A Curious ERISA Case Before the Supreme Court

The filings in Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, 497 F.3d 426 (5th Cir. 2007), *cert. granted*, 2008 U.S. LEXIS 1291 (U.S. Feb. 19, 2008) are complete, and oral argument is scheduled for October 7, 2008.

The case, which is a dispute about who is entitled to a participant's death benefits, has many curious elements. In my view, neither party addresses the certified question which refers to the entitlements of an ERISA beneficiary rather than the payment obligations of an ERISA plan administrator. The AARP amicus brief suggests that ERISA should no longer protect entitlements to retirement benefits after their distribution. Under the approach of the amicus brief of the United States, that the Department of Treasury, the Internal Revenue Service, and the Department of Labor presented, for which the Solicitor General ("SG") was the counsel of record, divorcing spouses may not retain spousal survivor benefits with qualified domestic relations orders ("QDROs"), even though Congress introduced QDROs for this very purpose, because the United States approach limits QDROs to orders that transfer benefit rights and no right is transferred if rights are retained.

The result may be a Supreme Court decision or dicta that substantially change basic ERISA provisions with respect to benefit entitlements, benefit designations, the alienation prohibition and QDROs.[1]

The Facts:

In 1974, William Kennedy named his spouse, Liv, the sole beneficiary under the DuPont Savings and Investment Plan (the "SIP Plan"). William and Liv were divorced in 1994. The divorce decree constituted a "qualified domestic relations order" (QDRO) with respect to another DuPont retirement plan and granted Liv a portion of that plan's benefits. The divorce decree contained a customary provision whereby each party waived rights to the other party's separate property not otherwise allocated. That provision does not meet the QDRO requirements. William's designation of Liv under the SIP Plan was not changed when he divorced Liv, when he retired in 1998, or when he died in 2001. At the time of his death, William had no surviving spouse, and the SIP Plan provisions for beneficiary designations and revocations provided that if there were no surviving spouse and "no beneficiary designation in effect," William's SIP Plan death benefit would be paid to his estate. As Liv survived William, the SIP Plan paid Liv the

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[1] *See* When Does A Domestic Relations Order Determine the Disposition of ERISA Plan Benefits?, 36 Comp. Plan. J. 91 (May 2, 2008), http://ssrn.com/abstract=1126883 for a more extensive discussion of the issues in this case.

$402,000 death benefit even though Keri, the daughter of William and Liv, claimed the benefits as the executrix of William's estate.

The Fifth Circuit held Keri was not entitled to William's death benefit from the SIP Plan. The Court ruled that ERISA does not require the SIP Plan to recognize Liv's "waiver" of the SIP death benefit in the 1994 divorce decree. There are conflicting Circuit decisions on similar claims, and the Supreme Court accepted Keri's appeal.

The Certified Question:

The Supreme Court certified the following general question for review:

> Was the Fifth Circuit correct in concluding that ERISA's Qualified Domestic Relations Order provision, 29 U.S.C. § 1056(d)(3)(B)(i), is the only valid way a divorcing spouse can waive her right to receive her ex-husband's pension benefits under ERISA?

The question refers to the divorcing spouse's benefit entitlements, not the plan's payment obligations, which are a consequence of her benefit entitlements. None of the briefs elucidates the issue by presenting a QDRO by which a divorcing spouse waives her right to receive her ex-husband's pension benefits, such as a QDRO which named a child of the participant as the beneficiary. Such a QDRO revokes the participant's beneficiary designation of the divorcing spouse. The issue before the Supreme Court is may a divorcing non-participant spouse revoke the participant's designation without a QDRO.

The Petitioner argued a QDRO is not needed, in which case the decision below would be reversed or the case would be remanded so the court below could determine if the conditions that the Supreme Court had set forth had been satisfied. The Respondent argued a QDRO is needed, in which case the decision below would be affirmed.

