide survivor benefits to nonparticipant spouses (unless the spouse waives that right). Domestic relations orders that assign a portion of the retirement benefits to an alternate payee must be "qualified" by the plan.

Non-ERISA Plans include government plans for civil servants and plans maintained by religious organizations that have not elected to be subject to ERISA. Although these plans are not required to provide surviving spouse benefits, they usually do, though the spouse's consent to an option that doesn't so provide is not required.

Defined Benefit Plans are traditional pension plans that usually provide a monthly benefit check calculated according to a formula. There is no separate account maintained for the participants. In New York (and New Jersey), Defined benefit plan benefits are often distributed according to the *Majauskas* formula. *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984).

Defined Contribution Plans include 401k plans, profit sharing plans, etc. In these plans, the amount of the contribution made by the employer is defined (e.g., matching contributions; 7% of salary). Individual accounts are often maintained and the value of the benefit can be seen as an account balance. Instead of using the *Majauskas* formula, divorcing parties frequently stipulate to a sum certain (e.g., \$15,000) or a percentage of the marital portion (the amount accrued during the marriage plus interest and investment returns).

6. Plan Documents

You should obtain the Plan's operating documents, Domestic Relations Order procedures and sample DRO's (if available). Chris has a library of plans, or use the authorization form at Appendix A to obtain them from the Plan's administrators. If the Participant is not willing or able to authorize the Alternate Payee to obtain this information, you may need a subpoena. If the plan is subject to ERISA, the Alternate Payee has the right to this information upon written request but many plans don't know this. See 29 C.F.R. § 2520.104a-8.

7. Benefit information

Months of Credited Service may differ from total months of employment. A Participant need not be vested during the marriage for benefits to be subject to equitable distribution so long as the Participant eventually does vest.

Single-life annuity is a pension payable for the lifetime of the participant. All benefits stop upon the death of the participant. This provides the maximum amount of benefits to the participant.

A *joint & survivor annuity* is also payable for the lifetime of the participant, but a survivor benefit is also payable to the *beneficiary* if the participant dies first. The amounts are usually reduced to take into account the fact that benefits are payable for a longer period. The amount of the survivor benefit may be a fraction of the amount paid to the participant (e.g., 50% of the amount paid to the participant during their joint lives). The *beneficiary* is the recipient of the survivor benefits, either by designation or by operation of law (e.g., for ERISA plans, a participant's spouse is entitled to survivor benefits unless they are waived in writing.) An Alternate Payee can be the designated beneficiary.

Disability benefits are also subject to equitable distribution to the extent of the portion attributable to deferred compensation; the portion related to personal injury is considered the separate property of the disabled participant. As always, the parties can stipulate differently.

If benefits are already in pay status, the Alternate Payee might not be able to obtain survivor benefits. Most plans do not permit changes in options or beneficiary once benefits commence.

If benefits are already being paid, it may be appropriate for the Alternate Payee to receive retroactive benefits effective the date of commencement. This can be done by supplementing the award with a temporary increase until the retroactive amount has been recouped. Long v. Paige, 182 Misc.2d 260, 697 N.Y.S.2d 508 (Sup. Ct. Westchester Cty. 1999)

If all or part of the participant's benefits are already subject to a previous DRO, those benefits cannot be assigned to the client.

8. Protective Orders

To protect the pension asset, it might be necessary to have the court issue a restraining order prohibiting the withdrawal of funds, taking a loan against the accrued benefits, or commencing payment of benefits in a particular form (e.g., with no survivor benefits.)

9. Method of distribution

Lump-sum (cash) or in exchange: For defined contribution plans, determining the amount available is a matter of looking at the account balance as of the valuation dates, e.g., the date of the filing of the action for divorce less the amount in the account on the date of the marriage. In the case of defined benefit plans, the help of an actuary to determine the present value of the benefits may be required if the plan administrator won't do it for you.

Equitable distribution of retirement benefits under *Majauskas* can be by formula (e.g., "50% of the marital share") as determined by the court or stipulation, or a set amount ("\$100.00 a month for life"). Sample language is found in Appendix B.

The *marital share* is typically the amount of benefits that accrued *during the marriage*, but the parties may stipulate to something else.

"*During the marriage*" is usually from date of marriage to the commencement of the divorce action, but the parties can stipulate otherwise.

10. Survivor Rights

Pre-retirement survivor annuity provides a survivor benefit in the case of a participant who dies prior to retirement. This benefit is usually payable only

when the participant could have begun collecting (e.g., on date when participant would have turned normal retirement age).

Joint & survivor annuity is paid to the participant for his or her lifetime and to the surviving spouse for his or her lifetime.

If the participant is already collecting benefits in a form that does not provide survivor benefits, it's usually not possible to change the form. Try instead to negotiate for him or her to maintain a life insurance policy for the alternate payee.

If the participant has not yet started collecting benefits, try to stipulate that he or she will select an option that provides survivor benefits and designate the alternate payee as beneficiary. The DRO can direct the plan administrators not to pay in any other form or to any other beneficiary.

Extent: The Alternate Payee can be the survivor for purposes of the *Pre-retirement survivor annuity* and/or the *joint & survivor annuity* either to the same extent as if the parties had remained married or only to the extent of the formula established for payment of benefits.

Other benefits may include insurance policies, burial payments, etc.

11. Timing Issues

Note that if the Alternate Payee's benefits begin before Participant begins collecting, the alternate payee might forfeit subsidized benefits or the increase in benefits that would come with additional years of service if the Participant continues working.

Government plans usually do not allow the Alternate Payee to start collecting until the Participant starts collecting.

12. Additions to benefits

Cost of Living Adjustment ("COLA") is an increase in the amount of a benefit to offset inflation.

Supplements or subsidies come in different types. Examples include early retirement benefits that pay a full pension that is not actuarially reduced.

An Alternate Payee will be eligible for COLAs or *supplements or subsidies* only if expressly provided for in the DRO. Most government routinely plans provide COLAs. COLAs are rare in ERISA plans, but because plans can always be amended in the future to provide them, they should be included in negotiations as a possible asset.

13. Reductions

Either provide for the consequences in the event of a reduction in benefits or forbid the Participant from making and the plan from honoring such an election

Loans that are not paid back by the time benefits commence may lead to a permanent reduction in benefits.

Withdrawals of employee contributions may end participation in the pension plan, particular in the case of a government plan.

14. Taxes

Retirement benefits are taxable by federal government; state/local benefits not taxable by New York State if the recipient is a New York resident.

If the alternate payee is the spouse or former spouse of a participant, payments to the alternate payee are taxed to the alternate payee. If the alternate payee is the participant's child or dependent, the participant is taxed.

If distributions to an alternate payee may be "rolled over" to another pension plan or an IRA, taxes are generally deferred until withdrawn.

