



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

January 6, 2016



Re: Appeal 2014-█████; Case No. 213916, Milacron Retirement Plan (the "Plan")

Dear ██████

We have reviewed your appeal of August 12, 2014, on behalf of ██████, the spouse of ██████. Mr. ██████ (deceased) was a participant in the Plan. Mrs. ██████ appeals PBGC's determination of April 14, 2014, which was followed by the letter of May 7, 2014, stating that there are no continuing benefit payments due to anyone based on Mr. ██████ participation in the Plan.

For the reasons stated below, the Appeals Board grants Mrs. ██████ appeal. As a result of the Appeals Board's decision, Mrs. ██████ will receive a survivor's benefit under a joint and 50% survivor's annuity, subject to recoupment for overpayments made by PBGC to Mr. ██████ during his lifetime.

Introduction

A. *PBGC's Trusteeship of the Plan*

PBGC provides pension insurance in accordance with the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"). If a plan sponsor of a tax-qualified defined benefit pension plan is unable to support its plan, PBGC becomes statutory trustee of the plan and pays benefits pursuant to the terms of the plan, subject to limitations and requirements set by Congress under ERISA.

When the Plan terminated on June 10, 2009, it did not have sufficient assets to provide all benefits that PBGC guarantees under ERISA, and PBGC subsequently became the Plan's statutory trustee on March 23, 2010. The terms of the Plan, the provisions of ERISA, and PBGC's regulations and policies determine the benefits PBGC can pay.

When PBGC becomes statutory trustee of a terminated defined benefit plan, PBGC collects participant data and plan documents from a variety of sources, such as the plan administrator, the plan's actuaries, the plan's paying agent and any other appropriate third party

plan administrators. PBGC then audits the information it receives and relies on the information unless PBGC's audit of that information shows that it is incorrect, or a participant supplies PBGC with documents indicating that the information is incorrect or incomplete.

B. PBGC's Determination Letter and Mrs. [REDACTED] Appeal

On April 14, 2014, PBGC issued a benefit determination letter to Mr. [REDACTED] based on his participation in the Plan. PBGC stated that he was entitled to a PBGC-payable monthly benefit of \$3,476.25 in the form of a Straight Life Annuity with No Survivor Benefits ("SLA"), based on his benefit commencement date of [REDACTED] 2009. The enclosed Benefit Statement showed that Mr. [REDACTED] monthly benefit under the Plan was \$3,908.65, which exceeded PBGC's maximum insured monthly benefit, resulting in the reduction of the benefit to \$3,476.25. The letter also stated that because PBGC continued to pay the unreduced benefit, Mr. [REDACTED] was overpaid by \$6,918.40. To collect the overpayment, PBGC would reduce his benefit to \$3,429.32 per month.

After receiving the determination of April 14, 2014, Mrs. [REDACTED], on behalf of the estate of Mr. [REDACTED], informed PBGC that Mr. [REDACTED] was deceased. PBGC replied in a letter dated May 7, 2014, which stated that: (1) no continuing benefit payments are due to anyone after Mr. [REDACTED] death; and (2) any payments made after his month of death must be returned to PBGC. PBGC also requested that Mr. [REDACTED] estate submit his death certificate as soon as possible.¹

After securing an extension of time in which to file an appeal and obtain a copy of Mr. [REDACTED] file from PBGC's Disclosure Office, you submitted an appeal on Mrs. [REDACTED] behalf on August 12, 2014. With your appeal, you provided a copy of the Plan's benefit election form, titled "Milacron Retirement Plan: Application for Retirement Benefits" ("Application").² You also provided the Plan's spousal consent form titled "Milacron Retirement Plan: Spousal Consent Form" ("Spousal Consent Form").³ The appeal essentially contends that Mrs. [REDACTED] is entitled to a survivor's benefit under the Plan because her consent to Mr. [REDACTED] election to waive the Plan's joint and survivor annuity form of benefit was invalid under section 205(c) of ERISA.

Background

A. Statutory Background

In general, ERISA requires that pension plans pay the accrued benefit of a married participant in the form of a qualified joint and survivor annuity ("QJSA").⁴ ERISA defines a QJSA as "an annuity—(A) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of . . . the amount of the annuity which is payable during the joint lives of the participant and the spouse, and (B) which is the actuarial equivalent of a

¹ It does not appear in PBGC's records that a death certificate was submitted. An obituary published in the [REDACTED] reports Mr. [REDACTED] date of death as [REDACTED].

² Enclosure 1 (Milacron Retirement Plan: Application for Retirement Benefits).

³ Enclosure 2 (Milacron Retirement Plan: Spousal Consent Form).

⁴ ERISA § 205(a); 29 U.S.C. § 1055(a).

single annuity for the life of the participant.”⁵ The “statutory object” of the QJSA provisions, “along with the rest of [section 205 of ERISA], is to ensure a stream of income to surviving spouses.”⁶

ERISA permits participants to elect to waive the QJSA during the applicable election period. The election is not effective, however, unless the participant’s spouse consents to the election.

Section 205(c)(2) of ERISA provides as follows:

Each plan shall provide that an election under paragraph (1)(A)(i) of [§ 205(c)] shall not take effect unless—

(A)(i) the spouse of the participant consents in writing to such election,

(ii) * * * and

(iii) the spouse’s consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public⁷

Section 205(c) of ERISA was enacted as part of the Retirement Equity Act of 1984 (“REA”).⁸ In *Boggs v. Boggs*, the Supreme Court explained how a spouse’s rights changed under the REA:

Before REA, ERISA only required that pension plans, if they provided for the payment of benefits in the form of an annuity, offer a qualified joint and survivor annuity as an option entirely within a participant’s discretion. 29 U.S.C. §§ 1055(a), (e) (1982 ed.). REA modified ERISA to permit participants [to elect to waive the QJSA], only when the spouse agrees. § 1055(c)(2). Congress’ concern for surviving spouses is also evident from the expansive coverage of §[205], as amended by REA.⁹

The REA amendments were intended “to . . . provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account . . . the status of marriage as an economic partnership, and the substantial contribution to that partnership of

⁵ ERISA § 205(d)(1); 29 U.S.C. 1055(d)(1).

⁶ *Boggs v. Boggs*, 520 U.S. 833, 843 (1997).

⁷ 29 U.S.C. § 1055(c)(2).

⁸ Pub. L. 98-397, 98 Stat. 1426 (1984).

