

---

## Settlements and Waivers Affecting Pension Benefits Under ERISA

*Eric D. Chason*

*Waivers affecting pension benefits may be entered into as part of a controversy (for example, a settlement agreement) or in isolation (for example, a disclaimer). Under current law, however, it is unclear how these waivers fit within the protections of ERISA, particularly the antialienation rule. Courts have generally honored settlement agreements so long as they are procedurally fair to participants. However, the antialienation rule looms in the background. The IRS and Treasury, in contrast, have focused on waivers outside the settlement context, prohibiting participants from making them but allowing beneficiaries to do so if the waiver satisfies gift-tax rules for disclaimers. The author critiques these results and suggests that waivers that settle disputes or that simply refuse plan benefits are outside the scope of the antialienation rule and should be respected.*

Agreements that purport to waive or settle claims under ERISA raise unique issues, especially for tax-qualified retirement plans. A primary issue here is the antialienation rule of ERISA. In essence, the antialienation rule says that retirement benefits can neither be sold nor made available to creditors of the employee (subject to some exceptions). Potentially, then, a private settlement of pension rights could never be enforceable against the employee. For example, suppose Employer A and Employee B disagree over Employee B's pension benefit, with A saying it is \$1,200 per month and B saying it is \$800. To avoid litigation, they settle, agreeing that B should receive \$1,000 per month. Does this agreement prevent B from suing A's plan for \$1,200 a month? Employee B might say that he or she was really entitled to \$1,200 under A's plan and that the settlement agreement is void as a prohibited alienation.

Courts have generally avoided this issue and accepted settlement agreements affecting pension benefits with some reservations. Some courts have suggested that it would matter whether B was "entitled" to \$1,200 or whether B was simply "claiming" \$1,200. What is meant

Eric D. Chason is an associate with the Washington, D.C. office of Ivins, Phillips & Barker, where he represents employers and fiduciaries in ERISA matters.

by this distinction is unclear. Other courts view settlements as being subject to the antialienation rule while others suggest that settlements are entirely outside the scope of the antialienation rule.

In contrast, the Internal Revenue Service and Department of Treasury have focused on waivers in isolation, analyzing them under the antialienation rule, but also the anticutback rule of I.R.C. Section 411(d)(6) and ERISA Section 204(g) and the vesting rules of I.R.C. Section 411(a) and ERISA Section 203(a). In general, the agencies have found that beneficiaries can waive pension benefits but participants cannot. The legal basis for this result, and the policy for the distinction between participant and beneficiary, are both problematic.

The focus of this article will be on waivers and settlements between the employer (or plan), the participant, and any beneficiary affecting previously earned benefits under a pension plan. This article will not focus on waivers affecting participation (that is, preaccrual) or waivers affecting welfare plans. First, there will be a brief review of the applicable statutory and regulatory provisions. Second, there will be a discussion of the case law on waivers, which typically deal with settlement agreements. Third, there will be a discussion of disclaimers, a creation of the law of trusts and estates and recognized by the IRS in informal guidance. Finally, there will be a discussion of all these authorities with the goal of discussing inconsistencies and proposing a general theory of waivers and settlements affecting pension rights under ERISA.

## STATUTORY AND REGULATORY PROVISIONS

Below is a brief discussion of four major ERISA protections implicated by waivers and settlements. They are the antialienation rule of ERISA Section 206(d)(1) and I.R.C. Section 401(a)(13)(A); the written plan document rule of ERISA Section 402(a)(1); the anticutback rule of ERISA Section 204(g) and I.R.C. Section 411(d)(6); and the non-forfeiture rule of ERISA Section 203(a) and I.R.C. Section 411 (a).

### *Antialienation Rule*

The antialienation rule is the focus of many decisions dealing with waivers and settlements. The antialienation rule says that benefits under a pension plan "may not be assigned or alienated." (ERISA §206(d)(1); I.R.C. 401(a)(13)(A).) Treasury regulations indicate that assignments and alienations include arrangements for payment of plan benefits to the employer and third parties. (Treas. Reg.

§1.401(a)-13(c)(1).) The purpose of the antialienation rule is to prevent participants from spending funds that were set aside for retirement.<sup>1</sup> The antialienation rule does not apply to welfare benefits.<sup>2</sup> It does, however, apply both to participants and to beneficiaries under Treas. Reg. Section 1.401(a)-13(c)(1)(ii).