Appendix A Authorization to Release Plan Information

from Landis Olesker, How to Write Successful Qualified Domestic Relations Orders
(New York State Bar Assoc. 1996)

AUTHORIZATION TO RELEASE PLAN INFORMATION

TO: [Name of Administrator of Pension Benefit Plan]

You are hereby authorized and directed to release and provide to [name and address of attorney for nonparticipant spouse] the following information regarding [name and SSN of participant spouse] (the "Participant"):

I. A complete copy of the Plan, including all amendments adopted since the Plan was established or last restated.

II. The Plan's Summary Plan Description, a description of all material modifications which are not included in the SPD and any other printed materials (for example, brochures) which describe the terms of the Plan.

III. A statement whether the Plan is a qualified plan under the Internal Revenue Code of 1986, as amended.

IV. The Participant's employer-provided accrued benefit under the Plan and, if applicable, his/her employee-provided accrued benefit and rollover benefit. If the Plan is an individual account plan, also provide a description and the value of each separate account and sub-account maintained by the Plan for the Participant.

V. A statement of the Participant's vested interest in his/her accrued benefit under the Plan. If the Participant is not fully vested in his/her accrued benefit, provide a statement as to when full vesting will occur.

VI. A statement and description of all optional forms of benefit which may be available to the Participant under the Plan.

VII. The Participant's normal retirement date under the Plan and any earlier date when (a) the Participant is or may be entitled to receive his/her Plan benefits and (b) distribution of a portion of the Participant's benefits could be made under a qualified domestic relations order ("QDRO").

VIII. If the Participant has previously withdrawn or borrowed funds from the Plan, provide the gross amount (before tax withholding or any other deductions) and the date of each payment made by the Plan to the Participant. Identify the nature of each such payment (e.g., plan loan, hardship withdrawal, etc.)

IX. Whether the alternate payee under a QDRO is entitled to the same rights as the Participant under the Plan as to (a) the designation of beneficiaries to receive benefits payable after death, (b) the direction of the investment of Plan account and sub-account balances, (c) loans from the Plan, and (d) withdrawals from the Plan.

X. The Plan's procedures for dealing with the qualification of domestic relations order, including (a) any forms of QDROs which will be acceptable to the Plan, and (b) any information which has been developed on behalf of the Plan for the use of nonparticipant spouse, other potential alternate payees and the representatives of any of them.

_____, 200__

(Signature of Participant)

CERTIFICATE OF SUBSCRIBING WITNESS

State of New York)

) ss.:

County of)

On the ____ day of _____ in the year 20____, before me, the undersigned, a Notary Public in and for said State, personally appeared, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he/she/they reside(s) in (if the place of residence is in a city, include the street and street number, if any, thereof); that he/she/they know(s) to be the individual described in and who executed the foregoing instrument; that said subscribing witness was present and saw said execute the same; and that said witness at the same time subscribed his/her/their name(s) as a witness thereto.
(Signature and office of individual taking proof.)

Appendix B Sample Settlement Provisions

From Karen Greenberg, Esq., A Basic Guide to Pensions, Deferred Compensation Plans and Other Retirement Benefits for Matrimonial Attorneys (Dec. 2005)

1. NYCERS pension; 50% distribution to wife of marital share of husband's benefits:

Wife shall be awarded an irrevocable interest in the Husband's pension benefits under the N.Y.C.E.R.S. pension plan pursuant to the formula set forth in Majauskas as follows: Wife shall be entitled to 50% of a fraction of the Husband's monthly pension, the numerator of which fraction is "a", representing the number of months the Husband was in the pension plan during the marriage and the denominator of which fraction is "b", representing the total number of months that the Husband has been covered in the pension plan at the time of his retirement.

2. ERISA pension; 50% distribution to wife of marital share of husband's benefits:

Wife shall be awarded an irrevocable interest in the Husband's pension benefits under [name of plan] as follows: The Wife shall receive 50% of the Husband's vested and accrued benefit as of the benefit commencement date, multiplied by a fraction, the numerator of which is "a", representing the number of months of the Husband's credited service in the plan during the marriage, and the denominator of which is "b", representing the total number of months of the Husband's credited service as of the benefit commencement date, which is the date of the Husband's retirement, or the date the Wife elects to begin to receive her pension share, whichever occurs first.

I. "Lying Spouse" cases

The retiree lies on the pension application about marital status to get a higher monthly benefit amount and avoid paying a survivor pension.

A. ERISA Section 205 (c)(6) provides that if a plan administrator satisfies its fiduciary duty in determining that a spouse's consent is valid, or such consent can't be obtained, that determination is valid to discharge the plan from liability "to the extent of payments made pursuant to such Act."

B. Case examples. We have had different results in several lying spouse cases.

1. In one case, the spouses had been separated for around 20 years, but never divorced. Upon retirement, the wife signed that she was widowed. She got back together with her husband shortly before she died. He applied for her pension and got no response. We intervened on his behalf, sent the marriage certificate and proof that he was being paid his wife's social security benefits, and the company paid the full amount of the survivor annuity to the surviving spouse retroactive to the date of death. They did not calculate the amount already paid out to the participant and subtract them from what was owed to the survivor.

2. We had another case where the spouses were also separated, and the husband signed in front of a notary that he was single. When he died, his widow attempted to get her survivor pension. In this case, the company followed ERISA Section 205 (c)(6). Since the husband had received an unreduced benefit, he was overpaid, and the overpayment must be recouped before the company will begin the survivor annuity. The client will not start receiving her widow's pension for another seven years, until the overpayment to her husband is recouped.

3. It is possible to obtain benefits where the participant forges the spousal waiver. A handwriting expert is probably but not always needed.

Note: Participation must include time after Retirement Equity Act in 1984.

II. Bigamy -- Which spouse gets the pension?

A. Common -law spouse

In one case, the husband left his common-law spouse and married someone else without divorcing the common law spouse. Wife number two was indicated as the survivor on the retirement application. First we had to prove that wife number one was a common law spouse under Ohio law, which was easy because the union had paid health benefits for the wife and children during participant's employment. Since wife number two was already in pay status, and the plan was not at fault, we settled the matter by dividing the pension between both spouses.

B. Two spouses, no divorce

Both spouses applied for survivor benefits. The company refused to pay either spouse. Instead of granting one claim or the other, the company told us to go to court and have the court determine which marriage was valid. We opposed this, stating that the company must either grant or deny the claim according to the ERISA claims procedure, and may not order the client to court to avoid making a decision. We were successful in getting the DOL to intervene in this case, probably because the employer was one of the big three automakers in the US and this type of breach could affect many employees. A DOL representative called the employer and told the employer that their fiduciary duty required them to take action to determine the legitimate claim, instead of foisting this job on the claimants. The employer filed an interpleader. Our client was successful in obtaining the survivor benefits, because she had married participant first and was able to show no divorce had taken place in both the forum of the marriage and the forum where participant worked.

Note: State and federal plans are not regulated by ERISA, and have their own unique survivorship eligibility rules.

Gwen Neldfick Case Law
(Claim-Draft #1)

Wally Wendall Neldfick was a member of the St. Paul Painters; Union local 61 from approximately 1961 to 1993. He worked as a painter for several employers in the painting industry and during his career as a painter he was employed by numerous contractors. Wally Neldfick was also a participant in the *St. Paul Industry Pension Fund*. In 2002, Wally Neldfick reached age 62, retired, and applied for – and received – a single lump-sum distribution from the *St. Paul Industry Pension Fund* (the “Fund”) in the form of a single-life annuity in the amount of \$149,161.53.

