2022 National Training Conference – Case Sharing Session

Survivor Benefit Issue with Shell Pension – M. Tabor/WSPAP

My client and her husband were married in July 1982. They remained married until his death on June 5, 2020. He began working for Shell Oil Company from around 1977 until he left employment around 2012. He was a vested participant in the Shell Pension Plan. He began to receive his pension benefit around 2012.

Fidelity contacted my client by email on June 8, 2020 following notification of the passing of her husband and to inform her that Fidelity is in the process of reviewing and researching survivor benefits. She then received a letter dated June 14, 2020 stating that there were no benefits due to her after the participant's death since he was a "single man." The client sent a response letter to Fidelity dated August 24, 2020. In the letter, she explained that she and her husband were legally married at the time of his passing. She included a copy of the parties' marriage certificate, and requested a copy of documents, including a copy of the signed spouse waiver that would have allowed the participant to receive a single life annuity.

On September 28, 2020, the client contacted Fidelity to inquire about the status of a response to her letter. She spoke with a representative named Cheryl who informed her that the letter was sent to the legal team on September 9, 2020 and that someone would be following up. On January 4, 2021, the client contacted Fidelity and spoke with Cheryl again. Cheryl stated that the case was closed and hung up. The client called back to get more information and spoke with representative Ron Brown, who informed her that they are still researching the matter but that he would contact the legal team to let them know the client called to request a status update.

On March 16, 2021, the client called Fidelity and spoke with a representative named Laura. Laura informed the client that she would contact the legal person working on the case to request a status update. Laura called the client back the same day and left a voicemail stating that the legal team needs a copy of the participant's death certificate. She provided an email address where the client could send the certificate. On March 22, 2021, she emailed Fidelity a copy of the death certificate. On March 23, she received confirmation that Fidelity had received the document.

The client received a letter from Fidelity dated April 1, 2021, informing her that she is not due a benefit because at this time his benefit election, the participant was "confirmed as single and commenced his benefits [as] a Single Life Annuity."

The client called Fidelity in early September 2021 and spoke with a representative. She was

unable to obtain any information about whether there was a spousal waiver on file. The rep informed her that she needs legal representation to get the information she is requesting. The client then retained Western States Pension Assistance Project as counsel. I submitted a claim on her behalf dated October 15, 2021, indicating that the client denies ever having signed a waiver of joint and survivor benefits and the Plan has not produced either a copy of such waiver or the participant's benefit election document. Therefore, there is not sufficient evidence to conclude that the client waived her rights to benefits in the manner consistent with the requirements of ERISA. The client remains entitled to benefits as the participant's surviving spouse under ERISA and the written rules of the Plan. I contacted EBSA in January 2022 for assistance.

I received a response from the Plan on March 23, 2022. The Plan stated that:
"In considering the Claim, we have also reviewed the death certificate on file for [the participant]. The death certificate indicated that [the participant] was 'Married, but separated' at the time of his death. Whether [the participant] was single or legally separated at benefit commencement, he would not have had an eligible spouse for purposes of the spousal consent rules. If you have evidence that your client was married and remained married past the participant's benefit commencement date in 2003 (without legal separation), please provide us that evidence…"

In response, I submitted additional information and documents on June 13, 2022. I pointed out that on the death certificate, under Section 12. Surviving Spouse's Name (if wife, give name prior to first marriage), it states my client's name. I also provided the Plan with a letter from SSA to my client dated May 29, 2022, which states she is "entitled to monthly widow's benefits beginning October 2021" in the monthly amount of $1,317.30. She also received a life insurance benefit as the participant's surviving spouse. On the Petition for Letters of Administration that the participant's son, filed in the state of Illinois, it says, "[The participant] died with a spouse and with two children." My client is listed as his wife on the petition. I provided the Plan with a copy of that document. I further informed the Plan that according to the CDC's Medical Examiners' and Coroners' Handbook on Death Registration and Fetal Death Reporting (2003 Revision), "A person is legally married even if separated. A person is no longer legally married when the divorce papers are signed by a judge."

The Plan responded to this additional information in a letter dated July 21, 2022, stating that "based on further investigation of the evidence you provided, such evidence is not conclusive as to the legal status of legally separated versus married." The letter further stated that Shell would have sufficient evidence to pay a survivor benefit to my client if I provided them with three notarized affidavits from my client, "the duly appointed representative of [the participant's] Estate" and "the individual that certified the marital status on the death certificate." The

appointed representative is the participant's son and my client's stepson. He is not willing to assist by signing an affidavit. The Funeral Home Director filled out the death certificate and is also unwilling to sign an affidavit, due to not knowing about the parties marital history. Originally, my client was left off the death certificate. She called the funeral director and requested she be listed as the participant's wife. The Funeral Director amended the death certificate to include her name, but is not willing to amend it again to change the status to simply "married" or assist in any other way.

I looked into the procedures for amending the death certificate independently. Without the cooperation of the participant's son and/or the Funeral Director, we are unable to amend the certificate. My client contacted her husband's childhood best friend and the godfather to his son about signing an affidavit confirming the parties' marital status. He signed and returned an affidavit, though I doubt this will be very persuasive to Shell. My client has been in contact with her husband's attorney about signing an affidavit, as have I. He has not responded and likely will not at this point.

In response to Shell's letter of July 21, 2022, I drafted a letter that includes a detailed background of all efforts to date (including many details mentioned above), compiled all previous correspondence I have sent to Shell, and included the two affidavits. On September 1, 2022, I directed a copy of the package to Shell's General Counsel and Shell's Plan Administrator, as listed on the form 5500. In the letter, I also requested the participant's benefit election document and any waiver on file signed by my client, since Shell previously refused to provide these documents. I do not believe there is a waiver on file. Most likely, the participant did not list my client as his wife and checked the box for single life annuity, which Shell did not investigate further.

I am looking for any information or options that might help secure this survivor benefit for my client, given that we are unable to obtain the affidavits Shell requested. I anticipate Shell will deny the claim.

General Dynamics Overpayment Case of about $900K/ Martin Bolt – SCPSP

The short facts are that our client worked for General Dynamics several (three) times. Each time she accrued a pension under a separate or component part of a GD pension plan. But, every time she left, the pension plan/sub-part she was in at the time of termination was frozen and she would enter a new GD plan/sub-part when she returned to employment. In short, she had three separate sub-pension benefits (none were particularly large) under the GD Pension Plan. When she elected to retire the GD Pension Plan (Fidelity as TPA) sent her a benefit estimate for one of

the sub-pensions but made a huge error in calculating her benefit for that sub-pension (in part they gave her service credit for all her employment with GD when she should have only gotten service credit for the time that was applicable for that sub-plan). In short, the plan valued her annuity for that sub-part of the GD Plan at approximately $4,300/month and the client elected a lump-sum distribution of about $900K. Client thought that she was entitled to all the funds since she had worked at GD for almost 30 years and the annuity amount was close to her salary when she left GD. Thereafter, GD sent the client an overpayment letter and said she was only entitled to about $50K for that sub-plan and the plan wanted about $850K back and that the plan was going to offset against the other two sub-plans that the client still had a benefit in under the GD plan. At that point the client called the SCPRP. She had spent about $450K already and needed help. We spent a significant amount of time dealing with GD, talking to them on the matter and on getting docs, etc. We filed a very detailed claim for waiver of the overpayment. GD denied the claim. In the claim denial letter, GD specifically instructed the client not to spent any of the remaining funds (approx.. $450K). Not only had I told the client on several occasions not to spend any more money, I specifically pointed out the portion of the GD denial letter that told her not to spend any ore funds (we had previously disclosed she had already spent about $450K). We then filed an appeal with the plan. Thereafter, the HR person I had been dealing with on the matter called and said that the Benefits Committee was reviewing the appeal and wanted to know the location of the remaining funds. I called the client and asked her to give me a breakdown of where the remaining funds (during the preparation of the claim, I had previously received a breakdown of the location of the remaining $450K and the amounts from the client). The client told me that, after the claim denial, she spent basically all the remaining funds – most of the funds she used to pay off the mortgage on her house. The client explained that she thought that when they sold her second home, she would use those funds to restore the overpayment funds she spent. During the course of my many talks with the client, she kept asking me about if her home was protected in bankruptcy (which I told her I could not answer). So, at this point, I felt that the client was intentionally trying to shield the overpayment funds for a potential bankruptcy and may have possibly committed a crime (fraud, etc); so, Roger and I talked and decided we should withdraw. We did withdraw at that point. Subsequently, the client e-mailed

me and told me not only had GD waived the almost $900k overpayment, but GD was not going to offset her benefits still in the GD Plan in her two remaining sub-plan parts. So, all $900K of the overpayment was waived and the GD Plan is still going to pay client the rest of the benefits she has remaining in the GD Plan.

