PBGC
Protecting America's Pensions
Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

November 24, 2010

Re: Appeal 2010-[redacted], [redacted], and Appeal 2010-[redacted]; PBGC Case 203971; Huffy Corp. Retirement Plan (the "Plan" or the "Huffy Plan")

Dear Mr. Jeffery:

The Appeals Board has reviewed the appeals your law firm filed on behalf of your clients [redacted] and [redacted].[1] The [redacted] appeals relate to the August 3, 2003 "Qualified Domestic Relations Order" obtained from the District Court in the 216th Judicial District in Kerr County, Texas (the "DRO," which is Enclosure 1 to this decision). PBGC, in a letter dated December 18, 2009 (Enclosure 2), determined that the DRO is not a Qualified Domestic Relations Order ("QDRO"). For the reasons explained below, the Appeals Board has upheld PBGC's December 18, 2009 determination and therefore is denying the [redacted] appeals.

Factual Background

[redacted] retired from the Huffy Corporation ("Huffy") and started receiving a Plan benefit on August 1, 1994. [redacted] benefit is in the form of a Joint and 100% survivor annuity ("J&100%SA") with [redacted] then-[redacted].[2] [redacted] elected the J&100%SA on the Plan's form, "Application for Retirement Benefits under Huffy Salaried Employees' Retirement Plan," which is signed by him and dated May 11, 1994 (Enclosure 3).[3]

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[1] Although you filed a single appeal letter dated May 6, 2010 on behalf of both [redacted] and [redacted], the Appeals Board docketed a separate appeal for each individual. In this decision, we use the term "the [redacted] appeals" when we refer (collectively) to [redacted] and [redacted] appeals. The Appeals Board has concluded that the [redacted] appeals arise out of the same or similar facts and seek the same or similar relief. Exercising its discretion under section 4003.56 of PBGC's regulation, the Board has consolidated the two appeals and is responding to them in a single decision. *See* 29 Code of Federal Regulations section 4003.56.

[2] For convenience, in this decision we will refer to [redacted] by their first names, i.e., "[redacted]" "[redacted]" and "[redacted]."

[3] Although [redacted] did not sign this form [redacted] signature was not required because the J&100%SA provides [redacted] with a more valuable survivor benefit than the minimum Qualified Joint and Survivor Annuity ("QJSA") benefit required by the Employee Retirement Income Security Act ("ERISA") (and also is more valuable than the Plan's

[redacted] and [redacted] were divorced by a court order signed on March 15, 2002 (the "Divorce Order"). The Divorce Order awarded [redacted] all rights "related to any . . . pension plan . . . existing by reason of the [redacted]'s past, present, or future employment."[4]

In a letter dated December 5, 2002 (Enclosure 4), [redacted] asked the Plan's Retirement Committee "to revoke my designated beneficiary, namely [redacted], since we are no longer [redacted] and [redacted]." Huffy, on behalf of the Plan, then asked its legal counsel whether the division of the benefits provided under the Divorce Order is proper under ERISA and the Internal Revenue Code ("IRC").

[redacted] of the law firm of Dinsmore & Shohl LLP responded to Huffy's request in a January 15, 2003 letter (the "[redacted] Letter," provided as Enclosure 5). After discussing the facts and applicable law concerning QDROs and QJSAs,[5] the [redacted] Letter stated as follows (with footnotes omitted):

> Treasury Regulation Section 1.401(a), Q&A 25(b)(3) provides that if the QJSA commences before a divorce, the spouse at the time of the participant's annuity starting date is entitled to the survivor annuity. Additionally, some courts have held that when a retirement benefit commences in the form of QJSA prior to a divorce, the current spouse vests in those survivor benefits.
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> Treasury Regulation Section 1.401(a), Q&A-25(b)(3) implies that even if a QJSA commences before the divorce, the participant and spouse may execute a qualified domestic relations order disposing of the spouse's interest in the survivor annuity provided that an alternate payee becomes entitled to the survivor annuity. An alternate payee cannot be anyone other than a spouse, a former spouse, a child, or other dependant of the participant. However, since a QDRO cannot provide for increased benefits, the monthly QJSA payment will still be calculated using the life expectancies of the participant and the participant's spouse on [redacted]'s annuity starting date, and the monthly payments will cease upon the death of the survivor of [redacted] and [redacted]'s former spouse.

The [redacted] Letter concluded: "Since the Retirement Plan does not allow a participant to change his or her retirement benefit option after its commencement, [redacted] is unable to designate a new beneficiary for the survivor annuity portion of [redacted] retirement benefit under the Retirement Plan unless he obtains a QDRO designating a proper alternative payee . . . . If [redacted] does obtain a QDRO, the retirement benefit will be calculated in the same manner, except that the beneficiary entitled to receive the survivor annuity will be changed."

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normal form for a married participant, which is a Joint and 50% Survivor Annuity ("J&50%SA")). *See* 29 U.S.C. § 1055(d)(1), ERISA § 205(d)(1) (definition of QJSA); 29 U.S.C. § 1055(c)(2), ERISA § 205(c)(2) (requirements for QJSA waiver); and Treas. Reg. § 1.401(a)-20 (Q&A 16) (discussion of QJSA waiver requirements).

[4] The Divorce Order did not specify the names of [redacted] pension plans.

[5] The letter points out that, as a defined benefit plan, the Plan is subject to the QJSA requirements under IRC sections 401(a)(11) and 417.

[redacted] married [redacted] on February 14, 2003. We note that [redacted] (who was born in 1957) and [redacted] (who was born in 1959) both are younger than [redacted] (who was born in 1936).

On July 31, 2003, the Texas state court issued an Order on Motion for Clarification and Modification of the Final Decree of Divorce (Enclosure 6). This order provided that "[redacted] has all interest and rights to the Huffy Corporation retirement accounts and [redacted] is divested of all interest and rights to the Huffy Corporation retirement account including but not limited to the right to be designated the beneficiary of the survivor annuity portion of the retirement account."

The DRO, which was "signed and rendered" by the state court Judge on August 3, 2003, refers to [redacted] as "Husband" and to [redacted] as "Wife." In Section 2, the DRO provides: "[redacted] designates [redacted] whom [redacted] married on February [redacted], 2003, as the 'Alternate Payee' with respect to the survivor annuity portion of the Retirement Benefits set forth above, within the meaning of IRC 414(p)(8) and ERISA 206(d)(3)(K)."

Section 4 of the DRO further states that the "[redacted] waived [redacted] rights to the survivor annuity portion of the Retirement Plan." Additionally, in Section 5, the DRO purported to provide [redacted] with this survivor benefit, stating:

> The Alternate Payee is entitled to the survivor annuity portion of the Retirement Plan distributed in accordance with the provisions of the Plan. The survivor annuity portion of the Retirement Benefit remains unchanged and is calculated based upon the life expectancies of Husband and Wife.