### *Written Plan Document Rule*

ERISA Section 402(a)(1) says that all ERISA plans must "be established and maintained pursuant to a written instrument." This rule acts like a Statute of Frauds, protecting participants from secret amendments.<sup>3</sup> No court analyzing ERISA waivers or settlements has ever treated them as part of the written plan document (for example, as an amendment to the plan). In addition, no court has ever suggested that plans may not follow waivers and settlements on the grounds that they are not part of the written plan document. In other words, ERISA waivers and settlements can be valid even though they are not part of the written plan document. This may seem like a small point, but it has important implications for the treatment of waivers and settlements under the anticutback rule.

### *Anticutback Rule*

Certain rights and benefits under a pension plan may not be eliminated or reduced by plan amendment. These rights are (1) the accrued benefit under the plan, (2) early retirement benefits and retirement-type subsidies (as defined in Treasury regulations), and (3) optional forms of benefit under the plan. (ERISA 204(g); I.R.C. §411(d)(6).)

The Treasury regulations state, "In general . . . a participant may not elect to waive section 411(d)(6) protected benefits." (Treas. Reg. §411(d)-4 Q&A 3(a)(3).) By 411(d)(6) protected benefits, the regulations refer to the three types of benefits described in the preceding paragraph.<sup>4</sup> There are two exceptions to this rule in the regulations dealing with transfers between plans, which have been expanded by the recent tax act (EGTRRA).<sup>5</sup> The regulation quoted above could be interpreted as prohibiting any waiver, or even a settlement of pension claims, by a participant. (It is worth noting that the terms of the regulation do not apply to a beneficiary.) The IRS has reiterated its position on participant waivers in its manual and in a private ruling.<sup>6</sup>

If this regulation were valid, it might well end, or at least greatly shorten, the discussion of waivers relating to pension plans.

However, this regulation probably is invalid. It is black-letter law that the anticutback rule applies only to plan amendments. One circuit court has said, "[T]he word amendment is used as a word of limitation . . . Congress did not state that any change would trigger [the anticutback rule]; it stated that any change by amendment would do so. . . In its present form, [the anticutback rule] is specifically limited to actual amendments."<sup>7</sup>

By prohibiting waivers (which are not amendments) under authority of the anticutback rule (which applies only to amendments), the regulation is invalid even under the deferential standard of "manifestly contrary to the statute."<sup>8</sup> This standard, however, applies only to legislative regulations, which are issued under express grants of regulatory authority.<sup>9</sup> There is no general authority to issue legislative regulations under I.R.C. Section 411(d)(6) and ERISA Section 204(g). As a result, the waiver regulations under I.R.C. Section 411(d)(6) are probably interpretive regulations and subject to an even less deferential standard of review, meaning they are upheld only if they implement the statute in a reasonable manner.<sup>10</sup>

### *Nonforfeitability Rule*

A participant's benefit must be nonforfeitable (vested) upon satisfying certain service requirements under ERISA and the Code. (I.R.C. §411(a); ERISA §203(a).) The purpose of this rule is to prevent employers from forfeiting pension benefits in response to termination of employment or misconduct by the employee.<sup>11</sup> In its manual and in a private ruling, the IRS has indicated that waivers implicate the nonforfeitability rules.<sup>12</sup>

## WAIVERS AND SETTLEMENTS UNDER THE CASE LAW

As discussed in this section, courts have honored settlements and waivers subject to limitations.<sup>13</sup> However, the limitations vary from decision to decision. Although there is no recognized split of authority, the cases might be broadly divided between two lines. One line views the validity of waivers and settlements as essentially beyond the scope of the antialienation rule, considering them valid if they are "knowing and voluntary." Essentially, these courts view the validity of waivers and settlements as depending upon the procedure under which they were executed. Another line views the validity of waivers and settlements as being subject to the antialienation rule, considering them valid if they do not result in the alienation of

“established” pension rights. This division may not neatly apply to every decision, although it does represent the two main doctrines that courts apply when analyzing waivers and settlements.

*Waivers and Settlements Under the  
“Knowing and Voluntary” Standard*

Courts using the knowing and voluntary standard generally agree that waivers of pension rights are subject to high scrutiny.<sup>14</sup> They also generally agree that enforceability of waivers is governed by federal common law.<sup>15</sup> The essence of the inquiry for these courts is whether the waiver or settlement was “knowing and voluntary” under all of the facts and circumstances.<sup>16</sup>

Courts have developed a list of factors for assistance in determining whether waivers and settlements are knowing and voluntary. The first court to do so was the Second Circuit in *Laniok v. Advisory Committee of Brainerd Manufacturing. Company Pension Plan*, 935 F.2d 1360 (2d Cir. 1991), which borrowed the following list of factors from ADEA waiver cases—

- employee’s education and business experience;
- amount of time the employee had to review the agreement before signing;
- employee’s role in deciding terms of the agreement;
- clarity of the agreement;
- whether the employee had legal representation and whether the employer encouraged the employee to seek it; and
- whether the consideration given in exchange for the waiver exceeded the employee benefits that the employee was already entitled to.