Gwen Neldfick (“Gwen”) was the legally married spouse of Wally Neldfick (“Wally”) until the time of his passing. They were married on May 6th, 1961. They remained married, and were so in September 2002, when Wally Neldfick submitted his application for pension benefits; and they remained married at the time Wally passed away in 2009. There never was a divorce, a judicial decree of separation, partition of community property, or a proceeding for abandonment.

In the process of applying for his pension benefits, Wally filled out two forms provided by the Fund. The first form (attached as Exhibit #1) listed Wally’s current address, social security number, identified his Union Local, and date of birth. On this form, Wally also identified Gwen as his spouse, listed her date of birth, her social security number, and the date of their marriage. Nowhere on this form does Wally represent that he is (i) no longer married, or (2) that his wife is deceased. This form apparently is used for the participant to select the benefit they are applying for; in Wally’s case, he selected “Pension (Normal-Early).” This form concludes with a certification statement reading:

“In applying for Pension Benefits from the St. Paul Paining Industry Pension Fund,
I certify the above statements are true to the best of my knowledge. I agree and understand that a false statement may disqualify me for pension benefits, and
that
the Trustees shall have the right to recover any payments made to me because of a false statement.”

After this certification statement, this form is signed by Wally W, Neldfick and dated 09-08-02 (September 8, 2002).

The second form (attached as Exhibit “2”) connected to the pension distribution is entitled *Participant’s Analysis of Retirement Benefits Available*. This form lists Wally’s date of birth and also lists Gwen’s date. This form appears to be the form where Wally selected the pension benefit option. The form lists four options: 1) Joint and Survivor Benefit (under which are four Joint and Survivor options are offered); 2) Normal Benefit;

3) Lump Sum Payout Benefit (with a statement reading "You can cash out on your retirement date with a payout of \$149,161.53); and 4) Combination of Above Benefits. Wally placed a check mark next to the "Lump Sum Payout Benefit" option. The bottom of this form there is a statement reading:

"You and your spouse must sign and have this form notarized indicating that you have reviewed your options and agree on your choice."

After this statement, there is a line identified as "PARTICIPANT'S SIGNATURE" where Wally W. Neldfick signed his name and another line identified as "SPOUSE'S SIGNATURE" where the words "NO SPOUSE" are written (apparently by Wally). This form is dated "09-25-02." The form also has a Notary Republic listed, and the form is notarized (with a date of 09-30-02).

When considered together, these two forms are inconsistent and contradictory. The first form indicates Wally is married to Gwen; the second form indicates Wally has no spouse. It is also important to note that the forms were signed within seventeen (17) days of each other; the first form was dated September 8th, 2002, the second form was dated September 25th, 2002 (and notarized apparently on September 30th 2002).

In 1984, the Congress of the United States enacted the Retirement Equity Act ("REA") amending the *Employee Retirement Income Security Act* ("ERISA") to require that a qualified joint and survivor annuity be provided to the surviving spouse of a participant of an employee benefit plan, unless the surviving spouse has waived his or her rights to benefit plan proceeds and consented to the participant's election of an alternative benefit form. 29 U.S.C. § 1055(c)(2), *Vilas v. Lyons*, 702 F. Supp. 555.

Unless a participant properly and legally waives the requirement, ERISA requires plan participants to take retirement benefits as a joint and survivor annuity, which pays benefits to the participant for life and to a surviving spouse for life, rather than as a single life annuity, which pays greater sums than does a joint and survivor annuity, but pays during the participant's life only. See 29 U.S.C. §1055(a) (1), (c) (1)(A) (i) & (c)(7)(A). Alternatively, the participant may establish to the plan administrator's satisfaction that he could not obtain the consent, either because he had no wife or could not locate her. See 29 U.S.C. §1055(c)(2).

The court in *Vilas* noted that "[i]n the absence of *actual knowledge* of fraud or coercion in the inducement or *actual knowledge* of invalidity, the plan administrator may rely on a waiver that conforms on its face, and he will not, by doing so, expose himself to the plan to liability for relying on it." *Vilas*, p. 559.

A Senate Report, No. 99-313 provides that "[t]he spousal consent form is to contain such information as may be appropriate to disclose to the spouse the rights that are relinquished." (*Vilas*, p. 560).

ERISA defines a "beneficiary" as a "person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8).

The waiver by Wally Neldfick is void; as such, Gwen Neldfick is still a beneficiary "who is or may become entitled to receive a benefit."

From *Hearn v. Western Conference of Teamsters Pension Trust Fund*:

"ERISA protects pension plans from large, unexpected liabilities that could arise when plan administrator reasonably rely on waivers of spousal benefits that turn out to be invalid." See ERISA §205(c)(6).

"If pension plan administrator satisfies its fiduciary duties in determining that spouse's consent to waiver of benefits is valid or that such consent cannot be obtained, that determination shall be treated as valid for purposes of discharging the plan from liability to the extent of payments made pursuant to ERISA."

"When pension plan paid benefits to participant who falsely informed the plan that he was not married, provision of ERISA governing joint and survivor annuities discharged the plan from liability to the participant's widow, however, to the extent that its debt to her exceeded its overpayments to her deceased husband."

"Pension plans may bring restitution actions against deceptive plan participants and their estates."

"Trustee is liable for mistaken payments to the wrong person, even if the mistake was reasonable."

"ERISA §205(c)(2) provides: – Each plan shall provide that an election [to waive the joint and survivor annuity] shall not take effect unless (A)(i) – the spouse of the participant consents in writing to such election, . . . or (B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse [or] because the spouse cannot be located . . ."

"If the plan administrator acts in accordance with the fiduciary standards of ERISA in securing spousal consent or in accepting the representations of the participant that the spouse's consent cannot be obtained, then the plan will not be liable for payments to the surviving spouse. For example, if the plan administrator receives a notarized spousal consent valid on its face, which the administrator has no reason to believe is invalid; the plan would certainly be allowed to rely on the consent even if it is, in fact, invalid."

"Mrs. Hearn and the Fund are both victims of Mr. Hearn's deception. Accordingly, the question of equitable relief doesn't come up. We note, however, that the victim of collusion might have equitable defenses to a survivor's suit for benefits or an offsetting equitable action for unjust enrichment. In any case, plans may bring restitution actions against deceptive participants and their estates."

"Congress was very concerned about surviving spouses. Indeed, it enacted Section 205(c)(6) as part of a bill that added strict spousal consent requirements for waiver of survivor benefits. The very Senate Report on which the Trust Fund relies recommends passage of the bill "because the committee believes that a spouse should be involved in making choices with respect to retirement income on which the spouse may also rely." "Absent Section 205(c)(6) – the Fund would have been liable to Mrs. Hearn for the full amount of her annuity."