⁹ 520 U.S. at 843.

spouses who work both in and outside the home.”¹⁰ The Senate Report accompanying the bill further explains the statutory requirements as follows:

The bill provides that the consent of a participant’s spouse is required for an election to decline the qualified joint and survivor annuity. This consent is to be given in writing at the time of the participant’s election, and the consent is to acknowledge the effect of the election. A consent is not valid unless it is witnessed by a plan representative or a notary public.¹¹

Under Section 205(c)(6) of ERISA, if a plan’s administrator acts in accordance with the fiduciary standards under section 404 of ERISA in relying on a spouse’s consent, the consent is treated as valid for purposes of discharging the plan from liability to the extent of payments made.¹² ERISA does not, however, relieve the administrator from a duty of inquiry:

If the plan administrator acts in accordance with the fiduciary standards of ERISA in securing spousal consent . . . then the plan will not be liable for payments to the surviving spouse. For example, if the plan administrator receives a notarized spousal consent, valid on its face, which the administrator has no reason to believe is invalid, the plan would certainly be allowed to rely on the consent even if it is, in fact, invalid.¹³

B. Factual Background

PBGC records contain the following information related to the benefit earned by Mr. [REDACTED] under the Plan:

- Mr. [REDACTED] was born on [REDACTED];
- He began his employment with Milacron on [REDACTED];
- The [REDACTED] were married on [REDACTED];
- Mr. [REDACTED] terminated employment on [REDACTED];
- He retired effective [REDACTED] 2009; and
- He died on [REDACTED] 2014.

¹⁰ S. Rep. No. 98-575, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. (98th Congress, Second Session 1984) 2547.

¹¹ S. Rep. No. 98-575, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. (98th Congress, Second Session 1984) at 2560.

¹² 29 U.S.C. § 1055(c)(6); 29 U.S.C. § 1104.

¹³ S. Rep. No. 98-575, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. (98th Congress, Second Session 1984) at 2560.

1. The Plan and its prescribed election forms

The Plan in effect when Mr. █████ terminated employment was the Milacron Retirement Plan, as Amended and Restated. The Plan's normal form of benefit for married participants is the qualified joint and (50%) survivor annuity ("J&50%SA"). Under section 7.5 of the Plan, a participant may elect to waive the J&50%SA within the 90-day period preceding the Benefit Commencement Date.¹⁴

Consistent with section 205(c) of ERISA, the participant's spouse must consent to the waiver of the J&50%SA, as follows:

Any such election to waive the qualified joint and survivor annuity or the Spouse's death benefit shall not be effective unless the Participant's Spouse consents to the election in a document filed with the Committee that acknowledges the effect of such election and that is witnessed by a representative of the Plan or a notary public.¹⁵

The Milacron Application (referenced above), dated March 2009, was apparently a standard form for Plan participants wishing to apply for their pension benefits under the Plan.¹⁶ It shows the dates relevant to the calculation of the participant's benefit (e.g., date of hire, termination, retirement, and expected benefit commencement date), and spouse or beneficiary information. The Application identifies Mrs. █████ relationship to Mr. █████ as "Wife." The Application provides a description of available forms of benefit (e.g., Life Annuity, 50% Joint and Survivor Annuity), and a customized comparison of different optional forms of benefit available under the Plan, based on the participant's accrued benefit.

The Application provides a separate Note for married participants and their spouses:

If you are married when your pension commences, you will automatically receive the 50% JOINT AND SURVIVOR ANNUITY option unless you indicate on this form that you prefer another option. By initialing a form of benefit other than the 50% Joint and Survivor Annuity and by signing your name at the end of this application, you will automatically reject the 50% Joint and Survivor Annuity. However, if you elect option 1, 2 or 3, your spouse must sign the Spousal Consent Form and your spouse's signature must be notarized or witnessed by a representative of the plan.¹⁷

¹⁴ Excerpts from the Plan are provided in Enclosure 3.

¹⁵ See Section 7.5(c) of the Plan, Enclosure 3.

¹⁶ See Enclosure 1 (Application for Retirement Benefits).

¹⁷ Emphasis in original. To the extent that the Application is inconsistent with the Plan, the Appeals Board gives effect to the Plan's terms and the provisions of ERISA.

Option 1 is the Life Annuity. The space opposite Option 1 is initialed, and the Appeals Board presumes that these initials are Mr. [REDACTED] initials. The Application was not signed.

The Spousal Consent Form (referenced above) provides three certifications, two for the participant and one for the participant's spouse.¹⁸ The first certification is a certification that the participant is not married. It was not checked. The third certification is a certification that there are no outstanding qualified domestic relations orders that assign a portion of the benefit to a former spouse. Mr. [REDACTED] apparently checked and signed this certification. The second certification is completed by the spouse to certify the spouse's consent to the participant's election of a form of benefit without survivor rights. It states as follows:

I have read the enclosed "Application for Retirement Benefits" form, and I consent to the Benefit Form my spouse [has] elected[.] I acknowledge that the effect of my consent may be to forfeit benefits I would be entitled to receive upon my spouse's death, that my spouse's election is not valid unless I consent to it, and that my consent is irrevocable unless my spouse revokes the action[.]
(NOTARY SIGNATURE IS REQUIRED)¹⁹

The second certification is checked, dated [REDACTED] 2009, and signed by Mrs. [REDACTED]. In the block entitled "Witnessed by," there is a signature by [REDACTED] and a notary's stamp. Ms. [REDACTED] signature is dated [REDACTED] 2009.

2. *Mrs. [REDACTED] affidavits and Ms. [REDACTED] declaration*

In support of her appeal, you provided Mrs. [REDACTED] affidavit dated August 14, 2014, concerning the Application and Consent Form. In her affidavit, Mrs. [REDACTED] makes a number of statements, including the following:

- I first became aware of my husband's elections on the [Application] on or about May 22, 2014, when my attorney and I spoke on the phone with a PBGC representative.
- I have no recollection of seeing the first page of the [Application].
- The signature on the [Spousal Consent Form] appears to be mine.
- I did not sign the [Spousal Consent Form] in the presence of a Notary Public.
- If I had seen the [Application] and understood the options available, I would not have signed the [Spousal Consent Form] or forfeited any benefits I may have been entitled to upon his death.
- If I had to sign a document in the presence of a Notary Public or a Plan Representative, I would have known to review the document more

¹⁸ Enclosure 2 (Spousal Consent Form).