The Response to the Certified Question Should be Negative:

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which the Petitioner used to obtain jurisdiction of this case, provides that individual may use the federal courts to enforce his or her right to benefits due under the terms of an ERISA plan. ERISA bars the alienation of retirement benefits. Under ERISA § 206(d)(1)(A), 29 U.S.C. § 1056(d)(1)(A), a domestic relations order which establishes a right to an ERISA benefit but is not a QDRO is a prohibited alienation. Thus, an ERISA retirement plan may not use a domestic relations order, which is not a QDRO, to make a beneficiary designation or revocation. Therefore, a divorcing spouse may not waive (revoke) her right to receive her ex-husband's retirement benefits under an ERISA retirement

plan without using a QDRO.

The beneficiary designation and revocation terms of the SIP Plan provide that Liv is William's beneficiary. Thus, the Petitioner's benefit claim, which is based on a waiver that is not a QDRO, must be denied.

The above analysis is consistent with prior Supreme Court decisions and the principal goal of ERISA, namely to secure the benefits of ERISA participants and beneficiaries. This goal is so important that in both *Boggs v. Boggs*, 520 U.S. 833 (1997) and *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) the Supreme Court held that claimants may not obtain the ERISA benefits from the person designated as a plan beneficiary under the terms of the ERISA plan. In *Egelhoff* the Supreme Court held that ERISA preempted a state law that attempted to revoke the beneficiary designations for ERISA retirement and non-retirement plans of a participant undergoing a divorce. The Supreme Court may be expected to hold that a state court order that attempted to achieve the same result is similarly preempted, if the order is not a QDRO with respect to the retirement plan at issue.

The Petitioner Argues for an Affirmative Response to the Certified Question:

The Petitioner never discussed ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), by which claimant sought to enforce her claimed right to benefits due under the terms of an ERISA plan, and the Respondent never asked the Petitioner to justify its claim on the basis of that section. The Petitioner instead justified its claim by asserting again and again that ERISA does not prohibit voluntary benefit waivers, but failed to cite a SIP Plan term that provides for a revocation by a divorcing spouse, i.e., an effective waiver, by a way other than a QDRO. Such a citation is needed. Otherwise, oral designations which are not prohibited by ERISA would be effective in the vast majority of ERISA plans that provide only for written designations.

The Petitioner referred to lower court decisions that used federal common-law principles in order to find that voluntary benefit waivers revoked benefit designations and determined benefit entitlements. However, the Petitioner never explained how those principles supersede the ERISA requirement that benefit entitlements be determined by plan terms, which terms must include the criteria for revoking beneficiary designations. The Petitioner also asserted that the QDRO provisions do not bar voluntary benefit waivers by a divorcing spouse. It did not discuss in its initial brief the significance of the first sentence of ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A):

> Paragraph (1) [The prohibition on the alienation of retirement benefits] shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified

domestic relations order.

In particular, a domestic relations order other than a QDRO, such as the one at issue, may not be used to revoke a beneficiary designation of an ERISA retirement plan because ERISA would treat the establishment of the benefit rights of the designee who replaces the divorcing spouse as a prohibited alienation.

The Petitioner made five major policy arguments in favor of permitting voluntary beneficiary waivers that are not QDROs, which should be directed at Congress not the Supreme Court. First, federalism would be undermined by federal courts invalidating state divorce decrees. This is an odd criticism because ERISA invalidates state divorce decrees which attempt to establish rights to ERISA retirement benefits which are not QDROs. Second, plans would disregard the intention of the participant and divorcing spouse to have another person obtain his death benefits. This is an odd criticism because an ERISA plan beneficiary designation is not revoked if an attempted revocation does not satisfy plan terms regardless of the participant's intentions. Third, the millions of individuals who relied on the many courts that have ruled to the contrary would have their expectations dashed. This is an odd rule for resolving circuit conflicts. Fourth, greedy former spouses would be encouraged to disavow their waivers. This is an odd criticism because the ERISA prohibition on assignments of retirement benefits permits greedy individuals to disavow assignments for value. Fifth, the use of common-law slayer principles would be discouraged. This, is a somewhat odd criticism because the Supreme Court rejected that argument in *Egelhoff*, and the lack of any common-law slayer principles. *See e.g.*, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 1048-1059 (Spring 2007) http://ssrn.com/abstract=1087504.