Former Prisoner - **Martin Bolt – SCPSP**

- Client was just released from prison after 20 years for a sexual offense. Prior to his incarceration, he had worked for 20years for a state college and the college hospital. He had accrued a benefit while employed at the hospital and wanted to access it since he was in need of funds now that he was out of prison and had reached retirement age. The client's brother (who had POA while in prison) had attempted to find his retirement and the college hospital kept telling the brother that they had no record of the client ever being an employee at the hospital – so, not benefits. So, client needed help finding his benefits. I initially told him that perhaps he was not technically and employee of the hospital but the college itself since he had started his career out as a college employee. So, a variety of letters were sent out the hospital, the college, and several state entities that maintain employee benefits for employees of that state. We got a number of responses back from the letters we sent. All pointed us to the state's Employee Retirement Board ("ERB"). Additionally, the hospital's response verified that since the client started his career as a college employee, his benefits were not maintained in the hospital's plans but with the college through the ERB. I had already sent the ERB a letter in the initial letters sent out. The ERB was the last response we received and they informed me that the client's funds had been at the ERB but he had taken a complete distribution at the time he was fired by the hospital but before he went to prison. They had signed and notarized distributions form. So, while we did not get any funds for the client, we did locate and determine what happened to the benefit. The client was grateful for all the time we put in to the matter to provide him answers. He had thought no one would help him on the matter because of his criminal history. So, no money to the client but a good result.

Ph.D. - **Martin Bolt – SCPSP**

This case shows how confusing pension plans are, even for the smartest of clients. Client is a Ph.D. in Engineering and is a Professional Engineer. He worked at a government nuclear facility. He initially worked for Company A which ran the nuclear facility for 14 years. In 2014, when Company A lost the contract to manage the facility, client when to work for Company B which was awarded the nuclear facility management contract. His pension under Company A's pension plan was to be offset at retirement by the pension plan for the nuclear facility employees and which is currently sponsored by Company B. In 2015, Company A provided client with a NRA SLA benefit estimate of about $3,400/month (before offset/reduced by the Company B/Plant Plan

pension benefit that client accrued also by his work at the nuclear facility). In May and June of 2019, Company A sent client a one-time offer to take his Company A Pension Plan annuity in the form of a lump-sum payment with a lumpsum benefit of approx. $71K based on an annuity of approx. $400/month. Because client did not realize that the $400/month annuity value in the lump-sum offer was his Company A annuity AFTER OFFSET by the Company B/Plant Pal benefit, he thought he had TWO pensions under Company A's plan, one of $3,400/month and another annuity of $400. The misunderstanding was compounded by the fact that after client got the lump-sum offer, he called the Company A TPA and asked for retirement forms for his NRA SLA annuity. Because he had not yet completed and returned the lump-sum election (he was still in the election window), the TPA sent him a set of retirement forms for his NRA SLA benefit estimate of $3.400/month which is the amount of his benefit prior to offset by the Company B/Plan pension benefit. So, client, thinking he had two annuities under Company A pension plan submitted the elected to receive the $71k lump-sum (which was the actuarial equivalent of his Company A annuity benefit of $400/month AFTER the offset was applied) on July 3, 2019 AND also submitted his request for his NRA SLA about three weeks later. The plan paid him the lump-sum and client never heard back on the annuity forms he subsequently submitted. Client still believes he is entitled to two benefits (the lump-sum and the annuity). I have drafted a letter to the plan to have them verify that there are not two benefits – there are not two benefits. The Company A TPA has repeatedly told client that he never had two benefits annuities under Company A's pension plan. All of this is a result of the different election forms presented his annuity value benefit estimates differently (one reduced by his Company B pension and one not reduced/offset) and the timing of the forms. Because he requested his NRS SLA estimate and commencement forms after he got the lump-sum offer forms (but before he accepted it), he thinks he has two benefits under the company A Plan. Also, client DOES have two retirement benefits which adds to client's confusion - one under Company A's plan and one under Company B/Plant plan – but not two benefits/annuities under Company A's Plan

State Plan – Roger Curme – SCPSP

McCulloch County is a participating subdivision in the statewide Texas County & District Retirement System (TCDRS). Each participating county and district have their own retirement plan, and each employer decides the level of benefit it provides. The amount needed for vesting is determined by each employer and could be either 5, 8 or 10 years. Vesting is 8 years under the McCulloch County retirement plan.

Client began working for McCulloch County part-time (less than 900 hours/year) in June of 2000. She worked part-time until May of 2013, when she became full-time. She worked full-time until she separated from employment in July of 2018.

Effective January 1, 2006, TCDRS' participation rules were changed to include part-time employees. However, Client was not treated as a member of TCDRS by McCulloch County until she became full-time in May of 2013, did not receive 7+ years of vesting credit from January 1 of 2006 to May of 2013, and, according to McCulloch County, was not vested when she separated from employment in 2018. She did not withdraw her employee contributions from TCDRS. Shortly after separation, she heard that she should have gotten vesting credit for the part-time employment beginning in 2006. She called TCDRS and was referred to McCulloch County. She called McCulloch County, but nothing happened.

Corrections of Error Rules: A person seeking the correction of an error relating to membership, rights, benefits, or benefit payments under the retirement system (TCDRS) must timely provide to the appropriate subdivision or the retirement system written notice specifically describing the error. The written notice must be received before the first anniversary of the earlier of the date the person discovers the error or the date a reasonable, diligent person should have discovered the error. A person seeking an adjustment to a record based on an act or omission of the subdivision must apply to the sponsoring employer for a correction of the error.

Client contacted SCPRP in 2021. SCPRP filed a Presentment of Claim Letter with the McCulloch County Commissioners Court for Correction of Errors, including for vesting of part-time employment from 2006 to May of 2013. SCPRP negotiated with the County Treasurer, who was also in communication with TCDRS. The County Treasurer put an Agenda Item on the County Commissioners Court Meeting for approval of TCDRS employee adjustments for previous part-time employees, including Client, in the amount of $48,096.80 (attached, last sentence Page 2). The Agenda Item passed, Client became vested, and, presumably, other part-time employees since 2006 also got their records corrected.

Overpayment – Christine Steinmetz / Mid-America Pension Rights Project

The first is an overpayment case where the client owed over $93,000. I submitted a claim for benefits and negotiated it down to a little over $11,000. I also negotiated the amount recouped each month from 25% to 10%. This allowed the client and his wife, who are both disabled, to be able to pay their daily expenses and medical bills.

QPSA – Christine Steinmetz / Mid-America Pension Rights Project

Client retires and notices that her former employer is deducting $36 a month from her pension. She calls the company and is told that she never completed a waiver. Cl was single when she left the company and single when she retired. In addition, her JOD states that her ex-spouse has no

interest in her pension benefit. I submitted a claim for benefits on behalf of the client. The company determined that they would not deduct the $36 for the QPSA and made a retroactive payment to the client in the amount of $2,092 which represented the 58 months that the fee was deducted from her pension benefit.