Shortly thereafter, the DRO was submitted to Huffy for approval as a QDRO. In a letter dated August 15, 2003 from [redacted], Corporate Benefits Manager of Huffy, to [redacted] (the "Huffy Letter," which is Enclosure 7), the DRO was approved as a QDRO. The Huffy Letter stated:

> Our ERISA counsel has determined that the order dated August 5, 2003 meets the requirements of the Internal Revenue Code Section 414(p) and is determined to be a Qualified Domestic Relations Order (QDRO) with regard to your benefits under the Huffy Corporation Retirement Plan. Per the terms of the QDRO, [redacted] is now designated as the Alternate Payee with respect to the survivor benefits under the Plan and, upon your death, will receive $7,173.95 per month for [redacted] lifetime.

PBGC became statutory trustee of the Plan in October 2005 and continued to pay [redacted] benefit on an estimated basis. In a letter dated February 15, 2006, [redacted] requested that PBGC review [redacted] benefit payment amount.

PBGC sent [redacted] a benefit determination letter on September 26, 2008. This letter informed [redacted] that [redacted] monthly PBGC-payable benefit is $4,317.09, which is greater than the estimated amount he had been receiving. The letter further stated that PBGC would pay [redacted]s

benefit in the form of a joint-and-100%-survivor annuity, which "provides you with a reduced monthly benefit for the rest of your life. Thereafter, your surviving beneficiary will receive 100% of your benefit for the rest of your beneficiary's life." The benefit statement PBGC enclosed with the letter listed [redacted] as the beneficiary. PBGC's September 26, 2008 determination became final after the 45-day appeal period expired without the filing of an appeal. *See* 29 C.F.R. §§ 4003.23, 4003.59.

Prior to filing your May 6, 2010 appeal letter, you wrote two letters to PBGC on [redacted] behalf, which are dated February 16, 2009, and April 8, 2009. These letters contended that the DRO properly substituted [redacted] for [redacted] as the beneficiary for the survivor annuity. You also specifically asked that PBGC issue you an initial determination on the survivor benefit issue, so that you may have the opportunity to appeal that issue to the Appeals Board. After initially denying this request, PBGC reconsidered its position and issued the December 18, 2009 determination that is the subject of the [redacted] appeals.

PBGC's Determination

In its December 18, 2009 determination, PBGC stated the following two general reasons as to why the DRO could not be qualified: (1) the DRO violates the legal requirements for a QDRO because, in attempting to substitute [redacted] for [redacted] as the beneficiary of the survivor annuity, it would impose increased costs on the pension plan and/or would require the plan to provide a form of benefit not offered by the Plan; and (2) the DRO impermissibly attempts to divest [redacted] of [redacted] right to the survivor benefit, a right that had vested at the time that [redacted] began to receive [redacted] pension benefits. The impact of PBGC's determination is that [redacted] retained [redacted] right to be treated as the beneficiary for the survivor annuity portion of [redacted] benefit.

With respect to the first of its reasons, PBGC noted that the DRO could be interpreted in at least two different ways.[6] Under one interpretation, the DRO would provide [redacted] with a survivor benefit (upon [redacted] death) that is "paid to [redacted] for as long as [redacted] lives, and not end upon the death of [redacted]" (hereinafter "***Interpretation 1***"). PBGC concluded that ***Interpretation 1*** would require the Plan "to provide increased benefits (determined on the basis of actuarial value)," and thus would be contrary to the requirement for a QDRO in ERISA section 206(d)(3)(ii).[7]

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[6] In its December 18, 2009 determination letter, PBGC stated that the ambiguity that exists due to these two possible interpretations is another reason why the DRO cannot be qualified because it fails to "clearly specif[y] . . . the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined," or "the number of payments or period to which such order applies." *See* ERISA § 206(d)(3)(C)(ii)-(iii).

[7] PBGC concluded that, if the DRO is interpreted to substitute [redacted] for [redacted] as the beneficiary of the survivor benefit (***Interpretation 1***), the DRO would impose an increased cost to the Plan (on an actuarial basis) based on "adverse selection." PBGC's determination, at pages 3 to 5, provides a detailed explanation of the "adverse selection" concept and the reasons why (in PBGC's view) adverse selection would cause increased costs to the Plan.

PBGC's letter also stated that the DRO could be interpreted as providing [redacted] with a survivor benefit (in place of [redacted]) that "would cease upon the death of [redacted] (even if [redacted] is still alive)" (hereinafter "***Interpretation 2***"). PBGC concluded that ***Interpretation 2*** would be contrary to the QDRO requirement stated in ERISA section 206(d)(3)(ii) because it would require the plan to provide "a form of benefit, or [an] option, not otherwise provided under the plan."

With respect to the second of its reasons as to why the DRO could not be qualified, PBGC referred to the QJSA requirements in ERISA section 205. That section, among other things, provides that: (1) all defined benefit plans must offer a QJSA as the automatic benefit form for a married participant; (2) a participant, with spousal consent, may elect a different form or change the beneficiary, as permitted by the plan; and (3) such a "waiver" of the QJSA is valid only if obtained within a specified time period before retirement. Noting that ERISA provided a 90-day period for benefit elections at the time [redacted] retired, PBGC concluded that the time period for [redacted] and [redacted] to waive the QJSA form of benefit "had long since lapsed" on the date the DRO was obtained.

PBGC further stated that, if the QJSA is not waived during the applicable time period, "the spouse's right to the survivor annuity vests when the annuity begins." In making this point, PBGC observed that "the majority of the federal courts that have considered the issue have held that, because the survivor rights irrevocably vest at the annuity starting date, a subsequent domestic relations order cannot reassign the spouse's rights to this benefit." Based on those court decisions, PBGC concluded that the DRO could not properly transfer [redacted] right to the survivor benefit to [redacted].

PBGC's determination also cited the agency's written QDRO policy, which "precludes changing the beneficiary of a QJSA after benefits commence." Under this policy, PBGC pays survivor benefits to the spouse that was married to the participant at the annuity starting date, unless those benefits were waived by that spouse within the applicable election period, or a QDRO is in effect before the participant's benefit commenced. Thus, PBGC concluded that its December 18, 2009 determination denying qualification of the DRO "is consistent with this longstanding agency policy."

Finally, PBGC acknowledged that the former Plan administrator had determined that the DRO met the requirements for a QDRO. PBGC concluded, however, that the earlier determination was erroneous and thus could not be accepted by PBGC.

