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# WHEN ARE RELEASES OF CLAIMS FOR ERISA PLAN BENEFITS EFFECTIVE?

ALBERT FEUER\*

The Supreme Court made the following statement about the limits, if any, on the effectiveness of purported releases of statutory rights:

It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.<sup>1</sup>

Congress made the following declaration when it enacted the Employee Retirement Income Security Act of 1974 ("ERISA"):

It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . .<sup>2</sup>

## I. INTRODUCTION

ERISA significantly enhanced safeguards for pension and welfare benefits of employees. ERISA did this by establishing nationwide standards "with respect to the establishment, operation and administration of . . . [employee benefit] plans,"<sup>3</sup> and "standards of conduct, responsibility and obligations for fiduciaries of employee benefit plans"<sup>4</sup> which could be enforced with "appropriate remedies, sanctions, and ready access to the Federal courts."<sup>5</sup> This Article proposes that ERISA requires the application of the following principles to determine if a release deprives an individual of the right to a court review of the denial of a claim to a benefit entitlement under an ERISA plan:<sup>6</sup>

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1. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1945) (internal citations omitted).

2. ERISA § 2(b), 29 U.S.C. § 1001(b) (2000).

3. ERISA § 2(a), 29 U.S.C. § 1001(a).

4. ERISA § 2(b), 29 U.S.C. § 1001(b).

5. *Id.*

6. This Article will focus on releases to ERISA plans and their fiduciaries of claims by individuals for the entitlement of plan benefits. Thus, we will not focus on releases of such claims to spouses or medical providers or releases of

1) The ERISA spendthrift prohibition on the assignment or alienation of pension benefits voids any release of such a plan or its fiduciaries from a claim that an individual is entitled to accrued benefits under such plan. This does not preclude settlements of pension benefit claims disputes. However, only judicially approved settlements are binding. Settlements of overtime payment disputes also require such approval to be effective.<sup>7</sup>

2) The ERISA fiduciary-duty provisions void any release of a welfare plan or its respective fiduciaries from claims that an individual is entitled to benefits under such plans unless, when the individual executed the purported release:

(a) the individual voluntarily agreed to release the plan and fiduciaries from the claim at issue;

(b) the individual fully understood what a prudent fiduciary would have known about the released rights; and

(c) the individual received fair and reasonable consideration for such release.

Thus, a court reviewing the effectiveness of a release must generally review the individual's underlying benefit claim.

3) The fiduciary-duty provisions void any release of a pension plan, or its fiduciaries, from a claim that an individual is entitled to benefits that accrued under such plan on or after the execution of the "release,"<sup>8</sup> unless each of the three conditions set forth in the second principle is satisfied. Two such major releases are often at issue. First, the release of a right to participate in an ERISA plan, such as a 401(k) plan or a medical plan,<sup>9</sup> and second, the release of a right to have payments that are part of a settlement of a non-ERISA dispute, such as one pertaining to a purported wrongful layoff, treated for pension benefit purposes in the same manner as similar compensation.<sup>10</sup> This does not preclude settlements of non-ERISA

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any claims against ERISA fiduciaries other than the failure to pay the plan benefits to which an individual is entitled. Nor will we consider purported implicit releases of such claims on the basis that an individual failed to make timely benefit claim or a timely appeal at the denial of such a claim. We will, however, consider implicit releases arising from the characterization of an individual's compensation and service in settlements of non-ERISA disputes, such as wrongful termination settlements.

7. However, Department of Labor approval also suffices for releases of rights under the Fair Labor Standards Act of 1938. 29 U.S.C. § 216(C).

8. Releases are only permitted for pension benefits that have not yet accrued. A release of accrued pension benefits is void by the first principle.

9. Thus, the fair and reasonable requirement would appear to void an individual's decision to defer monthly compensation of \$1,000 in exchange for an increase in monthly compensation of \$100.

10. These releases may purport to bind the pension plan implicitly on the basis that the individual has agreed not challenge the characterization of the

disputes, but prevents them from violating ERISA's fiduciary provisions.

4) Therefore, a purported release of the benefits described in the second and third principles is not effective merely because the agreement with the release includes boilerplate provisions that the individual: (a) read and understood the agreement, and (b) was given the opportunity to, and was encouraged to, seek assistance of legal or other professional counsel. Also adding references to all claims arising from the participant's employment, to all employee benefit claims, or even to all claims against the named plan, will not suffice. These provisions do not show that the individual fully understood the claim at issue or received fair consideration for such claim. By contrast, both informed consent and fair consideration usually accompany an equitable settlement of a bona fide dispute about an individual's entitlement to benefits from an ERISA plan.

These four principles, which rest upon ERISA's fundamental purpose and basic provisions, have not been consistently considered or applied by the courts. The courts have also rarely considered whether ERISA voids all attempts to release claims to (1) any ERISA benefit entitlements;<sup>11</sup> or (2) accrued pension benefits.<sup>12</sup> Many courts have instead applied contract principles, supplemented at times by special scrutiny, rather than ERISA fiduciary principles. Fiduciary principles place the burden of showing that the individual received fair consideration and fully understood the release on the party wishing to rely on the release. Thus, individuals are being wrongfully denied pension and welfare benefits to which they are entitled by releases that wrongfully deprive them of access to federal courts to challenge improper claim denials.<sup>13</sup>

## II. ERISA'S PURPOSE, COVERAGE, AND MAJOR PROVISIONS

As ERISA Section 2: Congressional Findings and Declaration of Policy declares:

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest;

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payment in the settlement.

11. ERISA § 410, 29 U.S.C. § 1110(a), prohibits any agreement which purports to relieve fiduciaries of their duties. One of the most basic fiduciary duties is the obligation to follow plan terms, ERISA § 404(a)(4)(D), 29 U.S.C. § 1104(a)(1)(D), and thus pay individuals the plan benefits to which they are entitled.

12. ERISA § 206(d), 29 U.S.C. § 1056(d).

13. Class actions have also been wrongfully denied certification for similar reasons.

that they have become an important factor affecting the stability of employment and the successful development of industrial relations . . . that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans . . . .<sup>14</sup>

### A. ERISA Purpose and Coverage

ERISA was enacted in response to numerous protests by employees and their beneficiaries who had not received their anticipated pension and welfare benefits.<sup>15</sup>

Under the pre-ERISA rules, very few employees qualified for pension benefits and those that qualified would often find, on retiring, that there were no assets to pay their benefits. Workers could be required to be employed by the same employer without any interruption of employment until they attained their "normal retirement age" to be entitled to any pension benefits.<sup>16</sup> Further, employers did not have to fund pension benefits adequately<sup>17</sup> and no government agency insured pension benefits.<sup>18</sup>

Under the pre-ERISA rules, many participants who qualified for pension or welfare benefits were also not paid their promised benefits because of improper plan operations:<sup>19</sup>

- There were no general federal standards requiring persons operating such plans to pay promised benefits or to avoid transactions which could dissipate plan assets;
- Participants and beneficiaries were not generally entitled to the disclosure of plan terms and conditions, their benefits, or the financial condition of their plans; and
- Participants and beneficiaries had no federal right to appeal benefit denials either within the plan or to the courts unless they

14. ERISA § 2(b), 29 U.S.C. § 1001(b).

15. See generally JAMES A. WOOTEN, *THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 A POLITICAL HISTORY* (2005).

16. S. REP. NO. 93-383 (1974), reprinted in 1974 U.S.C.C.A.N. 4890, 4901.

17. Although, the pre-ERISA tax qualification rules of the Internal Revenue Code for pension plans contained funding rules, I.R.C. § 404(a)(1), there were not sufficient advance funding requirements. See e.g., S. REP. NO. 93-383, reprinted in 1974 U.S.C.C.A.N. 4890, 4901, 4940; H.R. CONF. REP. NO. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5064.

18. See e.g., S. REP. NO. 93-383, reprinted in 1974 U.S.C.C.A.N. 4890, 4902, 4962 (referencing the 1963 Studebaker shutdown in which participants received only fifteen percent of their vested benefits). See WOOTEN, *supra* note 15, at 51-79 for a discussion of the role of Studebaker in creating ERISA.

19. See, e.g., SACHER ET AL., *EMPLOYEE BENEFITS LAW* xciv-xcv (2000).

participated in certain collectively bargained plans.<sup>20</sup>

ERISA, which was enacted in 1974, generally applies to both pension plans (which include profit-sharing plans)<sup>21</sup> and welfare plans (which include medical, disability, life insurance, and severance plans).<sup>22</sup> For simplicity, all such covered plans will be herein denoted as ERISA plans.<sup>23</sup> ERISA does not require employers to establish any ERISA plans, but it does impose minimum standards on the establishment and operation of any covered employee benefit plans that employers choose to adopt.<sup>24</sup>

Defined contribution pension plans ("DC plans")<sup>25</sup> are pension

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20. Benefit denials by collectively bargained plans administered jointly by representatives of the union and the employer or employers could be challenged as violations of section 302 of the National Labor Relations Act, 29 U.S.C. § 186. This section permits the establishment and operation of jointly administered employee benefit plans. *Id.* Beneficiaries, however, had to show the determination was arbitrary and capricious. There was also no protection against employer retaliation. *See Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 108-11 (1989) and Kathryn Kennedy, *Judicial Standards of Review in ERISA Benefit Claim Cases*, 50 AM. U. L. REV. 1083, 1100-04 (2001).

21. Pension plans are generally defined as plans which provide retirement income to employees or result in the deferral of income by employees for periods extending to the termination of covered employment; however, under certain circumstances severance plans arrangements are not treated as pension plans. ERISA § 3(2), 29 U.S.C. § 1002(2). Employees may but need not be able to obtain distributions from pension plans before the termination of employment. Profit-sharing plans often permit such in-service distributions, although 401(k) plans may only permit the distribution of employee contributions.

22. Welfare plans are generally defined as plans which provide participants or their beneficiaries with medical, surgical, or hospital care, or benefits, or benefits in the event of sickness, accident, disability, death, or unemployment, or vacation benefits, apprenticeship, or other training programs, or daycare centers, scholarship funds, or prepaid legal services. ERISA § 3(1), 29 U.S.C. § 1002(1). These plans do not include payroll practices, such as sick pay, holiday pay, jury pay, or overtime. 29 C.F.R. § 2510.3-1b(3) (2005). *See also Massachusetts v. Morash*, 490 U.S. 107, 120-21 (1989) (distinguishing between unfunded vacation benefit plans and ERISA-covered welfare benefit plans).

23. ERISA does not, however, cover employee benefit plans whose only participants are the owners and the spouses of the owners of the trade or business sponsoring the plan. It is irrelevant whether the sponsor is a corporation, a partnership, or an unincorporated entity. 29 C.F.R. § 2510.3-3(b)-(c). If there are other participants, then the owner and the owner's spouse are provided with the ERISA protections such as the protection of pension plan assets of a bankrupt participant. *See generally Yates v. Hendon*, 541 U.S. 1 (2004).

24. *See, e.g., Esden v. Bank of Boston*, 229 F.3d 154, 172 (2d Cir. 2000).

25. ERISA § 3(34), 29 U.S.C. § 1002(34). A participant's benefits in such plans are based solely upon the amounts contributed to the participant's account. Any income, expenses, gains, losses, and any forfeitures from other participants' accounts, are allocated among the remaining participants' accounts. All investment risk is placed on the participant, who benefits from investment gains and suffers from investment losses. Thus a participant's accrued benefits, namely the participant's account balance, may either

plans in which each participant has an individual account. Profit-sharing plans and 401(k) plans are DC plans.

Defined benefit pension plans (“DB plans”)<sup>26</sup> are pension plans in which participants do not have individual accounts.<sup>27</sup> A participant’s benefits in DB plans are expressed in the form of a life annuity, beginning at the participant’s normal retirement age.<sup>28</sup> The annuity is called the participant’s “normal retirement benefit” and is derived from a formula that usually includes the participant’s compensation and years of service.<sup>29</sup>

### B. Major ERISA Provisions

ERISA protects pension benefits more than welfare benefits, as is suggested by the inclusion of the term “retirement” in the name of the statute.<sup>30</sup> Explicit mandates address four distinct dangers to pension benefits.

First, pension benefits may not be assigned or alienated.<sup>31</sup> Thus, the benefits may not be endangered by a participant’s agreement to surrender any of his or her pension benefits.

Second, pension benefits may not be forfeited if the plan

increase or decrease in the course of a year. Benefits may be and usually are made available on a participant’s termination of employment. Distributions may be also permitted prior to the termination of such employment.

26. ERISA § 3(35), 29 U.S.C. § 1002(35).

27. But see Patrick J. Purcell, *The Enron Bankruptcy and Employer Stock in Retirement Plans, available* at <http://fpc.state.gov/documents/organization/9102.pdf> (Mar. 11, 2002), for a discussion of hybrid plans in which a participant’s benefit in a DB plan is presented as an individual account.

28. See ERISA § 3(24), 29 U.S.C. § 1002(24), for the definition of a participant’s normal retirement age.

29. Such annuities may be converted into lump sum equivalents as of the participant’s normal retirement age or as of any other time, although the plan need not permit lump sum payments of such amounts. All investment risk is placed on the employer, who benefits from investment gains and suffers from investment losses. Thus, a participant’s accrued benefits, namely the annuity beginning as of the participant’s normal retirement age, may not decrease in a year. For example, a participant who has accrued a \$1,000 annual lifetime annuity beginning as of the participant’s normal retirement age may not find that such benefit will decrease at any later time. Benefits may be, but are often not, made available when a participant terminates employment for a reason other than death, although distributions are not generally permitted prior to such termination.

30. Plans may provide both pension benefits and welfare benefits, such as “pension plans” which provide disability “pension” benefits to participants during the participant’s disability rather than for life. Those disability benefits are thus welfare benefits rather than pension benefits. The pension plan provisions apply only to the pension benefits but not to the welfare benefits, whether provided by a pension plan or a welfare plan. See e.g., *McBarron v. S & T Indus., Inc.*, 771 F.2d 94, 98 (6th Cir. 1985); *Rombach v. Nestle USA, Inc.*, 211 F.3d 190, 193-94 (2d Cir. 2000).

31. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1).

sponsor has employed a participant for at least a short statutory period.<sup>32</sup> Thus, the benefits may not be endangered by a sponsor's plan provision or an administrator's plan practice.

Third, pension assets must be held in trust.<sup>33</sup> Thus, the benefits may not be endangered by a sponsor's weak financial position, which could otherwise permit a sponsor's creditor to obtain plan assets.

Finally, pension plans must meet minimum advance funding requirements.<sup>34</sup> Thus, the benefits may not be endangered by the employer's failure to put aside sufficient funds to satisfy the plan's expected obligations.

Congress reinforced these mandates when it adopted ERISA by also establishing a government agency, the Pension Benefit Guaranty Corporation (the "PBGC"), to insure benefits from DB plans.<sup>35</sup> Thus, the benefits may not be endangered because the plan lacks sufficient funds to pay its actual obligations.<sup>36</sup> Such shortfalls may result from poor investment performance, changes in employee populations, inappropriate actuarial projections, or inadequate advance funding. The PBGC is financed with premiums from DB plan sponsors<sup>37</sup> and it has the authority to recover any benefit payments made on behalf of an insufficiently funded plan from the controlled group, which contains the plan's

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32. ERISA § 203, 29 U.S.C. § 1053.

33. ERISA § 403, 29 U.S.C. § 1103, which also permits insurance contracts and custodial IRA accounts to be used instead of trusts. The section applies to any funded plan, which may also include welfare plans such as a funded medical insurance plan.

34. ERISA §§ 301-308, 29 U.S.C. §§ 1081-1086.

35. ERISA § 4000 *et. seq.*, 29 U.S.C. § 1301 *et. seq.*, also known as Title IV of ERISA. No government guarantee applies to benefits provided by DC plans, such as 401(k) plans.

36. A participant's benefits may, however, exceed the guaranteed benefits, if the benefits were increased within five years of the termination or if they are in excess of the statutory guarantees (which are adjusted annually for inflation). ERISA §§ 4022-4022A, 29 U.S.C. §§ 1322-1322a. *See American Academy of Actuaries, PBGC and United Airlines, How Does United's termination affect the PBGC deficit?* (May 12, 2005) (\$3.2 billion of pension benefits for United Airlines were not funded or guaranteed on May 10, 2005 when a bankruptcy judge permitted United to terminate its pension plans). The total PBGC premiums may not suffice to pay all guaranteed benefits for the airline plans, let alone the other insured plans. *See generally Protecting Pensions: Hearing Before the S. Finance Comm.*, 109th Cong. (June 7, 2005) (statement of David Walker, Comptroller-General, Government Accountability Office); U.S. GOVERNMENT ACCOUNTING OFFICE REPORT TO CONGRESSIONAL COMMITTEES. "RECENT EXPERIENCES OF LARGE DEFINED BENEFIT PLANS ILLUSTRATE WEAKNESSES IN FUNDING RULES, GAO-05-294 (MAY 2005). Compare PBGC FEBRUARY 7, 2005 PROPOSAL, "STRENGTHEN FUNDING FOR SINGLE-EMPLOYER PENSION PLANS, with ERISA INDUSTRY COMMITTEE MAY 2005 PROPOSAL, CONSENSUS PROPOSALS FOR PENSION FUNDING, PBGC REFORM AND HYBRID PENSION PLANS.

37. ERISA §§ 4005-4006, 29 U.S.C. §§ 1305-1306.



sponsor.<sup>38</sup>

ERISA protects both pension and welfare benefits with three basic sets of provisions. First, standards of conduct, responsibility, and obligations are set forth for ERISA fiduciaries of all employee benefit plans.<sup>39</sup> ERISA established a uniform set of national rules that enhanced traditional trust protections by imposing duties upon a broader class of fiduciaries and prohibited agreements or plan clauses which relieved fiduciaries from those duties.<sup>40</sup>

Second, all covered plans must meet minimum operating standards. Each employee benefit plan must be established and maintained pursuant to a written instrument.<sup>41</sup> Moreover, each plan must have, and distribute to participants and beneficiaries, a summary plan description designed to be understood by an average plan participant and which describes participants' rights and obligations.<sup>42</sup> Specific disclosure obligations are imposed on the plan's administrator,<sup>43</sup> who is defined<sup>44</sup> as the person designated in the plan instruments, or if no one is so designated,

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38. ERISA §§ 4061-4071, 29 U.S.C. §§ 1361-1371.

39. Fiduciary rules do not apply to unfunded plans maintained primarily to defer the compensation for a select group of the highly compensated, which are often called top-hat plans. ERISA §§ 4(b), 401(a), 29 U.S.C. §§ 1003(b), 1101(a). Such employees are presumed to have sufficient knowledge and bargaining power to protect their plan interests without resort to ERISA fiduciary protections. See Dept. of Labor, Advisory Opinion 90-14A (May 8, 1990). *But cf.* Demery v. Extebank Deferred Compensation Plan (B), 216 F.3d 283, 289-90 (2d Cir. 2000) (treating bargaining power as a secondary factor in determining whether a plan was such a top-hat plan).

40. See H.R. REP. NO. 93-533 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4648-51. See also John Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell Mertens and Great-West*, 103 COLUM. L. REV. 1317 (2003) 1321-32. However, in order to achieve this broadening of fiduciary protection ERISA, unlike common law trust laws, permits fiduciaries to have a conflict with their beneficiaries. ERISA does require, however, that the fiduciary with two hats wear only one at a time, and wear the fiduciary hat when making fiduciary decisions. Pegram v. Hardrich, 530 U.S. 211, 225 (2000).

41. ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). Every plan must also have a procedure for amending such plan. ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3).

42. ERISA § 102, 29 U.S.C. § 1022.

43. A plan administrator must automatically provide (a) summary plan descriptions at least once every five years, although interim summaries of material modifications to the plan must be provided more often, and (b) summary annual reports describing the financial condition of the plan. ERISA § 104(b)(1)-(3), 29 U.S.C. § 1024(b)(1)-(3). Administrators must make available for inspection, the plan documents, the latest summary plan description, and summary annual report—copies of those items must also be made available at a reasonable charge. ERISA § 104(b)(2), (4), 29 U.S.C. § 1024(b)(2), (4). Participants also have the right to obtain on request annual benefit statements from the administrator. ERISA § 105, 29 U.S.C. § 1025. See generally ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031.

44. ERISA § 3(16), 29 U.S.C. § 1002(16).

the plan sponsor<sup>45</sup> is the administrator.

Third, plan participants and beneficiaries are given tools to enforce their benefit rights, including federal court access. Claims for ERISA benefits may be filed in federal court.<sup>46</sup> Successful claimants may be able to recover costs and attorneys' fees.<sup>47</sup> Finally, there are prohibitions on (a) retaliating against employees for making benefit claims, b) any actions intended to prevent employees from qualifying for benefits; and (c) retaliating against a person who has given information in any inquiry related to ERISA.<sup>48</sup>

Participants and beneficiaries are, however, not generally permitted to begin a civil action to claim benefit entitlements until they have exhausted the plan's claims procedures,<sup>49</sup> assuming the

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45. The plan sponsor for a plan (a) maintained by a single employer is the employer, (b) maintained by a employee organization is the organization, and (c) maintained by more than one employer, or by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or similar group of representatives of the parties who establish or maintain the plan.

46. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). A claim may be based either on an explicit plan provision or on the assertion that ERISA overrides a specific plan provision, such as the ERISA prohibition on the forfeiture of pension benefits. Benefit claims may also be presented as an equitable relief claim under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). A claim under the latter provision often asks for plan reformation to eliminate a provision violating ERISA and then requests benefits under those reformed terms pursuant to ERISA section 502(a)(1), 29 U.S.C. § 1132(a)(1). An individual may also use the latter to claim that a plan fiduciary breached its duty by failing at some time in the past to pay the entitled the benefits to which the individual was entitled—such a claim may raise a statute of limitations issue under ERISA section 413, 29 U.S.C. § 1113.

47. ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1). Such recoveries are not always available. See e.g., *Lowe v. McGraw-Hill Cos.*, 361 F.3d 335 (7th Cir. 2004) (holding that a prevailing participant is only awarded attorneys' fees if plan's litigating position was not "substantially justified"); *Leyda v. AlliedSignal*, 322 F.3d 199 (2d Cir. 2003) (using a five factor test that includes whether action conferred a common benefit on a group of plan participants). *But cf.* *Canseco v. Constr. Laborers Pension Trust*, 93 F.3d 600 (9th Cir. 1996) (noting a presumption in favor of awarding attorneys' fees to prevailing participant or beneficiary); *Anderson v. Procter & Gamble Disability Plan*, 220 F.3d 449 (6th Cir. 2000) (attorneys' fees are not generally available for internal appeals of plan denial).

48. ERISA § 510, 29 U.S.C. § 1140. This protection applies to all ERISA plan benefits, not merely pension benefits. Section 510 "helps make [ERISA benefit] promises credible." *Inter-modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997). The inquiry protection applies to both internal and external inquiries. *Nicolaou v. Horizon Media, Inc.* 402 F.2d 325 (2d Cir. 2005).

49. The exhaustion requirements of the various circuits are discussed in *Fallick v. Nationwide Mutual Insurance*, 162 F.3d 410, 418-19 (6th Cir. 1998).

The primary purposes of the exhaustion requirement are to: (1) uphold Congress' desire that ERISA trustees be responsible for their actions, not the federal courts; (2) provide a sufficiently clear record of

procedures comply with ERISA minimum standards for a "full and fair review."<sup>50</sup> The claims regulations impose very specific disclosure obligations on initial and appellate benefit denials so that participants and beneficiaries will understand the reasons for the denial and the additional facts, if any, they may present to show their entitlement to the benefits at issue.<sup>51</sup> The claims procedures may not contain any provision or be administered in a way that unduly inhibits or hampers the initiation or processing of benefit claims, such as imposing a claim filing fee.<sup>52</sup>

### C. General Fiduciary Provisions

An ERISA fiduciary is required by ERISA section 404(a)(1), 29 U.S.C. § 1104(a)(1),<sup>53</sup> to

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administrative action if litigation should ensue; and (3) assure that any judicial review of fiduciary action (or inaction) is made under the arbitrary and capricious standard, not *de novo*.

*Davenport v. Abrams*, 249 F.3d 130, 133 (2d Cir. 2001). However, exhaustion is deemed to have occurred and court access is permitted if the plan fails to satisfy the ERISA minimum claims resolution standards. 29 C.F.R. § 2560.503-1(b),(l). Exhaustion may not be required if the benefits claim is based on the interpretation of a ERISA statutory requirement, such as the interest rates that may be used to compute benefits, rather than on the interpretation of a plan provision. *See, e.g., Costantino v. TRW*, 13 F.3d 969, 974-75 (6th Cir. 1994). But compare *Mason v. Continental Group, Inc.*, 474 U.S. 1087 (1986) in which the Supreme Court declined to rule whether there is such a distinction.

50. ERISA § 503, 29 U.S.C. § 1133.

51. Benefit denials must do more than refer to plan documents and the summary plan description that the plan administrator must make available to all participants. The denial must set forth in a manner designed to be understood by the claimant:

(i) the *specific reason or reasons* for adverse determination; (ii) references to the *specific plan provisions* on which the determination is based; (iii) a description of any material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; (iv) a description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a suit under [ERISA section 502(a), 29 U.S.C. § 1132(a)] following an adverse benefit determination on review.

29 C.F.R. § 2560.503-1(g) (emphasis added).

52. 29 C.F.R. § 2560.503-1(b)(3).

53. These rules were designed to take into account the special nature and purpose of employee benefits plans, whose beneficiaries required more protection than the beneficiaries of other trusts. *See* H.R. CONF. REP. NO. 93-1280, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5083. ERISA's enhancements of existing trust law include the imposition of duties upon a broader class of fiduciaries, ERISA § 3(21), 29 U.S.C. § 1002(21), the prohibition of exculpatory clauses, ERISA §§ 404(a)(1)(D), 410(a), 29 U.S.C. §§ 1104(a)(1)(D), 1110(a), and extensive specific disclosure and reporting requirements, ERISA § 101-111, 29 U.S.C. §§ 1021-1031. *See also* H.R. REP. NO. 93-533, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649-51.

discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [entitled "Protection of Employee Benefit Rights"] and title IV [entitled "Plan Termination Insurance"].<sup>54</sup>

The introductory language imposes together with paragraph (A) a duty of loyalty ("Duty of Loyalty"),<sup>55</sup> and with paragraph (B) a duty of care ("Duty of Prudent Care"). Both these duties are derived from the common law of trusts.<sup>56</sup>

In *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, the Supreme Court permitted the fiduciaries of a multi-employer pension and welfare plan<sup>57</sup> to conduct random audits of the employment records of a plan's contributing employers to determine if the employers were making the correct contributions.<sup>58</sup> The Supreme Court found that no specific ERISA provision was needed to permit or require such employer audits because:

In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of "assuring the equitable character" of the plans. *Thus, rather than explicitly enumerating all of the powers*

54. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

55. This Duty of Loyalty is reinforced by ERISA section 403(c), 29 U.S.C. § 1103(c), which prohibits the inurement of plan assets to the benefit of the sponsoring employer.

56. *Cent. States, Southeast & Southwest Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570-71 (1985). See also RESTATEMENT (SECOND) OF TRUSTS § 170, at 364 (1959) (Duty of Loyalty); *id.* § 174, at 379 (Duty to Exercise Reasonable Care and Skill).

57. A multi-employer plan is one established for a substantial business purpose in which more than one employer is required to contribute pursuant to a collective bargaining agreement between one or more employee organizations and one or more employers. See ERISA § 3(37), 29 U.S.C. § 1002(37); 29 C.F.R. § 2510.3-37(c).