MAPRP
Mid-America Pension Rights Project

Elder Law of Michigan, Inc.
3815 W. St. Joseph, Suite C-200
Lansing, MI 48917
www.elderlawofmi.org
866.735.7737

January 20, 2022

Consumers Energy Company
One Energy Plaza
Jackson, MI 49201
Attention: Secretary of the Retirement Board

SENT BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[redacted]

CLAIM FOR BENEFITS

[redacted] has contacted the Mid-America Pension Rights Project (MAPRP) seeking legal representation. I have included a copy of her executed and notarized Authorization for Release of Records and Appointment of Representative giving MAPRP, and its authorized agents permission to represent her in all pension related matters.

MAPRP is a program of Elder Law of Michigan, Inc. (ELM), a private, non-profit organization recognized by the State Bar of Michigan as a statewide agency providing Legal Aid and Legal Services. I am an attorney with ELM.

The MAPRP is filing this claim for benefits because Consumer Energy has reduced Ms. [redacted] pension benefit due to a Pre-Retirement Death Benefit (PRDB). [redacted] believes that her benefit should not be reduced. [redacted] now submits this claim for benefits for the reasons listed below.

Background

[redacted] is currently receiving a reduced pension benefit of $464.53 from Consumers Energy. Consumers Energy has stated that it reduced her pension benefit of $500.57 by $36.04 each month due to a Pre-Retirement Death Benefit (PRDB).

[redacted] worked full-time at Consumers Energy in various administrative positions in Jackson, Michigan from June 1971 to September 1989, 18 years where she had an exemplary work history including promotions to the salaried professional ranks. After [redacted] chose to leave her employment with Consumers Energy, [redacted] married [redacted] on 10/14/1989 and divorced [redacted] on 2/1/2013. [redacted] had previously provided the Plan with a copy of her Judgment of Divorce. Page 5 of her Judgment of Divorce, dated 2/1/2013, states:

> **C. PENSION/RETIREMENT/INVESTMENT ACCOUNTS**
>
> Plaintiff, [redacted], shall have and receive as her sole and separate property, free and clear of any claim on the part of the Defendant, any and all retirement funds held in her name.
>
> Defendant, [redacted] shall have and receive as his sole and separate property, free and clear of any claim on the part of the Plaintiff, any and all retirement funds held in his name, with the exception of the $9,000 being awarded to the Plaintiff as hereinabove indicated.
>
> Except as provided hereinabove, the provisions made for either party herein shall be in lieu of their respective rights in and to any pension, annuity or retirement benefits, any accumulated contributions in any pension, annuity or retirement benefits, and for any right or contingent right in and to any pension, annuity or retirement benefits held by and for the benefit of the other party which has not vested, and each party shall hereafter hold all rights and interest in said respective pensions, annuities or retirement benefits, including any which either may hereafter have an interest in, clear and discharged from any right or claim of the other party.

The Judgment of Divorce of 2/1/2013 clearly states that [redacted] aka [redacted] is to receive her pension benefit free of any claim from her former spouse. A copy of the judgment is included for your convenience.

On 6/23/2017, [redacted] applied to Consumers Energy for her pension benefit. Ms. [redacted] received a letter from Consumers Energy, dated 6/30/2017, stating that her

pension benefit would be $500.57. On 6/30/2017, [redacted] completed a Marital and Waiver History Form that was included in the packet. A copy of the letter and Waiver History Form are included for your convenience.

In 7/2017 and 8/2017, [redacted] received her pension benefit from Consumers Energy in the amount of $464.53 and not the full amount of $500.57. [redacted] contacted Consumers Energy by phone regarding the error. She was told that she did not complete a QPSA Marital Waiver form, which she had never received with her retirement packet.

On 8/11/2017, Consumers Energy sent [redacted] a letter stating:

> "The $500.57 Accrued Benefit on which your pension is based was provided to the Service Center by a prior record-keeper. The Accrued Benefit is the Single Life Annuity value of your pension benefit at 66 years of age and was calculated using your Final Average Pay and service at the time of your termination on September 15, 1989. Your Accrued Benefit is reduced by the Pre-Retirement Death Benefit (PRDB) charges. Per the Plan provisions, any married participant who is not retirement eligible at termination will be charged a PRDB, unless the participant elected (with spousal consent) not to pay PRDB. Per our records, you did not submit your spousal consent as you were previously married. **Marital status is determined when a participant initiates the process for benefit commencement."** (Emphasis added)

The letter went on to state, "This calculation was initiated on July 15, 2017. Your age of commencement was 66 years and the PRDB factor of 0.9280 was applied based on the information provided in the Marital and Waiver History Form." The letter stated that $500.57 x 0.9280 =$464.53 and that $464.53 was the amount of [redacted] pension benefit. A copy of the letter is included for your convenience.

On 8/22/2017, [redacted] called Consumers Energy's customer benefits line. The representative told her that the PRDB did not apply to her, and that the reduction was in error. The representative stated that she would submit a request for correction and gave [redacted] reference number #W064484-22Aug17. However, the error was not corrected.

On 10/10/2017, 10/11/2017, 10/12/2017, and 10/14/2017, [redacted] called Consumers Energy regarding the error. On 10/14/2017, Daniel Salazar, a Consumers Energy representative, told [redacted] that the waiver form was sent by mistake and indicated that this was "irrevocable."

On 10/31/2017, [redacted] received a letter from Consumers Energy stating, "Please note that as per the signed marital and waiver form, you were married from October 14, 1989 to February 01, 2013. Therefore, **Pre-Retirement Death Benefit** (PRDB) is applied

till February 1, 2013 in the calculation of your pension benefits." A copy of the letter is attached for your convenience.

On 11/4/2017, [redacted] sent a letter to Consumers Energy requesting that a correction be made to her pension distribution. [redacted] requested that her pension be restored to the amount of $500.57, and that her back payments for the months she did not receive the full pension amount be paid to her in the amount of $180.20. A copy of the letter is included for your convenience.

On 11/16/2017, Consumers Energy sent a response letter to [redacted] stating that, "Per the Plan provision Pre-Retirement Death benefit (PRDB) charges apply for the period of marriage if you are married after termination of employment and got divorced before commencement of Plan benefit. As per the Marital and Waiver History Form, you confirmed that your marital status as single, but were previously married as of or after age 35. Based on the Plan provision, your accrued benefit $500.57 is reduced by PRDB charges." A copy of the letter is included for your convenience.

On 12/12/2017, [redacted] sent a letter to Consumers Energy including the completed Qualified Pre-Retirement Spouse's Annuity (QPSA) Waiver or Revocation of Waiver Form. In her letter, [redacted] stated that she was single when she left employment and single when she applied for her pension benefit. [redacted] stated that she was never provided the QPSA Waiver and Revocation of Waiver Form until December 2017. Ms. [redacted] submitted the form to show that she was not married when she terminated her employment, and she was not married when she applied for her pension benefit. A copy of the letter and Waiver Form are included for your convenience.

On 1/3/2018, Consumers Energy sent a response letter to [redacted] stating that, "Please note that, as per the Plan provision Pre-Retirement Death Benefit (PRDB) charges apply for the period of marriage if you are married after termination of employment and got divorced before the commencement of Plan benefit." A copy of the letter is included for your convenience.

On 6/15/2020, [redacted] sent a letter to Consumers Energy's Secretary of the Retirement Board requesting a thorough review of her file and a copy of the plan document. [redacted] never received a response. A copy of the letter is included for your convenience.

On 9/23/2021, the MAPRP sent an inquiry letter to Consumers Energy. A copy of the inquiry letter is enclosed for your convenience.

On 10/12/2021, Consumers Energy sent a response letter that included a copy of the plan document, the summary plan description, a pension calculation, a copy of Ms. [redacted] QPSA Waiver or Revocation of Waiver form that was submitted to Fidelity, and a copy of the internal verification of the PRDB calculation charged by Fidelity.