The court in *Laniok* insisted that the list of factors was simply a guide, and not a checklist. The court said, “The essential question is a pragmatic one: whether, in the totality of the circumstances, the individual’s waiver of his right can be characterized as ‘knowing and voluntary.’”<sup>17</sup> The First Circuit has applied these factors in a somewhat more mechanical manner in *Morais v. Central Beverage Corp. Union Employees’ Supplemental Retirement Plan*, 167 F.3d 709 (1st Cir. 1999). In *Morais*, the court found that the language of the waiver agreement can support factors 2 (time to review agreement) and 5 (legal representation).<sup>18</sup> In fact, the court held that plaintiff’s extrinsic

evidence was inadmissible to establish that these factors were not satisfied.<sup>19</sup>

The decision in *Laniok* did not implicate the antialienation rule or the anticutback rule, because it dealt with an employee's waiver of participation in a pension plan upon first being hired. (That is to say, the employee had nothing to be alienated or cut back at the time.) However, other courts have approved waivers and settlements under the *Laniok* test in ways that do implicate the antialienation rule. For example, the Second Circuit in *Finz v. Schlesinger*, 957 F.2d 78 (2d Cir.), certiorari denied, 506 U.S. 822 (1992), respected a waiver of pension benefits by an attorney (Finz). Finz was apparently a shareholder in the firm and claimed he joined the firm in hopes of receiving a "guaranteed pension." Seven years after joining the firm, Finz demanded information on the pension, which the firm refused to provide. Finz and the firm settled the dispute by an agreement where Finz relinquished all rights he may have had to the pension plan. Without even addressing the issue of antialienation,<sup>20</sup> the *Finz* court seemed content that the severance agreement satisfied the standard set forth by *Laniok*. Similarly, the Seventh Circuit separated the enforceability of settlements from the operation of the antialienation rule by saying, "[T]he anti-alienation provision protects individuals who pledge their pension benefits as collateral or squander their benefits before retirement . . . . The Settlement Agreement in this case does not fall into either category."<sup>21</sup>

*Rhoades v. Casey*, 196 F.3d 592 (5th Cir. 1999), certiorari denied, 531 U.S. 924 (2000), is perhaps the clearest case of waiving uncontested pension entitlements. There, the Fifth Circuit respected a bank executive's waiver of his ESOP benefits. The executive waived the benefit as part of settling an investigation by the Office of Thrift Supervision and the Texas Savings and Loan Department on the grounds that the executive may have "committed violations of banking regulations, breached fiduciary duties, and engaged in unsafe or unsound banking practices."<sup>22</sup> Later, the executive claimed the waiver was invalid under the antialienation rule. Citing *Finz*, the court noted, "[T]he anti-alienation provision of ERISA is not absolute. Courts . . . have noted that there is an exception to ERISA's anti-alienation provision for a knowing and voluntary waiver of retirement benefits that is executed to reach a settlement."<sup>23</sup> The court also suggested that all "voluntary waivers of pension benefits by a plan participant that are made in exchange for substantial consideration" are exempt.<sup>24</sup>

What seems to unite this line of cases is that participants can execute waivers affecting pension rights as long as the waiver is

knowing and voluntary. The cases dealing with waivers after the benefits have (allegedly) accrued might also be read as to require that the waiver be executed as part of the settlement of a dispute. That said, the settlement-of-a-dispute element was only tangentially related to the waiver in *Rhoades*. There, the participant's dispute was with bank regulators, not with the plan or his employer.

### *Waivers and Settlements Under the Antialienation Rule*

Other cases have focused more sharply on the antialienation rule in analyzing waivers and settlements. In the view of these courts, a waiver of pension rights cannot violate the antialienation rule, even if the waiver satisfies the test in *Laniok*. Taken to an extreme, however, this view could invalidate many settlements affecting pension benefits. Ambiguities in plan terms, the law, and the facts can all cause wide differences in how much benefits a participant is entitled to. If plan and participant resolve these ambiguities through a settlement, it is unclear what would keep a participant from bringing the "settled" issues before a court, claiming that the settlement was really an impermissible alienation.