58. 472 U.S. at 569-74.

and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility. Under the common law of trusts, as under the Central States trust agreements, trustees are understood to have all "such powers as are necessary or appropriate for the carrying out of the purposes of the trust."<sup>59</sup>

The Court also stated that "trust documents cannot excuse trustees from their duties under ERISA" and thus implied that the plan trustees would have the responsibility and authority to perform the audits regardless of the trust terms.<sup>60</sup>

The Supreme Court subsequently stated in *Massachusetts Mutual Life Insurance Co. v. Russell* that ERISA fiduciary mandates were intended

to incorporate the fiduciary standards of trust law into ERISA, and it is black-letter trust law that *fiduciaries owe strict duties running directly to beneficiaries in the administration and payment of trust benefits*. The legislative history also shows that Congress intended these fiduciary standards to govern the ERISA claims-administration process.<sup>61</sup>

According to ERISA, a person is a fiduciary for an ERISA plan to the extent:

- (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control regarding management or disposition of its assets,
- (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or
- (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.<sup>62</sup>

Such term includes any person designated under Section 405(c)(1)(B) [allowing that fiduciary authority to be delegated in the plan governing instrument].<sup>63</sup>

Thus, a person may be a fiduciary whether or not he has any

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59. *Id.* at 570 (quoting 3 AUSTIN SCOTT, *THE LAW OF TRUSTS* § 186 (3d ed. 1967)) (emphasis added). The reference to the Scott treatise was footnoted with references to the *RESTATEMENT (SECOND) OF TRUSTS* § 186 and to the multi-volume treatise, GEORGE G. BOGERT & GEORGE T. BOGERT, *LAW OF TRUSTS AND TRUSTEES* § 551 (2d ed. 1982).

60. *Cent. States*, 472 U.S. at 568.

61. 473 U.S. at 152-53 (emphasis added). The Court's black-letter trust law conclusion was supported by references to the *RESTATEMENT (SECOND) OF TRUSTS* § 182 and the one-volume treatise, GEORGE G. BOGERT & GEORGE T. BOGERT, *LAW OF TRUSTS* § 109 (1973).

62. ERISA § 3(21), 29 U.S.C. § 1002(21)(A).

63. *Id.*

plan title.<sup>64</sup> On the other hand, persons with plan titles often have the authority, control or responsibility to be treated as engaged in fiduciary acts.

ERISA explicitly describes some of the responsibilities associated with the two titles often held by plan fiduciaries: plan trustee and plan administrator. Plan assets must generally be held by one or more trustees, who may not delegate the responsibilities imposed on them by the plan's trust agreement.<sup>65</sup> Explicit disclosure obligations are imposed on plan administrators.<sup>66</sup> In *Massachusetts Mutual Life Insurance Co. v. Russell*, the Supreme Court distinguished the fiduciary duties of plan administrators from those of trustees:<sup>67</sup>

[T]he *fiduciary obligations of plan administrators are to serve the interest of participants and beneficiaries and, specifically, to provide them with the benefits authorized by the plan.* But the principal statutory duties imposed on the trustees relate to the proper management, administration, and investment of fund assets, the maintenance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest.<sup>68</sup>

Congress made a fiduciary's duties under ERISA "the highest known to the law"<sup>69</sup> by adding three enhancements to the protections of the common law of trusts when it adopted ERISA.<sup>70</sup> First, fiduciary duties were imposed on a broader set of actors and actions, namely on any person performing a fiduciary act. Second, the fiduciary principles embodied in ERISA, including the Duty of Loyalty and Duty of Prudent Care, may not be overridden by any plan provisions.<sup>71</sup> Third, ERISA section 410, 29 U.S.C. § 1110,

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64. Persons performing ministerial functions within a framework of policies, interpretations, rules, practices and procedures made by other persons are not thereby fiduciaries. 29 C.F.R. § 2509.75-8, D-2. By contrast, the persons establishing and maintaining the framework are engaged in fiduciary acts. *Id.* § 2509.75-8, D-3. See, e.g., *Milofsky v. American Airlines*, 404 F.3d 338 (6th Cir. 2005) (Third party administrator not treated as fiduciary with respect to notices it distributed because it lacked authority over the content of such notices).

65. ERISA §§ 403(a), 405(c)(1), 29 U.S.C. §§ 1103(a), 1105(c)(1).

66. See *supra* note 43.

67. An individual who is both a plan trustee and administrator would have both responsibilities.

68. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142-43 (1985) (emphasis added). In that case, the Supreme Court concluded that the "panoply of remedial devices" ERISA places at the disposal of a participant who did not receive her promised benefits did not include a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims. *Id.* at 146-48.

69. *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

70. See *supra* note 53.

71. ERISA § 404(a)(1)(D), 29 § 1104(a)(1)(D). See also H.R. CONF. REP. NO. 93-1280, reprinted in 1974 U.S.C.C.A.N. 5038, 5083, 5101; S. REP. NO. 93-127 (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4865-66, 4869-70.

voids any agreement or instrument, not merely plan provisions, purporting to relieve fiduciaries from liability or responsibility for a breach of fiduciary duty.

III. DETERMINING AN INDIVIDUAL'S PLAN BENEFIT ENTITLEMENTS IS A FIDUCIARY ACT AND FIDUCIARIES HAVE A DUTY TO WARN INDIVIDUALS IF THEIR FIDUCIARY ACT MAY PLACE AN INDIVIDUAL'S PLAN INTEREST AT MATERIAL RISK

In *Pegram v. Herdrich*, the Court noted that:

At common law, fiduciary duties characteristically attach to *decisions about managing assets and distributing property to beneficiaries*. Trustees buy, sell, and lease investment property, lend and borrow, and do other things to conserve and nurture assets. They pay out income, choose beneficiaries, and distribute remainders at termination. *Thus, the common law trustee's most defining concern historically has been the payment of money in the interest of the beneficiary.*<sup>72</sup>

Similarly, in *Globe Woolen Co. v. Utica Gas & Electric Co.*, the New York Court of Appeals noted:

A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word. *The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface, or lurking beneath the surface, but visible to his practiced eye.*<sup>73</sup>

ERISA fiduciaries have two distinct obligations pertaining to the determination and the payment of plan benefits to which an individual is entitled. First, the Duty of Prudent Care requires plan fiduciaries to know, understand, follow the plan terms, determine the correct benefit entitlements and pay such entitlements.<sup>74</sup> In some cases individuals may have to resort to both judicial and internal plan reviews of a benefit denial to reverse an incorrect benefit claims denial. Second, the Duties of Care and of Loyalty require plan fiduciaries to warn individuals if the individual's entitlement to plan benefits may be placed at material risk by an action of the fiduciary when the fiduciary knows or should know of such risk. Such fiduciary actions include encouraging individuals to withdraw from, to refrain from plan participation or to release the rights to benefit entitlements.<sup>75</sup>

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72. 530 U.S. 211, 231 (2000) (emphasis added and internal citations to Bogert & Bogert and Scott omitted).

73. 121 N.E. 378, 380 (1918) (emphasis added).

74. ERISA § 404(a)(1)(A)–(B), (D); 29 U.S.C. § 1104(a)(1)(A)–(B), (D).

75. *Id.*

A. *Seeking a Release of a Claim of Entitlement to ERISA Plan Benefits Is a Fiduciary Act*

ERISA treats a person who controls the benefit amount to be distributed to a plan participant or beneficiary as thereby engaged in a fiduciary act.<sup>76</sup> Fiduciary duties characteristically attach to decisions about distributing property to beneficiaries.<sup>77</sup> The initial determination of an individual's entitlement to plan benefits in response to a benefit claim may be characterized as a fiduciary action because it is part of the key plan administration responsibility of providing such benefits.<sup>78</sup> The Supreme Court recently reemphasized this conclusion in *Egelhoff v. Egelhoff*, when it stated that the "the payment of benefits [is] a central matter of plan administration."<sup>79</sup> Similarly, the determination of a participant's benefit entitlement in response to an appeal of a denial of a participant's claim for plan benefits is also treated as a fiduciary act.<sup>80</sup>

Persons making benefit determination are thus acting as fiduciaries because they are exercising control over the disposition of plan assets and they have discretionary authority or responsibility in plan administration.<sup>81</sup> There appears to be no reason to distinguish whether the determination is (a) explicitly

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76. ERISA § 3(21)(A)(1), 29 U.S.C. § 1002(21)(A)(1).

77. 530 U.S. at 231. The Court cited *BOGERT & BOGERT*, *supra* note 59, §§ 551, 741-47, 751-75, 781-99; 2 A. SCOTT, *supra* note 59, §§ 176, 181; 3 A. SCOTT, *supra* note 59, §§ 188-193, 232.

78. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. at 142-43.

79. 532 U.S. 141, 148 (2001). The Court therein decided that ERISA preempted local law which purportedly provided that a participant's divorce overrode a participant's explicit designation of the beneficiary of his benefits under an ERISA life insurance plan. *Id.* at 147-48. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3), describes the conditions under which court orders may override a pension plan participant's beneficiary designations. These orders are known as "qualified domestic relations orders" ("QDROs"). *Id.* QDROs may not, however, be needed to supersede a beneficiary designation for a pension plan's death benefits. See *Silber v. Silber*, 786 NE2d 1203 (2003) and *Moore v. Moore*, 2005 Mich App. LEXIS 1055. See also *Guardian Life v. Finch*, 395 F.3d 238, 242-43 (5th Cir. 2004) and *Manning v. Hayes*, 212 F.3d 866, 871-72 (5th Cir. 2000), which discuss whether there is a federal common law which permits spouses to waive their interests in non-pension plan benefits.

80. *Varity*, 516 U.S. at 514-15 (citing *Firestone*, 489 U.S. at 111).

81. ERISA § 3(21), 29 U.S.C. § 1002(21). A person need not have any plan title to engage in a fiduciary act, although ERISA plans are required to name the fiduciaries that are authorized to manage and control the operation and administration of the plan. See ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). A person with such authority, regardless of the person's title, is treated as an ERISA fiduciary. 29 C.F.R. § 2509.75-8, D-3. Fiduciary actions do not include the performance of merely ministerial tasks, such as persons preparing benefit computations pursuant to plan terms for the administrator, who would authorize the actual payment. Such authorizations are treated as fiduciary acts. *Id.*



made in response to a claim for plan benefits or to a formal denial of a participant's claim for plan benefits as in the Supreme Court cases described above; or (b) implicitly made by persuading a participant or beneficiary to release rights to claim an entitlement to plan benefits.<sup>82</sup> The authority and control exercised to obtain a release and thereby reduce or eliminate a participant's benefit far exceeds that exercised by (1) the employer the Second Circuit found to have engaged in a fiduciary act when it delayed the payment of plan benefits to a former employee by delaying its submission of the requisite distribution application;<sup>83</sup> (2) the third-party administrator the Ninth Circuit found to have engaged in a fiduciary act when it decided to pay those health benefit claims which it deemed so clear that no review was required by the plan sponsor;<sup>84</sup> or (3) the employer the Supreme Court found to have engaged in a fiduciary act when it persuaded employees to cease participating in its welfare plans.<sup>85</sup>

The fiduciary act characterization of the process of seeking and obtaining such a release is unaffected by whether the person who controlled the process of obtaining the release, often the participant's employer, has any plan title, such as plan administrator. Such person may thus be called a Releasing Fiduciary. ERISA requires the Releasing Fiduciary, like all fiduciaries to fulfill the Duty of Loyalty, i.e., to act "solely in the interests of the participants and beneficiaries"<sup>86</sup> for the "exclusive purpose of" providing benefits for those persons and defraying the plan's reasonable administrative expenses.<sup>87</sup>

*B. ERISA Fiduciaries Have a Duty to Warn If Their Fiduciary Act May Place an Individual's Plan Interest at Material Risk*

The Supreme Court referred to a fiduciary's duty to disclose facts which it knows or should know could materially affect the participant's benefits when the Court suggested that the plaintiff in *Pegram v. Herdrich*, may have been able to seek relief under a claim that the plan officers had breached their fiduciary duty to

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82. By contrast if the release assigns the participant's plan benefits to another party, such as a transfer of medical benefits to pay the fees of a medical practitioner, the act of requesting and obtaining the release is not a fiduciary act. This is so because the individual's entitlement to the benefits is not at issue. For pension plans, such assignments are generally prohibited by ERISA section 206, and some non-pension plans also prohibit the assignment or alienation of benefits.

83. *Blatt v. Marshall & Lassman*, 812 F.2d 810 (2d Cir. 1987).

84. *See IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415 (9th Cir. 1997) (holding that ERISA section 410, 29 U.S.C. § 1110, voided a contract exonerating the third party administrator from any fiduciary liability).

85. *Varity*, 516 U.S. at 500-501.

86. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

87. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

disclose the incentives for non-treatment by its physicians, which was information that "affects [the] beneficiaries' material interests."<sup>88</sup> The Supreme Court's suggestion was accompanied by a brief description of two earlier decisions addressing the extent of a fiduciary's duty to disclose, including the duty to warn that his or her actions may place an individual's interest at material risk.