¹⁹ Enclosure 2 (Spousal Consent Form) (Emphasis in original).

carefully and ask questions to understand what I was signing and what rights I may have been forfeiting.

- I was misled and did not understand the [Spousal Consent] Form I was signing. I never saw the first page of the [Application] which outlined the specific options available upon my spouse's death. [REDACTED], made the election for a Life Annuity without my knowledge and consent. I had no knowledge of what the forms contained or what elections he made until May 2014.

As part of its review, the Appeals Board contacted [REDACTED], the notary public who notarized the Consent Form in 2009, to obtain information regarding the circumstances of the execution of the form. In 2009, Ms. [REDACTED] was a Relationship Manager at [REDACTED] in [REDACTED] Ohio. At the Board's request, she provided a written declaration that included the following statements:

- While employed at [REDACTED], in the course of my duties, I met [REDACTED] and [REDACTED].
- In the course of my employment with [REDACTED], I notarized documents for Mr. and Mrs. [REDACTED], as customers of [REDACTED], on several occasions.
- I do not recall the circumstances under which I notarized the [Spousal Consent Form].
- Although I do not recall notarizing the [Spousal Consent Form] on [REDACTED] 2009, my routine practice was to notarize a person's signature only if he or she appeared before me.
- If a person had already signed a document to be notarized, I would require identification of the person and verification of the person's signature.
- Because I knew Mrs. [REDACTED], I likely would not have required her to show identification or needed to verify her signature.

By letter dated July 17, 2015, the Appeals Board provided you with Ms. [REDACTED] declaration and a 30-day opportunity to respond. You provided additional points and authorities in support of Mrs. [REDACTED] appeal, and Mrs. [REDACTED] provided her Supplemental Affidavit dated August 10, 2015, which included the following statements:

- I did not sign the [Spousal Consent Form] in the presence of [REDACTED] or any other Notary Public; nor did I acknowledge my signature on that document in her presence;
- I do not personally know [REDACTED] . . . who signed the bottom of the [Spousal Consent Form] as a Notary and who submitted the Declaration attached to PBGC's recent correspondence.

The Appeals Board's Findings of Fact

Based on the available evidence, the Appeals Board makes the following findings of fact.

1. The Board finds that Mrs. [REDACTED] signed the Spousal Consent Form on [REDACTED] 2009. Mrs. [REDACTED] states that the signature on the Spousal Consent Form appears to be hers. Ms. [REDACTED] knew Mrs. [REDACTED] as a customer of [REDACTED] and was familiar with her signature because she had notarized other documents for the [REDACTED].
2. The Board finds that that Mrs. [REDACTED] appeared before Ms. [REDACTED] on [REDACTED] 2009, with the signed Spousal Consent Form. Ms. [REDACTED] states that it was her regular practice to notarize documents for a customer only if the person appeared before her. Mrs. [REDACTED] does not deny that she was present when Ms. [REDACTED] notarized the Spousal Consent Form, stating only that she did not acknowledge her signature on the Spousal Consent Form.
3. The Board finds that Ms. [REDACTED] signed and applied her notarial stamp to the Spousal Consent Form on [REDACTED] 2009, without ceremony. The [REDACTED] were customers of [REDACTED], and Ms. [REDACTED] had notarized documents for them in the past.
4. The Board finds that Ms. [REDACTED] did not take an acknowledgment from Mrs. [REDACTED], based on her supplemental affidavit and Ms. [REDACTED] notarial certificate.
5. Because the Board finds that Mrs. [REDACTED] signed the Spousal Consent Form, we find that she read the statements in the written acknowledgment, i.e., "I have read the enclosed 'Application for Retirement Benefits' form, and I consent to the Benefit Form my spouse [h]as elected . . ."

Discussion

A. *Issues presented by Mrs. [REDACTED] appeal and the Board's decision*

Under Section 205(c) of ERISA, a spouse's waiver of the QJSA is not valid unless the spouse consents in writing to the election and the consent is witnessed by a plan representative or notary public. Under the Board's findings, Mrs. [REDACTED] signed the Consent Form on [REDACTED] 2009, and appeared before Ms. [REDACTED], a notary public, on [REDACTED] 2009, when Ms. [REDACTED] notarized the form under a certificate stating "Witnessed by." The Board concludes that Mrs. [REDACTED] consent was invalid because it was not "witnessed by" a notary public under section 205(c)(2) of ERISA.

Given its conclusion that Mrs. [REDACTED] consent was invalid, the Board must determine the form of survivor benefit to which Mrs. [REDACTED] is entitled. The Board concludes that in the absence of valid consent under section 205(c) of ERISA, the Plan's normal form of benefit for a married participant—the J&50%SA—is the form of benefit to which Mrs. [REDACTED] is entitled. Mrs. [REDACTED] benefit may also be subject to recoupment because of overpayments to Mr. [REDACTED] in the form of a SLA.

B. Was Mrs. [REDACTED] written consent witnessed by a notary public within the meaning of section 205(c) of ERISA?

As discussed above, a participant may elect to waive the QJSA form of benefit, but the election is not effective unless the requirements of section 205(c)(2) of ERISA are satisfied. Under section 205(c)(2), the consent is not valid unless (1) the spouse consents in writing to the election, (2) the spouse's consent acknowledges the effect of the election, and (3) a plan representative or notary public witnesses the spouse's consent. Only the third requirement is at issue in Mrs. [REDACTED] appeal.

The rules of statutory interpretation are well-established. In interpreting statutes, courts begin with the statutory language. "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'"²⁰ Under the "plain meaning rule," courts "must presume that a legislature says in a statute what it means and means in a statute what it says there."²¹ The Appeals Board concludes that the statutory language is unambiguous. The statute requires a plan representative or notary public to witness a spouse's written consent to a participant's election to waive the qualified joint and survivor annuity.