Your Appeal Letter

Your May 6, 2010 appeal letter ("the Appeal Brief" or "AB") contends that "PBGC misunderstands the role of the QDRO in this dispute." AB at 2. You assert that the DRO "does not purport to divest [redacted] of the QJSA's survivor benefits," and thus it does not mean "that the QJSA's survivor benefits revert to [redacted]." *Id.* In making this claim, you indicate that the relevant facts are: (1) [redacted] "waived [redacted] QJSA survivor rights in the Final Decree of Divorce," which further is acknowledged in the DRO; and (2) "the intent of the [DRO] was to designate an alternate payee – [redacted] – to receive the survivor benefits that [redacted] waived." *Id.*

In contending that the DRO should be qualified, you disagree with PBGC's conclusion that the DRO would require the Plan to provide increased benefits. *Id.* at 5-8. You assert that this PBGC conclusion is based on its mistaken belief that the DRO would "transfer" the QJSA survivor benefit from [redacted] to [redacted]. *Id.* at 6. You refer to section 5 of the DRO, which states that the "survivor annuity portion of the Retirement Benefit remains unchanged and is calculated based upon the life expectancies of Husband [redacted] and [redacted]." *Id.* at 7. You claim that this language confirms that [redacted] benefits under the DRO "terminate on [redacted] death, not [redacted]." *Id.* You argue that, if the DRO is interpreted in this manner, there is no increased cost to the Plan. *Id.*

The Appeal Brief also disagrees with PBGC's conclusion that the DRO would require the Plan to provide a benefit not otherwise available under the Plan. *Id.* at 8. You state that the Plan expressly provides for the designation of an alternate payee to receive QJSA benefits, so long as the designation is made pursuant to a qualified domestic relations order. *Id.* Thus, in your view, "the clear intent of the Plan is to provide a QJSA benefit that pays survivor benefits to a surviving spouse or to an appropriately designated alternate payee." *Id.*

You further assert that the Plan vests the Plan Administrator "with extraordinarily broad discretionary powers." *Id.* As a result, "it is up to the Plan Administrator to determine in its 'sole and absolute' discretion what benefits the Plan intended to provide . . ." *Id.* You state that "[t]he benefits the Plan approved for [redacted] represent the Plan Administrator's exercise of its discretionary authority" as to the benefits the Plan is permitted to pay. *Id.* Therefore, you contend that PBGC should not change the former Plan administrator qualification of the DRO on the basis that the DRO would require the Plan to provide a benefit not otherwise available under the Plan. *Id.*

The Appeal Brief also disagrees with PBGC's determination that the DRO cannot be qualified because "'it attempts to divest [redacted] of [redacted] statutory right' to the QJSA survivor benefit 'after that right had already vested.'" *Id.* at 9. You state:

> The PBGC's argument fails for two reasons. As noted above, the QDRO did not seek to divest [redacted] of [redacted] right to the QJSA benefits; [redacted] waived those rights. In addition, the PBGC's argument that [redacted] rights irrevocably vested is based on the decision in *Carmona v. Carmona*, 544 F.3d 988 (9th Cir. 2008). The court in that case concluded, *inter alia*, that a beneficiary could not waive [redacted] interest in [redacted] ex-husband's survivor benefits. *Id.* at 1005-1006. That aspect of the court's holding was abrogated by the Supreme Court's decision in *Kennedy v. Plan Admin. For DuPont Savings and Invest. Plan,* 129 S.Ct. 865 (2009). There, the Court found that a beneficiary holding an otherwise inalienable pension benefit could indeed waive [redacted] right to receive those benefits. *Id.* at 873. Thus, because [redacted] waived [redacted] right to the QJSA's survivor benefit, the Plan was free to honor the QDRO and designate [redacted] as the alternate payee for those benefits. Accordingly, the QDRO is a qualified domestic relations order that the PBGC must honor.

Finally, you contend that PBGC's determination should be reversed for the following two additional reasons: (1) based on the factual circumstances under which the DRO was qualified, the Plan "waived" its legal defenses with respect to its validity, and this waiver also is binding on PBGC; and (2) the [redacted] "have relied to their detriment on the Plan's representations" with respect to validity of the DRO, and thus "PBGC, acting on behalf of the Plan, is estopped to deny the validity and enforceability of the QDRO." *Id.* at 3-5.

Relevant Plan Provisions

The Plan's governing documents incorporate ERISA's requirements for QJSAs and QDROs.[8] Section 9.05(b) of the 2001 Plan provides that the "Participant's waiver [of a QJSA] and [redacted] Spouse's consent thereof . . . must be made within the 90 day period ending on the Participant's Annuity Starting Date." Section 9.09, titled "Survivor Benefit," provides that upon the participant's death "the Participant's Beneficiary shall be entitled to a Survivor Benefit (if any) governed exclusively by the distribution form elected by the Participant, provided that the remaining portion of such benefit will continue to be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death. . . ."

Section 12.02 of the 2001 Plan, which contains standard ERISA language concerning the non-alienation of benefits and the QDRO exception to that rule, states in relevant part:

> Except as permitted by Treasury Regulations § 1.401(a)-13, no benefit or interest of a Participant or Beneficiary available under the Plan shall be subject to assignment or alienation, either voluntarily or involuntarily. The preceding sentence also applies to the creation, assignment, or recognition of a right to any benefit payable with respect to a Participant under a domestic relations order, unless: (a) the Plan Administrator determines that the order is a qualified domestic relations order, as defined in Section 414(p) of the Internal Revenue Code (a "Qualified Domestic Relations Order"); . . . . The Plan shall pay benefits to an Alternate Payee under a Qualified Domestic Relations Order no sooner than the Participant's earliest retirement age as provided pursuant to Section 414(p)(4) of the Code.

Discussion

The Plan terminated, effective August 31, 2005, without sufficient assets to provide all benefits PBGC guarantees under ERISA. PBGC determines the benefits it may pay in accordance with the terms of the pension plan, the provisions of ERISA, and PBGC regulations and policies.

There are two basic types of domestic relations orders: separate interest orders and shared payment orders. A separate interest order generally provides the alternate payee with a portion

[8] *See* Huffy Corporation Retirement Plan effective January 1, 2001 ("2001 Plan") at sections 2.57 (definition of "Qualified Joint and Survivor Annuity"); section 2.59 (definition of "Qualified Waiver"); section 9.04 (provision concerning required annuity and optional forms); section 9.05 ("Qualified Waiver"); and section 9.06 ("Participant Notice and Election Requirements"). You provided a copy of the 2001 Plan as an enclosure to the Appeal Brief.

(or, in some cases, all) of the value of the participant's benefit based on the lifetime of the alternate payee. The alternate payee's benefit is usually payable regardless of whether the participant has entered pay status. Conversely, a shared payment order generally provides the alternate payee with a portion (or, in some cases, all) of the participant's pension payments during the participant's lifetime, or for a specified shorter period.

Under ERISA and the IRC, the Plan Administrator determines whether an order is qualified. In the case of a terminated defined benefit plan for which PBGC is trustee, however, PBGC makes that determination. Section 6.6-3.F of PBGC's "Qualified Domestic Relations Orders" policy (the "QDRO Policy," which we are providing as Enclosure 8) describes the procedures PBGC will follow in reviewing domestic relations orders submitted to PBGC for qualification determinations.

For an order qualified by the prior plan administrator prior to PBGC becoming trustee of the plan, section 6.6-3.F.2.b of PBGC's QDRO Policy states:

> PBGC may review QDROs that a prior plan administrator qualified before PBGC became trustee of a plan. PBGC will not suspend payments to a participant or alternate payee while it is reviewing a QDRO that was qualified by the prior plan administrator. PBGC will not contact the parties to the QDRO unless PBGC finds something in the order that would not meet the requirements for a QDRO . . . Generally, PBGC will not make changes to QDRO benefits that went into pay status prior to trusteeship.

If PBGC determines that the prior plan administrator improperly qualified the order, PBGC will notify the interested parties that the order is not qualified and the reasons for the non-qualification. PBGC will then grant the interested parties a 45-day right of appeal so that they can provide a specific reason why PBGC's determination is wrong.