To prevent this problem, some cases have suggested distinctions between permissibly settling pension disputes and impermissibly alienating pension benefits. For the Seventh Circuit in *Licciardi v. Kropp Forge Division Employees' Retirement Plan*, 990 F.2d 979 (7th Cir. 1993), Judge Richard Posner wrote:

The basic point is that the release released the defendants from liability based on contestable pension claims. . . . [T]he release did not wipe out Licciardi's claims to any pension benefits to which the plan entitled him. If the release were thought broad enough to wipe out actual pension entitlements, its enforceability would be questionable in light of ERISA's provision forbidding the alienation of pension benefits. For then it might be a case of Licciardi's having "sold" his pension rights, in the release, in exchange for the \$650,000 and any other consideration in the omnibus agreement.<sup>25</sup>

This passage seems to divide issues between those related to "pension entitlements" and "contestable pension claims." In a subsequent case, *Lynn v. CSX Transportation*, 84 F.3d 970, 975 (7th Cir. 1996), the Seventh Circuit tried to make this distinction more clear:

Pension entitlements are, without exception, subject to the anti-alienation provision of ERISA. Contested pension claims, on the other

hand, are "simply outside the realm of the provision." The distinction between these two categories is a critical one, and, if the decision of the district court is any indication, one that has not yet been drawn with sufficient clarity. A pension entitlement arises under the terms of the pension plan itself. A contested pension claim, by contrast, arises under a settlement agreement. A release may prevent a plan participant from asserting claims based on a settlement agreement, but may not bar claims based on pension entitlements.<sup>26</sup>

In *Lynn*, the plaintiff had signed a general release upon terminating employment. He later sued the pension plan of his employer claiming, among other things, that he should receive credit under the plan for his military service. The Seventh Circuit held that this claim was not waived under the general release. The court's rationale was that the claim was not based upon the release but was based upon pension entitlements that were outside the realm of the release.<sup>27</sup> This can be contrasted with *Licciardi*, where the plaintiff asked that amounts received under a settlement agreement count towards credited earnings under the pension plan. The claim in *Licciardi* was barred because it arose under the agreement, which contained a general release and did not designate the earnings as counting towards the plaintiff's pension. As a result, the court viewed the claim as being waived.<sup>28</sup>

The Tax Court has expressly ruled that the waiver of an accrued benefit under a pension plan violates the antialienation rule, even if the waiver was knowing and voluntary. In *Gallade v. Commissioner*, 106 T.C. 355 (1996), the taxpayer owned a company 100 percent and wanted to have his substantial benefits revert to the company when he terminated the company's pension plan. The Tax Court disregarded the waiver as violating the antialienation rule, and ruled that the taxpayer received a deemed distribution from the plan. The waiver was not (as other reported cases), part of settling any case or controversy. Instead, the taxpayer wanted his pension to revert to his company in order to provide funding for the company. A curious aspect is that *Gallade* was not dealing with protecting a participant from squandering his or her pension benefits, which is the purpose of the antialienation rule.<sup>29</sup>

*Gallade* did not even technically deal with the tax-qualified status of the plan. Instead, it dealt with the tax consequences of the waiver, and found that the waiving participant was in constructive receipt of the benefit. The analysis of the Tax Court was essentially this: (1) the waiver violated the antialienation rule, and (2) therefore



the taxpayer is taxed under the constructive receipt doctrine. However, the Tax Court never said why (1) leads to (2). Perhaps the theory was not really invalid but was rather disregarded for tax purposes. To reconcile the tax treatment (the waiver is disregarded) with the substantive reality (the corporation, not the taxpayer, has the money), the Tax Court may have implicitly "expanded" the transaction by deeming the occurrence of two steps—taxpayer receives distribution and then contributes it to company. However, this analysis was altogether unnecessary. This is because the taxpayer's waiver could have simply been treated as an assignment, and thus a distribution, under I.R.C. Section 72(p)(1)(B). As a result, the whole discussion of the validity of waivers in *Gallade* could be viewed as *obiter dictum*.

## DISCLAIMERS

A disclaimer is typically thought of as the refusal of a gift or bequest by a beneficiary. Usually, the beneficiary refuses the gift or bequest, which then passes as if the beneficiary had predeceased the donor. If the disclaimer meets the requirements of I.R.C. Section 2518, then the beneficiary is not subject to gift tax, even though the beneficiary could have received the property but instead let it pass to someone else (presumably a person the beneficiary wishes to benefit). It is important to note, however, that disclaimers are not created by federal law. For the property interest to bypass the beneficiary, there must be a provision in applicable state law. That said, such provisions are relatively uniform across the laws of the various states.<sup>30</sup>

In G.C.M. 39858 (September 23, 1991), the IRS concluded that a disclaimer by a beneficiary does not violate the antialienation rule if (1) the disclaimer meets the requirements of I.R.C. Section 2518 and (2) the disclaimer meets the requirements of "applicable state law." In addition, the disclaimer would not result in immediate income taxation. There was no discussion as to why disclaimers are an exception to I.R.C. Section 72(p)(1)(B).