ERISA does not, however, define the terms "consent" and "witness," and the ERISA agencies (PBGC, Dept. of Labor, and Internal Revenue Service) have not published regulations specifically interpreting these terms. In the absence of a statutory definition, courts "construe a statutory term in accordance with its ordinary or natural meaning."²² The ordinary meaning of the word "witness," when used as a verb, is "to see (something) happen; to be present at (an event) in order to be able to say that it happened; [law] to act as a legal witness of (something); to be [at] the time or place when (something) happens."²³ The ordinary meaning of the verb "consent" is "to agree to do or allow something; to give permission for something to happen or be done."²⁴

Based on the ordinary meaning of the terms "consent" and "witness," as used in section 205(c)(2) of ERISA, the Appeals Board concludes that the statute requires a plan representative or notary public to witness a spouse's written consent, *i.e.*, *to be present when a spouse gives permission to a participant's election by signing a consent form*. Under the plain language of the statute, the spouse must sign the consent form in the presence of a plan representative or notary public. PBGC, the government agency responsible for administering the benefits of the terminated plans for which it is the statutory trustee, has incorporated such a physical presence

²⁰ *Russello v. United States*, 464 U.S. 16, 20 (1983) (citing *United States v. Turkette*, 452 U.S. 576, 580 (1981) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))).

²¹ See *e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (citations omitted).

²² *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); see also *Russello*, 464 U.S. at 21 (absent a statutory definition, courts assume that "the legislative purpose is expressed by the ordinary meaning of the words used") (citing *Richards v. United States*, 369 U.S. 1, 9 (1962)).

²³ See www.merriam-webster.com/dictionary/witness (last visited on December 11, 2015).

²⁴ See www.merriam-webster.com/dictionary/consent (last visited on December 11, 2015).

requirement into its own application for benefits. PBGC Form 700 states “Your spouse must sign and date this section in the presence of a Notary Public witnessing his/her signature.”²⁵

The Appeals Board’s interpretation is consistent with the interpretation of the Internal Revenue Service (“IRS”), the government agency with interpretive jurisdiction over section 205(c)(2) of ERISA.²⁶ In promulgating regulations in the analogous context of standards for transmitting notices and consents through electronic media, the IRS initially determined in 2000 that electronic media was not suitable for spousal consents under section 417(e) of the Code, concluding that the witnessing requirement presupposed that a spouse would need to be in the “physical presence” of a notary or plan representative when consent was given.²⁷ Subsequently, the IRS proposed and issued new regulations extending the use of electronic media to the election rules for plans subject to the QJSA requirements under section 417 of the Code while maintaining the “physical presence” requirement for spousal consents.²⁸ Section 1.401(a)-21(d)(6) of the final regulations requires the signature of a spouse to be “witnessed in the physical presence of a plan representative or notary public.”²⁹ The Board has no reason to believe that the IRS’s interpretation is limited to spousal consents solely in the context of electronic media.

The Appeals Board reviewed a number of cases involving the validity of spousal consent under section 205(c)(2) of ERISA, including those cited by Mrs. [REDACTED]. In the most analogous cases, the courts applied a literal or strict interpretation of section 205(c)(2). *See, e.g., Lasche v. George W. Lasche Basic Profit Sharing Plan*,³⁰ *Butler v. Encyclopedia Britannica*,³¹ and *Alferi v. Guild Times Pension Plan*.³² In each of these cases, the non-participant spouse had signed a consent form effectively waiving benefits, and the authenticity of the spouse’s signature was not the ultimate issue. Rather, each case dealt primarily with whether the spouse’s consent had been “witnessed by” either a plan representative or a notary public. In each case, the court strictly

²⁵ See PBGC Form 700 (“Participant Application for Pension Benefit”) at 3, Enclosure 4. PBGC Form 700 is used by participants of a PBGC-trusted plan to apply for their pension benefits after PBGC becomes the statutory trustee of the plan. The form applies only to notaries public because plan representatives no longer may witness spousal consents after PBGC becomes the statutory trustee of a pension plan.

²⁶ See Section 101(a) of the Reorganization Plan No. 4 of 1978, 29 U.S.C. § 1001 nt.

²⁷ See *New Technologies in Retirement Plans*, 65 Fed. Reg. 6001, 6004 (Feb. 8, 2000). Section 417(e) of the Code is the parallel provision to section 205(c) of ERISA.

²⁸ See *Use of Electronic Technologies for Providing Employee Benefit Notices and Transmitting Employee Benefit Elections and Consents*, 70 Fed. Reg. 40675, 40679 (July 14, 2005) (“[T]he proposed regulations would require that the signature of the individual be witnessed in the presence of the plan representative or notary public regardless of whether the signature is provided on paper or through an electronic medium”); *Use of Electronic Media for Providing Employee Benefit Notices and Making Employee Benefit Elections and Consents*, 71 Fed. Reg. 61876, 61881 (Oct. 20, 2006) (“These regulations retain the requirement from the 2005 proposed regulations that the signature of a spouse be witnessed in the physical presence of the plan representative or notary public.”).

²⁹ 26 C.F.R. § 1.401(a)-21(d)(6) and 1.401(a)-21(f), Example 3; § 1.401(a)-21(e) (definition of “Participant election” to include consents by beneficiaries).

³⁰ 111 F.3d 863 (11th Cir. 1997).

³¹ 41 F.3d 285 (7th Cir. 1994).

³² 446 F. Supp. 2d 99 (E.D.N.Y. 2006).

construed the statute to hold that the statutory requirements under section 205(c)(2) of ERISA had not been met.

While each of these cases was decided based on a strict construction of the statute, the *Butler* court suggested that the statutory requirement for witnessing consent could be satisfied by simply verifying the authenticity of the spouse's signature, at least in cases in which a notary public serves as the witness.³³ But given the statutory language and the statutory purpose of protecting a spouse's interest in the QJSA, the Appeals Board declines to follow the reasoning in the *Butler* court's *dicta*. While verifying a spouse's signature might demonstrate that the spouse signed the consent form, the statutory language requires a plan representative or notary public to actually witness the spouse's written consent—i.e., the intentional act of agreeing to the participant's waiver of the QJSA by signing a consent form.

The *Butler* court also suggested that compliance with ERISA's literal language might lead to the absurd result of invalidating a spousal consent form that the spouse admits signing "but attempts to disavow on the technicality that he did not sign it in the physical presence of the notary,"³⁴ citing the following principle of statutory construction:

Nevertheless, in rare cases the literal application of the statute will produce a result demonstrably at odds with the intention of its drafters, and those intentions must be controlling. We have reserved "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute."³⁵

The Appeals Board has found nothing in the statute, legislative history, case precedent, or underlying policy to indicate that a strict application of section 205(c) of ERISA would produce a result "demonstrably at odds" with Congress's intent or thwart the statutory purpose of protecting spouses' interests in retirement benefits. To avoid the result contemplated by the *Butler* court, a plan administrator need only design and implement a consent form that requires a spouse to give written consent in the presence of a plan representative or notary public. As noted above, PBGC's application for benefits requires spousal consent in the presence of a notary public, as do the IRS's regulations in an analogous context. The Appeals Board concludes that the weight of case precedent is consistent with its interpretation of section 205(c)(2) of ERISA under the plain meaning rule.³⁶

³³ 41 F.3d at 293.