From *Rice v. Rochester Laborers' Annuity Fund*

(Attorney of spouse in divorce warned Plan that husband may try to take distribution before divorce final)

"Held: [The Plan] administrator failed to live up to the prudent man standard of care and therefore, spouse retained all rights to obtain survivorship benefits that she had prior to Fund's lump-sum distribution to participant."

"The application required the applicant to fill out either Section I, certifying that he was not legally married, or Section II, for married participants, requiring a waiver of the spouse's fifty-percent lifetime annuity benefit. Remarkably, Harold Rice filled out *both* Sections I and II. In Section I, he indicated that he was not married, but Section II contained the purported signature of 'Carrie Rice' professing to waive all interest in the spousal annuity, the signature was notarized but plaintiffs claim, and defendants do not dispute, that the signature was in fact a forgery."

"The Fund's administrator failed to act as a prudent administrator should have acted under all the circumstances. The Fund's administrator erred in accepting the conflicted request form without question and without further inquiry. The administrators as fiduciaries are charged with acting prudently under the circumstances."

"It is up to the fund to take whatever steps are necessary to insure that plaintiff's survivorship's rights are protected in all respects."

"Defense contemplated under ERISA statute providing that consents or waivers of spousal survivor's rights shall discharge plan from liability exists only if plan administrator acted according to the prudent man standard of care."

"If plan administrator complies with statutory requirements regarding waiver of spousal survivor's annuity rights, he is shielded from liability as long as he acts consistent with

his fiduciary obligations and he cannot ignore obvious warning that suggest an obligation to inquire."

"Standard from submitted by participant was ambiguous and contradictory on its face."

"Contrary to the Pension Plan's argument, the express terms of section 1055(c)(6), as well as the REA's somewhat sparse legislative history on this point, establish that a plan administrator's determination that spousal consent cannot be obtained must be judged by the standard of fiduciary care set forth in Section 1104. Accordingly, this court must reject the Plan's contention that Section 1055(C)(2) intends a wholly subjective standard of care, and instead determine whether the plan administrator acted prudently under the circumstances."

"The plan administrator in this case simply accepted, without further questioning or investigation, Mr. Lester's unverified statement that his wife could not be located. At a minimum, a prudent plan administrator in such circumstances would have questioned Mr. Lester about his statement that he could not locate his wife. A prudent plan administrator might also have tried to contact Lester (wife) at her last known address or telephone number."

29 U.S.C. Section 1055(c) (2) requires written consent from spouse.

Sec. 1055(C)(6) provides that consents to waivers or spousal survivor's rights pursuant to Sec. 1055(c)(2), shall "discharge the Plan from liability to the extent of payments made . . . if the plan fiduciary acts in accordance with the "prudent man" standard of care set out in Section 1104."

The Rice court stated that the Plan's administrator cannot ignore obvious warning signs that suggest an obligation to inquire. The court stated "if the plan administrator acts in accordance with the fiduciary standards of ERISA in securing spousal consent . . . then the plan will not be liable for payments to the surviving spouse. For example, if the plan administrator receives a notarized spousal consent, *valid on its face*, which the administrator has *no reason to believe* is invalid, the plan would certainly be allowed to rely on the consent even if it is, in fact, invalid."

"The Fund's administrator as a fiduciary was required to act in all cases to protect the interest of beneficiaries such as plaintiff. [Citing *John Blair Communications v. Telemundo Group*, 26 F.3d 360, 367 (2dCir. 1994)]. A fiduciary breaches his §1104 duty to a plan participant by preventing or interfering with the receipt of benefits to which the participant is entitled. [Citing *Blatt v. Marshall & Lassman*, 812 F.2d 810 (2d Cir. 1987)]. Under ERISA, a fiduciary's duties to participants and beneficiaries are "the highest known to law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8; 469 U.S. 1069. Section 1104 of ERISA "is a more stringent version of the prudent person standard than in the common law of

trusts.” *Reich v. Valley Nat’l Bank of Arizona*, 837 F. Supp 1259, 1273 (S.D.N.Y. 1993).

It is up to the Fund to take whatever steps are necessary to insure that plaintiff’s survivorship’s rights are protected in all respects.

This is a Section 502(a) Claim – “Spouse of plan participant had interest in pension fund because of her right to receive a survivor’s annuity and in such capacity, spouse had standing to maintain action under ERISA to clarify and establish her rights to future benefits.”

“Defense’ contemplated under ERISA statute providing that consents or waivers of spousal survivor’s rights shall discharge plan form liability only if plan administrator acted according to the prudent man standard of care.”

“Administrator of annuity fund failed to live up to the prudent man standard of care which compelled him to inquire further prior to taking action which effectively terminated survivorship interest of plan participant’s spouse and hence, fund remained liable and spouse retained all rights to obtain survivorship benefits that she had prior to fund’s lump-sum distribution to participant. [The] standard form submitted by participant was ambiguous and contradictory on its face.”

“As a fiduciary, pension fund administrator was required under ERISA to act in all cases to protect the interest of beneficiaries. Fiduciary breaches his duty to plan participants under ERISA by preventing or interfering with receipt of benefits to which participant is entitled.”

From *Strand v. Automotive Machinists Pension Trust*

The purpose of the strict waiver provisions in ERISA was “to afford better protection to women dependent on their husbands’ earnings and at the mercy of death or divorce. (Citing *Ablamas v. Roper*, 937 F.2d 1450 (10th Cir. 1991). The formalities required for spousal waiver are included to protect against the risks of a spouse’s unwitting waiver of those rights. Formalities are necessary to ensure a valid waiver of a spouse’s retirement plan [and] are consistent with the legislative policy of protecting spousal rights. (citing *Lasche v. George W. Lasche Basic Profit Sharing Plan* 111 F.3d 863, 867 91-1th Cir. 1997). The formalities are, therefore, to be strictly enforced. (citing *Hagwood v. Newton*, 282 F.3d 285, 290 (4th Cir. 2002).

From *Lombardo v. United Technologies Corporation*

"When information comes to the attention of the committee calling into question the validity of the notarized document, a prudent fiduciary is required to investigate." (citing *Rice*)

"Courts have uniformly held that the clear intent of Congress in passing the Retirement Equity Act of 1984 was to preserve and protect spouses' interests in participants' benefits. ERISA accomplishes this purpose by establishing strict requirements that must be met to insure that the spouse consents to an act that may divest him or her of the right to receive benefits in the future. ERISA also charges plan fiduciaries with the highest of responsibilities, which are owed not only to plan participants but also to their beneficiaries."

In 1994, congress enacted the Retirement Equity Act, which amended ERISA to require that a qualified joint and survivor annuity be provided to the surviving spouse of a participant of an employee pension benefit plan, unless the surviving spouse waived his or her rights to benefits and consented to the participant's election of an alternative benefit form (See *Vilas. V. Lyons*, 702 F.Supp. 555, 559 [D.Md. 1988]).

Under ERISA, a waiver of a qualified joint and survivor annuity and consent to the participant's election will be effective only if:

- (i) The spouse of the participant consents in writing to such election;
 - (ii) Such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent; and
 - (iii) The spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.
- (See 29 U.S.C. Sec. 1055(c)(2)(A))

"When information comes to the attention of the committee calling into question the validity of the notarized document, a prudent fiduciary is required to investigate." (See *Rice v. Rochester Laborers' Annuity Fund*, 888 F. Supp. 494).