Typically, a disclaimer would meet these requirements if within nine months of the participant's death the beneficiary delivered a written refusal of benefits to the plan administrator and personal representative of the deceased participant without previously taking a distribution. In addition, the disclaimant must not have received any consideration for making the disclaimer. The IRS gave no opinion

on disclaimers that fail to meet this standard. There are no cases or regulations dealing with disclaimers of benefits under a tax-qualified plan.

The IRS did not say how the state law of disclaimers could be applicable to tax-qualified retirement plans in light of ERISA preemption. The Supreme Court has recently ruled twice that aspects of state probate law are preempted by ERISA.<sup>31</sup> Presumably, the preempted state law of disclaimers could be replaced by plan language allowing for disclaimers, or a court might recognize some federal common law of disclaimers that applies to ERISA plans.

Plan language (or federal common law) would not necessarily avoid the problem of disclaimers under the antialienation rule. The whole of the analysis in G.C.M. 39858 is the assertion that the rules governing disclaimers "are generally consistent with the Congressional purpose underlying" the antialienation rule. A disclaimer, however, can be a complete waiver of all benefits that a beneficiary has under the plan. It is unclear why the IRS believes this is consistent with the antialienation rule but thinks that a complete waiver of all benefits by a participant is not.

The G.C.M. is probably sufficient to ease concerns over disqualifying a plan by honoring disclaimers. Disclaimers are acknowledged in proposed regulations under an unrelated Code section, I.R.C. Section 401(a)(9). (Prop. Treas. Reg. §1.401(a)(9)-4 Q&A 4.) So, the IRS has allowed disclaimers but only in a very informal fashion.

Until there is more substantial authority on the subject, however, cautious fiduciaries might choose not to accept disclaimers out of concern over liability under Title I of ERISA. Not only is there risk of liability to the disclaiming beneficiary, but there might also be liability to his or her heirs. For example, suppose a participant names her second husband as primary beneficiary and her child from a prior marriage as secondary beneficiary under a 401(k) plan. Participant dies, and second husband disclaims, allowing the account balance to pass to the child from the prior marriage. The second husband may have a claim (although unsympathetic) that his disclaimer violated the antialienation rule. If second husband dies with surviving children from another marriage, however, these children might have a more sympathetic claim that the disclaimer is invalid.

The more curious aspect is the fact that the IRS thinks that a beneficiary's "qualified disclaimer" satisfying "applicable state law" (if there is such a thing) satisfies antialienation, anticutback, and nonforfeitability requirements. On the other hand, the IRS thinks a participant's refusal to receive benefits under a plan violates all of

these requirements. However, the technical operation of disclaimer rules could be used to allow a *participant*, and not just a beneficiary, to disclaim an interest in a pension plan before payments commence. Under the gift tax rules relied on in the G.C.M. 39858, a disclaimant has nine months after the date of "the transfer creating the interest in the disclaimant,"<sup>32</sup> provided that the disclaimant has not previously enjoyed the benefits of the property (for example, received a distribution). The date of the transfer occurs when the transfer is complete for federal gift tax purposes. A transfer to a defined benefit plan would rarely be considered "complete" under the gift tax rules because the employer typically has the power to add new participants.<sup>33</sup> (The transfer may be considered complete to a defined contribution plan because new participants could not receive benefits from a particular account of a vested participant.) So, at least in the case of defined benefit plans, a literal application of the disclaimer rules could allow a participant to disclaim an accrued benefit up to the time that benefit payments commence.

### A MORE GENERAL THEORY OF WAIVERS AND SETTLEMENTS OF PENSION CLAIMS UNDER ERISA

Current law places plans and participants in a difficult position because it is unclear what pension claims can be waived. Case law has generally dealt with waivers under settlement agreements, focusing on procedural protections and contract interpretation. The best summary of case law I can provide is that waivers under settlement agreements are usually respected subject to interpretation of the agreement and procedural safeguards for participants. However, the antialienation rule unnecessarily stunts the analysis of the courts.

The IRS and Treasury have dealt with isolated waivers of benefits. They think that waivers by participants are *per se* impermissible. The only regulation on this was issued under I.R.C. Section 411(d)(6), which deals only with plan amendments. Beneficiaries, however, can waive death benefits if they do so within nine months of the participant's death and do not receive a distribution before executing the disclaimer.