³⁴ 41 F.3d at 294.

³⁵ See *Griffin v. Oceanic Contractors*, 458 U.S. 564, 570 (quoting *Commissioner v. Brown*, 380 U.S. 563, 571) (1965) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-511 (1941) (omission in original)).

³⁶ See also *Hurwitz v. Sher*, 982 F.2d 778, 782 (2d Cir. 1992) ("The [REA] says what it says . . . and so does the plan document"); *McMillan v. Parrott*, 913 F.2d 310, 311 (6th Cir. 1990); *Rice v. Rochester Laborer's Annuity Fund*, 888 F. Supp. 494, 498 (W.D.N.Y. 1995) ("ERISA contains strict rules for protecting the spouse's interest in the participant's benefits") (quoting *Lester v. Reagan Equip. Co. Profit Sharing Plan & Empl. Sav. Plan*, 1992 U.S. Dist. LEXIS 12872, (E.D. La. 1992) and citing *Abott v. Caron*, 1990 U.S. Dist. LEXIS 16498, *5 ("Courts have uniformly held that the clear intent of Congress in passing the REA was to preserve the benefits of spouses.")). *But*

In this case, the Appeals Board finds that Mrs. [REDACTED] signed the Spousal Consent Form on [REDACTED] 2009. Ms. [REDACTED] signed the form on [REDACTED] 2009, and applied her notarial stamp. It is clear that Ms. [REDACTED] did not actually “witness” Mrs. [REDACTED] consent—Ms. [REDACTED] was not present when Mrs. [REDACTED] signed the Spousal Consent Form giving her consent to Mr. [REDACTED] election. The Appeals Board believes that a notary public’s witnessing a spouse’s consent under section 205(c) of ERISA and attesting his or her signature after the fact under state law are different acts. Consequently, the Board cannot treat Ms. [REDACTED] notarial certificate as satisfying the witnessing requirement under section 205(c)(2)(iii) of ERISA.³⁷ We therefore must grant Mrs. [REDACTED] appeal.

The Board turns next to determining the form of benefit to which Mrs. [REDACTED] is entitled.

C. Mrs. [REDACTED] benefit entitlement and recoupment of overpayments

Article VII of the Plan lists the different forms of benefit provided by the Plan. Section 7.1 of the Plan provides as follows:

Standard Form of Benefit. Unless a Participant elects a different form of payment as provided in Section 7.3:

- (a) a Participant who has a spouse on his Benefit Commencement Date shall receive his benefit in the form of a qualified joint and survivor annuity, which, for the purposes of this Plan, shall mean an annuity, beginning on such Date and ending on the first day of the month in which he dies, with equal monthly payments for the life of the Participant, with a survivor benefit for the life of his spouse beginning on the first day of the month after the Participant’s death equal to one-half of the amount payable to the Participant during their joint lives, which annuity is the Actuarial Equivalent of the benefit computed under section 4.1.

Because the Appeals Board has determined that Mrs. [REDACTED] consent to Mr. [REDACTED] benefit election was invalid, PBGC must pay Mrs. [REDACTED] a survivor’s benefit. In the absence of Mrs. [REDACTED] valid consent, the Plan would have paid Mr. [REDACTED] benefit in the form of a J&50%SA, the Plan’s normal form of benefit.

In her appeal, Mrs. [REDACTED] seeks to elect a Joint and 100% Survivor Annuity (“J&100%SA”), claiming the status as executor of Mr. [REDACTED] estate. Nevertheless, even if

see Burns v. Orthotek, Inc., 657 F.3d 571, 575-577 (7th Cir. 2011) (adopting *Butler* court dicta, court held that the statutory requirements were satisfied by husband-participant-plan representative’s verification of spouse’s signature under the “unique circumstances” presented).

³⁷ The notarial act of “witnessing or attesting a signature” requires the notarial officer to “determine either from personal knowledge or from satisfactory evidence, that the signature is that of the person appearing before the officer and named therein.” See, e.g., Uniform Law on Notarial Acts (“ULNA”) § 2(c) (Notarial act of witnessing or attesting a signature) (1982) at www.uniformlaws.org/shared/docs/notarial_acts/ulna82.pdf (last visited Dec. 15, 2015).

the Board assumes that Mrs. [REDACTED] is the executor of Mr. [REDACTED] estate, she cannot now elect a J&100%SA. Under ERISA, plans must provide a participant's accrued benefit in the form of a QJSA.³⁸ Under section 7.1(a) of the Plan, a participant's benefit is a J&50%SA unless the participant "elects a different form of payment as provided in Section 7.3."³⁹ Under section 7.3, the Plan provides optional benefit forms that may be elected in accordance with Section 7.5 of the Plan. Section 7.5 allows a married participant to elect to waive the QJSA within the 90-day period immediately before commencing a benefit. Consistent with section 205(c) of ERISA, the Plan provides that a participant's election to waive the QJSA is not effective unless, among other things, the spouse's consent acknowledges the effect of the waiver and is witnessed by a plan representative or notary public.⁴⁰

The Appeals Board denies Mrs. [REDACTED] election of a J&100%SA. The Plan defines "Participant" as "[a]n individual who is participating in the Plan as provided in Article II."⁴¹ Mrs. [REDACTED] is not a participant under the Plan, nor is she a participant in her presumed capacity as executor of Mr. [REDACTED] estate. The Plan allowed participants to make elections regarding their benefits within 90-days of benefit commencement. That period has long since passed. As the surviving spouse of a Plan participant, Mrs. [REDACTED] may not now elect the Plan's J&100%SA, nor could she have during Mr. [REDACTED] lifetime. While Mr. [REDACTED] could have elected the Plan's J&100%SA, the evidence shows that Mr. [REDACTED] would not have so elected, and the Board will not speculate as to the election he would have made in the absence of Mrs. [REDACTED] consent to the SLA during the election period.