In the remainder of this "Discussion" section, we address the following six questions:

1. How should the DRO be interpreted?
2. Does the DRO fail to comply with ERISA because it would require the Plan to provide increased benefits?
3. Should the DRO be qualified because [redacted] "waived" [redacted] right to the survivor benefit in the Divorce Order?
4. Did PBGC correctly determine that [redacted] could not validly transfer [redacted] survivor benefit interest to [redacted] through a QDRO?
5. Must PBGC qualify the DRO based on the legal doctrines of "waiver" and/or "estoppel"?

Based on our analysis of these questions, we have decided that the [redacted] appeals must be denied.

1. How should the DRO be interpreted?

As stated above, PBGC concluded that the DRO could be interpreted in at least two ways, including: (1) ***Interpretation 1***, under which the DRO would provide [redacted] with a survivor benefit upon [redacted] death for as long as she lives; thus, any payments to [redacted] would not end upon [redacted] death; and (2) ***Interpretation 2***, which would substitute [redacted] as the beneficiary of the survivor benefit that (absent the DRO) is payable to [redacted] upon [redacted] death; thus, any payments to [redacted] would cease upon the death of [redacted] In the Appeal Brief, you contend that the DRO is not ambiguous and ***Interpretation 2*** is the correct one.

The Appeals Board agrees with you that the DRO's terms clearly are consistent with ***Interpretation 2***. The Board reached this conclusion based on the following analysis:

- The DRO, on page 1, states that [redacted] "is receiving benefits under the Plan in the form of a qualified joint and survivor annuity, calculated based upon the life expectancies of [redacted] and [redacted] (hereinafter the "Retirement Benefit)." Section 5 of the DRO then provides that [redacted] as alternate payee, is entitled to receive "the survivor annuity portion of the Retirement Plan distributed in accordance with the provisions of the Plan." Thus, Section 5 refers to the same benefit that is identified on page 1 of the DRO, which is a QJSA based on [redacted] and [redacted] lives.

- Section 5 further clarifies that the "survivor annuity portion of the Retirement Benefit remains unchanged and is calculated based upon the life expectancies of [redacted] and [redacted]." There also is nothing anywhere in the DRO that would indicate that [redacted] survivor benefit could continue after [redacted] death. Accordingly, when the DRO is read as a whole, it provides [redacted] with the same survivor benefit payments that [redacted] otherwise would receive absent any QDRO. Accordingly, under the terms of the DRO, no payments could be made to [redacted] after [redacted] death.

PBGC, in stating that the DRO's language "is far from clear," referred to the former Plan administrator's interpretation of the DRO in the Huffy Letter. The Huffy Letter stated: "Per the terms of the QDRO, [redacted] is now designated as the Alternate Payee with respect to the survivor benefits under the Plan and, upon your death, will receive $7,173.95 per month *for* [redacted] *lifetime.*" Enclosure 7 (emphasis added). Thus, the Huffy Letter is consistent with ***Interpretation 1*** (rather than ***Interpretation 2***), since the words "[redacted] lifetime" in it refer to [redacted] rather than to [redacted]. Accordingly, the Appeals Board found that the above-quoted language in the Huffy Letter does not correctly describe the terms of the DRO.

The Appeals Board is unable to determine why the language of the Huffy letter differs from the language in the DRO.[9] It is unnecessary, however, to determine the reason for the inconsistency because: (1) whether or not the DRO meets the requirements for a QDRO should

[9] Among the possible explanations are: (1) the Huffy Letter contained an inadvertent mistake (i.e., its drafter had intended to refer to a survivor benefit based on [redacted] "lifetime"); or (2) the Huffy Letter's drafter had incorrectly interpreted the DRO's language.

not depend upon the (incorrect) summary of the DRO in the Huffy letter; and (2) even if ***Interpretation 1*** applies to the DRO as stated in the Huffy Letter, such an interpretation would not meet the requirements for a QDRO (for the reasons explained below).

2. Does the DRO fail to comply with ERISA because it would require the Plan to provide increased benefits?

ERISA § 206(d)(3)(D)(ii), which sets forth one of several substantive requirements for QDROs, provides that a domestic relations order may be qualified as a QDRO "only if [it] . . . does not require the plan to provide increased benefits (determined on the basis of actuarial value) . . . ."

PBGC's December 18, 2009 determination provides a lengthy explanation, based on the principle of "adverse selection," as to why the DRO fails to comply with this requirement. PBGC's explanation appears to apply, however, only if the DRO is interpreted, consistent with ***Interpretation 1***, to provide [redacted] with a survivor benefit that is "paid to [redacted] as long as she lives, and [does] not end upon the death of [redacted]."[10]

As discussed above, we have rejected the above-stated interpretation of the DRO. Instead, we have interpreted the DRO as providing [redacted] with the same survivor benefit payments that [redacted] otherwise would receive absent any QDRO. Interpreted in this way, which is consistent with ***Interpretation 2***, we concluded that the DRO does not require the Plan to provide increased benefits in violation of ERISA § 206(d)(3)(D)(ii) – although it cannot be qualified for the other reasons that are discussed below.

3. Does the DRO fail to comply with ERISA because it would provide a "type or form of benefit" that is not otherwise provided under the Plan?

ERISA section 206(d)(3)(D)(i) provides that a domestic relations order may be qualified as a QDRO "only if [it] . . . does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan . . . ." PBGC determined that the DRO failed to satisfy this ERISA requirement under ***Interpretation 2*** (under which [redacted] survivor benefit payments end upon the death of [redacted] even if [redacted] is still alive). In PBGC's view, the Plan "provided no such form of benefit." In the Appeal, you disagree with PBGC's conclusions on this issue.

As is the case with shared payment QDROs, the terms of the DRO do not change either the total monthly amounts or the timing of the benefit payments that PBGC is required to make.[11] This is because:

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[10] PBGC's determination provides persuasive reasons as to why the DRO should not be qualified if ***Interpretation 1*** applies. Thus, if we had interpreted the DRO that way, we would have decided that the DRO failed to comply with ERISA section 206(d)(3)(D)(ii).

[11] The DRO is similar to a typical Shared Payment QDRO in that it provides an alternate payee ([redacted]) with the payments that would otherwise be received by another individual ([redacted]) for the other individual's ([redacted]) lifetime. The DRO differs from a Shared Payment QDRO, however, in that it changes the recipient of a *beneficiary's* benefit, while a Shared Payment QDRO changes the recipient of a *participant's* benefit.

- The DRO does not change the $4,317.09 monthly benefit that [redacted] will receive for [redacted] lifetime;
- The DRO does not change PBGC's benefit obligation if [redacted] dies before [redacted] As would occur if there is no QDRO, PBGC would pay no survivor benefits in this situation;
- The DRO does not change the amount and/or the duration of the required payments if [redacted] outlives [redacted] In that situation, PBGC would be required to pay a monthly benefit of $4,317.09 for the remainder of [redacted] lifetime. The only difference is that the DRO changes the recipient of the payments from [redacted] to [redacted]; and
- The DRO does not require PBGC to make any benefit payments other than those described above.