#### *What Should Be Waivable in the Settlement Context*

As noted previously, there are two currents of cases dealing with settlement agreements:

- Some courts (for example, the Seventh Circuit) think there is a distinction between unwaivable "pension entitlements" and waivable "contested pension claims." I will call this the "Contested Claim Position."
- Some courts (for example, the Second and Fifth Circuits) think that any pension benefit can be subject to a "knowing and voluntary waiver" if part of settling a dispute. I will call this the "Knowing and Voluntary Position."

In this section, I will try to show that the Knowing and Voluntary Position is the better method for analyzing waivers and settlements arising out of pension disputes.

The primary problem with the Contested Claim Position is the difficult distinction it makes between pension entitlements and contested pension claims. It should be noted that the courts making this distinction (*Licciardi* and *Lynn*) did not really apply them to the facts at hand. Rather, both courts simply said that a settlement agreement would not create any additional pension benefits by reason of settlement payments unless specified by the agreement. This is a simple enough rule, seemingly based more on interpreting the settlement agreement than on applying the antialienation rule. In addition, these courts maintained that pension claims independent of the settlement agreement were not waived. Again, this is mere contract interpretation. (It might also be a good reason for employers to staple a benefit statement to settlement agreements they reach with employees before execution.)

Even though *Licciardi* and *Lynn* can be explained as simple cases of contract interpretation, the decisions are written in terms of the antialienation rule. Unfortunately, these decisions never really differentiate between waivable pension claims and unwaivable pension entitlements. The decisions seem to imply that if the issue is a subject of the controversy, it is a pension claim. While this might lead to the result I ultimately argue for below, it does not make much sense. Since virtually anything could be the subject of a controversy, then virtually anything could be a waivable pension claim.

What these courts might be trying to say is parties usually have controversies over "ambiguous" (which they consider waivable) claims rather than "clear-cut" entitlements (which they consider unwaivable). This analysis has problems of its own. Typically, a pension plan give the administrator the power to resolve ambiguities, and the exercise of this power is respected by courts unless it is

arbitrary and capricious.<sup>34</sup> This analysis would lead to the conclusion that settlement agreements can function only as to matters subject to fiduciary discretion. In one sense, a settlement would not be a waiver on the merits of the claim, but rather a waiver that the fiduciary was arbitrary and capricious over the final determination. As a result, a plan could settle only those pension claims that a responsible fiduciary could determine on his or her own.

These problems point toward adopting the Knowing and Voluntary Position. The primary advantage of this position is that it relieves courts of having to make the problematic distinction between "pension entitlements" and "contested pension claims." Whether something is a "pension entitlement" depends on numerous facts, interpretations of ambiguous or missing facts, legal rules, and interpretations of complex or ambiguous rules. For example, new cases, statutes, or regulations may shed light on prior ambiguities, turning what were previously ambiguous matters under a settlement into clear-cut pension entitlements. Essentially, settlement agreements could bring a final and binding resolution only to factual disputes (and then only if new clarifying facts were not brought to light).

Under the Knowing and Voluntary Position, a court reviewing a settlement agreement would (1) determine whether the terms of the settlement agreement cover the issue at hand and (2) determine whether the settlement agreement was a knowing and voluntary act by the participant. It would not need to determine the state of the facts and law at the time of the settlement or at the time of decision in order to find out whether the matter was a pension entitlement and not subject to settlement.

One potential criticism is that an employer could extort a settlement agreement from a participant by acting in bad faith. However, the cases adopting the knowing and voluntary test do not automatically approve all settlements. Rather, they require that a settlement agreement be a knowing and voluntary act on the part of the participant. For example, if an employer would not pay benefits to a participant until the participant agreed to a benefit reduction under a waiver, a court should have no problem looking at those facts and determining the waiver was not knowing and voluntary. In fact, the Knowing and Voluntary Position would allow courts to look at numerous factors, including the ones set forth in *Laniok*. Because of the ability to settle more issue (legal and factual) and because of the inherent procedural safeguards, the Knowing and Voluntary Position should be the one adopted by the courts.

*What Should Be Waivable Outside the Settlement Context*

The rules on waivers outside the settlement context can be summarized as follows:

- The Tax Court thinks that a waiver of benefits violates the antialienation rule.
- The IRS and Treasury think that a waiver of any right covered by I.R.C. Section 411(d)(6) by a participant violates the antialienation, anticutback, and nonforfeitability rules.
- The IRS thinks that a waiver of benefits by a beneficiary is permissible, so long as it satisfies the gift-tax rules under I.R.C. Section 2518.