In the absence of a valid spousal consent under section 205(c)(2) of ERISA, Mr. [REDACTED] would have received his benefit under a J&50%SA in the amount of \$3,408.34 per month, commencing [REDACTED] 2009. After the Plan terminated, PBGC would have reduced his monthly benefit to \$3,128.63 (estimated), because of ERISA's maximum guaranteed benefit limit. Mrs. [REDACTED] survivor benefit under the J&50%SA would have commenced on [REDACTED] 2014, in the estimated amount of \$1,564.32 per month (50% of \$3,128.63 per month). Consequently, Mrs. [REDACTED] has been underpaid.

Because the invalidity of Mrs. [REDACTED] consent was not recognized, however, Mr. [REDACTED] received his monthly benefit in the form of a SLA in the amount of \$3,908.65, commencing [REDACTED] 2009. After the Plan terminated, PBGC reduced his monthly benefit to \$3,476.25 beginning November 1, 2010, because of ERISA's maximum guaranteed benefit limit. He was receiving \$3,476.25 monthly when he died on [REDACTED]. The last payment of \$3,476.25 was made on [REDACTED]. Consequently, Mr. [REDACTED] was overpaid during his lifetime.

Because there were overpayments to Mr. [REDACTED] and underpayments to Mrs. [REDACTED], PBGC may be required to recoup all or a portion of the net overpayments from the survivor's

³⁸ ERISA § 205(a)(1); 29 U.S.C. § 1055(a)(1).

³⁹ See Section 7.1 of the Plan, Enclosure 3.

⁴⁰ See Section 7.5(c) of the Plan, Enclosure 3.

⁴¹ See Section 1.1 of the Plan (definition of "Participant"), Enclosure 3.

benefit or otherwise recover the overpayments by methods other than recoupment.⁴² PBGC's Office of Benefits Administration ("OBA"), the office responsible for calculating and paying benefits, will determine the amount of net overpayment or underpayment and will notify you of its findings.

Dissent

The Dissent of William F. Condron, Jr., Appeals Board Member, is enclosed with this decision.

Decision

Having applied the terms of the Plan, the provisions of ERISA, and PBGC regulations and policies to the facts in this case, the Appeals Board grants Mrs. [REDACTED] appeal to the extent of determining that her consent under section 205(c) of ERISA was invalid and that she is entitled to a PBGC-payable survivor's benefit under a J&50%SA. The Board denies her appeal to the extent of her election of a J&100%SA.

PBGC's OBA will issue Mrs. [REDACTED] a new benefit determination with a 45-day appeal period, but her appeal rights will not include any matters decided in this decision. The new benefit determination will include PBGC's findings regarding under or overpayments.

This is not the Agency's final decision on this matter, and Mrs. [REDACTED] may seek court review of this decision in an appropriate U. S. District Court only for the matters decided in this decision. If you or Mrs. [REDACTED] have any questions, please call the Customer Contact Center at 1-800-400-7242.

Sincerely,



James L. Eggeman
Appeals Board Member

(4) Enclosures and Dissent:

- (1) Milacron Retirement Plan: Application for Retirement Benefits (1 page)
- (2) Milacron Retirement Plan: Spousal Consent Form (1 page)

⁴² See 29 C.F.R. § 4022.81(a) ("If any time the PBGC determines that net benefits paid with respect to any participant in a PBGC-trusted plan exceed the total amount to which the participant (and any beneficiary) is entitled up to that time under title IV of ERISA, and the participant (or beneficiary) is, as of the termination date, entitled to receive future benefit payments, the PBGC will recoup the net overpayment in accordance with paragraph (c) of this section and § 4022.82.").

- (3) Excerpts from the Milacron Retirement Plan (16 pages) [Not Included]
- (4) PBGC Form 700 (Participant Application for Pension Benefit) (10 pages) [Not Included]

Dissent by William F. Condrón, Jr., Appeals Board Member (5 pages)

cc:



**LACRON RETIREMENT PLAN
APPLICATION FOR RETIREMENT BENEFITS**

Applicant Information

Name [Redacted]
Address [Redacted]

Birthdate [Redacted]
Date of Hire [Redacted]
Date of Termination [Redacted] 2009
Normal Retirement Date [Redacted]
Date Pension Commences [Redacted] 2009

Spouse or Beneficiary Information

Name [Redacted]
Address [Redacted]

Birthdate [Redacted]
Relationship to Applicant WIFE

In order to help you compare the optional forms of payment available to you, the "relative value" of the single life annuity to each of the other options available to you has been determined. This relative value comparison converts the optional forms to the life annuity form, using 5.0% interest and average life expectancy assumptions.

As a result of this comparison, it has been determined that all of the optional forms are approximately equal in value to the single life annuity. Your actual life expectancy will differ from that assumed, so the actual relative economic value of the options will depend on how long you and any beneficiary lives. The selection of an optional form is an important decision and the best choice for you will depend on many factors other than relative value. You should discuss your choice with your family and your financial advisor.

Benefit Payment Options

- 1 Life Annuity - You will receive a monthly benefit for your lifetime
- 2 Life, 5 or 10 Years Certain - You will receive a monthly benefit for your lifetime. If you should die within 60 or 120 months following the first benefit payment to you, the monthly benefit will be continued to your beneficiary for the balance of the 60, or 120 month period
- 3 50%, 66-2/3%, 75% or 100% Joint and Survivor Annuity - You will receive a monthly benefit for your lifetime. When you die, 50%, 66-2/3%, 75% or 100% of your monthly benefit amount will be paid to your beneficiary for his/her lifetime

Selection of Payment Option Based on the preceding description of the benefit options the plan provides, please select and initial ONE benefit payment option

Note If you are married when your pension commences, you will automatically receive the 50% JOINT AND SURVIVOR ANNUITY option unless you indicate on this form that you prefer another option. By initialing a form of benefit other than the 50% Joint and Survivor Annuity and by signing your name at the end of this application, you will automatically reject the 50% Joint and Survivor Annuity. However, if you elect option 1, 2 or 3, your spouse must sign the Spousal Consent Form and your spouse's signature must be notarized or witnessed by a representative of the plan.