In Consumers Energy's letter, dated 10/12/2021, Kelly McEldowney states that "a detailed explanation for why the full benefit is not available to the pensioner. The copy of the plan document in effect at the time she began her benefit on 7-1-2017 (the document is from 2016). The section regarding the Pre-Retirement Death Benefit, or Option (d) begins on page 33..."

The plan document that was provided with the letter states on page 33, part 4 as follows:

> 4. **Provisional Payee Option (d) for Employees Leaving the Company With Rights Under Subsection 1 of Section VII.** A former employee whose employment with the Company is or was terminated on or after August 23, 1984, for any reason and who has rights to Retirement Income under subsection 1 of Section VII of the plan will have his Retirement Income adjusted to provide Provisional Payee Option (d) for his spouse...

The plan document further states on page 33 that "The Retirement Income payable to the employee electing this Option (d) or the payment to his Provisional Payee will be reduced by .5% for each year (or any portion thereof) this option is effective after the first day of the month following his 55th birthday." A copy of the letter and page 33 of the plan document are included for your convenience.

Consumers Energy is reducing [redacted] pension benefit due to the Pre-Retirement Death Benefit (PRDB), also known as a Qualified Pre-Retirement Survivor Annuity (QPSA). [redacted] married after she left employment with your company and divorced in February 2013, before she applied for her pension benefit. [redacted] was formerly known as [redacted]

The Retirement Equity Act of 1984

The Retirement Equity Act of 1984 (REA), which became effective December 31, 1984, was implemented to safeguard the rights of a participant's surviving spouse. The Internal Revenue Service interprets REA in Publication 504 explains on its website the Qualified Pre-Retirement Survivor Annuity (QPSA). The IRS states that:

> **"A QPSA is a form of a death benefit paid as a life annuity** (a series of payments, usually monthly, for life) **to the surviving spouse (or former spouse, child or dependent who must be treated as a surviving spouse under a QDRO) of a participant who:**
>
> **1. was vested in his or her retirement plan benefits;**
> **2. died before retirement; and**
> **3. was married to the surviving spouse** (for at least one year is the plan so provides) **(or to a former spouse named in a QDRO)."** (Emphasis added).
>
> IRS, *Retirement Topics- Qualified Pre-Retirement Survivor Annuity (QPSA),* <http://www.irs.gov/retirement-plans/plan-participant-

employee/retirement-topics-qualified-pre-retirement-survivor-annuity-qpsa> (Accessed January 19, 2022).

Thus, the IRS Publication 504 and the IRS website provide guidance to Plan Administrators regarding the QPSA under REA. Based on the IRS interpretation of REA, Consumers Energy is misinterpreting REA by deducting money from [redacted] pension benefit for the Pre-Retirement Death Benefit (PRDB). [redacted] was vested in her retirement plan, but she did not die and there is no QDRO stating that her former spouse is entitled to her pension benefit.

Consumers Energy's plan document, which was supplied by Consumers Energy to the MAPRP, states on page 5 that "Spouse" is, "An individual who is legally married to the Participant." Page 4 of the plan document states that the "Pre-Retirement Surviving Spouse Benefit" is "The monthly benefit payable to the surviving spouse or named beneficiary of an employee who dies before retiring from the Company..." The plan document states on page 33 that "A former employee whose employment with the Company is or was terminated on or after August 23, 1984, for any reason and who has rights to Retirement Income under subsection 1 of Section VII of the plan will have his Retirement Income adjusted to provide Provisional Payee Option (d) for his spouse..."

The plan document states that the Pre-Retirement Surviving Spouse Benefit (PRDB) is for the spouse or a named beneficiary. Spouse is defined by the plan document as "An individual who is legally married to the Participant." [redacted] was single when she initiated her pension benefit and did not have a spouse, but a former spouse.

Moreover, both REA and ERISA state that the QPSA is for a spouse. REA talks about "spouse," not a former spouse. A former spouse is only entitled to a benefit only if there is a QDRO. Here, there is no QDRO. Second, the Department of Labor in Technical Release No. 2013-04 states that, "the term "spouse" will read to refer to any individuals who are lawfully married under any state law, including marriages to persons of the same sex." Under Michigan law, a former spouse, who is not a "spouse," can only obtain a share of the participant's pension benefit through a Qualified Domestic Relations Order (QDRO).

Pursuant to Michigan law, a former spouse is only entitled to a pension benefit when it is ordered by a judge in a QDRO. [redacted] judgment of divorce clearly states that she "shall have and receive as her sole and separate property, free and clear of any claim on the part of the Defendant, any and all retirement funds held in her name." The judgment of divorce, which is submitted with this brief, clearly states that [redacted] ex-husband has no claim for her pension benefits. Therefore, pursuant to REA, the IRS, a court order, and Consumer Energy's plan document, Consumers Energy should not be deducting a PRDB from [redacted] pension benefit. Consumers Energy appears to be purposely usurping the law and the judge's order.

Moreover, Consumers Energy has not been inconvenienced or incurred any additional expense for a Pre-Retirement Death Benefit, yet it is reducing [redacted] benefit by

$36.04 a month. REA was created to protect participants and their surviving spouses, not cause participant's benefits to be unlawfully reduced.

Consumers Energy has been disingenuous and misinterprets REA so that Consumers Energy benefits because [redacted] was married at one point in her life. Consumers Energy has a lot to gain if it incorrectly applies the PRDB expense to every participant who was married at some point in his or her life. The Department of Labor would be curious to know how many other participants are being taken advantage of by Consumers Energy.

Pursuant to ERISA, the only time that marital status is important is the day the retirement packet is completed. Moreover, Consumer Energy's letter, dated 8/11/2017, states that **"Marital status is determined when a participant initiates the process for benefit commencement."** (Emphasis added.) Therefore, [redacted] marital status when she initiated the process for benefit commencement in June 2017 was single, she had no spouse because she divorced him in 2013.

REA provides that a spousal waiver is required only if you are married or if a QDRO states a death benefit must be paid. (Emphasis added.) [redacted] is single and her judgment of divorce states that her former spouse is not entitled to her pension benefits. Consumers Energy has misconstrued REA and is not in compliance with the law when it reduces [redacted] monthly pension benefit for a PRDB.

For all the reasons above, Consumers Energy should immediately reimburse [redacted] for each month that $36.04 has been deducted from her pension benefit because it is inappropriate for Consumers Energy to deduct the PRDB under REA.

The Plan Has Breached Its Fiduciary Duty

ERISA is clear that the Plan Administrator's first duty is to the participants and beneficiaries. Employee Retirement Income Securities Act ("ERISA"), 29 U.S.C. § 1104 (a)(1) states that, "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries...."

Under ERISA, Consumers Energy owes a fiduciary duty to [redacted] This "fee" is nothing but a disingenuous attempt to bypass REA and deduct a Pre-Retirement Death Benefit "fee" when none was ever paid or was required. It is patently unfair for a Plan Administrator to benefit from their confusion of the law and ignore REA. Consumers Energy is looking out for their own interest and not in the interest of the participants, which is in direct violation of ERISA and REA. Consumers Energy is penalizing Ms. [redacted] for ever being married. [redacted] has questioned if Consumers Energy is paying the $36.04 to her ex-husband?

In *Rice v. Rochester Laborers' Annuity Fund,* 88F. Supp. 494 (1995), the court stated, "A fiduciary breaches his 29 U.S.C.S. Sec. 1104 duty to a plan participant by preventing or interfering with the receipt of benefits to which the participant is entitled. Under the

Employee Retirement Income Security Act (ERISA), a fiduciary's duty to participants and beneficiaries are "the highest known to law."

Based on *Rice*, Consumers Energy owes [redacted] the highest fiduciary duty known to law to establish that ERISA's requirements were met. Consumers Energy's inaccurate reading of REA is a direct breach of their fiduciary duty. Furthermore, it is impermissible for Consumers Energy to reduce [redacted] pension benefit, which she is clearly entitled to under the law.

Under 29 U.S.C. Section 1104, Consumers Energy owes [redacted] the highest fiduciary duty and should pay [redacted] her full pension benefit of $500.57.