"Courts have uniformly held that the clear intent of Congress in passing the Retirement Equity Act of 1984 was to preserve and protect spouses' interests in participant benefits." (See *Lester v. Reagan Equipment Company Profit Sharing Plan & Employee Savings Plan*, No. Civ. A. No. 91-2946, 1992 WL 211611).

"ERISA accomplishes this purpose by establishing strict requirements that must be met to insure that the spouse consents to an act that may divest him or her of the right to receive benefits in the future. ERISA also charges plan fiduciaries with the highest of responsibilities, which are owed not only to the plan participants but also to their beneficiaries. 29 U.S.C. Sec. 1104(a)(1). (See also *Donovan v. Bierwirth*, 680 F.2d 263,272.

"Thus, the question in this case, is whether the Benefit Claims Appeal Committee acted in a manner consistent with its fiduciary duties owed to Mrs. Lombardo. Once the Committee was notified of a claimed forgery, they had a duty to at least inquire as to the

validity of the notarized spouse consent form. A plan administrator cannot ignore obvious warning signs that suggest an obligation to inquire. (See *Rice*)."

The Courts provide a highly deferential standard afforded administrator's decisions. A reviewing court should not overturn a denial of benefits unless it concludes that the decision was "without reason, unsupported by substantial evidence or erroneous as a matter of law."

From *Board of Trustees of the Equity-League Pension Trust Fund v. Royce*

29 U.S.C. §1055(c)(2)(B) provides that each plan shall provide that an election to waive a surviving spouse annuity is conditioned upon a finding that spousal consent is unavailable by reason of certain designated circumstances or other circumstances as the Secretary of the Treasury may by regulations prescribe. One such other circumstance is a legal separation between the spouse and the participant.

"The REA is a 1984 amendment to ERISA designed to ensure that individuals whose spouses die before their retirement would nevertheless receive the spouses' pension benefits. Congress intended to ensure a stream of income to surviving spouses. [See *Lefkowitz v. Arcadia Trading Co. Ltd Benefit Pension Plan*, 996 F.2d 600, 601 (1993); and *Boggs v. Boggs*, 520 U.S. 833, 843 (1997)]

Under Section 1055(c)(2)(B) - each plan shall provide that a participant's election to waive the surviving spouse annuity shall not take effect unless - (B) - it is established to the satisfaction of a plan representative that spousal consent cannot be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulations prescribe.

From *Neidich v. Estate of Henry K. Niedich*

Under ERISA, Fund's administrator, as a fiduciary, is required to act in all cases to protect interest of beneficiaries.

Where fiduciary duties arise under ERISA, they must be enforced without compromise to ensure that fiduciaries exercise their discretion to serve all participants in the plan.

From *Lester V. Reagan Equipment Company*

Plaintiff Jan Lester - Mr. Lester's widow - contends that she is entitled to benefits under several Plans. Lester further contends that the trustees of these Plans breached their fiduciary obligations, mandated by ERISA. Seeking to redress these grievances, Lester has brought suit under Section 502(a)(1)(B) [29 U.S.C. §1132(a)(1)(B) of ERISA].

It is undisputed that the Pension Plan took no steps to determine the accuracy or veracity of Mr. Lester's statement that he could not locate his spouse, other than

requiring that he sign before a notary public. The Pension Plan neither attempted to contact Ms. Lester at her last-known address set forth in the notarized letter nor questioned Mr. Lester about his efforts to contact his spouse.

On March 14, 1989, Mr. Lester named Steven Lester, his son from a previous marriage, as beneficiary of his death benefit from the Profit Sharing Plan. Mr. Lester did not have his spouse's written consent to this designation.

As a beneficiary of the Pension Plan, Ms. Lester points out that, the Plan Administrator had a fiduciary duty under ERISA to act prudently and to take reasonable steps to safeguard her interest in Mr. Lester's pension benefits. See 29 U.S.C. §1002(8); 29 U.S.C. §§1101 and 1104. Thus, Ms. Lester concludes, in accepting without question Mr. Lester's unverified statement that she could not be contacted and in making absolutely no effort to contact her, the plan administrator breached his fiduciary obligation.

The Plan counters that it complied with its fiduciary duties pursuant to 29 U.S.C. §1055(c)(6). The Senate Report accompanying REA §205(c)(6) [now §1055(c)(6)] states:

"If the plan administrator acts in accordance with the fiduciary standards of ERISA in securing

spousal consent or in accepting the representations of the participant that the spouse's consent cannot be obtained, then the plan will not be liable for payments to the surviving spouse. For

example, if the plan administrator receives a notarized spousal consent, valid on its face, which the administrator has no reason to believe is invalid, the plan would rely on the consent even if it is, in fact, invalid." [Sen. Rep. No. 578, 98 Cong.2d Sess.]

This court finds the Pension Plan's arguments contrary to the language and purpose of §1055(c). ERISA contains strict rules for protecting the spouse's interest in the participant's benefits. The clear intent of Congress in passing the Retirement Equity Act of 1984 was to preserve the benefits of spouses. Under ERISA, waiver of the qualified joint and survivor annuity, the standard form of payment from a defined benefit plan to a participant before death, is invalid unless it satisfies the rigorous rules in §1055(c).

A Plan meets the requirements of §1055(c) only if it provides that an election waiving the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor form of benefit shall not take effect unless:

(A)(i) – the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse, (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or notary public, or

(B) It is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary of the Treasury may by regulation prescribe.

Part 4 of subtitle B of ERISA is entitled "Fiduciary Duties," and includes the standard of care for plan fiduciaries. (29 U.S.C. §1104). This section states in relevant part:

(a) Prudent man standard of care. (1) Subject to section 403(c) and (d), 4042, and 4044 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of participants and beneficiaries and – (A) for the exclusive purpose of; (i) providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan; (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.

The express terms of §1055(c)(6), as well as the Senate report on REA, establish that a plan administrator's determination that spousal consent cannot be obtained must be judged by the standard of fiduciary care set forth in §1104. The court in *Lester* accordingly rejects the Plan's contention that §1055(c)(2) intends wholly subjective standard of care, and instead determine whether the plan administrator acted prudently under the circumstances. The court has no trouble in deciding that the plan administrator did not.

The plan administrator in this case simply accepted, without further questioning or investigation, Mr. Lester's unverified statement that his wife could not be located. At a minimum, a prudent plan administrator in such circumstances would have questioned Mr. Lester about his statement that he could not locate his wife. A prudent plan administrator might also have tried to contact Ms. Lester at her last known address.

"What the plan fails to recognize is that a notarized letter in which the *spouse* waives her rights to the participant's benefits is materially different than a notarized letter in which the *participant* waives the spouse's rights. If the participant signs for the spouse, then the person giving up the benefits has made no representation. The presence of a notary public or plan administrator to witness the participant's signature provides the spouse with no protection because it only ensures that the participant was in fact the signing party. Therefore, in such a situation, as Section 1055(c)(6) clearly indicates, the plan representative, as fiduciary of the beneficiary, must act prudently and take reasonable steps to protect the spouse's rights."