The Court described its earlier decision, *Varity Corp. v. Howe* as "holding that ERISA fiduciaries may have duties to disclose information about plan prospects that they have no duty, or even power, to change." In that case, the employer was a fiduciary who had determined the prospects of the company's medical and severance plans. The Supreme Court held therein that fiduciary disclosure duties are not limited to the specific statutory and regulatory requirements applicable to plan administrators and claims administrators.<sup>89</sup>

In particular, an employer who was also the administrator of its medical benefits plan and its severance benefits plan was found to have exercised discretionary authority over the management or administration of the plans when it provided information to employees to help them decide whether to withdraw from those plans by joining a new subsidiary and participate in the subsidiary's identical plans. Thus, the employer was performing a fiduciary act and violated its Duty of Loyalty when it misrepresented the plans' future prospects to persuade the plan participants to withdraw from those plans and join the subsidiary. Consequently, when the subsidiary went into receivership, the participants were entitled, under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), to recover from their prior employer the welfare benefits they would have had if they had not transferred to the subsidiary. The Court's holding rested on two crucial points:

First, the Duty of Loyalty requiring that fiduciaries act "solely in the interest of the participants and beneficiaries" applies not only to the management of plan assets but to activities associated with the "provision of benefits" to individual participants, such as benefit determinations under the claims procedures.<sup>90</sup> The Court rejected the defendants' argument that permitting the participants to obtain relief for such "fiduciary breaches" would threaten the viability of employee benefit plans by making them too costly.<sup>91</sup> The Court found such relief to be consistent with the ERISA fundamental purpose of assuring that employers incur the costs

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88. 530 U.S. at 228 n.8. In that case, the ERISA fiduciary breach rules were held not to apply to decisions by physicians employed by an ERISA welfare plan about either the medical care to which a participant was entitled under the plan or the care which was medically appropriate. *Id.* at 231-36.

89. *Id.* at 504.

90. *Id.* at 513-15.

91. *Id.* at 504-05.

necessary so that individuals will obtain their employee benefit entitlements.<sup>92</sup> The Court also stated that characterizing an unwarranted benefit denial as a fiduciary breach does not change the review standards applicable to a reviewer's denial of an appeal of a benefit denial.<sup>93</sup> In fact, the Court observed that it had previously used traditional fiduciary conduct rules to determine those standards.<sup>94</sup> Thus, the fiduciary characterization of these acts did not expand the plan's definition of promised employee benefits or increase the costs the employer should incur.

Second, as the Court observed, it had previously held in *Central States Pension Fund v. Central Transport, Inc.*:

There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are "ordinary and natural means" of achieving the "objective" of the plan. *Indeed, the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.*<sup>95</sup>

The Supreme Court's analysis focused on the company's encouragement of its employee-participants in its company plans to join a subsidiary and the subsidiary's corresponding plans, even though it knew (and had helped arrange) that the subsidiary would be unlikely to survive or to maintain those plans. The Court did not rely on the fact that the employer was named as the

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92. *Id.* at 513.

93. *Id.* at 514-15.

94. *Id.* A challenge to an ERISA plan's denial of a benefit claim under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), is subject to de novo rather than arbitrary and capricious review standards unless the decision of the reviewer of the initial benefits denial was an exercise of "a discretion vested in them by the instrument under which they act." *Firestone*, 489 U.S. at 111-12. See generally *Kennedy*, *supra* note 20. If the plan's benefit denial does not result from the fiduciary's exercise of its discretion under the plan terms, as described in *Firestone*, but rather is deemed denied because of a substantial violation of the claims rules by the reviewer, such as the failure to issue a decision, some federal circuit courts have found the arbitrary and capricious standards inapplicable. See *Gilbertson v. Allied Signal Inc.*, 328 F.3d 625, 631 (10th Cir. 2003); *Jebian v. Hewlett-Packard Co.*, 310 F.3d 1173, 1180 (9th Cir. 2002), *substituted opinion* at 349 F.3d 1098, 1106 (9th Cir. 2003); *Gritzer v. CBS, Inc.*, 275 F.3d 291, 296 (3d Cir. 2002); *Seman v. FMC Corp. Ret. Plan*, 334 F.3d 728, 733 (8th Cir. 2003). But compare *Southern Farm Bureau Life Insurance Co. v. Moore*, 993 F.2d 98, 101 (5th Cir. 1993), which gives no explanation for the failure to distinguish a deemed denial from an actual denial, with *McGarrah v. Hartford Life*, 234 F.3d 1026, 1030-31 (8th Cir. 2000), and *Daniel v. Eaton*, 839 F.2d 263, 268 (6th Cir. 1988), in which the initial denial was fully responsive to the appeal.

95. 516 U.S. at 504 (second emphasis added and internal citations to Bogert & Bogert omitted).

administrator of the original plan. After mentioning the common law fiduciary duty to deal fairly and honestly with beneficiaries, the Court explicitly declined to discuss whether fiduciaries have affirmative disclosure obligations, i.e., an obligation to warn.<sup>96</sup>

The Supreme Court described the second case, *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*,<sup>97</sup> as one which “discussed the disclosure obligations of an ERISA fiduciary.”<sup>98</sup> The lower court therein described “an affirmative duty to inform when the trustee knows that silence might be harmful.”<sup>99</sup> In particular, the court held that a resigning ERISA fiduciary may have had a duty to warn a replacement fiduciary about the risk of retaining an investment manager.<sup>100</sup>

The reference in *Glaziers* to the duty to warn if a transaction places a beneficiary's entitlement at material risk was derived from Judge Cardozo's holding in *Globe Woolen Co. v. Utica Gas & Electric Co.*<sup>101</sup> Under Judge Cardozo's analysis; the fiduciary must act so that the beneficiary will fully understand the material facts of the risk. Otherwise, the warning would be pointless.<sup>102</sup>

Several circuits have similarly recognized the affirmative duty of ERISA to warn participants about plan transactions and policies that place the participant's interest at material risk.<sup>103</sup> In *Shea v. Esenstein*, the Eighth Circuit reversed a Rule 12(b)(6) dismissal<sup>104</sup> (unless otherwise designated, “dismissals” shall refer to such dismissals) of a claim against a medical benefits plan by the widow of a participant who died of heart failure because the lower court should have found the plan had a fiduciary obligation to disclose the incentives that its physicians had not to treat participants.<sup>105</sup> The court quoted the D.C. Circuit when it declared: “The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long

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96. *Id.* at 506.

97. 93 F.3d 1171 (3d Cir. 1996).

98. 530 U.S. at 228 n.8.

99. 93 F.3d at 1180.

100. *Id.* at 1184.

101. 121 N.E. at 379-80.

102. *See generally id.*

103. For a more general discussion of ERISA fiduciary disclosure obligations see Susan Stabile, *I Believed My Employer and Didn't Sell My Company Stock: Is There an ERISA (or '34 Act) remedy for Me*, 36 Conn. L. Rev. 385, 398-404 (2004).

104. Under the notice pleading rules that underlie the Federal Rules of Civil Procedure: “The accepted rule [is] that a complaint should not be dismissed for failure to state a claim [under Rule 12(b)(6)] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *See Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002).

105. *Shea v. Esenstein*, 107 F.3d 625, 627 (8th Cir. 1997).

before the enactment of ERISA.”<sup>106</sup>

The Second and Third Circuits found that multi-employer pension plan fiduciaries had an affirmative obligation to inform a participant that his benefits were being jeopardized by his employer’s failure to make required plan contributions.<sup>107</sup> As the Third Circuit declared: “*Continued eligibility is the core of the trustee beneficiary relationship* and those responsible for the administration of the fund are required to notify pensioners when their employer jeopardizes their eligibility.”<sup>108</sup> In *Ream v. Frey*, the Third Circuit upheld a breach of fiduciary judgment in favor of participants who had not been warned by a departing trustee of the risks associated with a replacement trustee.<sup>109</sup>

#### IV. WHEN ARE RELEASES OF EMPLOYEES’ NON-ERISA FEDERAL COMPENSATION RIGHTS EFFECTIVE?

Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. With respect to private rights created by a federal statute, such as § 16(b) [of the Fair Labor Standards Act of 1938], the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute.<sup>110</sup>

The principles applicable to determining the conditions under which individuals may release their claims to benefit entitlements from ERISA plans may be illuminated by the rules the courts have applied to other compensation rights established by federal law.

Federal law sets minimum standards for both major components of employee compensation: wages and employee benefits. The Fair Labor Standards Act of 1938 (“FLSA”) regulates the wages and hours of those employees who are not highly paid and whose work duties are not treated as executive, administrative, or professional under the applicable regulations.<sup>111</sup> ERISA regulates employee benefit plans that provide benefits such as pension, severance, medical, disability, or life insurance benefits. Unlike the FLSA, ERISA protects all employees. Both these statutes rest on the presumption that without such

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106. *Id.* at 628 (quoting *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990)).

107. *See Rosen v. Hotel & Rest. Employees & Bartenders Int’l Union*, 637 F.2d 592, 600 (3d Cir. 1981); *Dellacava v. Painters Pension Fund*, 851 F.2d 22, 27 (2d Cir. 1988).

108. *Rosen*, 637 F.2d at 600 (emphasis added).

109. 107 F.3d 147, 156 (3d Cir. 1997).

110. *Brooklyn Sav. Bank*, 324 U.S. at 704-05.

111. There was considerable controversy about the revised final regulation which took effect on August 23, 2004. 29 C.F.R. § 541.700.

mandates many employment contracts would not satisfy the minimum statutory standards. Thus, the requirements for an effective release must exceed those for an effective employment contract. The Supreme Court found that the congressional policies that FLSA was designed to effectuate would be rendered a nullity if employees could without judicial approval release claims of entitlement to the compensation that the FLSA protected.

Common-law fiduciary principles are used to determine the effectiveness of releases made by seamen regarding their rights to recover damages for work-related injuries under the Merchant Marine Act of 1920 (the "Jones Act").<sup>112</sup> Unlike ERISA, the Jones Act lacks the full panoply of ERISA fiduciary safeguards and it is far more difficult to determine the precise damages to which an injured seaman is entitled to than the ERISA plan benefits to which an individual is entitled. Nevertheless, decisions about Jones Act releases illustrate how the courts substantially limit the ability of fiduciaries to use releases to avoid fulfilling their statutory fiduciary obligations.

#### A. *Fair Labor Standards Act of 1938*

The FLSA requires employers to pay covered employees a minimum hourly wage and overtime hourly pay at least equal to one and a half times their regular pay if they work beyond the statutory maximum of hours.<sup>113</sup> The FLSA also provides that liquidated damages and reasonable attorneys' fees are awarded if the required wages are not paid.<sup>114</sup>

The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, "labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."<sup>115</sup>

The Supreme Court declared that the FLSA rules were designed to achieve

the Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto . . . . No employee in any part of the United States in any industry affecting

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112. See generally 46 U.S.C. § 688. This Act provided seamen with rights to damages for work-related injuries similar to those provided to railroad workers under the Federal Employers' Liability Act of 1905. However, the Jones Act did not change the fiduciary principles governing contracts between seamen and their employers—those principles do not govern contracts between railway workers and their employers.

113. 29 U.S.C. § 207(a)(1).

114. *Id.* § 216(b).

115. *Barrentine v. Ark.-Best Freight Sys. Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)).

interstate commerce need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes.<sup>116</sup>

Moreover, the Court found these rules were premised on "the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required *federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency* and as a result the free movement of goods in interstate commerce."<sup>117</sup>

Even though the FLSA did not explicitly prohibit releases, the Court found releases of the FLSA required wage payments were implicitly prohibited because, "[n]o one can doubt but that to allow waiver of statutory wages by agreement would nullify the purposes of the Act."<sup>118</sup> Furthermore, unequal bargaining power of the parties similarly prevented an effective waiver of statutory liquidated damages by bank night watchmen who had not been initially paid their required wages.<sup>119</sup>

The Supreme Court later rejected the argument that a prohibition on releases of FLSA claims would preclude amicable settlements of disputes about such claims in *D.A. Schulte, Inc. v. Gangi*.<sup>120</sup> The Court observed that a stipulated settlement of a bona fide dispute that was submitted to a court with pleadings by both sides could be converted into a binding judgment after judicial scrutiny of the settlement terms.<sup>121</sup>

### B. The Jones Act

The Jones Act had overturned the Supreme Court's ruling in *Warner v. Goltra*, which limited the ability of seamen to recover damage from their employers for work-related injuries.<sup>122</sup> The Jones Act was designed to enlarge the traditional broad protection which admiralty law offered to seamen.<sup>123</sup>

116. *Brooklyn Sav. Bank*, 324 U.S. at 710.

117. *Id.* at 706-07 (emphasis added).

118. *Id.* at 707.

119. *Id.* at 708.

120. 328 U.S. 108, 114 (1946). The Supreme Court concluded that the FLSA liquidated damages may not be waived in a non-judicial compromise of a dispute over FLSA coverage of building service and maintenance workers. However, before repeating the *Brooklyn Sav. Bank* unequal bargaining power argument in favor of such prohibition, the Court stated that it did not need to "consider the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment." *Id.* at 114-15.

121. *Id.* at 113. However, in 1949, the FLSA was amended to provide that the Department of Labor was authorized to approve settlements. 29 U.S.C. § 216(c).

122. 239 U.S. 155, 159-62 (1934). See, e.g., T.J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 249-50 (2d ed. 1994).

123. 239 U.S. at 156, 162. Justice Cardozo concluded, in the Court's opinion,

In *Garrett v. Moore-McCormack Co.*, the Court “liberally construed [section 33 of the Jones Act] to carry out its full purpose” when it set forth the requirements for an effective release of Jones Act rights.<sup>124</sup> In *Garrett*, a jury verdict of \$4,000 for damages to compensate the seaman for his injuries was overturned by the Pennsylvania courts because the seaman had executed a written release.<sup>125</sup> The seaman had received \$100 in exchange for the release.<sup>126</sup> The Pennsylvania courts found that the seaman’s allegations about the release’s invalidity did not satisfy the local burden that such allegations must be proven beyond a reasonable doubt.<sup>127</sup>

The Supreme Court rejected this application of Pennsylvania law because the Jones Act was intended to “have a uniform application throughout the country, unaffected by ‘local views of common law rules’ . . . . This uniformity requirement extends to the type of proof necessary for judgment.”<sup>128</sup>

The Court decided that the guiding principle in considering the effectiveness of any Jones Act release is the “solicitude” with which admiralty traditionally views seamen’s contracts as discussed in an 1823 circuit decision by Justice Story:

*They [the seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trustent with their trustees . . . . If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.*<sup>129</sup>

The Court then remanded the case to the Pennsylvania court with instructions to apply a fiduciary-like analysis to the release:

We hold, therefore, that the burden is upon one who sets up a seaman’s release to show that it was executed freely, without

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that a ship’s master was entitled to the statutory damages for bodily injuries because the statute’s coverage of “seaman” “must be read in the light of the mischief to be corrected and the end to be attained.” *Id.* at 158.