Options	Your Monthly Benefit	Beneficiary's Monthly Benefit	(Select One)
1 Life Annuity	\$3,908 65	N/A	[Redacted] (initials)
2 Life, 5 Years Certain	\$3,838 29	\$3,838 29	(initials)
3 Life, 10 Years Certain	\$3,674 13	\$3,674 13	(initials)
4 50% Joint and Survivor Annuity	\$3,408 34	\$1,704 17	(initials)
5 66-2/3% Joint and Survivor Annuity	\$3,263 72	\$2,175 81	(initials)
6 75% Joint and Survivor Annuity	\$3,197 28	\$2,397 96	(initials)
7 100% Joint and Survivor Annuity	\$3,033 11	\$3,033 11	(initials)

Signature _____

Date _____

MILACRON RETIREMENT PLAN
SPOUSAL CONSENT FORM

(If single, complete Items #1 and #3, if married, complete Items #2 and #3)

- (1) I certify that I am not married. The spousal consent requirement does not apply to me. I also certify that there are no outstanding Qualified Domestic Relations Orders that award a portion of my retirement benefit to a former spouse. (Notary signature not required)

Date _____

Participant's Signature _____

- (2) I have read the enclosed "Application for Retirement Benefits" form, and I consent to the Benefit Form my spouse as elected. I acknowledge that the effect of my consent may be to forfeit benefits I would be entitled to receive upon my spouse's death, that my spouse's election is not valid unless I consent to it, and that my consent is irrevocable unless my spouse revokes the action. (NOTARY SIGNATURE IS REQUIRED)

Date [redacted] 2009

Spouse's Signature [redacted]

Spouse's Social Security Number [redacted]

Spouse's Address [redacted]

- (3) As the Participant entitled to benefits under the Milacron Retirement Plan, I certify that there are no outstanding Qualified Domestic Relations Orders that award a portion of my benefit to a former spouse.

Date [redacted] 2009

Participant's Signature [redacted]

Witnessed by _____



[redacted] 2009
Notary Public, State of Ohio
My Commission Expires [redacted]

Dissenting Opinion
Re: Appeal 2014- [REDACTED]; Mrs. [REDACTED]

Summary of Dissent:

The issue in this case involves the interpretation of ERISA § 205(c)(2)(a)(iii), which requires that in order for a participant and his or her spouse to elect to waive a survivor benefit under a qualified joint and survivor annuity, “the spouse’s [written] consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.” In this appeal, the evidence clearly establishes that the spouse signed the Consent Form; the dispute concerns whether the notary who signed and applied her notarial stamp to the Consent Form had witnessed the spouse’s consent.

I disagree with the majority decision by the Appeals Board that ERISA § 205(c)(2)(a)(iii) requires the spouse to sign a consent form in the presence of a plan representative or notary. Instead, I would find that a consent form that acknowledges the effect of the election and is signed outside the presence of a plan representative is valid if the representative or notary verified the authenticity of the spousal signature in the spouse’s presence.

In this appeal, the administrative record supports a finding that a notary public witnessed Mrs. [REDACTED] consent to waive her right to a survivor benefit, which occurred when the notary authenticated Mrs. [REDACTED] signature on the Consent Form in Mrs. [REDACTED] presence. Thus, I would find Mr. [REDACTED] election of a Straight Life Annuity (“SLA”) is valid, and Mrs. [REDACTED] is not entitled to receive a survivor annuity under the Plan.

Factual Background and Findings

The administrative record supports the following facts:

- The appellant is a career [REDACTED] married to her spouse for over [REDACTED] years as of [REDACTED].
- The appellant knew that her husband was retiring from his employer, effective [REDACTED] 2009, after a nearly 40-year career with his employer.
- The Plan used a benefit election and spousal consent and waiver form similar to those used by hundreds of other defined benefit pension plans trustee by PBGC. The participant’s election of a SLA form of benefit was lawful, provided his spouse properly consented and waived her right to a Qualified Joint and Survivor Annuity (“QJSA”) in accordance with ERISA § 205(c)(2)(a)(iii).

- The Plan's spousal consent paragraph stated:

I have read the enclosed "Application for Retirement Benefits" Form, and I consent to the Benefit Form my spouse [h]as elected[.] I acknowledge that the effect of my consent may be to forfeit benefits I would be entitled to receive upon my spouse's death, that my spouse's election is not valid unless I consent to it, and that my consent is irrevocable unless my spouse revokes the action[.] (NOTARY SIGNATURE IS REQUIRED)

[Emphasis in original.]

- The appellant, as spouse, signed the consent on [REDACTED] 2009.
- The spouse's signature was voluntary and not coerced.
- The appellant physically appeared in the presence of a licensed notary public, Ms. [REDACTED], for the State of Ohio on [REDACTED] 2009.
- The notary public worked at a [REDACTED] office in [REDACTED] Ohio and had previously notarized documents for both the appellant and her husband.
- The notary public affixed her seal at the bottom of the consent form in the portion of the form titled "Witnessed by" on [REDACTED] 2009.
- Although the notary public does not recall nor possess records (such as a notary log) of the circumstances of the notarization on [REDACTED] 2009, the notary's routine practice was to notarize a person's signature only if he or she appeared before the notary and the notary could verify the authenticity of the person's signature.
- Plan officials relied on the election form and spousal consent to start a retirement benefit for the appellant's husband effective [REDACTED] 2009, in the amount of \$3,908.65, in the form of a SLA, almost exactly \$500 more a month than a QJSA form of benefit.
- No record exists that the appellant or participant ever claimed to the Plan or PBGC the SLA form of benefit elected was incorrect until after the participant died.

Discussion

I strongly disagree with the majority's insistence that under ERISA § 205(c)(2)(a)(iii) a plan representative or notary has not "witnessed" the spouse's "consent" unless the representative or notary actually observes the spouse's signing of the form. The majority's interpretation of the "witnessing" of the spouse's "consent" under ERISA § 205(c)(2)(a)(iii) is unjustifiably narrow.

I agree with the majority's view that a spouse must physically appear in the presence of a plan representative or notary in order for the spouse's consent to be validly witnessed. And,

obviously, a plan representative or notary has “witnessed” the spouse’s “consent” if the representative or notary actually observes the spouse voluntarily signing the form. I do not believe, however, that *witnessing the signing* is the only means by which a spouse’s “consent” may be “witnessed” under ERISA. Instead, in my view, ERISA also contemplates that the spouse’s “consent” may be “witnessed” by a plan representative or notary verifying with the spouse in person that the signature already on the waiver form is indeed the spouse’s signature.