From *Davenport v. Davenport*

Even if state court issued a post-death order finding that surviving spouse had abandoned participant, it would not have been valid under ERISA for purposes of

waiving surviving spouse's benefits during applicable period before his death as required under ERISA, and participant's failure to do so, especially since he had recently changed his will to leave his estate to his four children, suggested that he did not intend to designate a different beneficiary under the plan.

After participant's death, surviving spouse was entitled to benefits under defined contribution retirement plan pursuant to ERISA, as both a participant and surviving spouse beneficiary, where spouse was a participant in the plan, plan provided for surviving spouse benefit, surviving spouse did not consent to alienating her benefits under plan, and neither a QDRO nor an abandonment order had been entered before participant's death that would have altered surviving spouses' benefits.

From *Canestri v. NYSA-ILA Pension Trust Fund and Plan*

ERISA requires that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. {29 U.S.C. §1104(a)(1)(B)}.

From the SPD

"Before your pension payments commence, you may elect to receive the single-life pension instead of the 50% joint and survivor pension. However, your spouse must consent *in writing* to your election of a single-life pension. Your spouse's signature must be witnessed by a Plan representative or a notary public." P. 13

"[A] surviving spouse benefit also is payable after the death of an active or former employee who has 5 years of continuous service after January 1, 1998 and is entitled to receive a vested pension. The benefit will begin on the first of the month next following the date the employee would have reached his 62nd birthday. The amount of the pension will be the amount the spouse would have received if employee had survived to age 62, **started a 75% joint and survivor pension** and then died on the next day." P. 14

Lump Sum Distributions –

"If you are eligible for normal or early retirement and have earned at least the minimum required years of continuous service as of the time of your retirement, you may make a one-time election to receive a full or partial lump sum payment in lieu of other benefit options. If you began participation in this Plan prior to January 1, 2000, the minimum required years of service is ten. If you began participation after December 31, 1999, the minimum required years of continuous service are twenty." (p. 15)

"If you retire and elect a lump sum distribution of your pension, the plan administrator first will figure your monthly pension and then will apply a lump sum conversion factor based on your age and the discount rate in effect for such year. The spouse of a married participant must consent in writing (on a form provided by the Plan Administrator) to the payment of a lump sum in excess of \$1000.00."

From the Plan Document

"If a participant does not have an eligible spouse on the date his pension payments are due to commence, then his pension will be paid in the form of a single life pension unless he elects to receive his entire pension as a lump sum." (p. 29)

"In the case of a Participant who has at least one-Hour of Service or one hour of paid leave on or after August 23, 1984, any election made on or after January 1, 1985 to waive the joint and 50% survivor benefit will be ineffective unless one of the following conditions is satisfied:

(a) The spouse of the Participant provides written consent to the Plan Administrator to such

election acknowledging the effect of such election and such consent is witnessed by a plan representative or notary public.

(b) It is established to the satisfaction of the Plan Administrator that the consent required under paragraph (a) above cannot be obtained because no spouse exists or cannot be located, the

Participant is deemed not married for purposes hereof, or because of such other circumstances

as the Secretary of Treasury may by regulations permit."

"Lump Sum Payments. Subject to the other provisions of this Plan, a Participant may elect to receive a full or partial lump sum payment of his Early or Normal Retirement benefit, the amount of which will be the Actuarial Equivalent of the Employee's Retirement benefit if paid on a monthly or less regular basis. The foregoing provisions notwithstanding, (a) benefits *accrued* after September 1, 1994 will not be payable in this form *unless* the Participant has attained ten (10) years of Continuous Service on or before the date of Retirement; and (b) an individual becoming a Participant in the Plan on or after January 1, 2000 may not receive benefits in this form until he or she has earned at least twenty (20) years of continuous Service." (p. 32)

"Section 9.6 – Distributions Requiring Spousal Consent – Distributions may not be made when the present value of the non-forfeitable accrued benefit exceeds \$5000.00 unless the distribution is consented to in writing by the Participant and the Participant's spouse, if any, or, where the Participant is dead, the Participant's surviving spouse."

From *Weiss v. Cigna Healthcare*

A person is a fiduciary of a benefit plan for the purposes of ERISA to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such Plan, or (ii) he has any discretionary authority or discretionary responsibility in the administration of such plan." See 29 U.S.C. §1002(21)(A); 29 U.S.C. §1104(a); ERISA §404(a)(1).

ERISA requires plan fiduciaries to discharge their duties with respect to a plan solely in the interest of participants and beneficiaries. ERISA §404(a)(1). Such fiduciary duties "draw much of their content from the common law of trusts." (*Varity Corporation v. Howe*, 516 U.S. 489). These fiduciary duties "must be enforced without compromise" to ensure that discretionary power is exercised "with an eye single to the interests of participants and beneficiaries." *John Blair Communications v. Telemundo Group*, 26 F.3d 360, 367 (2nd Cir, 1994) citing *Donovan v. Bierwirth*, 600 F.2d 263, 271 (2d Cir. 1982)).

DECLARATION OF GWEN NELDFICK

I, Gwen Neldfick, hereby declare:

1. I currently reside at [REDACTED]. I also maintain a P.O. Box I am making this declaration in support of my application and request for spousal survivor benefits from my deceased husband's pension benefits from the *St. Paul Painting Industry Pension Fund*. I have personal knowledge of the following and could testify competently to the following if called at trial.
2. I married Wally Wendell Neldfick on May 6, 1961. We resided together in St. Paul, Minnesota and maintained a mailing address of [REDACTED]. We remained married until Wally's death. We were never legally separated or divorced.
3. In November of 1993, Wally left me and our adult sons and moved to California, where he continued to live until his death in August 2009. Even while Wally lived in California, we would have casual contact. He would sometimes call me, or send me holiday cards. We would talk about our children. I remember one time, Wally asked me about information concerning his pension; and I provided him with this information. I also remember that Wally had heart surgery, and he called me to talk about that because he had complications from this surgery.
4. Around 2007, as a result of some health issues I later developed, I was forced to apply for medical assistance. I also applied for Social Security to determine if I qualified for early social security benefits. Because of my meager work record, and because I had an insufficient amount paid into the fund, Social Security informed me that I was ineligible for benefits under my own work record.
5. I was then advised by Social Security to apply for benefits under Wally's work record. The determination of that application showed that - as Wally's wife - I was entitled to a portion of his Social Security benefits. Shortly after, I received another letter from Social Security informing me that I might be eligible for pension benefits under Wally's record and that I should contact the pension plan administrator.
6. Around late December 2007, I contacted Wilson McShane to inquire about this letter I received from Social Security. I spoke to a woman (I think her name was "Amanda"), told her who I was and informed her that I had received this letter from Social Security regarding Wally's pension. I asked if she could explain to me what the letter meant, but instead, the focus of our conversation was regarding Wally's pension record.