124. 317 U.S. 239, 247-48 (1942).

125. *Id.* at 240-41.

126. *Id.* at 242.

127. The seaman had alleged that at the time he executed the release (a) he was under the influence of painkillers; (b) his employer had threatened him; and (c) he thought the release applied only to disputed wage payments. *Id.* at 241.

128. *Id.* at 244 (citations omitted).

129. *Id.* at 246 (emphasis added).



deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of the consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.<sup>130</sup>

This fiduciary-like analysis was subsequently used by a New York federal district court to reject a claim that a release by a seaman of his Jones Act rights be set aside because he asserted that his injuries were more serious than he had contemplated when he executed the release.<sup>131</sup> In *McBrien v. United States Petroleum Carriers*, the court first found that the waiver applied to the damage claims.<sup>132</sup> The release explicitly (a) identified the particular claims; (b) made the seaman aware that he was releasing those claims; and (c) warned him that by executing the release he would thereby assume the risk that his injuries may turn out to be more serious than they appeared at the time of the execution.<sup>133</sup> Second, the settlement was found to be fair.<sup>134</sup> The payment for the release, more than forty percent of the actual damages, was found not to be unreasonable in view of the uncertainty of the damages at the time of the execution.<sup>135</sup> Third, the seaman was found to have fully appreciated what he was releasing.<sup>136</sup> The seaman was actively represented by an experienced admiralty attorney who had complete access to all medical reports and had advised the seaman to postpone settling until the extent of his injury became clearer. Finally, the voluntary nature of the contract was not contradicted by any showing that the seaman was under economic distress when he executed the contract.

V. ERISA MAY VOID ALL BENEFIT RELEASES; IF BENEFIT RELEASES ARE PERMITTED, THEN EFFECTIVE RELEASES MUST COVER THE BENEFIT CLAIMS AGAINST A PLAN AND ITS FIDUCIARIES; THE TERMS OF THE RELEASE MUST BE FAIR AND THE INDIVIDUAL MUST HAVE FULLY UNDERSTOOD THE SIGNIFICANCE OF THE RELEASE WHEN EXECUTING THE RELEASE

ERISA section 410, entitled "Exculpatory Provisions; Insurance" provides:

- (a) Except as provided in section 405(b)(1) and 405(d) [which refer to liability for breaches by other fiduciaries] any provision in an

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130. *Id.* at 248.

131. *McBrien v. U.S. Petroleum Carriers, Inc.*, 177 F. Supp. 627 (S.D.N.Y. 1959).

132. *Id.* at 635.

133. *Id.* at 633-34.

134. *Id.* at 635.

135. *Id.* at 634.

136. *Id.*

agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility under this Part [the ERISA part entitled "Fiduciary Responsibility"] shall be void as against public policy.

The Supreme Court made the following statement, in *Black & Decker Disability Plan v. Nord*, about ERISA's statutory purpose:

"ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans, and to protect contractually defined benefits."<sup>137</sup>

ERISA Section 2, entitled "Congressional Findings and Declaration of Policy," provides:

(b) It is hereby declared to be the policy of this Act to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.<sup>138</sup>

ERISA may void all releases by individuals of claims against an ERISA plan or its fiduciaries to a benefit entitlement under such plan. If, however, such releases are permitted,<sup>139</sup> then ERISA's fiduciary provisions impose substantial limits on the conduct of the Releasing Fiduciary if the fiduciary wishes to obtain an effective release. Thus, I propose that such releases are void unless:

- The plan, its fiduciaries, and the benefit issue are covered by a contract voluntarily entered into by the individual;
- The individual received fair and reasonable consideration for the release; and
- The individual fully understood his legal rights and the material facts pertaining to the release which the Releasing Fiduciary knew or should have known when the release was executed.

#### *A. General ERISA Release Considerations and the Prohibition of Fiduciary Releases*

The effectiveness of releases of claims for ERISA benefit entitlements<sup>140</sup> is determined by ERISA sections 404(a)(1)(D) and 410, 29 U.S.C. §§ 1104(a)(1)(D) and 1110, ERISA's other fiduciary

137. 538 U.S. 822, 830 (2003) (quoting *Firestone*, 489 U.S. at 113, which quoted *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983), and *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. at 148).

138. ERISA § 2(b), 29 U.S.C. § 1001(b).

139. In this Section we disregard the prohibition of release of entitlements to accrued pension benefits that I discuss extensively in Section VII.

140. *Id.*

sections, and the developing federal common law of rights and obligations under ERISA-related plans, which, as described in numerous Supreme Court cases, rests on general trust principles. ERISA preempts any local law relating to employee benefit plans.<sup>141</sup> This is particularly true for the provisions for the enforcement of benefit entitlements.<sup>142</sup> Thus, like the FLSA and the Jones Act, which also mandate the uniform application of their minimum standards, the effectiveness of these ERISA benefit releases is determined by federal rather than local law. The Supreme Court has, however, not discussed the conditions under which releases of ERISA benefit claims are permitted or are effective.<sup>143</sup>

Releases from employee benefit claims are generally sought by three distinct parties, each of whom seeks to avoid direct and indirect liability for such claims. First, and most obvious, are the plans, which must generally act through fiduciaries. Second, are the plan fiduciaries, such as a trustee or the administrator. They usually seek releases in both their plan and individual capacity. The latter are designed to avoid any liability for a fiduciary breach claim associated with the benefit claim. Finally, are the employers, who are usually ultimately responsible for funding the plan. An employer wishes to avoid any liability for additional plan contributions as well as breach of fiduciary claims against it, its officers, agents, representatives, and owners, so that it may instead fund non-plan obligations.

ERISA section 410, 29 U.S.C. § 1110, prohibits agreements relieving fiduciaries from responsibility or liability for a breach of fiduciary duty.<sup>144</sup> As discussed, *supra*, this section in concert with ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) significantly enhances the protections of common law trusts. There is no exception, equitable or otherwise, for fiduciaries who breach their

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141. ERISA § 514(a), 29 U.S.C. § 1144(a). *See, e.g.*, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523-24 (1981) (describing an instance in which a state law prohibiting pension offsets for workers compensation benefits was preempted).

142. ERISA § 514(a), 29 U.S.C. § 1144. *See generally* *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (detailing how ERISA preempted state law claims by ERISA medical plan participants regarding their eligibility for certain benefits).

143. *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) held that an employer did not commit a breach of fiduciary duty by amending a pension plan to provide additional benefits to those employees who executed releases of Title VII discrimination claims against their employer. The Court also unsurprisingly held that the plan fiduciaries did not violate ERISA by paying these additional benefits even though the employer benefited by obtaining an effective release in exchange for those additional payments. *Id.* at 892-94.

144. The only "exception" to this provision, which allows indemnification agreements, ERISA § 410(b), 29 U.S.C. § 1110(b), enhances the protections for individuals seeking to collect their benefit entitlements from a plan.

explicit duty to make the benefit payments to which a participant or beneficiary is entitled.<sup>145</sup> The Supreme Court has stated that "as a general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text."<sup>146</sup> Thus, whether an individual has received any consideration or acknowledged receiving full payment of the plan benefits to which he or she is entitled the release is void.<sup>147</sup> The individual retains the right to bring a civil action to obtain any promised benefits that he or she was not paid, although as discussed, *supra*, the individual may be required to first exhaust the plan's internal review processes.<sup>148</sup>

Some may argue that ERISA's exculpatory prohibition applies only to plan fiduciaries and thus ERISA plans may be released from an individual's claims to entitlements to plan benefits. Therefore, plan fiduciaries would be required to enforce the release on behalf of the plan. This argument has a fundamental flaw. Fiduciaries have a duty to pay individuals their benefit entitlements pursuant to the terms of the plan.<sup>149</sup> Those terms may only be changed by plan amendments, but the releases do not constitute such amendments.<sup>150</sup> Thus if ERISA section 410 prevents plan fiduciaries from being relieved of their responsibility to follow plan terms, which it does, the plan also may not be relieved of such responsibility.

*B. Proposed Fiduciary Rules for Effective Releases of a Claim of Entitlement to ERISA Plan Benefits*

If the explicit prohibition on releases of ERISA section 410, 29

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145. See ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

146. See *Guidry v. Sheet Metal Workers National Pension Fund*, in which the Court found that there is no equitable exception to the ERISA prohibition on the assignment of pension plan benefits. 493 U.S. 365, 376 (1990). Similarly, there is no limit on ERISA's explicit ban on all releases of fiduciary responsibilities. See ERISA § 410, 29 U.S.C. § 1110. Prohibiting releases of claims for the entitlement to ERISA plan benefits is also consistent with the Supreme Court's repeated characterization of ERISA as a "comprehensive and reticulated statute" to protect the interests of employees and their beneficiaries in promised employee benefits. The Supreme Court first used this language when it held that ERISA protected benefits accrued prior the effective date of ERISA. See *Nachman v. PBGC*, 446 U.S. 359 (1980). See also *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. at 146 and *Harris Trust v. Salamon Smith*, 530 U.S. 238, 247 (2000).

147. Of course, if the individual received full payment of his benefit entitlements he will not be entitled to any additional benefit payment if the release is void.

148. See *supra* note 49.

149. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

150. See ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3) and *Curtis-Wright v. Schoonnejongen*, 514 U.S. 73, 83 (1995) (plans must be maintained pursuant to written instruments with a procedure for sponsor amendments).

U.S.C. § 1110, is disregarded, then guidance on the effectiveness of releases may be found in ERISA's other fiduciary provisions. In particular, I propose that a plan or plan fiduciary claiming it has been effectively released from an individual's claim to an entitlement to ERISA benefits has the burden of showing that the Releasing Fiduciary, i.e., the person who sought the release, satisfied each of the following Proposed Fiduciary Release Rules:

- (a) the individual agreed to a voluntary contract releasing the plan or its fiduciaries from the claim in question;
- (b) the individual received fair and reasonable consideration for the release;
- (c) the individual fully understood his legal rights and the material facts pertaining to the release which the Releasing Fiduciary knew or should have known when the release was executed.

The latter two fiduciary conditions, however, need not be considered unless there is a binding contract. The requirement that the plan and its fiduciaries be covered has, however, sometimes been disregarded. There are decisions discussed, *infra*, in which the plan was an entity distinct from the employer, such as a plan funded with a trust or insurance contracts, but the release was held to preclude a benefit claim against the plan even though neither the plan nor any of its fiduciaries in its fiduciary capacity was designated as a released party or even mentioned in the contract. Similarly, there are decisions discussed, *infra*, in which the claim was not covered.

Releasing Fiduciaries are obligated to know the plan terms determining the plan benefits of the individual.<sup>151</sup> This is a consequence of the requirement that fiduciaries must perform their duties with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims in accordance with the terms of the plan documents.<sup>152</sup> In general, "a pure heart and an empty head are not enough" to meet fiduciary responsibilities.<sup>153</sup>

Releasing Fiduciaries also have the duty to assure that the individual fully understands the material aspects of the release, so that he or she can give informed consent to the release. Under the Proposed Fiduciary Release Rules, a Releasing Fiduciary must assure that the individual receives a fair and reasonable amount

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151. By contrast, an individual is responsible for the facts under his control, such as his medical treatment and expenses if the plan has clarified what he needs to show to be entitled to reimbursement under a medical benefits plan.

152. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

153. *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983).

in exchange for releasing his or her claim to the entitlement to plan benefits. These are both a consequence of the requirement that fiduciaries shall act solely in the interests of plan participants for the exclusive purpose of providing them with plan benefits.<sup>154</sup>

Under the Proposed Fiduciary Release Rules a release is treated as ineffective if the individual did not fully understand the benefit claim being released; *a fortiori* such treatment is required if the Releasing Fiduciary also lacked the same understanding. Mutual ignorance should not cause an individual to be wrongfully deprived of the plan benefits to which she is entitled. On the other hand, a similar deprivation will often occur without a release if the fiduciaries never bring a benefit violation to the attention of an individual. In such case, the individual and perhaps the plan fiduciaries may not even know that he or she has a claim to pursue. ERISA imposes stringent requirements on fiduciaries to know, follow, and disclose plan terms so that individuals will not be deprived of their benefit entitlements.

Under the Proposed Fiduciary Release Rules a court considering the effectiveness of a release of rights to benefit entitlements thus must review the strength of the underlying benefit claim to determine

(1) if the individual fully understood his legal rights and the material facts pertaining to the release which the Releasing Fiduciary knew or should have known when the release was executed; and

(2) if the participant received fair and reasonable consideration for the release under the first assumption.

The benefit entitlements of the individual would be determined under the *Firestone* de novo standards of review unless the claims reviewer had the requisite discretion and exercised such discretion in reviewing the benefit claim and the appeal of the denial of the claim.<sup>155</sup> The considerations that the Supreme Court applied in *Firestone* to determine the appropriate standard of review appear to apply whether such review occurred before or after the execution of the agreement containing the release. Thus, if the plan's position has no merit, the individual would be required to receive at least the benefits set forth in the plan for the consideration to be fair. If the individual's position has no merit, then any consideration would be fair. If, as often occurs in a bona fide dispute, the opposing positions each have some basis, then the fairness would depend upon the court's assessment of the relative

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154. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). See also *Central States*, 472 U.S. at 570-71 and *Varsity*, 516 U.S. at 506 which discuss the fiduciary duty to deal fairly and honestly with ERISA participants and beneficiaries.

155. See *supra* note 94 for a discussion of the applicability of de novo reviews if the claims reviewers had but failed to exercise the requisite discretion.

strengths and values of the opposing positions.