The Petitioner made an argument for "good administration" in favor of permitting voluntary beneficiary waivers that are not QDROs. It asserted uniform plan administration would be undermined if voluntary waivers by divorcing spouses that do not comply with plan terms for revoking designations of beneficiaries are permitted for non-retirement plans but not for retirement plans. The better reaction to this disparity would be the uniform application of the ERISA requirement that plan terms for determine whether voluntary waivers are effective.

Misleading Assertions in The Amici Briefs of Solicitor General and AARP Who Supported Neither Party:

The AARP concluded that the Petitioner is not entitled to plan benefits under the terms of the SIP Plan. The AARP responses to Petitioner's policy concerns are not consistent with ERISA.

One of the "best practices" that the AARP recommended to assure that a participant's

presumed intentions to revoke a designation of a divorcing spouse are achieved is that retirement plans "automatically revok[e] all beneficiary designations upon divorce, [with a provision] similar to that of the Washington statute in *Egelhoff*." However, the use of a domestic relations order that is not a QDRO, such as the one at issue, to revoke a beneficiary designation, would as discussed violate the ERISA alienation prohibition.

In order to prevent greedy former spouses from revoking waivers in an effective fashion, the AARP suggested that state law remedies be used to enforce the waiver in the divorce decree at issue. However, the Supreme Court, in both *Boggs* and *Egelhoff*, held that a person entitled to ERISA plan benefits may be compelled to pay another person those benefits. The Supreme Court declared in *Boggs* at 520 U.S. 833, 853 (1997) when it held that ERISA did not permit a claimant to obtain any funds from the beneficiary designated under the plan terms:

> the diversion of retirement benefits will occur regardless of whether the interest in the pension plan is enforced against the plan or the recipient of the pension benefit.

Such retiree protection is not unique to ERISA but is customary in many state debtor protection laws that apply to non-ERISA plan benefits. For example, NY CPLR § 5205(d)(1) protects qualified-plan and IRA benefits after distribution.

The SG also concluded that the Petitioner is not entitled to plan benefits under the terms of the SIP Plan. In the course of finding that the waiver at issue did not comply with the SIP Plan terms, the SG incorrectly described QDROs as "a narrow exception to the requirement that the plan administrator make payment determinations strictly by reference to the plan terms." QDROs are not an exception to the rule that plan terms determine benefit entitlements. ERISA requires that retirement plan terms provide that (1) the applicable terms of a QDRO be followed, and (2) the alternate payee be treated as a plan beneficiary for all purposes.

The SG asserted incorrectly that the divorcing spouse's waiver is not a prohibited alienation of pension benefits if the waiver, such as the one at issue is "bare," i.e., does not set forth the new designee who will replace the divorcing spouse, even though as a revocation it must establish the identity of the new designee, because such a waiver does not meet the requirements of an alienation under § 206(d)(1), 29 U.S.C. § 1056(d)(1). The SG asserted that the first sentence of ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A), set forth *supra*, which describes those provisions in a domestic relations order that are treated as a prohibited alienation if the order is not a QDRO, is not applicable to bare waivers. The SG asserted "there is no reason to conclude that Congress intended [in this provision] by using the words 'creation' and 'recognition' to expand the prohibition against 'assignment' and 'alienation' beyond its ordinary meaning" which meaning requires a "transfer" of benefit rights. The Petitioner repeated this argument in its reply. The Respondent responded that the SG is disregarding the ordinary

meaning of those words.