ERISA § 205(c)(2)(a)(iii) requires only that the spouse’s “consent” be witnessed, not that the signing of the form be witnessed. As the majority explains on page 9 of its decision, “the ordinary meaning of the verb ‘consent’ is ‘to agree to do or allow something; to give permission for something to happen or be done.’” Thus, it is consistent with the statutory language to find that a notary has witnessed a spouse’s written consent if the notary has verified in the presence of the spouse that the signature on a signed waiver form is the spouse’s signature. The majority provides no explanation or authority for why, in its view, ERISA’s usage of the word “consent” is different than the ordinary meaning of the word “consent” and instead, requires a form to be signed in the presence of a plan representative or notary.

Accordingly, I would find that a consent form that acknowledges the effect of the election and is signed by a spouse outside the presence of a plan representative or notary meets the requirements of ERISA § 205(c)(2)(a)(iii) if the representative or notary verified the authenticity of the spousal signature in the spouse’s presence.

I have reviewed the three cases, *Lasche v. George W. Lasche Basic Profit Sharing Plan*¹, *Butler v. Encyclopedia Britannica*², and *Alfieri v. Guilt Times Pension Plan*³, cited by the majority decision for the proposition that “[i]n each case, the court strictly construed the statute to hold that the statutory requirements under section 205(c)(2) of ERISA had not been met.” I agree that the ERISA’s statutory requirements, properly construed, must be met. But these cases do not support the interpretation of ERISA § 205(c)(2)(a)(iii) as requiring witnessing the writing of a signature as opposed to the witnessing of consent. Rather, these cases show only that ERISA’s requirements for the “witnessing” of “consent” must be met, which I agree with and which I believe are satisfied when a spouse appears before a plan representative or notary and verifies the authenticity of his or her signature on a consent form.

The impact of the majority’s reading of ERISA § 205(c)(2)(a)(iii) is that a spouse is entitled to a survivor benefit when the majority’s requirement is not met, even when the factual record establishes that the spouse’s signing of the benefit election form was voluntary, consensual, and with knowledge of the benefit waiver’s effect. Under the majority’s decision, even if a spouse appeared before a notary and the notary confirmed that the signature on a waiver form is the spouse’s signature, and even if the spouse acknowledged that he or she had read the consent

¹ 111 F.3d 863 (11th Cir. 1997).

² 41 F.3d 285 (7th Cir. 1994).

³ 446 F. Supp. 2d 99 (E.D.N.Y. 2006).

form and fully understood the significance of the waiver, the consent would be invalid if not signed (a second time) in the notary's presence.

In other words, the focus of the majority's decision is not on consent in a meaningful sense, but on imposing a much narrower requirement that consent is only manifested if the spouse signs the consent form in the presence of the plan representative or notary. This rule would lead to the absurd result of invalidating a spousal consent form that the spouse admits understanding and signing but attempts to disavow on the technicality that he or she did not sign it in the physical presence of the notary.⁴ I find nothing in ERISA or in Treasury regulations that supports this interpretation.⁵

Under the majority's interpretation of ERISA § 205(c)(2)(a)(iii), every spousal consent would be invalid on its face if the dates of the spouse's signature and notary's (or plan representative's) signature do not match. Even if the signature dates match, a widow or widower could claim his or her signature occurred at an earlier time of day than when he or she met with the plan representative or notary. And as this appeal illustrates, it is very difficult to recall and review the factual circumstances related to the completion of a consent form that may have been signed many years ago. Thus, in my view, the majority's overly narrow reading of the statute is neither practical nor required by the language in ERISA § 205(c)(2)(a)(iii).

⁴ In *Butler v. Encyclopedia Britannica*, the Seventh Circuit expressly rejected the proposition that "the manifest purpose of the spousal consent requirement. . . is served only by requiring that the spouse sign the document in the presence of a notary public or plan representative." 41 F.3d 285, 293. Moreover, the *Butler* court stated that "[a]rguably, compliance with ERISA's literal language in this case would lead to the absurd result of invalidating a spousal consent form that [the spouse] admits he signed and now attempts to disavow on the technicality that he did not sign it in the physical presence of the notary." *Id.* at 294. Likewise, the court in *Burns v. Orthotek, Inc. Employees' Pension Plan and Trust* agreed with the analysis in *Butler* that section 205 "does not necessarily require a witness (whether a notary or plan representative) to be physically present when a spousal consent form is signed." 657 F.3d 571, 576 (7th Cir. 2007) (emphasis in original). I agree with this interpretation of ERISA.

⁵ The majority finds it significant that Treasury rules relating to the use of an electronic medium to make participant elections require, in part, that "[i]n the case of . . . a spousal consent . . . the signature of the individual making the participant election [must be] witnessed in the physical presence of a plan representative or a notary public." 26 CFR 1.401(a)-21(d)(6). In my view, the inclusion of this language in the regulation does not bolster the majority's interpretation of ERISA § 205(c)(2)(a)(iii). The regulation does *not* state that the witness is required to be physically present at the *time of signing*. It requires only that the "signature" be witnessed in the physical presence of the spouse. As stated in this dissent, I agree that the spouse must physically appear in the presence of a plan representative or notary in order for the spouse's consent to be validly witnessed.

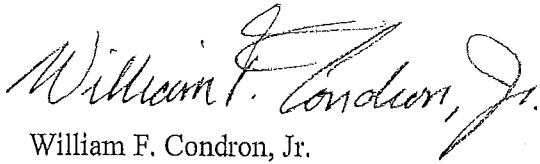
Nor do I find significant the fact that PBGC's benefit application (Form 700) states that "[y]our spouse must sign and date this section in the presence of a Notary Public witnessing his/her signature." A plan (or PBGC) may always adopt requirements more stringent than what ERISA requires.

Conclusion

ERISA requires that the spouse's "consent" be "witnessed" by a plan representative or notary public. This ERISA requirement ordinarily is satisfied if the spouse's signature, which signifies consent, is authenticated by the notary or plan representative in the presence of the spouse. Applying this rule, the totality of the circumstances in this case supports the conclusion that the notary (Ms. [REDACTED]) validly witnessed the consent in accordance with ERISA's requirements when she verified the authenticity of Mrs. [REDACTED] signature in Mrs. [REDACTED] presence. With the ruling in the majority's decision, however, the Appeals Board has set a much higher bar than ERISA requires for a consent form that was signed and notarized years ago.

For the reasons stated above, I dissent.

Sincerely,



William F. Condron, Jr.
Appeals Board Member