VI. IMPLICATIONS OF PROPOSED FIDUCIARY RELEASE RULES FOR ERISA PLANS AND THEIR FIDUCIARIES; CONSISTENCY OF RULES WITH ERISA BASIC PURPOSES AND TRADITIONAL FIDUCIARY PRINCIPLES; AND EXAMPLES OF APPLICATION OF THE PROPOSED FIDUCIARY RELEASE RULES

There was, then, a relation of trust reposed, of influence exerted, of superior knowledge on the one side and legitimate dependence on the other. At least, a finding that there was this relation has evidence to sustain it. A trustee may not cling to contracts thus won, unless their terms are fair and just . . . His dealings with his beneficiary are "viewed with jealousy by the courts, and may be set aside on slight grounds." He takes the risk of an enforced surrender of his bargain if it turns out to be improvident. *There must be candor and equity in the transaction, and some reasonable proportion between benefits and burdens.*<sup>156</sup>

Releases deprive individuals of the opportunity to show that they are entitled to ERISA plan benefits in both internal plan reviews and in federal courts unless the Releasing Fiduciary fulfilled its fair disclosure duties and fair dealing duties under ERISA to the individual. These rules pose no undue obstacles to the settlement of bona fide benefit disputes. The Proposed Fiduciary Release Rules are thus consistent with ERISA's statutory policies which determine the extent to which ERISA rights may be effectively waived. Thus, they meet the criteria set forth by the Supreme Court in *Brooklyn Savings Bank v. O'Neil*.<sup>157</sup>

*A. Implications of Proposed Fiduciary Release Rules for ERISA Plans and Their Fiduciaries and the Consistency of the Rules with ERISA Basic Purposes and Traditional Fiduciary Principles*

Under the Proposed Fiduciary Release Rules a Releasing Fiduciary has three affirmative fiduciary duties if it or any other person wishes to rely on a release it obtains of an individual's claim to the entitlement of ERISA plan benefits:

- First, the Releasing Fiduciary must fully understand the plan terms and the relevant facts pertaining to the benefit claim or claims for which it seeks the release.

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156. *Globe Woolen*, 121 N.E. at 380 (emphasis added and internal citations omitted).

157. 324 U.S. at 704-05. See also the Jones Act, which has no explicit release standards, but for which the Supreme Court applied fiduciary principles to determine the effectiveness of releases of its protected benefits.

- Second, the Releasing Fiduciary must act so that the individual fully understands the legal rights and relevant facts pertaining to the benefit claim purportedly being released. It may not suffice for the Releasing Fiduciary to refrain from making any misrepresentations about the plan terms, the relevant facts, or the rights of the individual, particularly if there is no bona fide dispute about the benefit claim or claims at issue.
- Third, the Releasing Fiduciary must assure that the consideration received by the individual in exchange for the release is fair and reasonable.<sup>158</sup>

The release is void ab initio if the Releasing Fiduciary violates any of these duties. Thus, it does not suffice to show there was a fair and reasonable payment for the claim. The individual must have also fully understood who and what was released.

The Releasing Fiduciary's fair disclosure duties and fair dealing duties become more extensive as the number and complexity of the discrete issues covered by the release become more extensive. For example, the following are discrete issues: (a) the individual's eligibility for any benefits; (b) the plan's annual benefit accruals; (c) the equivalence of different forms of benefit payments; (d) the plan's definition of covered compensation and the participant's covered compensation history; (e) the plan's definition of covered employment and the individual's periods of employment; and (f) the plan's compliance with ERISA's pension accrual rules. Each of those issues may contain discrete sub-issues if plan amendments caused different terms to apply at different times of the participant's employment. Finally, the Releasing Fiduciary's disclosure duties become particularly pronounced if there is no bona fide dispute about a claim for benefit entitlements from the plan when the release is requested.

The Proposed Fiduciary Release Rules pose no undue obstacle to reasonable settlements of bona fide disputes with respect to an individual's ERISA benefit rights. In such cases, the fair dealing and fair disclosure prerequisites of an effective release will be readily available.<sup>159</sup> The rules, however, prevent an individual

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158. The fairness assessment may be non-trivial if the agreement is not limited to a settlement of the specific claim for benefits because there may be considerable uncertainty about the portion of the consideration, if any, allocated to such claim. The Plan and its fiduciaries have the burden of showing compliance with all these duties, thus they bear the risk of being unable to show the fairness of the consideration.

159. The paucity of litigation regarding releases obtained by plans suggests that such plan releases are generally considered valid. This presumption is probably the result of those releases having often been obtained in settlements of bona fide disputes of the claim at issue for which there is little question that (1) the settlement payment was reasonable; and (2) the participant or beneficiary fully understood the significance of the release. By contrast, in most litigated release cases the Releasing Fiduciary was the employer funding



from being deprived of his promised ERISA plan benefits by an agreement that was not fair or was obtained without the individual's full understanding of what or who he was releasing. In such cases, the individual will appropriately retain access to the court and internal review process to obtain the benefits to which he was entitled under the comprehensive enforcement mechanisms of ERISA.<sup>160</sup>

The Proposed Fiduciary Release Rules are consistent with Congress' desire to offer employees enhanced protection for their benefits without creating a system so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans.<sup>161</sup> The Court in *Varity* used the fiduciary Duty of Loyalty to find that participants could remain entitled to benefits from their original employer's plan when their employer's misrepresentations had caused them to transfer to a subsidiary and thereby cease participating in the plans in question.<sup>162</sup>

In *Firestone*, the Supreme Court also emphasized the importance of protecting promised plan benefits and found that a default presumption in favor of de novo review of a plan's denial of a benefit claim.<sup>163</sup> The Court, however, observed that traditional trust principles permit a plan to be drafted to provide for arbitrary and capricious review of benefit determinations under certain circumstances.<sup>164</sup>

Releases raise an issue different than the appropriate claims review criteria. Instead, the issue is the conditions under which individuals may be deprived of even such minimal judicial review of a plan's denial of a participant's claim for entitlement to ERISA benefits. The traditional fiduciary Duty of Loyalty which may not be eroded under ERISA would appear to assure that purported releases of entitlements to ERISA benefits are void ab initio, unless, as set forth in the Proposed Fiduciary Release Rules, the "release" had been fully understood by the individual and had been

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the ERISA plan, who thus had a financial incentive to obtain the release in exchange for less than fair consideration.

160. Courts often justify preempting state regulation of employee benefit plans, with statements such as: "[T]he detailed provisions of § 502(a) [which provides federal court access] set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." See *Aetna Health Inc. v. Davila*, 542 U.S. at 200 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)) (emphasis added). Thus, ready court access is a critical part of ERISA.

161. *Varity*, 516 U.S. at 497.

162. The Supreme Court upheld such a remedy which had been provided by the court below. See *Howe v. Varity*, 36 F.3d 746 (8th Cir. 1994), *aff'd*, 516 U.S. 489 (1996).

163. 489 U.S. at 101.

164. *Id.* at 109. See generally *Kennedy*, *supra* note 20.

obtained in exchange for fair and reasonable consideration.

The three basic sources that the Supreme Court regularly consults when establishing a federal common law of ERISA rights and obligations<sup>165</sup> appear to agree that a release of a plan or plan fiduciaries from an individual's claim of entitlement to plan benefits is void ab initio unless the Proposed Fiduciary Release Rules are satisfied.<sup>166</sup> Furthermore, Bogert specifies that the fiduciary has the burden of proof,<sup>167</sup> whereas the other two sources are silent. The Bogert position is consistent with the standards applied to determine if the fiduciary-like releases of Jones Act claims are void.<sup>168</sup>

The Restatement describes the significance of the requirement that the beneficiary fully understand what is being released as follows:

Since the trustee is in a fiduciary relation to the beneficiary, he should inform the beneficiary of his rights and of *the material facts affecting a transaction* which is a deviation from the terms of the trust, in so far as the trustee knows or should know these facts. *The consent of the beneficiary does not preclude him from holding the trustee liable for a deviation from the terms of the trust, unless the beneficiary understands that the transaction is a deviation from the terms of the trust and that he is entitled to require the trustee to administer the trust according to its terms.* It is not necessary that the trustee should inform the beneficiary of all the details of which the trustee knows, but he should see that the beneficiary is sufficiently informed so that he understands the character of the transaction and is in a position to form an opinion as to its advisability. Thus, if the trustee proposes to invest in speculative securities in which he is not permitted to invest by the terms of the trust, the trustee should inform the beneficiary not only that the

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165. Those sources are: the RESTATEMENT (SECOND) OF TRUSTS; BOGERT & BOGERT, *THE LAW OF TRUSTS AND TRUSTEES*, *supra* note 59; and 3 AUSTIN SCOTT & WILLIAM FRATCHEL, *THE LAW OF TRUSTS* (4th ed. 1988).

166. See RESTATEMENT (SECOND) OF TRUSTS § 217(2) (Discharge of Liability by Release or Contract); BOGERT & BOGERT, *supra* note 59, § 943 (Releases); 3 SCOTT & FRATCHEL, *supra* note 165, § 217 (Discharge of Liability by Release or Contract). The cited sections all apply to post-breach releases. The following sections all apply to consents to fiduciary breaches at or before the time of the breach, such as releases before a claim has been made. RESTATEMENT (SECOND) OF TRUSTS § 216 (Consent of Beneficiary); 3 SCOTT & FRATCHEL, *supra* note 165, § 216 (Consent of Beneficiary); BOGERT & BOGERT, *supra* note 59, § 941 (Consent). However, the requirement for reasonable consideration in those releases is included only if the fiduciary has an interest adverse to the beneficiary, such as a purchase by the trustee of a part of the beneficiary's interest. A plan sponsor or its representatives seeking a pre-breach release, which will thereby decrease its plan contribution obligation, would appear to have a similar conflict of interest with the individual from whom the benefits release is being sought.

167. BOGERT & BOGERT, *supra* note 59, § 941, at 520, 542.

168. *Garrett v. Moore-McCormack Co.*, 317 U.S. at 248.

securities are not a proper trust investment but should tell him of the nature of the risk involved. If, however, the trustee is led by the beneficiary to believe that the beneficiary is fully informed, the trustee cannot be held liable even though the beneficiary did not in fact have full information.<sup>169</sup>

Thus, under the Proposed Fiduciary Release Rules, the release of a claim for entitlement to plan benefits is void ab initio unless the participant fully understood the significance of the release, including the fact that he will not be paid all the plan benefits to which he is entitled.

The exception from the requirement that the beneficiary fully understood the transaction for those cases in which the beneficiary leads the trustee to believe the beneficiary is fully informed would appear to be limited to cases in which the beneficiary has taken the initiative in presenting the specific claim. A beneficiary would not appear to have taken the initiative merely because the consent includes a boilerplate acknowledgment that the beneficiary understood the agreement and the beneficiary was advised to, and given the opportunity to, consult professional counsel, including legal counsel, before executing the consent. A lack of initiative is particularly apparent if the consent does not explicitly describe the specific claim. By contrast, a beneficiary will have taken the initiative if her professional counsel initiated a complaint about the specific claim and the consent follows extensive discussions by the professional counsel with the trustee about the complaint.

The Restatement describes the significance of the requirement that the transaction be fair and reasonable as follows:

If the beneficiary consents to a transaction in which the individual interest of the trustee is adverse to that of the beneficiary, the beneficiary is not precluded from *setting the transaction aside*, or otherwise holding the trustee liable for breach of trust, where the transaction involves *a bargain between them which was not fair and reasonable*. See § 170(2). *This requirement is in addition to the requirements stated in Clauses (a), (b) and (c).*

Illustration:

...

14. A is trustee of Blackacre for B. By the terms of the trust A is directed to sell Blackacre. With B's consent A sells Blackacre to himself individually for \$10,000. At the time of the sale, Blackacre is worth considerably more than \$10,000. B can hold A liable for breach of trust.<sup>170</sup>

Thus, under the Proposed Fiduciary Release Rules, the

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169. RESTATEMENT (SECOND) OF TRUSTS § 216 cmt. k (emphasis added).

170. *Id.* § 216 cmt. n (emphasis added).

beneficiary's understanding of the release need not be considered if he did not receive fair and reasonable consideration, which in of itself makes the release void ab initio.<sup>171</sup>

*B. General Releases Are Generally Not Effective Releases of Entitlements to ERISA Plan Benefits*

The Proposed Fiduciary Release Rules and the common law of trusts allow general releases to be effective only under very limited circumstances. Individuals may pursue unknown claims for entitlements to ERISA benefits, even if such claims are included within the coverage of a general release, i.e., those which don't identify both the specific claim and the released parties.<sup>172</sup> Unknown claims can not be fully understood. Such understanding is not shown by the inclusion of boilerplate that the individual (a) read and understood the agreement, and (b) was given the opportunity to, and was encouraged to seek assistance of legal or other professional counsel.

General releases of asserted claims of entitlements to ERISA plan benefits are effective if the circumstances surrounding the execution of the release show that the individual fully understood who and what was being released and the other Proposed Fiduciary Release Rules are satisfied. For example, a bona fide settlement of a dispute about specific pension benefit issue need not set forth the issue but may include a release of all pension benefit claims. If, *arguendo*, the pension issues may be released, the specific issue would be effectively released by such a general release.

By contrast, individuals may pursue unasserted, whether known or unknown, claims for entitlements to ERISA benefits, whether they are included within the coverage of a general release. Unasserted claims by definition are those for which no claim has been made and thus have not been considered by a claims fiduciary. The release would then be void as a prohibited attempt to exculpate plan fiduciaries from the responsibility to

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171. If a party not representing the employer obtains the pre-breach release, the result would appear to the unchanged. The Duty of Loyalty would appear to preclude any plan fiduciary from relying on a release in which the individual did not receive a fair and reasonable portion of the individual's plan benefits. *See id.* § 170 (Duty of Loyalty). *See also Central States*, 472 U.S. at 570-71 and *Varity*, 516 U.S. at 506 which discuss the fiduciary duty to deal fairly and honestly with ERISA participants and beneficiaries.