Waivers of benefits by participants outside of settlements are apparently more limited under current rules. Waivers by beneficiaries are more liberal so long as they comply with the gift-tax rules.

Neither the courts nor the IRS has ever addressed disclaimers by participants in the context of the gift-tax rules. As discussed above, the gift-tax rules could allow for a disclaimer by a participant, at least in most defined benefit plans. Fitting along with the antialienation rule, the disclaimer rules prohibit a disclaimant from receiving consideration in exchange for making the disclaimer. In other words, a participant could not sell pension benefits under the guise of a disclaimer. As noted in G.C.M. 39858, trust beneficiaries at common law were under no obligation to accept trust benefits. Participants should not be under this obligation as well, if they choose to refuse benefits.

The disclaimer rules seem to provide a method for participants to decline receipt of plan benefits without implicating the antialienation rule. Because the disclaimer rules participants could not receive consideration in exchange for their disclaimers. Applying the gift-tax rules for disclaimers would lead to the same result as in *Gallade*, where the Tax Court disregarded a waiver of pension benefits by the 100 percent owner of a company. In that case, the owner did not truly waive his benefits, but instead let them pass to his corporation (presumably for income-tax reasons). Essentially, the owner accepted the benefits, which is inconsistent with the gift-tax rules. Conversely, the result in *Rhoades* is consistent with this result. There, a bank executive waived his entire benefit, retaining no direct or indirect interest. The Fifth Circuit approved this waiver (although justifying it as a settlement with bank regulators).

The gift-tax model also recognizes the distinction between a refusal to receive benefits and an alienation or assignment of benefits. A refusal of trust benefits is allowed under the law of trusts, as noted by the G.C.M. If this right to refuse is granted to beneficiaries, and there is no reason why participants should not have it as well. The use of disclaimers by participants may well be inconsistent with current IRS position and Treasury regulations, although this is not completely clear.

As noted above, however, the Treasury regulations prohibiting waivers are probably invalid because they were issued under I.R.C. Section 411(d)(6), which applies only to plan amendments. Even if the gift-tax model for disclaimers is not recognized, there should be no bar to waivers of pension rights not covered by the antialienation rule (for example, optional forms of benefit).

## CONCLUSION

With increasing litigation and complexity surrounding pension issues, plans and their participants will increasingly settle their disputes by private agreement. Unfortunately, the current case law is somewhat unclear on what issues can be settled in light of the antialienation rule, with some courts drawing a difficult distinction between waivable pension claims and unwaivable pension entitlements. Other courts view pension settlements as being outside the realm of the antialienation rule, and will respect settlement so long as it is a knowing and voluntary act on the part of the participant. This seems to be the better view, as it protects the interests of participants while allowing parties to settle without the prospect of it being subject to collateral attack under the antialienation rule.

Waiving pension rights outside the settlement context is more problematic, with the IRS and Treasury drawing a sharp distinction between waivers by participants and by their beneficiaries. On the one hand, the IRS and Treasury have stretched I.R.C. Section 411(d)(6) to the breaking point, using it to prohibit waivers by participants even though the statute applies only to plan amendments. On the other hand, the IRS has (in a General Counsel Memorandum) recognized gift-tax disclaimers by beneficiaries as being permissible. The problem with the first view is that the regulation is invalid under the statute. The problem with the second view is that the General Counsel Memorandum may be insufficient guidance for fiduciaries to rely on.

The best solution would be to allow beneficiaries and participants to waive pension benefits so long as the waivers satisfy the

gift-tax rules for disclaimers. This solution would be consistent with the case law of ERISA waivers and with the law of trusts, allowing participants and beneficiaries to refuse pension benefits if they so choose. This solution may need regulation or statute to be implemented. Fiduciaries acting in the ordinary course may then wish to refuse to recognize disclaimers by participants and beneficiaries out of concern for potential liability under the currently unsettled rules.