Common Law Negligence

Consumers Energy, at all times, was a fiduciary because it exercised control, management, and administration of the Plan. Consumers Energy is reducing [redacted] monthly pension benefit by $36.04 a month for a Pre-Retirement Death Benefit that it is not entitled to collect.

The underpayment of [redacted] pension benefit is the direct result of Consumers Energy's negligence. Here, Consumers Energy has a fiduciary duty as imposed by ERISA, and Consumers Energy breached its duty by erroneously reducing [redacted] pension benefit.

Due to Consumers Energy's negligent breach of its fiduciary duty, [redacted] is having her pension benefit reduced monthly by $36.04 for her lifetime. Thus, Consumers Energy must repay [redacted] as soon as administratively possible, all the funds it has taken from her monthly benefit due to Consumer Energy's negligence.

Unjust Enrichment

Black's Law Dictionary defines "unjust enrichment" as, "A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."

Consumers Energy has been unjustly enriched by reducing [redacted] pension benefit for the Pre-Retirement Death Benefit (PRDB). Consumers Energy is not legally justified to deduct the PRDB pursuant to ERISA and REA. Consumers Energy is making money by charging a PRDB when any participant is married at any point of their life.

Furthermore, Consumers Energy has usurped the order of a Michigan Judge who signed a judgment of divorce stating that a former spouse has no rights to [redacted] pension benefit. Yet, Consumers feels that the former spouse does have a right and decides that it can charge [redacted] a fee.

As noted earlier in this brief, Consumers Energy's letter, dated 8/11/2017, clearly states that, **"Marital status is determined when a participant initiates the process for benefit commencement."** (Emphasis added)**.** Your own plan document and letter state that marital status is determined when the benefit process commences. To reiterate, [redacted] **was single when she initiated the process for benefit commencement.** (Emphasis added).

Consumer Energy's reduction of [redacted] pension benefit from $500.57 a month to $464.53 per month for a PRDB is unjustifiable under ERISA, REA, and the Plan's own requirements. Consumers Energy is misinterpreting REA and ignoring a Michigan Judge's order so that it can profit from the PRDB.

Consumers Energy's Plan Administrators owe [redacted] a fiduciary duty to comply with both ERISA and REA and not assess the Pre-Retirement Death Benefit "fee" to her benefit of $500.57. [redacted] should be reimbursed for each month her pension benefit was reduced by $36.04 plus interest.

REMEDY

Therefore, the MAPRP is requesting that [redacted] be paid her full pension benefits of $500.57 per month and repay [redacted] for each month that her benefit was incorrectly reduced by $36.04, plus interest, as soon as administratively possible. If there is paperwork which must be completed by [redacted] please forward it to me immediately.

Thank you for your prompt assistance in this matter. If you have any questions, please contact me directly at (517) 853-7188, or by email at csteinmetz@elderlawofmi.org.

Respectfully submitted,

Christine Steinmetz
Attorney

Enclosures:
Authorization and Release of Records
Judgment of Divorce, dated 2/1/2013
Pension Application with Marital and Waiver History Form, dated 6/23/2017
Consumers Energy letter, dated 6/30/2017
Consumers Energy's letter, dated 8/11/2017
Consumers Energy's letter, dated 10/31/2017

[redacted] letter to Consumers Energy, dated 11/4/2017
Consumers Energy's letter, dated 11/16/2017
[redacted] letter to Consumers Energy, dated 12/12/2017
Consumers Energy's letter, dated 1/3/2018
[redacted] letter to Consumers Energy, dated 6/15/2020
MAPRP Inquiry letter, dated 9/23/2021
Consumers Energy's letter, dated 10/12/2021
Pages 33 and 34 of Consumers Energy's Plan Document

Consumers Energy
Count on Us®

March 31, 2022

Christine Steinmetz
Elder Law of Michigan, Inc.
3815 W. St. Joseph, Suite C-200
Lansing, MI 48917

RE: [redacted] claim for benefits

Dear Ms. Steinmetz,

We received your letters of January 20 and February 24, 2022 regarding [redacted] benefit and the Pre-Retirement Death Benefit charge. Please be aware that these were the first letters we received, except for the letter last September that went to our legal department and of which we were not aware. We have no record of receiving the letter in June 2020. All other communications were with our recordkeeper.

We have reviewed our plan document and procedures, consulted with both our in-house legal counsel and our outside ERISA attorney. and our recordkeeper Fidelity Investments. Although Fidelity is following our document when charging this fee, we agree that in this case an exception should be made.

[redacted] was not provided a waiver when she terminated employment because she was unmarried at the time. The regulations indicate that an unmarried participant is deemed to have waived the QPSA requirement, but this waiver becomes null and void if the participant later marries. [redacted] could have requested and completed a waiver at the time she married, however we feel that it is unreasonable to expect that a former employee would contact us whenever a marital status changes. [redacted] was not provided a waiver at any later time as we have no way to know when a former employee changes marital status.

We will be increasing the monthly benefit of [redacted] by $36.04/month beginning May 1, 2022 and issuing a retroactive payment to [redacted] in the amount of $2,090.32, representing 58 months of the PRDB fee that she was charged. We do not pay interest on retroactive payments.

We trust this resolution is acceptable to [redacted] and we now consider the matter closed.

Sincerely.

Kendra K. Grob
Retirement Plans Manager
517-247-9634

cc: [redacted]

MAPRP
Mid-America Pension Rights Project

Elder Law of Michigan, Inc.
3815 W. St. Joseph, Suite C-200
Lansing, MI 48917
www.elderlawofmi.org
866.400.9164

November 4, 2021

Operating Engineers Local 324 Pension Plans
700 Tower Drive, Suite 300
Troy, MI 48098
Attention: Board of Trustees

[redacted]

REQUEST A WAIVER OF RECOUPMENT OF ASSESSED PENSION BENEFIT OVERPAYMENT

CLAIM FOR BENEFITS

My client, [redacted] has contacted the Mid-America Pension Rights Project (MAPRP) seeking legal representation. I have included a copy of his executed and notarized Authorization for Release of Records and Appointment of Representative giving MAPRP, and its authorized agents, permission to represent him in all pension related matters.

MAPRP is a program of Elder Law of Michigan, Inc. (ELM), a private, non-profit organization recognized by the State Bar of Michigan as a statewide agency providing Legal Aid and Legal Services. I am an attorney with ELM.

The MAPRP is filing this claim for benefits because the Operating Engineers Local 324 Pension Plan has reduced [redacted] pension benefit due to an alleged overpayment. [redacted] believes that his benefit should not be reduced, and he does not owe an overpayment. [redacted] now submits this claim for benefits for the reasons listed below.

Background

[redacted] retired from Operating Engineers Local 324 and began receiving his disability pension benefit in December 2009. [redacted] joined the union on 5/5/1989. [redacted] received a letter from the Pension Fund, dated 8/17/2021, indicating that there was an alleged overpayment of $93,179.52.

The 8/17/2021 letter states that, "It has come to the attention of the Operating Engineers' Local 324 Pension Fund that you have received an overpayment of benefits. Your monthly pension benefit under the terms of the Qualified Domestic Relations Order on file, was supposed to be reduced by $970.62 effective the 1st of the month after your 55th Birthday, September 1, 2013 and unfortunately this benefit adjustment was never done. This resulted in an overpayment in the amount of $93,179.52." The Plan goes on to state that, "Effective September 1, 2021 your corrected monthly benefit will be $3,053.91. The fund will contact you regarding the terms of repayment of the overpaid benefits." The Plan Administrator did not indicate why it had not sought to recover its "loss" from either the record-keeper/actuary who made the error or from the Plan. A copy of the letter is enclosed for your convenience.

On 9/15/2021, the MAPRP sent an inquiry letter requesting the summary plan description, the plan document, and a detailed calculation explaining the overpayment. A copy of the inquiry letter is enclosed for your convenience.