172. This is consistent with the claims regulations which do not permit general denials of claims for entitlements to benefits under ERISA plans but instead require references to specific plan provisions. The consequence of such deficiency is identical to the ineffectiveness of a release—the participant is given judicial access.

follow the plan terms when the claim is finally asserted.<sup>173</sup>

Thus, under the Proposed Fiduciary Release Rules, the plan and its fiduciaries retain the risk that all the issues pertaining to the benefit rights of an ERISA plan participant have not been identified in the release agreement and understood when a release is executed.<sup>174</sup> The Releasing Fiduciary, like all fiduciaries, is responsible for knowing and following the plan terms (consistent with ERISA) which determine the participant's benefit entitlements. Judge Cardozo reached a similar conclusion when he held that a fiduciary could not rely on a contract with a beneficiary. This holding was based in part on the lack of fair disclosure by the fiduciary prevented the beneficiary from fully understanding the transaction.<sup>175</sup>

*C. Examples of the Application of the Proposed Fiduciary Release Rules for Valid Releases of a Claim of Entitlement to ERISA Plan Benefits*

Under the Proposed Fiduciary Release Rules several common but inequitable releases of claims for entitlements to ERISA plan benefits may not be the basis for granting Rule 12(b)(6) motions to dismiss the benefit claim.<sup>176</sup>

*Ex.* (1) Employers often provide terminated employees who release fair employment practices claims with additional pension plan benefits, such as treating the employee as five years older with five additional years of service.<sup>177</sup> Such an agreement may have a general release provision in which the participant gives up the right to make any claims arising from his employment and another provision promising to pay the employee the benefits according to the terms of the specified plan.

Without any additional information, this release under the Proposed Fiduciary Release Rules does not apply to a claim by the participant with respect to a pension plan benefit issue other than the additional five years of age or service, such as his actual service or his compensation history. The participant did not agree to accept any particular interpretation of the plan. Moreover, the

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173. ERISA § 410, 29 U.S.C. § 1110.

174. The participant, however, remains responsible for the facts under his sole control that he knows may be relevant to his benefit claim, such as the seaman in *McBrien* who assumed the risk that his injury was more serious than he thought when signed his Jones Act release and had fully understood the relevance of such assumption when he executed the release.

175. *Globe Woolen*, 121 N.E. at 380-81 (annulling a contract between a manufacturer and electric utility because the common director of both companies, but principal shareholder of the manufacturer, who declined to participate in negotiation of contract did not speak up about unfairness of contract and thus breached his fiduciary duty to the utility).

176. The standards are set forth *supra* note 104.

177. *See, e.g., Lockheed Corp.*, 517 U.S. at 882.

outcome would not change if the plan and the summary plan description were part of the agreement. Nor would it change if the agreement had been reviewed by the participant's counsel because the participant never agreed to waive his rights to make some benefits claim based on an interpretation of the plan document that differed from his employer.

*Ex. (2)* An employer and an employee agree that he is entitled to severance benefits of \$10,000 based on \$1,000 per year that he and his employer believed he was entitled to for each of his ten years of pre-termination service. This agreement contains a release of an employee's severance benefit claims. The employee subsequently learns that he was entitled to \$2,000 per year of service because he was entitled to be classified in a different group than he and his employer thought at the time of the execution of the release.

Without additional information, under the Proposed Fiduciary Release Rules, the employer may not show the release is effective even though it does appear to be a voluntary waiver of the claim in question. The employee did not receive a fair payment for his agreement. Although there is no question about his entitlement to \$20,000, he received only half. Moreover, the participant may not be shown to have fully understood his legal rights and the relevant facts about the \$10,000 deficiency that the employer should have known when he executed the release. Regardless of whether or not he was advised by counsel, this would not change the inequity of the agreement or his apparent lack of understanding of his rights and the relevant facts. Thus, the release would remain ineffective. The employer's ignorance, which was in good faith, does not excuse its failure to adhere to the plan terms when it learned of its mistake and certainly offers no basis for treating the release as effective and thereby depriving the employee of his promised benefits.

*Ex. (3)* An employer agrees to provide a terminated employee with a \$5,000 payment in exchange for a release of the employee's fair employment practices claims. The agreement contains a general release by the employee of all claims arising from her employment that the employee may have against the *employer, its officers and its representatives* of all claims under a boiler plate list of statutes including ERISA. There is no mention of any pension plan in the agreement. However, one year prior to her termination the employer's pension plan trust paid her what she and the plan administrator, her employer, believed to be her entire benefit both at that time and at the time of the execution of the termination agreement. In fact, under the terms of the plan, she was entitled to \$10,000 more, which she did not receive.

Without any additional information, under the Proposed Fiduciary Release Rules the employer may not show the release is effective, even if, *arguendo*, the agreement is treated as a waiver of

the employee's benefit rights against the plan that is never mentioned as a released party or otherwise in the agreement. The employee did not receive a fair payment for her release. Although there is no question about her entitlement to \$10,000, she received substantially less than half that amount under the agreement. It is the employer's burden to show whether any portion of that payment was even allocable to the pension plan waiver. Moreover, the participant may not be shown to have fully understood her legal rights and the relevant facts about her \$10,000 pension plan deficiency that the employer knew or should have known when she executed the release.

The outcome would not change if the deficiency in the pension plan payment occurred a year after the execution of the termination agreement rather than a year before. Nor would the results change if she had been advised by counsel or had the released parties included a reference to the employer's employee benefit plans or even the specific plan (so there would be less question about the waiver applying to the plan) because the employer would still be unable to show that the agreement was fair and reasonable.

*Ex. (4)* An individual agrees to work for an employer without receiving any pension and medical benefits even though she will perform the same services in the same manner as other employees who are eligible for those benefits. At the time she is hired, she is not told the value of either the pension or the medical benefits or offered the opportunity to obtain the benefits in exchange for the waiver. But she is told she will have no job if she does not sign the waiver. The exclusion has nothing to do with the employee's age. The employer just wishes to save money by treating her for payroll purposes as an independent contractor even though she is an employee. In fact, the pension benefits are worth \$5,000-\$15,000 a year and her total compensation is comparable to the wage compensation of other employees doing work similar to her during her ten years with the company. When she leaves, she is entitled to \$100,000 (including earnings on the contributions she was entitled to) under the terms of the pension benefit plan, which she then requests.

Without additional information, under the Proposed Fiduciary Release Rules, the employer may not show the release is effective even though it appears to be a voluntary waiver of the claim in question. The employee did not receive fair payment for her release. Although there is no question about her entitlement under the plan to \$100,000, she received nothing. Moreover, the participant could not have fully understood her legal rights, and the relevant facts about the annual or expected total deficiency that the employer knew or should have known when she executed the release. Whether or not she was advised by counsel at the time of the execution of the employment agreement would not

change the inequity of the agreement or her lack of understanding of her rights and the relevant facts. Thus, the release would remain ineffective. In many cases, the employer could have achieved the desired pension savings without a release by amending the pension plan to exclude the particular employee without violating any of the non-discrimination rules applicable to pension plans.<sup>178</sup> Moreover, the employer may have been able to achieve the same monetary result by offering to provide the employee benefits in exchange for much lower wages. Similar questions about her eligibility for medical coverage could arise with respect to her entitlement to medical benefits if she had an accident or serious illness during her employment.

#### VII. PENSION BENEFIT RELEASES OTHER THAN PRE-ACCRAUAL PARTICIPATION WAIVERS ARE GENERALLY VOID AB INITIO

The [ERISA pension] anti-alienation provision can “be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement.”<sup>179</sup>

I propose that ERISA generally voids releases of claims for entitlements to accrued pension benefits. Such releases usually violate the ERISA spendthrift mandate that pension benefits may not be assigned or alienated.<sup>180</sup> This mandate prevents an individual from endangering his pension benefits by agreeing to relinquish any part of his or her accrued pension benefits to another party, whether it is the plan or another person. On the other hand, the mandate does not prohibit pre-accrual pension benefit waivers, such as annual elections not to participate in a 401(k) plan. Moreover, the mandate prohibiting the forfeiture of the vested pension benefits of individuals who have fulfilled certain statutory service periods may also independently void those releases.<sup>181</sup>

##### A. *Releases of Entitlements to Accrued Pension Benefits Are Void ab Initio*

ERISA's statutory language, regulations, and purpose, and the Supreme Court decisions, the treatment of spendthrift trust

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178. ERISA prevents discrimination in coverage by reason of age. ERISA § 202(a)(2), 29 U.S.C. § 1052(a)(2). Pension plans that qualify for favorable tax treatment may also not discriminate in favor of the highly compensated in participation or benefit accrual rules. I.R.C. §§ 401(a)(4), 410(b).

179. *Boggs v. Boggs*, 520 U.S. 833, 851 (1997) (citations omitted).

180. ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1). These anti-assignment and anti-alienation rules apply to all pension plans, whether the assets are held in a trust or in an insurance contract pursuant to ERISA section 403(a)-(b), 29 U.S.C. § 1103(a)-(b).

181. ERISA § 203(a), 29 U.S.C. § 1103(a).



interests by the three basic trust sources, and Griswold's traditional *Spendthrift Trusts* treatise imply that ERISA's anti-assignment mandate prohibits relinquishment by an individual of his or her pension plan rights to any party, including the pension plan.<sup>182</sup> This interpretation is consistent with the general definitions found in *Black's Law Dictionary*.<sup>183</sup> Thus, releases of claims to accrued pension plan benefits are void ab initio. Moreover, such a release does not become effective even if the participant received fair and reasonable consideration and was aware of all the relevant facts and law when he or she executed the release.<sup>184</sup> On the other hand, a court may be expected to approve a stipulated settlement a claim to an entitlement to ERISA plan benefits under the same circumstances.

The statutes and regulations set forth only two circumstances under which a pension plan may pay a participant's benefits to a party other than the plan, the participant, or the participant's beneficiaries. A pension plan may make benefit payments to an "alternate payee" under a qualified domestic relations order pursuant to ERISA section 206(d)(4), 29 U.S.C. § 1056(d)(4) ("QDROs"). A pension plan may also make benefit payments to the federal government in order to satisfy the tax obligations of a participant or a beneficiary.<sup>185</sup> These exceptions do not reduce an individual's entitlements to accrued pension benefits, but merely

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182. *The anti-assignment prohibitions in spendthrift trusts*, such as ERISA pension plans, are designed to protect a beneficiary from giving up his trust interest and thus apply to dispositions to any party including the trust, which is obligated to make the trust payments. These provisions thus *prevent any change in the party who will receive the required payments*. The parties may not agree to remove this prohibition except under very limited and specified circumstances. By contrast, *anti-assignment prohibitions in debt obligations are not spendthrift features*. The provisions are designed to protect a creditor from having its obligation impaired by a change in the party required to pay the obligation rather than the party who will receive the payment. As a consequence, such prohibitions *prevent any change in the party who is obligated to make the payments*, i.e., the debtor. Moreover, the two parties may and often do agree to remove such prohibitions on assignments.

183. BLACK'S LAW DICTIONARY 108 (5th ed. 1979) defines "assign" as "to transfer, make over, or set over to another." "Alienate" is defined as "to convey, to transfer the title to property." *Id.* at 66.

184. Of course, if under such agreement the individual received the plan benefits to which he was entitled, the individual may not obtain any additional plan benefit payments. As discussed *supra*, fair and reasonable consideration may be less than the plan benefits to which an individual is entitled if there is any uncertainty about the claim.

185. Under Reorganization Plan Number 4 of 1978, 43 Fed. Reg. 47,713 (1978) and 29 C.F.R. § 2570.200a-2, the IRS has the responsibility for establishing the regulations with respect to the prohibition on the assignment or alienation of pension benefits. ERISA § 206(d), 29 U.S.C. § 1056(d). Those regulations are associated with the similar prohibition in I.R.C. § 401(a)(13)(B). See Treas. Reg. § 1.401(a)-13(b)(2), (c)(2)(ii) (as amended in 1988).

permit those entitlements to be used to satisfy the individual's obligations to another person.

The statutes and regulations similarly only permit a pension plan to offset a portion of a participant's plan benefits against specified plan obligations of the individual.<sup>186</sup> ERISA permits arrangements to secure loans from the plan<sup>187</sup> and offsets for amounts that a participant is ordered to pay the plan as a result of a crime or an ERISA violation pertaining to such plan under a variety of arrangements including settlements between a participant and the Department of Labor or a participant and the PBGC.<sup>188</sup> There is also a regulatory exception for arrangements to recover overpayments of plan benefits.<sup>189</sup>

No statutory or regulatory exception permits any reduction of the benefit entitlements of participants or beneficiaries. Thus, ERISA section 206(d), 29 U. S.C. § 1056(d), prohibits a release of an individual's claim of entitlement to pension benefits, which would cause such a reduction.

The Supreme Court in *Guidry v. Sheet Metal Workers National Pension Fund* held that the statutory exceptions to the prohibition against the assignment or alienation of pension benefits are not subject to any generalized equitable expansion.<sup>190</sup> In particular, the Court found that the pension benefit interest of a union officer did not become subject to a constructive trust on behalf of the union from whom he had embezzled more than \$377,000 in violation of section 501(c) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 501(c).<sup>191</sup> The court below found that such a trust had been established because (a) the embezzlement of the union funds injured the union members, who were also the plan participants, and thus the plan was injured; and (b) the "other appropriate relief" authorized for violations of the LMRDA overrode the ERISA prohibition on the assignment or alienation of pension benefits.<sup>192</sup> The Court held that the plan was distinct from the union and an injury to the union was not equivalent to an injury to the plan, which would not be the

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186. In addition, there is also an exception for voluntary revocable assignments. They may not exceed ten percent of the payments to the individual. ERISA § 206(d)(2), 29 U.S.C. § 1056(d)(2). Such assignments are not at issue in this Article and thus not discussed further.