The SG's interpretation of the sentence is obviously wrong. The SG interpretation renders nugatory not only the words "creation" and "recognition," but the entire general rule set forth in the sentence. Under the SG's approach, not only would a bare waiver by a divorcing spouse of her beneficiary rights in a domestic relations order not be an alienation and thus not a prohibited alienation. The retention by a divorcing spouse of her beneficiary rights in a domestic relations order would also not be a prohibited alienation because the order would not transfer benefit rights and thus not be an alienation. However, in such case the domestic relations order could not qualify as a QDRO, because the sentence provides that QDROs are a subset of the domestic relations orders which would be otherwise be prohibited alienations. Such a QDRO preclusion is absurd. QDROs were enacted and are used primarily to provide divorcing spouses with a means to retain their ex-husband's survivor benefits.

The SG also failed to recognize that the three words upon whose individual meaning it focused upon are a part of the phrase "creation, assignment, or recognition of a right to any benefit payable." The use of the disjunctive "or" means that the three words are not synonyms but each has a distinct significance. ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B), shows that the phrase in the sentence helps set forth a general set of domestic relations orders that either continue pre-divorce benefit rights or establish rights to other benefits payable with respect to the divorcing spouse's husband. Those orders are the ones that are not prohibited alienations if they qualify as QDROs, but are otherwise prohibited alienations.

More generally, the QDRO provisions set forth a designation mandate for retirement plans. Domestic relations orders that are QDROs must be used to make or revoke beneficiary designations, but domestic relations orders that are not QDROs may not be so used. *See e.g.*, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 947-955 (Spring 2007) http://ssrn.com/abstract=1087504, which also discusses the ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B), mandate for spousal survivor benefits which similarly prohibits beneficiary revocations (waivers) that do not comply with its requirements.

The Petitioner asserted that this mistaken alienation analysis is needed so that plan beneficiary designation and revocation terms may permit Code Section 2518 gift tax disclaimers as the SIP Plan terms do. This assertion is wrong. ERISA § 514(d), 29 U.S.C. § 1144(d), provides that ERISA does not impair any other federal law. Thus, reliance may be placed upon the elementary tenet of statutory construction that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . ." *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 375 (1990) citing *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974). In particular, the general alienation prohibition does not prohibit income tax levies. Nor does it prohibit waivers by participants of spousal survivor benefits pursuant to ERISA § 205(c), 29 U.S.C. § 1055(c). Nor does it prohibit the federal gift tax disclaimers.

The Respondent Argues for a Negative Response to the Certified Question:

The Respondent did not mention ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), by which claimant sought to enforce her claimed right to benefits due under the terms of an ERISA plan, but relied instead on the similar doctrine that a plan must be administered pursuant to its documents that are consistent with ERISA. It asserted that the waiver at issue did not satisfy the requirements for a revocation of plan designations under the documents of the SIP Plan. Thus, the Respondent concluded that the waiver did not revoke William's designation of his former wife, Liv. Therefore, the estate was not entitled to William's death benefits.

The Petitioner's response was that the plan document ERISA provisions cited by the Respondent do not address beneficiary designation changes or beneficiary disputes and thus federal common-law principles must be used. No plan document prohibits waivers by divorcing spouses that are not QDROs because the Petitioner presumed the anti-alienation prohibition in those documents was inapplicable to such waivers. Designations are usually determined not by plan documents but by documents which do not conflict with the plan documents, such as QDROs, designation forms or marriage certificates. Why, therefore, the Petitioner asked then limit a divorcing spouse's waiver to QDROs? The Petitioner's briefs, however, do not discuss why the waiver at issue does not have to comply with the plan terms for beneficiary designations and revocations, which presumably do not include such waivers among the documents that need to be consulted to determine designations and revocations. Nor does the Petitioner explain under what conditions those terms need not be complied with. For example, when would a will supersede a designation pursuant to the plan terms?

The Respondent devoted most of its brief to arguing that a purported waiver that is not a QDRO, if effective, would be an alienation prohibited under § 206(d)(1), 29 U.S.C. § 1056(d)(1). The Respondent also presented arguments in favor of applying the automatic definition of an alienation to waivers in domestic relations orders, such as the one at issue.