7. I was then informed by this person that, according to the information on file with Wilson McShane, Wally had withdrawn his entire pension from the Fund in 2002, taking it as a lump-sum payment. That was when I first became aware that Wally had withdrawn his pension.

8. The person at Wilson McShane then explained to me that in order for Wally to take out his pension in the lump-sum, that my signature would have been required allowing Wally to do this. I assured her that I never knew that such a paper existed nor did I ever see or sign such a paper. I also informed her that I was never contacted by anyone from Wilson McShane regarding this matter.

9. By then it became apparent to me that my familiarity and knowledge of the rules as well as my rights concerning my husband's pension were clearly unknown. For example, I was unaware that - as Wally's wife - my signature would be required before he could withdraw his pension. I was also unaware that I might be entitled to a portion of his pension.

10. At no time during my conversations with people at Wilson McShane was I told that an attempt was ever made by Wilson McShane to locate me before the process of Wally's pension withdrawal took place. I was never informed of the facts concerning that withdrawal; for example, the amount of the pension, or any other pertinent or significant facts of the transaction. They offered no details about the transaction whatsoever.

11. I was never told that Wally had signed a notarized waiver form claiming he had no spouse when he took his pension in 2002. The only information given to me by Wilson McShane was that there was a paper with a notarized signature allowing Wally to cash out his pension.

12. I then contacted Bart Winter at the Department of Labor about this matter. Mr. Winter then did some follow up and spoke to Wilson McShane. I was then informed by Mr. Winter that Wilson McShane stated that they had tried to locate me before releasing the lump-sum pension to Wally. Wilson McShane claimed they found multiple addresses for me or thought I might have changed my name. I could not believe what I was hearing.

13. I have continuously maintained a Post Office Box at a [REDACTED] Postal station since 1991 [REDACTED]. I have continued to receive some of my mail there ever since. Wally received mail there as well while living in Minnesota and before leaving the state in 1993. I remember Wally received mail from Wilson McShane at that very P.O. Box and continued to receive mail there even after he moved to California. (See attached Exhibit "1" to this Declaration).

14. At no time did Wilson McShane attempt to contact me at that P.O. Box or any other address where I lived. I do not believe that Wilson McShane ever made a concerted effort to contact me concerning the lump-sum distribution to Wally of his entire pension fund. This, despite the fact that Wally had received previous communications from Wilson McShane concerning his pension at this very P.O. Box. I think this demonstrates that Wilson McShane had this address in their files.

15. As for Wally's claim when he obtained his lump-sum pension benefit that he had "no spouse" or could not locate me, that is completely untrue. I know he knew how to locate me. He had my phone number and address, and we did talk and correspond when he was living in California. Wally was also in contact with our children who continued to live in Minnesota during the time he lived in California, and I would often hear about Wally through my children when they called or visited me. Therefore, I believe with any real effort, Wilson McShane should have been able to locate me as well.

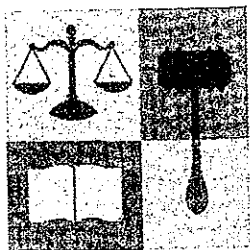
16. I believe that Wilson McShane failed in their obligation to protect my interests and my rights concerning my interest in Wally's pension.

I declare under penalty of perjury under the laws of the State of Minnesota that the above is true and correct to the best of my knowledge and if called as a witness, I could and would testify competently to the facts stated in this Declaration.

Executed this eighth (8th) day of April 2011, in North St. Paul, Minnesota

Signature of Gwen Neldfick

Notary



Western States Pension Assistance Project
California Senior Legal Hotline
444 North 3rd Street, #312 ~ Sacramento, CA 95811
Telephone: (916) 930-4923 ~ Fax: (916) 930-4993
www.seniorlegalhotline.org

March 23, 2011

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Benefits Service Center
P.O. Box 770003
Cincinnati, OH 45277-0072

Re: Surviving Spouse Benefits for Jan Smith
Altria Retirement Plan Participant John Smith

Dear Altria Retirement Plan Representatives:

The Western States Pension Assistance Project is a nonprofit law office that assists individuals with questions regarding their pensions and retirement savings plans. Our services are provided free of charge. I am writing on behalf of Jan Smith, the surviving spouse of former Altria Retirement Plan ("the Plan") participant John Smith. Ms. Smith's signed authorization is enclosed.

I am writing this letter in the hope that you will help us resolve a problem associated with Ms. Smith's pension benefit. To date, the Plan has refused to pay Ms. Smith's pension benefit in accordance with the election her late husband made prior to his death. This failure to pay her pension benefit in accordance with the timely election Mr. Smith made violates Internal Revenue Code (the Code) section 417(c)(1) and Treasury Regulation 1.401(a)-20 Q&A 18. Violation of these provisions can place a retirement plan's qualified status at risk under the Code.

Factual Background

Mr. Smith worked as an accountant with Mission Viejo Company from 1979 through 1997. Before he passed away, he was a participant in the Plan. In August 2010, Mr. Smith contacted the Altria Benefits Center in order to receive a pension application. He filled out the retirement application, designating his wife, Jan Smith, as the beneficiary and selecting the 75 percent qualified joint & survivor annuity (QJSA) option. (See Exhibit A) This

application was signed and notarized on August 24, 2010 and mailed shortly thereafter. On September 26, 2010, Mr. Smith passed away.

According to the Fidelity Net Benefits website, the Plan received Mr. Smith's signed application on August 29, 2010, reviewed the application for accuracy on September 2, 2010, and calculated the benefit on September 3, 2010. (See Exhibit B) Mr. Smith also received an email from Altria Group Benefits Center on September 2, 2010, which stated that they had reviewed his pension forms and found them to be free of error or omissions. (See Exhibit C) Therefore, there should be no doubt that the Plan received and processed Mr. Smith's signed application requesting a 75 percent QJSA before his death.

However, to Ms. Smith's surprise, she received a letter dated November 11, 2010 indicating that she would receive only \$452.43 per month instead of the \$657.66 per month under the 75 percent QJSA option. (See Exhibit D) Ms. Smith called the Plan to discuss this and was told that she is due a qualified pre-retirement survivor annuity (QPSA) instead of the 75 percent QJSA that her husband elected.

Internal Revenue Code and Treasury Regulations

Treasury Regulation 1.401(a)-20 Q&A 18 spells out the requirement for a Qualified Pre-retirement Survivor Annuity (QPSA) in a qualified defined benefit plan such as the Altria Retirement Plan.

The regulation states in relevant part, **"If the participant elects before the annuity starting date a form of joint and survivor annuity that satisfies the requirements for a QJSA and dies before the annuity starting date, the elected form is treated as the QJSA and the QPSA must be based on such form."**

While the Plan is correct that Ms. Smith is entitled to a preretirement survivor annuity, they are not only incorrect to ignore Mr. Smith's election of a 75 percent QJSA, but have placed the Plan in contravention of the Internal Revenue Code's minimum qualification standards by doing so.