## NOTES

1. *Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 456 (7th Cir.), cert. denied, 502 U.S. 939 (1991); John A. Langbein and Bruce A. Wolk, *Pension and Employee Benefit Law* 546 (2d ed. 1995).
2. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988).
3. See Langbein & Wolk, note 1 at 673, 679.
4. See Treas. Reg. §1.411(d)-4 Q&A 1(a). In defining 411(d)(6) protected benefits, the Treasury dropped the "as defined in regulations" qualifier in the statute that applied to early retirement benefits and retirement-type subsidies. Compare *id.* with I.R.C. §411(d)(6)(B)(i); ERISA §204(g)(2). Perhaps not coincidentally, the Treasury has never taken the occasion to define early retirement benefits and retirement-type subsidies, as contemplated by the statute.
5. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §645, 115 Stat. 38 (2001).
6. See I.R.M. 7.7.2.2.4 (Apr. 20, 1999) ("Upon termination of a plan, the accumulated funding deficiency cannot be deemed corrected by having plan participants 'waive' their accrued benefits. Such a waiver violates IRC 411(d)(6), 411(a), and 401(a)(13)."); T.A.M. 9146005 (same).
7. *Andes v. Ford Motor Co.*, 70 F.3d 1332 (D.C. Cir. 1995).
8. See *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); *Rite Aid Corp. v. United States*, 255 F.3d 1357, 1359 (Fed. Cir. 2001).
9. See *Schuler Indus. v. United States*, 109 F.3d 753, 755 (Fed. Cir. 1997).
10. *Id.* at 754-55.
11. See Wolk & Langbein, note 1 at 97.
12. See note 6.
13. Early case law suggested ERISA rights could never be subject to waiver. See, e.g., *Holt v. Winpisinger*, 811 F.2d 1532, 1541 (D.C. Cir. 1987); *Amaro v. Continental Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984).
14. See, e.g., *Sharkey v. Ultramar Energy*, 70 F.3d 226, 231 (2d Cir. 1995).

Courts disagree, however, on whether non-pension rights are subject to the same high scrutiny. Compare *Sharkey*, 70 F.3d at 231 (2d Cir. 1995) ("We see no reason to apply a lower level of scrutiny to waivers of severance claims under ERISA than we



## Settlements and Waivers Affecting Pension Benefits Under ERISA

---

do to pension claims.") with *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 587 (1st Cir. 1993) ("[T]he heightened scrutiny applied to waiver of rights accrued in ERISA pension plans does not apply in this case where the plans involved were both welfare benefit plans.").

15. See, e.g., *Rodriguez-Abreu* at 587. But see *Auslander v. Helfand*, 1997 WL 792,270 (D. Md. Dec. 16, 1997) (analyzing ERISA releases under Maryland state law, which was found not preempted by ERISA).

16. *Morais v. Central Beverage Corp. Union Employees' Supplemental Retirement Plan*, 167 F.3d 709, 713 & n.6 (1st Cir. 1999); *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181 & n.3 (1st Cir. 1995); *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir.), cert. denied, 506 U.S. 822 (1992); *Laniok v. Advisory Committee of Brainerd Manufacturing Company Pension Plan*, 935 F.2d 1360 (2d Cir. 1991).

17. *Laniok*, 935 F.2d at 1368.

18. *Morais*, 167 F.3d at 713.

19. *Id.* at 713-14

20. The plan in *Finz* does not seem to be a top-hat plan exempt from the antialienation rule, but the court never addressed that point. For why I think the plan probably was not a top-hat plan, I note the following. First, the name of the plan was the "Julien & Schlesinger Employee Retirement Fund Dated June 11, 1974." Second, reference was made to another attorney receiving a check from "Julien & Schlesinger, P.C. Employees Retirement Fund." Finally, the court said the firm had a duty to provide *Finz* with a summary plan description. See 957 F.2d at 80-83. That said, none of this is necessarily inconsistent with top-hat status.

21. *Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 456 (7th Cir.) (citation and footnote omitted), cert. denied, 502 U.S. 939 (1991). As discussed later in the article, this view may not reflect current thinking in the Seventh Circuit.

22. 196 F.3d at 594.

23. *Id.* at 598.

24. *Id.* at 600.

25. 990 F.2d at 982.

26. *Lynn*, 84 F.3d at 975 (citations omitted).

27. *Id.* at 976.

28. *Licciardi*, 990 F.2d at 982-83.

29. See *Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 456 (7th Cir.), cert. denied, 502 U.S. 939 (1991).

30. See, e.g., Unif. Prob. Code §2-801.

31. See *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (holding that ERISA preempts Washington state law purporting to change beneficiary designation in ERISA plan upon divorce); *Boggs v. Boggs*, 520 U.S. 833 (1997) (holding that ERISA preempts Louisiana community property law giving one spouse a transferable interest in the pension of another spouse).

---

Settlements and Waivers Affecting Pension Benefits Under ERISA

---

32. Treas. Reg. §25.2518-2(c)(3)(i); Unif. Prob. Code §2-801(b)(2).
33. Treas. Reg. §25.2511-2(c) ("A gift is also incomplete if and to the extent that a reserved power gives donor the power to name new beneficiaries . . . ."); Unif. Prob. Code §2-801(b)(2).
34. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).