On 9/21/2021, the Fund sent a response letter to our inquiry. The letter stated:

> "In response to your request for information, please be advised that in December 2009, the Pension Fund calculated [redacted] Disability Pension Benefit at $4,024.53 a month. The Qualified Domestic Relations Order (QDRO) assigning 50% of his accrued benefit earned during the term of the marriage to his ex-spouse/alternate payee required a reduction in his monthly Pension Fund Benefit effective September 1, 2013. A copy of the QDRO and the Actuary's QDRO Benefit calculation is enclosed.
>
> [redacted] benefit was not reduced effective September 1, 2013, when the benefit payments to that alternate payee commenced, resulting in an overpayment in the amount of $970.62 a month, for the months of September 2013 through August 2021, (96 months) with a total overpayment of $93,179.52."

The letter included a copy of the QDRO, the Actuary's QDRO Benefit Calculation, the plan document, and the summary plan description. A copy of the letter is enclosed for your convenience. In addition, [redacted] was never provided a hardship waiver form.

The Plan Has Breached Its Fiduciary Duty

ERISA is clear that the Plan Administrator's first duty is to the participants and beneficiaries. Employee Retirement Income Securities Act ("ERISA"), 29 U.S.C. § 1104 (a)(1) states that, "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries...."

In addition, the Operating Engineers Local 324 Plan Document states on page 35 that "ERISA imposes duties upon people who are responsible for the operation of the Plan. The people who operate your Plan, who are called "fiduciaries" of the Plan, have a duty to do so prudently and in the interest of you and other Plan participants and beneficiaries."

Courts have found that when a Plan breaches its fiduciary duty to a participant, the Plan is barred from seeking recoupment of overpayment. In *Philips v Maritime* Ass'n, the Court found that the Plan breached its fiduciary duty by overpaying benefits because of the Plan's miscalculation.[1] The Court said, "The fiduciary duty of care involved in ERISA is rooted in negligence principles and is an affirmative duty . . . In short, the fiduciary must exercise his position of trust so as, at the very minimum, not to harm the beneficiary as a result of his failure to exercise reasonable care.".[2]

In the recent case of *Richardson v. IBEW Pacific Coast Pension Fund*, the Ninth Circuit found that a defined benefit plan was barred from collecting an overpayment that was made to the participant. In *Richardson*, the mistake was entirely due to the Plan's error, and the overpayment occurred for a period of 11 years. The *Richardson* court found that the Plan was not merely negligent, but the error amounted to a breach of the Plan's fiduciary duties. The participant did not know she was being overpaid and the amount owed due to the overpayment grew so large due entirely to the Plan's error.[3]

When [redacted] received his pension benefit in 2013, the Plan did not conduct a review of his benefit calculations. The Plan provided the MAPRP with a copy of the actuary documents and the QDRO with their 9/21/21 letter. The plan knew of the QDRO but breached their fiduciary duty. [redacted] reasonably relied on the Plan to provide him with a correct calculation in 2013. However, the Plan did not review the calculation until 2021, 8 years after it had made the error.

[1] *Philips v Maritime Ass'n-I.L.A. Local Pension Plan*, F. Supp 2d 549, 555(E.D. Tex. 2001)
[2] *Id.* At 555-56 (citing *Wright v. Nimmons*, 641 F. Supp. 1391, 1402 (S.D. Tex 1986)).
[3] *Richardson V. IBEW Pacific Coast Pension Fund 2020*, No. C19-0772JLR, 2020 WL 3639625 (W.D. Wash. July 6, 2020).

The Operating Engineers Local 324 Pension Plan owed a fiduciary duty to [redacted] to detect errors in payment within a reasonable amount of time. Here, the length of time it took to detect the overpayments (8 years), weighs against restitution and is inequitable. The overpayments were the result of more than just a clerical mistake, they were the result of the Fund's breach of their fiduciary duty.

Therefore, under ERISA and the Operating Engineers' plan document, the Plan is barred from recoupment when it has breached its fiduciary duty to the participants.

The Plan shall not assign or alienate plan benefits

Pursuant to the Employee Retirement Income Securities Act ("ERISA"), § 206(d)(1), 29 U.S.C. § 1056 (d)(1), provides that "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." To the extent, the Operating Engineers Local 324 Pension Plan's recoupment of the alleged overpayment violates this § 206(d)(1).

The Operating Engineers Local 324 Pension Plan is the plan administrator with the responsibility to compute, certify, and direct the Trustee with respect to the amount and the kind of benefit to which a participant is entitled. To the extent that [redacted] has been overpaid, the Fund has breached its fiduciary duty.

The Operating Engineers Local 324 Pension Plan, as plan administrator, had at least three options for the Plan to recover any losses because the Fund made an error and failed to discover the error for 8 years: it could make the plan whole by continuing to fund the benefit as originally calculated or pay the plan a lump sum payment for the Plan's error; it could sue the record keeper/actuary for the consequences of the miscalculations; or it could seek recoupment from the innocent participant who relied on misrepresentation to their detriment. The Fund was required to make this determination subject to ERISA's fiduciary duties and the restraints of ERISA's prohibited transaction provisions.

The Plan breached its fiduciary duty to [redacted] when it did not conduct a review of its calculations until 8 years after the error was made. The Plan further breaches its fiduciary duties by using self-help recoupment methods rather than seek to recover the plan losses by either having the Operating Engineers Local 324 Pension Plan continue to fund the plan on the basis of the miscalculated benefit or by recovering plan losses from the actuary, which on information and belief prepared the erroneous calculations.

Here, the Plan chooses to recover the Plan's loss from the innocent participant rather than continuing to fund the plan to pay benefits at the level promised to the participant. In doing so, the Fund not only failed to administer the plan solely for the interest of the participants, but acted in the Fund's corporate interest, which is adverse to the interest of the Plan and the interests of the participants. This constituted a prohibited transaction under ERISA §408(b)(ii), 29 U.S.C. § 1106 (b)(1).

Even if the Plan is permitted to recoup overpayments, it must pursue recoupment through litigation rather than self-help and may not use the threat of benefit reduction to coerce participants to repay the plan with a lump sum benefit. [redacted] is entitled to his pension benefit without the offset for past overpayments. Again, the Plan's recourse would be to seek judicial relief, not self-help. The Plan has already reduced [redacted] benefit by $970.62, the offset for the QDRO. However, to reduce his Disability Pension Benefit due to the overpayment would create a hardship for him.

Moreover, pursuant to 29 C.F.R. § 2530.230-3(b0(3) states that multiemployer plans seeking to recover payment may not recoup more than 25% of the participant's monthly benefit payments. Therefore, any recoupment in excess of 25% would be in direct violation of federal law.

The Plan is Required to Follow its Plan Document

Pursuant to the Employee Retirement Income Securities Act ("ERISA"), 29 U.S.C. § 1104 (a)(1)(D) and the Restatement Second of Trusts § 164 (2012), a plan administrator owes a fiduciary duty to the plan participants and shall act "in accordance with documents and instruments governing the plan."

The Operating Engineers Local 324 Pension Plan provided [redacted] with a copy of the plan document and summary plan description. Operating Engineers Local 324 Pension Plan does not discuss the issue of an overpayment, nor does it contain any specific provisions disclosing to participants the potential for recoupment of overpayments. Therefore, Operating Engineers Local 324 Pension Plan does not have a right to recover payments made to [redacted] under ERISA and the express terms of the plan.

The IRS Does Not Demand That Plans Recoup Overpayments

In 2015, the Internal Revenue Service revised its Employee Plans Compliance Resolution System (EPCRS) 2013-12 to prevent pension plans from imposing undue hardship on plan participants.[4] IRS Revenue Procedure 2013-12 provides that corrections should be reasonable and appropriate; however, the IRS was informed that plan administrators have been **misinterpreting the rules by aggressively seeking recoupment of large amounts from plan participants and beneficiaries in order to correct plan administrator errors.** Therefore, the IRS modified this procedure. Because many of the affected participants and beneficiaries are older people who have financial difficulty meeting such corrective actions, the IRS has revised its regulations under the EPCRS to clarify its position on recoupment action.