The Respondent also addressed three concerns raised by the Petitioner:

First, in order to prevent greedy former spouses from revoking waivers in an effective fashion, the Respondent makes an even stronger statement than the AARP that the petitioner may seek a state law remedy to enforce the waiver in the divorce decree at issue. As stated above, the Supreme Court has held that ERISA preempts such state law remedies for both retirement plans and non-retirement plans. Moreover, the Supreme Court holdings did not rely on the alienation prohibition, but rather upon the ERISA mandate that benefit entitlements are

determined by plan terms.

Second, in order to distinguish the settlements of benefit disputes the Fifth Circuit approved, which the Petitioner asserted showed ERISA permitted waivers, the Respondent observed that those settlements pertained to distributed pension benefits. A more pertinent distinction is that they were not incorporated in a domestic relations order. Thus, the automatic alienation prohibition discussed above was not applicable to those settlements. *A fortiori*, the cited settlements are not consistent with ERISA. *When are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. MARSHALL L. REV. 773, 841-843 (Spring 2005) http://ssrn.com/abstract=827885.

Third, the Respondent also disagreed with the Petitioner about how substantial an administrative burden would be imposed on plan sponsors and beneficiaries to determine if waivers, such as the one at issue, could be effective.

The Amici Briefs Supporting the Respondent Describe the Widespread Burdens that Would be Imposed By a Decision In Favor of the Petitioner.

The Western Conference of Teamsters Pension Trust Fund filed a model amicus brief in support of the Respondent. The brief described in detail the significant burdens that it claimed would be imposed on plan administrators if they were required to review purported waivers in domestic relations orders that were not QDROs. Reference was made to the increased uncertainty the plan participants and beneficiaries would have about their benefit entitlements because of the asserted greater uncertainty about the significance of domestic relation orders other than QDROs. The Conference described many of the significant practical costs of using an interpleader. Finally, the Conference asserted that the increased administrative costs would be ultimately borne by the plan participants and beneficiaries rather than by the plan sponsor.

The American Benefits Council, the ERISA Industry Committee, and the National Association of Manufacturers filed a joint amicus brief that bolstered the Respondent's legal arguments by emphasizing the purpose of many of the ERISA provisions at issue and describing the substantial administrative costs that would result from the decision in favor of the Petitioner. This brief focused on three major points: First, there are numerous valuable advantages to being able to administering ERISA plans pursuant to written documents and the procedures adopted pursuant to those documents. Second, interpleaders impose very substantial costs on the system Congress established for benefit plan administration as well as on the courts, plan sponsors, and benefit claimants. Third, Congress intended to provide and did provide that domestic relations orders which establish benefit rights violate the general and the specific alienation prohibition unless they are QDROs.

Conclusion

The core ERISA principle that plan terms determine ERISA benefit entitlements is at stake in this case. This is the case whether or not the plan is subject to the administrator responsibility provisions that advocates of the importance of plan documents, including the Supreme Court, regularly cite. The Petitioner and many circuits have rejected these provisions as a thin reed unable to withstand the common-law preference for waivers. Moreover, those provisions do not determine the extent of a person's ERISA benefit entitlements. If the Supreme Court rules in favor of the Respondent and cites benefit entitlements, as the certified question does, rather than administrator responsibilities, the core principle will be dramatically enhanced. If the Supreme Court rules in favor of the Petitioner or remands, the principle will be seriously eroded unless the remanded issue is whether the waiver complied with the plan terms.

It is most likely that the Supreme Court will rule in favor of the Respondent, but the incorrect assertions in the briefs may lead to dicta that in practice changes basic ERISA principles. Will the Court undermine the principle that ERISA benefit entitlements are protected before and after benefit distributions, by suggesting state remedies are available in this case, or that some settlements by disputing claimants are effective? Will the Court undermine the QDRO provisions and the Alienation Prohibition, by suggesting retirement plan terms may permit waivers other than QDROs? Will the Court undermine the principle that benefit entitlements are determined by Plan terms, by suggesting that common-law principles such as slayer principles may override those terms?