Thus, if the only consideration is whether or not the DRO alters the amount and/or timing of payments from what "otherwise [is] provided under the plan," we would find that no change would occur under the DRO's terms.

Although the DRO does not change the amount and/or timing of the required payments, it changes the recipient of the payments. If [redacted] dies before [redacted], the DRO would require PBGC to pay the survivor benefit to [redacted] (rather than [redacted]) for as long as [redacted] lives. The Plan does not contain a provision under which a survivor benefit is paid to one beneficiary based on the remaining lifetime of another individual. Rather, as discussed above under "Relevant Plan Provisions," the Plan's terms include only standard language (which mirror ERISA's requirements) with respect to QJSAs and QDROs. Thus, based on its change in the survivor benefit's recipient, the DRO can be viewed as failing to comply with ERISA section 206(d)(3)(i) because it would require the payment of a type of benefit not otherwise provided under the Plan's terms.

We further observe that paying a survivor benefit under the DRO – which would differ from other benefits payable under the Plan's terms – would impose administrative requirements upon PBGC (as the Plan's trustee) that otherwise would not be present. If PBGC started paying survivor benefits to [redacted] based on the DRO, PBGC would need to monitor whether or not [redacted] remains alive (even though PBGC is not paying [redacted] benefits) because PBGC's payments to [redacted] would end upon M[redacted]leath. Additional administrative difficulties for PBGC could occur if [redacted] died before [redacted]a – which is a contingency not addressed in the DRO.[12]

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[12] PBGC's December 18, 2009 determination states that the DRO's failure to address the contingency under which [redacted] dies first, in combination with its lack of clarity as to whether [redacted] would continue to receive survivor benefit payments if [redacted] dies first, "demonstrates a further reason why the order is not a QDRO: it fails to 'clearly specif[y]. . . the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,' or 'the number of payments or period to which such order applies.' See ERISA §206(d)(3)(C)(ii), (iii)." You disagree with PBGC's statement, asserting (among other things) that the DRO's failure to address what happens if [redacted] dies first "has absolutely no bearing" as to whether the DRO should be qualified.

The Appeals Board, having decided that the DRO cannot be qualified as a QDRO for other reasons, concluded it is unnecessary to resolve the issue of whether or not the DRO meets the specificity requirements in ERISA section §206(d)(3)(C)(ii), (iii).

The Appeals Board, in denying the [redacted] appeals, has not relied solely upon the DRO's impact upon plan administration, nor is our denial based solely upon the above-stated analysis of ERISA section 206(d)(3)(i). Nevertheless, we concluded that those considerations, in combination with the other considerations discussed below, support PBGC's determination that the DRO cannot not be qualified.

4. Should the DRO be qualified because [redacted] "waived" [redacted] right to the survivor benefit in the Divorce Order?

PBGC's determination stated that the DRO cannot be a QDRO because it impermissibly "attempts to divest [redacted] of [redacted] statutory right to the survivor benefit after that right had already vested." You disagree, asserting that [redacted] validly had waived [redacted] statutory rights to the survivor benefit in the Divorce Order. In asserting this position, you contend that PBGC's reliance upon the Ninth Circuit's decision in *Carmona*, which held that a beneficiary could not waive [redacted] interest in [redacted] ex[redacted]'s survivor benefits, is misplaced.[13] You state that the Supreme Court in *Kennedy* "abrogated" that aspect of *Carmona's* holding. AB at 9. You further contend that the DRO is lawful because it properly designated [redacted] as the alternate payee for the survivor benefit that [redacted] had waived. *Id.* at 9-10.

Although the *Kennedy* decision you cite involved a pension plan, the benefit at issue in the case was not a QJSA and there was no QDRO – which are both significant distinctions from the facts in the [redacted] appeals. Nevertheless, in addressing one of the Respondent's arguments, the Supreme Court in *Kennedy* discussed ERISA's QDRO requirements. The Supreme Court concluded that a QDRO: (1) is "[n]ot . . . a mechanism for simply renouncing a claim to benefits";[14] and (2) cannot cause a right to a benefit to revert from the beneficiary to the participant.[15] Thus, *Kennedy* establishes that a waiver of a benefit right (or a reversion of a benefit right to the participant) cannot be accomplished solely through language to that effect in a domestic relations order.

The Supreme Court in *Kennedy* decided a broader issue that is also relevant to the [redacted] appeals: Does the anti-alienation provision in ERISA § 206(d)(1) bar any waiver by

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[13] *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010) (amended opinion). We note that PBGC, in its December 18, 2009 determination, cited the earlier *Carmona* decision (published at 544 F.3d 988) that was issued in 2008 prior to the *Kennedy* decision. In the amended opinion issued in 2010, the Ninth Circuit concluded that the *Kennedy* decision did not require the Ninth Circuit to change its holding that "QJSA surviving spouse benefits irrevocably vest in the participant's spouse at the time of the annuity start date . . . and may not be reassigned to a subsequent spouse." 603 F.3d at 1048.

[14] *Kennedy*, 129 S.Ct. at 873. The Supreme Court also stated: "a beneficiary seeking only to relinquish [redacted] right to benefits cannot do this by a QDRO, for a QDRO by definition requires that it be the 'creat[ion] or recogni[tion of] the existence of an alternate payee's right to, or assign[ment] to an alternate payee [of] the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.'" *Kennedy*, 129 S.Ct. at 873 (*citing* 29 U.S.C. § 1056(d)(3)(B)(i)(I)).

[15] 129 S.Ct. at 873 n.8. The Supreme Court reached this second holding based upon the definition of an "alternate payee" (in ERISA § 206(d)(3)(K)) as "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant."

a beneficiary of a pension benefit?[16] 129 S.Ct. at 868. The Supreme Court, after examining trust law principles under which a beneficiary may "disclaim" or "renounce" a benefit under certain circumstances, held that ERISA's anti-alienation provision did not bar all benefit waivers. 129 S.Ct. at 871-72. In reaching this conclusion the Supreme Court stated:

> We do not mean that the whole law of spendthrift trusts and disclaimers turns up in [ERISA § 206(d)(1)], but the general principle that a designated spendthrift can disclaim his trust interest magnifies the improbability that a statute written with an eye on the old law would effectively force a beneficiary to take an interest willy-nilly. Common sense and common law both say that "[t]he law certainly is not so absurd as to force a man to take an estate against his will." *Townson v. Tickell*, 3 Barn. & Ald. 31, 36, 106 Eng. Rep. 575, 576-577 (K.B.1819).

129 S.Ct at 872.

For the reasons that follow, we conclude that this holding in *Kennedy* does not dictate how the Appeals Board must decide the [redacted] appeals. First, we observe that, except for one situation, the Supreme Court in *Kennedy* did not elaborate upon the types of benefit waivers that a pension plan must (or could) honor notwithstanding ERISA's anti-alienation provision.[17] The one situation it discussed involved the pension plan's provision that a beneficiary could disclaim a benefit as provided under section 401(a)(13) of the IRC.[18] The Supreme Court indicated that, if the former spouse in *Kennedy* had executed a valid waiver under this plan provision, the pension plan would not be required to pay the benefit to the former spouse.[19] The [redacted] appeals, however, do not involve a disclaimer of benefits under section 401(a)(13) of the IRC, and the Plan does not contain a disclaimer of benefit provision.