Internal Revenue Procedure 2015-27 was issued to provide that the plans have flexibility in correcting overpayment failures and the plan administrator may not need to require that beneficiaries and plan participants return the overpayment to the plan.

[4] 2015 IRB LEXIS 74 (I.R.S. February 2, 2015).

Under the **Internal Revenue Procedure 2015-27, Section 3(.02)(2), Flexibility in Correction of Overpayment failures.** Some plans may be interpreting the correction rules in Rev. Proc. 2013-12 as requiring a demand for recoupment from plan participants and beneficiaries in all cases. However, depending upon the facts and circumstances, correcting an Overpayment under EPCRS may not need to include requesting that an Overpayment be returned to the Plan by participants and beneficiaries.

Under the **Internal Revenue Procedure 2015-2 Section 3(.02)(3) Description of modifications to clarify that there is flexibility in correcting Overpayment failures, Sections 6.06(3) and 6.06(3) and 6.06(4) of Rev. Prov. 2013-12**, are modified to clarify that there is flexibility in correcting an Overpayment under EPCRS. For example, depending on the nature of the Overpayment failure (such as Overpayment failure resulting from a benefit calculation error), an appropriate correction method may include...having the employer or another person contribute the amount of the Overpayment (with appropriate interest) to the Plan in lieu of seeking recoupment from plan participants and beneficiaries.

Thus, the IRS issued this Internal Revenue Procedure so that plan administrators are aware that they are not required to recoup overpayments from plan participants or beneficiaries, especially when the overpayment is due to the Plan's error.

The Operating Engineers Local 324 Pension Plan may and should seek alternative means of recouping the overpayment rather than aggressively demanding repayment from [redacted]. The overpayment error was entirely due to the Fund's mistake, rather than the result of any action on the part of [redacted] and therefore adverse action should not be taken against [redacted].

Common Law Negligence

The Operating Engineers Local 324 Pension Plan, at all times, calculated the pension benefits paid to [redacted]. If [redacted] disability pension benefits were overpaid, any such overpayments would have been a result of the Fund's negligence. The Fund should be responsible for paying any such overpayments that it caused, and not [redacted] an innocent party.

The Balance of Equities Does Not Support Recoupment

When a plan does not specifically allow for recoupment, but nevertheless it does so, it exercises extra-statutory devices to do so.[4] By reducing Mr. [redacted] monthly benefits to recoup past overpayments, the Operating Engineers Local 324 Pension Plan has availed itself of the common law remedy of restitution.

Several courts have refused to allow restitution in similar circumstances to [redacted] In *Agathos v. Starlite Motel*, it was found that the holding welfare fund was not entitled to reimbursement for benefits it paid to an employee who was ineligible to receive benefits, since damages at issue flowed from fund's failure to adequately police employer's account.[5] In *Burger v. Life Ins. Co. of N. Am*. the holding issuer waives its rights to recover overpayments account.[6] In *Dandurand v. Unum Life Ins. Co. of Am*. the holding that equities did not weigh in favor of requiring participants to pay restitution for overpayment.[7]

The Fifth Circuit characterizes the duty of plan administrators and trustees as fiduciary and establishes that the concept of fiduciary duty is to be broadly construed within the context of ERISA.[8] Here, the fiduciary, or the Operating Engineers Local 324 Pension Plan, should exert at least the duty of a reasonably prudent person who would exert in his own affairs under similar circumstances. "ERISA provides that the fiduciary shall discharge their duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims'."[9]

In addition, Operating Engineers Local 324 Pension's plan document states on page 35 that, "ERISA imposes duties upon the people who have the responsibility for the operation of the employee benefit plan. The people who operate your plan, called 'fiduciaries' of the plan, have a duty to act prudently and in the interest of you and other plan participants and beneficiaries." Local 324's plan document recognizes that the plan has a fiduciary duty to [redacted] to act prudently. Operating Engineers Local 324 Pension Plan's error that continued for 8 years violated the prudent person standard and breached their fiduciary duty. The plan should seek other means to recover the amount due to the fact that the overpayment is due entirely to the Operating Engineers Local 324 Pension Plan's error.

In addition, the *Phillips v. Maritime Association*[10] court held that the Plan could not recover an overpayment that was made in error because the beneficiaries had no way of knowing that they had been overpaid and had "rationally planned their lives on the amounts . . . paid to them by the Plan for years, and as a result had a change of position."

[5] *Agathos V. Starlite Motel*, 60 F.3d 1432015 IRB Lexis 74 (I.R.S. February 2, 2015).
[6] *Burger v. Life Ins Co. of N. Am*, 103 F. Supp 2d 1344.
[7] *Dandurand v. Unum Life Ins. Co. Am*., 150 F. Supp. 2d 178.
[8] *Wright v. Nimmons*, 641 F. Supp. 1391.
[9] *Phillips v. Maritime Ass'n - I.L.A. Local Pension Plan*, 194 F. Supp. 2d 549, 556, 29 U.S.C. § 1104(a)(1)(B)
[10] *Id.*

The court in *Dandurand*[11] ruled that the balance of equities does not support the recoupment of an overpayment made to a participant. The court reasoned that "it was reasonable for *Dandurand*[12] to believe that Unum conducted its accounting on a periodic basis and that it would correct payment errors within a reasonable period of time. Allowing an . . . error to persist for four years . . . does not fall within a reasonable period of time."

The court in *Phillips v. Brink's Co.* determined that the plan administrator's interpretation of the plan allowing it to make such deductions was plausible, equitable considerations prevented recoupment of amounts previously paid in error.[13]

Similarly, as in *Phillips*[14], [redacted] has reasonably relied on his pension benefit and has planned his life based on that amount.

As in *Dandurand*[15], it is reasonable for [redacted] to believe that the Fund was correct in sending his pension benefit and that the plan would correct errors within a reasonable time. The *Dandurand*[16] court found that 4 years is not a reasonable period of time for an accounting error to be corrected, and this calculation correction is occurring 8 years later.

Unfair Tax Consequences

[redacted] has already paid taxes on the amount the Plan is trying to recoup. Therefore, in addition to the financial hardship, this reduction in monthly income also requires Mr. [redacted] to incur the cost of hiring a tax professional to file amended tax returns for the years in which benefits are being recouped.

Because [redacted] income since the benefit reductions will be lower than at the time the miscalculated benefits were paid, and because [redacted] marginal tax rate is now lower than during the period of the alleged overpayments, [redacted] may pay more income tax than he would have over otherwise paid over his life and additionally will lose the time value of the taxes paid prematurely. [redacted] is asked to repay the full amount of this overpayment, without credit for the increased tax liability he is suffering because of the Fund's error.

Detrimental Reliance

A plan may not be able to recoup overpayments where participants or beneficiaries can show detrimental reliance. It is reasonable for the Operating Engineers Local 324

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[11] *Dandurand v. Unum Life Ins. Co. of Am.*, 150 F. Supp. 2d 178, 187
[12] *Id* at 189.
[13] *Phillips v. Brink's Co.*, 632 F. Supp. 2d 563
[14] *Phillips v. Maritime Ass'n - I.L.A. Local Pension Plan*, 194 F. Supp. 2d 549
[15] *Dandurand v. Unum Life Ins. Co. of Am.*, 150 F. Supp. 2d 178, 187
[16] *Id*. at 187.

Pension Plan to conduct an accounting on a periodic basis and that it would correct payment errors within a reasonable period of time.