A QPSA is a preretirement annuity payable to the surviving spouse that is based on a fiction – *if the individual had retired with the QJSA on the day immediately preceding his death*. In other words, the survivor benefit assumes that the individual actually retired with a Joint and Survivor Annuity and died the next day. (IRC §417(c)) However, the cited regulation makes clear that – as in our precise situation – where a participant has elected a 75 percent survivor annuity (an annuity that would meet ERISA's minimum qualification standards for a QJSA) and dies before the annuity start date, the resulting QPSA must be based on the *elected* benefit, not the plan's default QJSA benefit. Contrary to statements made by representatives from the Plan, the fact that Mr. Smith died before the actual annuity start date is irrelevant. Treasury Regulation 1.401(a)-20 requires the Plan to pay Ms. Smith the 75 percent survivor annuity in accordance with Mr. Smith's timely election.

Conclusion

The Internal Revenue Code and Treasury Regulations clearly dictate that Mr. Smith's election of a 75 percent QJSA must be honored. We kindly request that the Altria Retirement Plan begin making payments to Ms. Smith in accordance with the 75 percent QJSA her husband timely elected before his death. Commencement of benefits in the correct amount will alleviate the necessity of my having to confirm these Plan failures with the Internal Revenue Service.

I look forward to hearing from you. You can contact me at (916) 930-4923. You may also direct your written response to me at: Western States Pension Assistance Project, California Senior Legal Hotline, 444 N. 3rd Street, Suite 312, Sacramento, CA 95811. Thank you in advance for your attention to this matter.

Sincerely,

Justin Freeborn
Staff Attorney

cc: Ms. Jan Smith

[Lost Plan] Research

Excerpted from the South Central Pension Rights Project Procedures Manual

The SCPRP legal assistants are responsible for performing initial research on a client's case. The legal assistant gathers as much information about the client and his/her case as possible during the telephone intake. Based on that information, the legal assistant can begin research on the case prior to receiving documents from client. Sources of information are as follows:

- FreeErisa.com – Can search for companies that are required to file Form 5500 and other forms which will provide information on subject company's pension, i.e., plan sponsor, plan administrator and contact information.
- EINfinder.com – This is a service the SCPRP has subscribed to which allows the researcher to search by EIN number(s). To gain access to the web site the researcher must enter the email address gpartridge@tlsc.org and the password _____.
- PBGC – Pension Benefit Guarantee Corporation: Can search for plans that have been taken over by the PBGC. Can also search by client's name to see if they have a benefit currently being administered by the PBGC.
- EBSA – Employee Benefits Security Administration:
- DOL – Department of Labor:
- ERISA Correspondence Group: Ghost write letter for client's signature requesting a copy of Schedule SSA Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits and a form SSA-L99-C1. The existence of a client's name on the Schedule SSA and the existence of a SSA-L99-C1 ("Potential Private Pension Benefit" letter) is evidence that client was vested in his/her plan.
- Secretary of State's Web site – Depending on the comprehensiveness of any particular state's web site, the researcher can find information on any company that has received formal authorization from the Secretary of State to do business in the state, e.g., information on mergers, acquisitions, and bankruptcies.
- Google – A good way to find information on a company, particularly if it has gone out of business and no longer has a web site. The researcher can quite often find articles in business journals and newspapers that will explain what happened to the company in question.
- Company's Web Site – If the company in question is still in business, the researcher can find contact information and sometimes the history of the company written up and posted at the company's web site.

- Wikipedia.com – Many larger companies have written up or have had written up, their histories which typically allows the researcher to reconstruct the chain of ownership and possibly determine who may have current responsibility as the pension plan sponsor.
- PACER - <http://pacer.psc.uscourts.gov/> - Click on “Account Information” and enter PACER Login and PACER Password, which are, respectfully _____ and _____. This is another service that SCPRP has subscribed to that gives the researcher access to U.S. District, Bankruptcy, and Appellate court records. The disposition can sometimes be found by searching through the bankruptcy court records of the company in question.
- BNA- Benefits Practice Center: A subscription service: **BNA's Benefits Practice Center** is the definitive reference resource for pension and employee benefits practitioners, including attorneys, accountants, actuaries, and other consultants. The service features BNA's premiere pension and benefits reference services, extensive public domain material, highlights from BNA's premiere news service and Web Links.
- Local Newspapers archives. Business Section.
- Lexis: www.lexis.com
- West Law: <http://west.thomson.com>
- Telicon (Texas Law): <http://www.telicon.com/www/tx/index.htm>
- Facebook: Page Name: South Central Pension Rights Project
- Twitter: Full Name: SouthCentralPension

Print a copy of each relevant web page, and place it in the client's file folder. Also scan relevant information and save in client's "Cases" folder. Make a note in the PRIME database describing the research performed and materials added to the client's folder.

Once the legal assistant receives the authorization and questionnaire from the client, the legal assistant makes an effort to determine the last known address of the company or pension plan administrator and sends an inquiry letter by certified letter, return receipt requested. The inquiry letter is another SCPRP form that can be modified for specifics, but almost always requests the Summary Plan Description and the client's individual pension file. A copy of the general inquiry letter is Appendix 297. At the time the inquiry letter is written, a note is added to the case in PRIME, with a reminder input to follow up with the company after 30 days. A copy of the inquiry letter is placed in the client's file. A courtesy letter is then written to the client, which includes a copy of the letter sent to the company, to let the client know that work has begun on their case. A copy of the courtesy letter is Appendix 956.8.

Case Resolution

The Project should hear back from the company or plan within 30 days since ERISA requires a response from the company within that time frame. If no response, a phone call is made to the company/plan administrator. If there is not a quick answer at that time, a second letter is sent, reminding the company of ERISA's penalties (see Appendix 10).

If the company or plan responds that it has no record of the client, then the caseworker should resume research if he/she finds other avenues of inquiry to pursue or consult with the staff attorney for guidance/suggestions. It may be that the researcher and attorney will decide to no longer pursue the case if it appears that there are no other avenues of inquiry. Should that be the case the client should be notified first by phone and then by letter. Prior to closing the case, however, it is sometimes helpful to re-interview the client since the client may have uncovered new evidence helpful to the inquiry or recalled information not stated in the initial interview. Also, clients need to be pressed to be sure and complete the Client Data Sheet to the best of their ability and not to assume that the researcher has any particular knowledge or is blessed with clairvoyance.

If the company or plan responds to the first inquiry letter with a copy of the SPD and the client's pension file, then the caseworker evaluates the information provided and responds accordingly. Many times, when given the SPD and work history, it becomes clear that the client was not employed long enough to be vested in a pension. If that is the case, a letter is written to the client with a copy of the appropriate pages of the SPD that explains the reason why the client is not eligible for a pension. The case is then closed with our standard closure letter (see Appendix 2,397).

When the plan administrator responds that the client is eligible for a pension, the caseworker sends a letter to the client outlining as much information as is available. Frequently the plan will then provide the client with an application for benefits, which outlines the client's options. It is helpful to walk through the application with the client, so that all of the options are well understood. No recommendations are made by any SCPRP staff member regarding which option the client should choose. Once the client has filled out the application, and the benefit is known, the case can be closed. The client information is filled out in PAID and PRIME; PAID is used to calculate the values of the benefit.