Additionally, *Kennedy* did not involve the complex statutory and regulatory provisions that govern the election and waiver of spousal benefits in defined benefit pension plans. Not only was the pension plan in *Kennedy* exempt from QJSA requirements, but also the pension plan's terms "provided an easy way for [him] to change the [beneficiary] designation, but for whatever reason he did not." 129 S.Ct at 876. Thus, *Kennedy*, unlike these appeals, did not involve a potential conflict between a waiver in a divorce decree and the QJSA requirements that apply to the election and waiver of spousal benefits.

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[16] ERISA § 206(d)(1) states: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

[17] Although the "common law waiver" at issue in *Kennedy* was in a divorce decree, the Supreme Court ultimately decided that the plan administrator properly disregarded the divorce decree waiver because it conflicted with the beneficiary designation made by the former participant in accordance with plan documents. 129 S.Ct. at 875-877.

Furthermore, the Supreme Court in *Kennedy* found it unnecessary to decide whether or not the divorce decree in that case was a valid disclaimer under common law. *See* 129 S.Ct. at 872 n.6, which states: "In any event, our point is not that Liv's waiver was a valid disclaimer at common law: only that reading the terms of 29 U.S.C. § 1056(d)(1) to bar all non-QDRO waivers is unsound in light of background common law principles."

[18] *See Kennedy*, 129 S.Ct. at 868 n.1. The Supreme Court also cited the Tax Code's "qualified disclaimer" definition at 26 U.S.C. § 2518. 129 S.Ct. at 868.

[19] 129 S.Ct. at 877. In *Kennedy*, however, none of the parties contended that the former spouse had made a valid disclaimer under the terms of the pension plan.

Furthermore, in a recent case (*Matschiner v. Hartford Life and Accident Insurance Co.*[22]) the Eighth Circuit concluded that *Kennedy's* holding concerning a beneficiary's right to disclaim a benefit should not be given a broad reading. In *Matschiner*, as in *Kennedy*, a spouse had waived the right to a plan benefit in a divorce decree but had remained the designated beneficiary under the plan's documents.

The District Court in *Matschiner* concluded that the divorce decree waiver (rather than the beneficiary designation) should be honored in determining who was entitled to the benefit. The District Court, referring to footnote 13 in the *Kennedy* opinion, had distinguished its holding from *Kennedy* on the basis that the welfare plan in that case (unlike the pension plan in *Kennedy*) did not have a disclaimer of benefit provision.[23] The Eighth Circuit, however, applied the plan document rule and reversed the District Court. In holding that the beneficiary designation form controlled (rather than the divorce decree), the Eighth Circuit stated:

> Before its discussion of the plan documents rule, where footnote 13 appears, the [Supreme Court in *Kennedy*] noted that "[c]ommon sense and common law both say that the law certainly is not so absurd as to force a man to take an estate against his will." *Id.* at 872 (quotation omitted). We suspect that footnote 13 was simply a reminder that "common sense and common law" may apply to prevent the plan documents rule combined with ERISA's anti-alienation provision from precluding a pension benefit plan beneficiary from disclaiming an unwanted interest. Here, by contrast, the plan beneficiary, [redacted], has claimed [redacted] interest in the death benefit. As in *Kennedy,* the plan documents, not the divorce decree, are controlling.

2010 WL 3910217 at *3.

In the [redacted] appeals, as was the case in both *Kennedy* and *Matschiner*, the designated beneficiary, [redacted], has not formally disclaimed [redacted] right to the benefit at issue. In fact, there has not yet been any distributable benefit for [redacted] to disclaim, since the contingency for the survivor benefit's payment, i.e., [redacted] death, has not occurred. The Appeals Board further is unable to conclude that [redacted] waiver of the survivor benefit in the divorce decree is the equivalent of a formal benefit disclaimer, noting that courts in *Kennedy* and in *Matschiner* did not reach such a conclusion. Thus, we reject your contention that *Kennedy* requires PBGC to honor the "waiver" that [redacted] had made in the divorce decree and had reaffirmed in the DRO.

Indeed, the Ninth Circuit in *Carmona*, which was confronted with a factual situation that is almost identical to that in the [redacted] appeals, decided that the *Kennedy* decision did not require the pension plan to honor the waiver of a survivor benefit in the Carmona's divorce decree. In *Carmona*, the participant (Lupe Carmona) named his eighth wife (Janis) as his

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[22] *Matschiner v. Hartford Life and Accident Ins. Co.*, No. 09-3576, 2010 WL 3910217 (8th Cir., Oct. 7, 2010). We note that the Eighth Circuit's ruling is consistent with the position the Secretary of Labor had advocated as an amicus curiae in that case. The Secretary of Labor has primary enforcement authority for Title I of the ERISA. In Enclosure 9, we provide a copy of the Secretary of Labor's amicus curiae brief.

[23] Footnote 13 in the *Kennedy* decision states: "The Estate does not contend that Liv's waiver was a valid disclaimer under the terms of the plan. We do not address a situation in which the plan documents provide no means for a beneficiary to renounce an interest in benefits." *Kennedy*, 129 S.Ct. at 877 n.13.

survivor beneficiary under his pension plan. 603 F.3d at 1048. He then retired and began collecting pension benefits. *Id.* In a subsequent divorce decree, he was granted all benefit rights under his pension plans as his sole and separate property; his wife was granted similar rights under her own pension plan as her sole and separate property. *Id.* Lupe then married his ninth wife (Judy) and petitioned the state court for a QDRO, which would revoke Janis's designation as survivor beneficiary of his pension plans and substitute Judy. *Id.* at 1049. After his death, the state court ordered the plan administrators to change the survivor beneficiary to Judy. *Id.* at 1049.

The *Carmona* court addressed the issue of "whether or not a participant to an ERISA regulated Qualified Joint and Survivor Annuity ('QJSA') plan may change the surviving spouse beneficiary after the participant has retired and the annuity has become payable." *Id.* at 1047-48. The court held that "QJSA surviving spouse benefits irrevocably vest in the participant's spouse at the time of the annuity start date-in this case the participant's retirement-and may not be reassigned to a subsequent spouse." *Id.* at 1048 (footnote omitted). Thus, the *Carmona* court held that Janis, who was the beneficiary under the QJSA at the annuity start date, was entitled to the survivor benefit, rather than Judy. *Id.* at 1063.

As stated above in footnote 13 to this decision, the Ninth Circuit had issued its first *Carmona* decision before the Supreme Court had decided *Kennedy*. Later, however, the Ninth Circuit issued a revised opinion that (among other things) discussed the holdings in *Kennedy*. The *Carmona* court acknowledged that, under *Kennedy*, "ERISA's anti-alienation provision does not prohibit a surviving spouse beneficiary from waiving his or her interest in plan benefits" if the waiver "conform[s] to plan procedures and instruments." *Id.* at 1060. The Ninth Circuit nevertheless decided (notwithstanding this holding in *Kennedy*) that the waiver of the pension benefit in the Carmona's divorce decree did not result in a valid reassignment of the benefit from Janis to Judy. *Id.* at 1061. The *Carmona* court stated:

> Both the . . . plan documents and ERISA's statutory scheme allow for the waiver of surviving spouse benefits with both spouses' written consent during the benefits election period prior to the participant's retirement. 29 U.S.C. § 1055(c)(3). That procedure was not followed here. Judy has identified nothing in the . . . plan documents which require the plan administrator to redirect surviving spouse benefits to Judy, who was not, at the time of retirement and vesting, either a present or former spouse. Even if it is assumed that Janis had the authority to disclaim benefits, there is nothing that provides for them to be assigned instead to Judy.