In *Kapp v. Sedgwick CMS*, the court held that the equitable principle of laches barred a long-term disability plan from recouping overpayments it had made over 8 years.[17] The court determined that although ERISA permits a plan to recoup overpayments that were entirely the Plan's fault, the court would also consider whether the participant had relied on the benefit calculation to his detriment. The court considered six factors that were outlined in *Thorn v. United States Steel & Carnegie Steel Pension* Fund:

- The amount of time which had passed since the overpayment was made.
- The effect that recoupment would have on the participant's benefit income.
- The nature of the mistake by the administrator.
- The amount of the overpayment.
- The beneficiary's total income.
- The beneficiary's use of the money at issue.[18]

Similarly, [redacted] alleged overpayment began on 9/1/2013, and he received the notice of the error 8 years later, in a letter dated 8/17/2021. [redacted] detrimentally relied on the Fund's calculations used to determine his pension benefit. The Fund allowed this problem to persist for 8 years. [redacted] did not know he was overpaid and was surprised to find out that he owed $93,179.52.

A recoupment of this benefit would have the effect of dramatically reducing the present value of [redacted] pension benefit. [redacted] relied on the Fund's determination that the amount distributed to him was accurate and he planned his retirement and his resources based on that determination. [redacted] included the monthly amount in its totality in his household budget to pay for the necessities of life such as housing, food, clothing, medical expenses, insurance, utilities, etc.

[redacted] and his wife are both disabled and live modestly. They did not use the pension payments to accumulate large investments or make extravagant purchases. Mr. [redacted] had been receiving a monthly pension benefit of $4,024.53 and the Plan has adjusted [redacted] monthly benefit to $3,053.91 due to the QDRO. Any further reduction would prevent [redacted] from being able to pay for everyday necessities.

Therefore, the Plan must not seek recoupment from [redacted] because he detrimentally relied on an erroneous benefit determination and does not have the resources to recover the amount of $93,179.52.

[redacted] is currently receiving a disability pension. He is permanently disabled and has lumbar degenerative disc herniations at L3-L4 and L4-L5, right-side lumbar radiculopathies at L5-S1, and cervical disc disease post C3-C4, C5-C6 laminectomies. [redacted] has had 4 neck surgeries, back surgery, and knee replacement surgery.

[17] *Kapp v. Sedgwick CMS, AT&T Benefit Umbrella Plan* 1, 2013 WL 26051, 3 (S.D. Ohio, Jan. 2, 2013).
[18] *Thorn v. United States Steel and Carnegie Pension Fund*, CV-P-1829-S (M.D. Ala. 1983).

Along with caring for himself, [redacted] also cares for his wife. [redacted] wife is also disabled and has polymyositis. She has spinal cord issues, 4 fusions in her spine, nerve and muscle damage. She has osteoporosis at bilateral hips, thoracic and lumber spine, cervical and lumbar osteoarthritis, anterior spondylolisthesis at L2-L3, L4,-L5, atrophied L5 spinal nerve root, Epstein-Barr virus, occipital neuralgia, degenerative sacroiliac joint, post laminectomy and fusion with instrumentation at L4-L5 and L5-S1, L2-L3 disc herniation, and chronic right C7-C8/T1 radiculopathies, and chronic bilateral L5-S1 radiculopathies. [redacted] has issues with mobility and walking. She relies on a scooter to get around and has a special motor vehicle with a lift to accommodate her scooter. Unfortunately, [redacted] health continues to deteriorate.

The Operating Engineers Local 324 Pension Plan is seeking to shift onto [redacted] the full cost of an error that the Fund first made in September 2013 and has allowed to persist until August 2021. But for the Plan's error, [redacted] would not be facing an overpayment. [redacted] is an innocent party.

Undue Financial Hardship

The Department of Labor in issuing guidance to plan administrators that has stated that "depending on the facts and circumstances involved, the hardship to the participant or beneficiary resulting from such recovery or the cost to the Fund of collection efforts may be such that it would be prudent, within the meaning of section 404(a)(1)(B), for the Fund not to seek recovery from the participant or beneficiary of overpayment made to him."[19]

In *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, the Sixth Circuit Court considered equity in recoupment.[20] The court also found that "[a]lthough the Plan language permits recoupment, this court is concerned with the possible inequitable impact recoupment may have on the individual retirees [...] We thus remand this case to the district court to consider whether, under principles of equity or trust law, relief is unwarranted."[21]

The Plan should seek other means to recoup the funds. The Plan did not indicate why it had not sought to recover its "loss" from either the record keeper/actuary who made the error or from Operating Engineers Local 324, the plan sponsor as well as the plan administrator and named fiduciary, and which among other failures, apparently failed to identify the error for 8 years. Such a lengthy time period exacerbates the mistake, creating an even greater hardship.

[redacted] is 63 years old, is disabled, receives a limited fixed income, and is unable to return to work to supplement his income to repay this large sum of money. [redacted]

[19] Department of Labor Advisory Opinion 77-08, pg. 4.
[20] *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244
[21] *Id.* at 45.

wife is also disabled, and he has been a caregiver to his wife. In addition, the Fagan's have mortgage to pay, a car payment for their special equipped vehicle, and medical expenses. [redacted] pays the union $496 each month for his health insurance and his total out-of-pocket medical expense is $600 a month with co-pays for prescriptions. [redacted] has relied on his pension benefit since retirement ($4,024.53) which has been reduced to $3,053.91. Any further reduction to [redacted] disability pension benefit would cause him undue financial hardship. [redacted] depended on this benefit to pay for life's necessities during retirement after working for the union for 22 years. [redacted] has relied on his pension benefit and can't afford to have his pension reduced. The union breached its fiduciary duties and did not discover their error for 8 years.

Remedy

Because of all the reasons stated above, [redacted] respectfully requests that that the Plan waive the overpayment of $93,179.52 and any interest that may be owed on that amount be waived, and that the Operating Engineers Local 324 restore the Plan by other means. In addition, Mr. [redacted] requests that the Plan not reduce his monthly pension benefit.

Thank you for your review of this matter. If you have any questions, you can contact me at (517) 853-7188, or by email at csteinmetz@elderlawofmi.org.

Respectfully submitted,

Christine Steinmetz
Attorney

Enclosures:
Authorization for Release of Information
Letter from Operating Engineers Local 324 Pension Fund, dated 8/17/2021
Letter from Operating Engineers Local 324 Pension Fund, dated 9/21/2021
Inquiry letter from MAPRP, dated 9/15/2021

OPERATING ENGINEERS LOCAL 324
Pension Fund and Defined Contribution Plan

June 29, 2022

[redacted]

Re: Operating Engineers' Local 324 Pension Plan
Appeal Benefits

Dear [redacted]

This correspondence is to advise you that the Board of Trustees for the Operating Engineers' Local 324 Pension Fund (Fund or Pension Fund) reviewed you appeal requesting waiver of the overpayment of benefits to you and your request that your monthly pension benefit not be reduced. The Trustees determined that your appeal is granted in part and denied in part as detailed below.

As previously noted in Fund correspondence, a portion of your benefit was assigned to your ex-spouse pursuant to a Qualified Domestic Relations Order. The Trustees determined in reviewing your appeal that your monthly benefit payment ($4,024.53) was required to have been reduced at your deemed normal retirement age by the amount of the QDRO assignment, i.e. $970.62/month with a resulting and continuing reduced monthly benefit of $3,053.91.

You commenced receiving a Disability Benefit under the terms of the Plan in May 1, 2010. The Trustees determined that your Disability Benefit converted to a Normal Retirement Benefit following attainment of your age 62, or in September of 2020. Accordingly, you received an overpayment of benefits during the period of September of 2020 through August of 2021.

Thus, the Trustees determined that you received 12 months of overpayments at $970.62 per month totaling $11,647.44. Your regular monthly benefit will continue at the monthly amount of $3,053.91 to reflect the reduction required by the QDRO assignment. Additionally, recoupment of overpaid benefits is required in the amount of $11,647.44 for the period of September 2020 through August 2021.

The Pension Plan provisions permit it to withhold up to 25% of your gross benefit to recoup the overpayment. Please contact the Fund Office to further discuss the terms of the repayment.

Sincerely,

Board of Trustees Operating Engineers' Local 324 Pension Plan
Cc: Christine Steinmetz, Esq.