Id.

The Appeals Board found that the Huffy Plan is similar to the above-described pension plan in *Carmona* in that both plans: (1) provided for waiver of the surviving spouse benefits with written consent during the benefits election period prior to the participant's retirement; and (2) did not permit a change in the benefit form or in the designated beneficiary after payments began. Additionally, it appears that the pension plan in *Carmona*, as is the case with the Huffy Plan, did not contain a disclaimer of benefits provision. As the Ninth Circuit concluded in *Carmona*, we similarly decided that, even if we assume that [redacted] has the authority to disclaim the Plan's survivor benefit, that benefit cannot be reassigned to [redacted] through a QDRO. Additional reasons for this holding are presented in the next section of this decision.

5. Did PBGC correctly determine that [redacted] a could not validly transfer [redacted] r survivor benefit interest to [redacted] through a QDRO?

PBGC's QDRO policy (Enclosure 8) clearly precludes a waiver of survivor benefits and reassignment to a subsequent spouse through a QDRO, if (as is the case here) the waiver occurs after the participant enters pay status. PBGC's Operating Policy 6.6-3, at section E.9, states:

> **Spousal Rights of Alternate Payee**
>
> **Qualification**
>
> If a participant is married as of his annuity starting date, and his spouse has not waived her right to a QJSA, that spouse retains the right to the survivor annuity even if the participant and spouse later divorce. PBGC will not qualify an order under which the alternate payee would relinquish the surviving spouse benefit ("reverse QDRO") under a joint-and-survivor annuity that is in pay status.

PBGC's policy is consistent with the judicial decisions that have addressed the purported waivers of QJSA survivor benefits through QDROs. As PBGC stated in its December 18, 2009 determination, "the majority of the federal courts that have considered the issue have held that, because the survivor rights irrevocably vest at the annuity starting date, a subsequent domestic relations order cannot reassign the spouse's rights to this benefit." The Appeals Board, like PBGC, has examined federal case law and similarly has found that the majority of the decisions support PBGC's position.[26]

The *Carmona* decision, in particular, contains a detailed analysis of this issue. The *Carmona* court noted that, under ERISA § 205(c)(2), (7), "[b]oth spouses, if they are going to decline QJSA benefits, may only do so during the applicable election period which is defined as 'the 180-day period ending on the annuity starting date.'" 603 F.3d at 1057. The *Carmona* court then concluded, based on those ERISA provisions, that "the annuity starting date . . . is the point at which the surviving spouse benefits vest in the participant's spouse."[27]

Carmona, after discussing the 1984 Retirement Equity Act (REA) amendments to ERISA, further explained that Congress created surviving spouse benefits, like those found in QJSAs, "to protect non-participant spouses, particularly those that may not work outside the home and thus may not have independent retirement benefits." *Id.* at 1058. *See also* Boggs v. Boggs, 520 U.S. 833, 843 (1997). Although the *Carmona* court recognized that the rule under which survivor benefits vest on the annuity starting date would not always protect a non-working spouse, it nonetheless concluded that such a rule provides protection "in many situations involving a post-retirement attempt to transfer surviving spouse benefits." 603 F.3d at 1058. The court then stated:

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[26] *See Carmona, supra*; *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997); *Rivers v. S.W. Corp.*, 186 F.3d 681 (5th Cir. 1999); and *Montgomery v. AGC-Int'l Union of Operating Eng'rs Local 701 Pension Trust Fund*, No. 08-3129-CL, 2010 WL 1406566 (D. Or. April 5, 2010).

[27] 603 F.3d at 1057. In reaching this conclusion, the Ninth Circuit in *Carmona* cited the Fourth Circuit's similar reasoning in the *Hopkins* case. *See* 105 F.3d at 156-57.

> The finely tuned congressional scheme would not be served by state court DROs that attempt to divest a non-working spouse's interest in [redacted] surviving spouse benefits. Similarly, congressional intent is not advanced by permitting a subsequent post-retirement spouse to collect benefits accrued during an economic partnership she or he was not a part of.

603 F.3d at 1058.

Accordingly, based on PBGC policy and the weight of federal case law, the Appeals Board decided that the DRO cannot be qualified.

6. Must PBGC qualify the DRO based on the legal doctrines of "waiver" and/or "estoppel"?

For the reasons stated below, we further concluded that the contentions in the Appeal Brief with respect to the doctrines of "waiver" and "estoppel" do not provide a sufficient basis for the Appeals Board to grant the [redacted] appeals.

Waiver. The Appeal Brief asserts that the former Plan administrator, in qualifying the DRO as a QDRO, "waived it defenses to the QDRO, including those set forth in PBGC's December 18th [2009] letter." AB at 5. Stating that "waiver" is "the intentional relinquishment of a known right," you contend that employee benefit plans like the Plan can waive defenses to benefit claims. *Id.* at 3. You argue that, at all times prior to August 2003, the Plan was "aware of the defenses it could raise to [redacted] request to designate [redacted] the survivor beneficiary of [redacted] QJSA," but the Plan failed to assert them. *Id.*

In support of the above-stated position, you refer to the following facts:

- In January 2003, the Plan administrator asked its attorneys to review the Divorce Order to determine whether the division of the benefits under it was proper under ERISA and the Internal Revenue Code. *Id.*
- The Plan's legal counsel then advised the Plan administrator, in the [redacted] Letter, that the Plan could honor [redacted] request to designate [redacted] as the survivor beneficiary of [redacted] QJSA, if a QDRO with appropriate terms was obtained. *Id.* at 4.
- the Plan administrator next asked its attorneys to draft a qualified domestic relations order specifically for [redacted], with the DRO being the product of that request. *Id.*
- The Plan further forwarded its draft DRO to [redacted] and, on March 13, 2003, advised him to have [redacted] counsel review it, finalize it, and then to send a copy back to the Plan "for review prior to filing." *Id.*
- The DRO, after being approved by the court on August 3, 2003, then was filed with the Plan, who approved it as a QDRO on August 15, 2003 in the Huffy Letter. *Id.* at 4-5.

As you correctly state in the Appeal Brief, courts have defined "waiver" as "the voluntary or intentional relinquishment of a known right."[28] We disagree, however, with your conclusion that the former Plan administrator had "waived" its rights with respect the QDRO under this definition. If the former Plan administrator had "known" that the DRO did not comply with ERISA's requirements but decided to qualify it anyway, then arguably a "waiver" could have occurred. In this case, however, the evidence establishes only that the former Plan administrator (after consulting its own legal counsel) had interpreted the applicable law incorrectly in its communications with [redacted] legal counsel and when it qualified the DRO. We do not consider the error in legal interpretation that occurred here to be equivalent to a "voluntary" or "intentional" relinquishment of a known right.

We are unaware of any ERISA court decision holding that a pension plan had "waived" its right to apply the correct legal precedent because it previously had provided a party with an incorrect interpretation of the law. Furthermore, in our view, basing a decision upon the legal doctrine of waiver is particularly inappropriate in situations (such as the [redacted] appeals) where a third party is affected. As discussed above, the effect of our decision is that [redacted] retained [redacted] right to be treated as the beneficiary of the survivor annuity portion of [redacted] benefit. If, instead, we granted the [redacted] appeals based on waiver, [redacted] would be denied the survivor benefit that, under applicable legal precedent, she is entitled to retain.

We further observe that at least one of the Circuit Courts of Appeals has expressly declined to incorporate the principle of waiver into the federal common law of ERISA.[29] Other circuits, however, have concluded that waiver may be properly asserted as a defense under certain circumstances.[30] The cases where waiver has been permitted as a defense in an ERISA case – including all three waiver cases cited in the Appeal Brief – generally have involved claims for health insurance, disability insurance, or other similar benefits in welfare plans. In such cases, the courts have applied applicable insurance law principles, which, under certain circumstances, prevent an insurer from asserting a defense it had previously waived.[31] Such insurance law principles do not apply to the claims in th[redacted]n appeals – nor are we aware of any other basis in the law that would provide your clients with a successful waiver defense.

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[28] *See Pitts v. American Security Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991), which you cite in the Appeal Brief, and the cases cited therein.

[29] *White v. Provident Life & Acc. Ins. Co.*, 114 F.3d 26, 29 (4th Cir. 1997) (stating that the common law of ERISA "does not incorporate the principles of waiver and estoppel").

[30] Such court decisions include the three cited in the Appeal Brief: *Pitts, supra* note 28; *Rhorer v. Raytheon Eng'rs and Constructors, Inc.*, 181 F.3d 634 (5th Cir. 1999); and *Lauder v. First UNUM Life Ins. Co.*, 284 F.3d 375 (2d Cir. 2002).

[31] In *Lauder*, for example, the court recognized that "under the law applicable to insurance policies, an insurer may be barred from raising defenses not asserted in communications to the insured denying coverage." 284 F.3d at 380. The court in *Pitts* referred to the insurance law principle that "an insurer automatically waives the terms of a policy if it defends an insured without a reservation of its rights." 931 F.2d at 357.

Estoppel. The Appeal Brief asserts that a claim of estoppel arises "when one party has made a misleading representation to another party and the other party has reasonably relied to [redacted] detriment on that representation."[32] You state that estoppel applies to the [redacted] appeals for the following reason:

> Here, the Plan represented that the QDRO (which its attorneys drafted and the Plan approved) was consistent with the Plan Document. Because of the Plan's representation, the [redacted] did not seek an order that would have required the Plan to pay the QJSA survivor benefits to [redacted] based on [redacted] lifetime. Had the [redacted] sought and obtained such an order, it would have satisfied the statutory requirements for a qualified domestic relations order. Thus, in the event the Plan's representation was incorrect and the QDRO is not a qualified domestic relations order because it would require the Plan pay benefits not otherwise available under the Plan Document, the [redacted] will have relied to their detriment on the Plan's representations, and the PBGC, acting on behalf of the Plan, is estopped to deny the validity and enforceability of the QDRO. AB at 5 (citations omitted).

As indicated by the quoted language, your estoppel argument is based upon the position that, absent the Plan's representations, the [redacted] would have obtained a valid domestic relations order. The flaw in your position is that a domestic relations order drafted in the way that you suggest – or in any other manner – would not be valid because it improperly would divest [redacted] of [redacted] right in [redacted] vested survivor benefit.[33] Thus, the theory you advance does not establish detrimental reliance because – irrespective of the Plan's representations – [redacted]'s survivor benefit could not be transferred to [redacted] through a QDRO.

Moreover, several federal courts have held that a party raising an equitable estoppel claim against the government must not only prove all the elements of equitable estoppel, but also that the government committed affirmative misconduct going beyond mere negligence.[34] Two federal district courts have applied this holding in cases involving claims against PBGC.[35] There is no evidence in the [redacted] appeals of affirmative misconduct by PBGC.

For estoppel claims that do not involve the federal government, courts generally have held that the five elements of equitable estoppel are: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped had actual or constructive knowledge of the true facts;

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[32] The Appeal Brief cites *Moore v. Blue Cross and Blue Shield of The National Capital Area*, 70 F.Supp.2d 9, 26-27 (D.D.C.1999).

[33] Moreover, if the DRO had been drafted so as to provide a survivor benefit to [redacted] "based on [redacted] lifetime," it improperly would have required the Plan "to provide increased benefits (determined on the basis of actuarial value)." *See* ERISA § 206(d)(3)(D)(ii) and discussion concerning "adverse selection" in PBGC's August 3, 2003 benefit determination.

[34] *See, e.g., Rutten v. U.S.*, 299 F.3d 993, 995 (8th Cir. 2002).

[35] *See PBGC v. While Consolidated Indus.*, 72 F.Supp.2d 547 (W.D. Pa. 1999); *Szydlowski v. PBGC*, 37 Employee Benefits Cas. 2643 (E.D. Mo. 2006).

(3) the party to be estopped intended that the misrepresentation be acted upon or had reason to believe that the party asserting estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation. *See, e.g., Moore, supra,* 70 F.Supp.2d at 31 (*citing Heckler v. Community Health Services of Crawford,* 467 U.S. 51, 59 (1984)).

The Appeals Board concluded that the facts in the [redacted] appeals do not establish a valid equitable estoppel claim under this five-part test. In so holding, we found that: (1) the claim of estoppel in the [redacted] appeals does not involve the misrepresentation of "material facts," but rather involves the communication of a legal opinion; (2) there is no evidence that the party being estopped (i.e., the Plan) had "actual or constructive knowledge" of any "true facts" that differed from what had been communicated to the party asserting estoppel (i.e., to [redacted]); (3) this is not a case where the "party asserting the estoppel did not know, nor should have known, the true facts"; we note in this regard that [redacted] had retained independent legal counsel, who was responsible for identifying any legal problems with the DRO; and (4) the evidence does not establish that that [redacted] (or [redacted]) "reasonably and detrimentally relied" upon the Plan's representations concerning the DRO.

Decision

Having applied the provisions of the Plan, the provisions of ERISA, and PBGC regulations and policies to the facts in this case, the Appeals Board has denied the appeals you filed on behalf of [redacted] and [redacted].

This decision is PBGC's final Agency action. The Appeals Board has been informed that you have filed a court action in the United States District Court for the District of Columbia. That legal action has been stayed pending the issuance of this Appeals Board decision.

If you, [redacted] or [redacted] need any other information concerning PBGC benefits, please contact PBGC's Authorized Plan Representative at 1-800-400-7242.

Sincerely,

Charles Vernon

Charles Vernon
Appeals Board Chair

(b)6 - Personal Privacy