187. ERISA § 206(d)(2), 29 U.S.C. § 1056(d)(2).

188. ERISA § 206(d)(4), 29 U.S.C. § 1056(d)(4).

189. Treas. Reg. § 1.401(a)-13(c)(2)(i), (iii). There are also additional exceptions for administrative convenience, such as deposits to the joint bank account of the participant and the participant's spouse, which will not be discussed further.

190. 493 U.S. at 376.

191. *Id.* at 367-69.

192. *Id.* at 369-70.

beneficiary of the constructive trust.<sup>193</sup> The Court then unequivocally declared:

Nor do we think it appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA’s prohibition on the assignment or alienation of pension benefits. Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them.<sup>194</sup>

The Supreme Court reinforced its *Guidry* holding in *Boggs v. Boggs* by deciding that the statutory exceptions to the prohibition against the assignment or alienation of pension benefits are not subject to any judicial expansion.<sup>195</sup> The Court found that ERISA section 206, 29 U.S.C. § 1056 preempted the community property rights of the children of a deceased participant’s first wife to the

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193. *Id.* at 373. There is a division among the circuits about the ability of a pension plan to use an involuntary offset against a participant’s benefits to recover damages caused to the plan by such participant’s fiduciary breach when the offset does not meet the conditions described in ERISA section 206(d)(4), 29 U.S.C. § 1056(d)(4). Section 1502(a) of Pub. L. No. 105-3 added this exception with an effective date of August 5, 1997. Compare *Brovarski v. Local 1205 Int’l Bhd. of Teamsters Union Pension Fund*, No. 97-CV-489, 1998 U.S. Dist. LEXIS 23039, at \*29 (E.D.N.Y. Feb. 23, 1998), and *Coar v. Kazmir*, 990 F.2d 1413, 1420 (3d Cir. 1993) (permitting such an offset), with *Herberger v. Shanbaum*, 897 F.2d 801, 804 (5th Cir. 1990) (prohibiting such an offset). See also *Martorana v. Trustees of Steam-fitters Local Health Fund*, 404 F.3d 797 (3<sup>rd</sup> Cir. 2005) (no anti-assignment exception for offsets to cover attorney fees charged against participant for bringing frivolous benefit claim). See generally Sharon Reece, *The Gilded Gates of Pension Protection: Amending the Anti-Alienation Provision of ERISA Section 206(d)*, 80 OR. L. REV. 379 (2001). Three arguments are generally offered in favor of permitting such an offset, which will improve the ability of the plan to recover such funds for the benefit of all its beneficiaries and participants. First, ERISA section 409, which imposes personal liability on a person who commits a fiduciary breach, overrides the prohibition of ERISA section 206, 29 U.S.C. § 1056. Second, the legislative history shows that Congress focused on preventing garnishments when it considered ERISA section 206, 29 U.S.C. § 1056, which can only be done by third parties. Third, the Treasury Regulations recognized that offsets are not subject to the section 206 ban. However, ERISA section 206, 29 U.S.C. § 1056, prohibits the assignment or alienation of pension benefits. Prohibited assignments are not limited to garnishments. See generally Treas. Reg. § 1.401(a)-13(b)(1). Moreover, if Congress and the Treasury, respectively, wished to exclude all offsets from the anti-assignment and anti-alienation ban, the statutory exception would not have referred only to offsets arising from loans and the regulatory exception would not have been restricted to benefit overpayments. See *Coar*, 990 F.2d at 1422 n.8. *A fortiori*, if Congress or the Treasury had wished to exclude any benefit reductions from the ban, such as those resulting from any kind of release, they would have explicitly done so.

194. *Guidry*, 493 U.S. at 376.

195. 520 U.S. at 851.

participant's pension plan benefits.<sup>196</sup> Thus, the children had no right to any of the pension plan distributions, or the income on such distributions, that their father received after their mother's death because:

ERISA's pension plan anti-alienation provision is mandatory and contains only two explicit exceptions, see §§ 1056(d)(2) [voluntary revocable assignments], (d)(3)(A) [QDROs], which are not subject to judicial expansion. The anti-alienation provision can "be seen to bespeak a pension law protective policy of special intensity: Retirement funds shall remain inviolate until retirement."<sup>197</sup>

The strength of this protective policy is shown by the fact that the Court prevented the participant's children from obtaining any of the pension funds that had been paid out to the participant or any of the undistributed pension funds that had been rolled over into an IRA.<sup>198</sup>

The three basic trust sources that the Supreme Court regularly consults to establish a federal common law of rights and obligations under ERISA-related plans all appear to agree that if an individual's benefits may not be alienated or assigned, as occurs with a spendthrift trust, then the individual may not make an effective transfer of his or her interest to the trustee, or the other beneficiaries of the trust, by releasing his or her interest in the trust.<sup>199</sup>

If ERISA permits releases of claims for accrued pension benefits then the Proposed Fiduciary Release Rules would be applicable to such releases. This change would not significantly decrease the amount of attention that courts would devote to such releases. Under the Proposed Fiduciary Release Rules, the courts are required to look at the underlying dispute about the employee benefits to determine if the individual received fair and reasonable consideration and fully understood what and who was being released.<sup>200</sup> On the other hand if the courts permit releases of

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196. *Id.* at 853.

197. *Id.* at 851 (internal citations omitted).

198. Moreover, this protection continued even after the participant's death and included the income on the distributed and rolled over funds.

199. See BOGERT & BOGERT, *supra* note 59, § 226 (Attempted Transfer by Beneficiary—Destructibility of Spendthrift Trust); 3 SCOTT & FRATCHER, *supra* note 59, § 343 (Conveyance by Beneficiary to Trustee); RESTATEMENT (SECOND) OF TRUSTS § 343 (Conveyance by Beneficiary to Trustee). There have also been decisions that neither estoppel nor consent overrides a spendthrift provision which, like the anti-assignment mandate of ERISA, had been created by statute. See, e.g., *In re Wentworth*, 129 N.E. 646, 648 (1920), where the issue was the effect of a testamentary spendthrift clause created by statute.

200. Disallowing waivers of accrued pension benefits would mean the courts would have the more difficult task of determining the precise pension benefit entitlement of the plaintiff. However, a court asked to approve a stipulated

accrued pension benefits and do not apply the Proposed Fiduciary Release Rules, many claims will be dismissed without any consideration of the underlying claims. There may be a dramatic drop in class litigation, which is often the only effective way of obtaining promised employee benefits, if the courts deny class certifications on the basis that individual review is needed of the circumstances in which form releases were executed by numerous dismissed employees.<sup>201</sup>

*B. Releases of Entitlements to Accrue Future Pension Plan Benefits Are Permitted*

The prohibition against the assignment or alienation of pension plan benefits does not affect releases of the right to accrue future pension benefits, i.e., pre-accrual releases. For example, 401(k) plans permit individuals to decide, before earning compensation, whether to have such compensation contributed in a tax-free fashion, to a pension plan under the conditions set forth in I.R.C. § 401(k). The Treasury Regulations also describe the income tax effects of elections that are not pursuant to 401(k) arrangements, such as a one-time election not to participate in a pension plan on or before the date the individual becomes eligible to participate in the plan, or temporary elections not to participate in a pension plan.<sup>202</sup>

On the other hand, ERISA voids pre-accrual releases of service credits for periods of employment that may be required for an employee to be eligible to (a) participate in the plan, or (b) qualify for vesting of benefits that may accrue when the participation release is inapplicable.<sup>203</sup> The releases may, however, affect the benefits that may accrue during an individual's post-release employment.<sup>204</sup>

As with any employee benefits for which releases are not prohibited, the Prohibited Fiduciary Release Rules govern the effectiveness of such releases. The seeking of such pre-accrual

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settlement of a bona fide dispute between the parties would only have to conduct the more limited review of the reasonableness of the proposed settlement as is the case with settlements about the entitlement to ERISA non-pension plan benefits.

201. This may be the case even if the releases have no explicit reference to the plan (which for a pension plan must be distinct from the employer) or the claim at issue.

202. See Treas. Reg. § 1.401(k)-1(a)(2)-(3), (5) (as amended in 2004).

203. Service credits are generated by the periods of employment or presumed employment that ERISA requires pension plans to use for vesting and participation purposes pursuant to the rules set forth in ERISA sections 202(b) and 203(b), 29 U.S.C. §§ 1052(b), 1053(b). See e.g., *Holt v. Winpisinger*, 811 F.2d 1532, 1542 (D.C. Cir. 1987) (finding a release of the right to those credits was void).

204. See, e.g., *Minadeo v. ICI Paints*, 398 F.3d 751 (6th Cir. 2005).

releases are fiduciary acts because it is part of the traditional administration activity of enrolling eligible employees in an ERISA plan. In particular, there must be a showing that the employee fully understood the released participation rights and was fairly compensated for the release, such as the payment to the employee of the compensation that would otherwise be contributed to a 401(k) plan.

The common law of trusts also distinguishes between pre-accrual releases of spendthrift interests, which are allowed, and post-accrual releases, which are not allowed. In particular, a person named as a spendthrift trust beneficiary may disclaim his or her interest and thereby avoid becoming a beneficiary, but once he or she becomes a beneficiary, no benefit waivers are permitted.<sup>205</sup> There is a fundamental distinction between common law disclaimers of spendthrift interests and releases of claims to the entitlement of accrued pension benefits. In the former, there is often no question as to the entitlements of the beneficiary, who wishes to be treated as if he or she predeceased the time at which the transfer of the interest was to take place. In the latter, there is often a question as to the individual's entitlements, and the individual has no intention to be treated as if he or she predeceased the date when he or she wished to obtain the plan benefits to which he or she had been entitled to plan benefits.<sup>206</sup>

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205. See, e.g., BOGERT & BOGERT, *supra*, note 61, § 194.

206. It is thus irrelevant that comment (c) of the RESTATEMENT (THIRD) OF TRUSTS § 58 (Spendthrift Trusts: Validity and General Effect) (2003) permits beneficiaries to reject spendthrift interests by either disclaimer or releases because such rejections are not at issue in this paper. The reporter after conceding that allowing such releases is contrary to the weight of authority argues in his report for such comment that "an assignment or other relinquishment of a portion of a beneficiary's interest in a spendthrift trust should be permissible in connection with the settlement of a genuine will contest or other *bona fide* proceeding challenging the validity of the trust." The reporter recognized that his proposed changes in state spendthrift statutes would not affect the stricter anti-assignment prohibition for ERISA trusts, which contains no exception for such assignments. Moreover, the exception is explicitly derived from Section 377.1 of the pre-ERISA text, GRISWOLD, SPENDTHRIFT TRUSTS (2d ed. 1947), which is entitled "Assignment in Connection with Will Contests." The principal cited case is *In re O'Keefe*, 167 Misc. 148 (1938), which presents the unremarkable principle that the anti-alienation provision does not take effect until after the probate of the will and thus the provision is not violated by pre-probate settlements. By contrast after the probate of a estate, those provisions prevent an income beneficiary from making a binding consent to the termination of such spendthrift interest, *In re Fiscus*, 45 A.D.2d 235 (1974) and the beneficiary of spendthrift trust was prevented from using his trust interest to make a binding settlement with the trustee. *In re Margolis*, 187 Misc. 2d 600 (2001). Moreover, this narrow exception is limited to situations where the creation of the spendthrift trust is at issue in a *bona fide* dispute rather than a participant's entitlement to a precise amount of benefits under an existing ERISA pension plan.

Releases of pension benefits associated with payments of settlements for non-ERISA disputes may be either pre-accrual or post-accrual releases. To the extent the dispute pertains to deprivations of back pay or service credits the associated pension benefits would appear to be accrued benefits and thus may not be released under the anti-assignment prohibition of ERISA section 206(d). On the other hand, to the extent the dispute pertains to other matters, such as front pay, the pension benefits have not accrued, or factors that do not affect pension accruals, no benefits accrue. Thus, in any case, releases of claims to pension benefit entitlements associated with these agreements are certainly not effective if they were not obtained in compliance with the Proposed Fiduciary Release Rules. Those rules require a showing of the receipt of fair consideration for the foregone pension benefits and full understanding of the benefits being benefits. It should be noted that these releases often do not explicitly refer to pension plan claims but rather have implicit effects. For example, an individual may release the right to challenge the characterization of a payment under the settlement agreement, as a wage payment a bonus payment or a payment for emotional damages.<sup>207</sup>

*C. ERISA May Prohibit Releases of Entitlements to Vested  
Accrued Pension Benefits*

Finally, a release of a claim for vested accrued pension benefit entitlements by an individual to the plan or its fiduciaries may violate the non-forfeiture rules of ERISA section 203(a), 29 U.S.C. § 1053(a). The Supreme Court stated:

Section 203(a) is a central provision in ERISA. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in § 203(a)(2), as not subject to forfeiture. A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3) [none pertain to releases of any kind], would violate this section.<sup>208</sup>

In *Nachman*, the Supreme Court held that a pension plan could not avoid the non-forfeiture rules by defining a pension plan participant's benefit as non-forfeitable only to the extent the benefit had been funded.<sup>209</sup> The Court voided such definition even for those benefits accrued before the effective dates of the ERISA

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207. Similarly the agreement may determine the extent to which an individual is entitled to service credits. See generally 29 C.F.R. § 2530.200b-2(a)(3), which defines an "hour of service" in relevant part to include: "each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by the employer."

208. *Nachman*, 446 U.S. at 367.

209. *Id.*

vesting rules.

The prohibition of forfeitures by ERISA section 203(a), 29 U.S.C. § 1053(a),<sup>210</sup> does not apply to all pension benefits. The forfeiture rules apply only to those benefits that are required to vest under the minimum vesting rules (which require benefits to become non-forfeitable after a participant has satisfied certain statutory service requirements) or the rules prohibiting discrimination in favor of the highly compensated.<sup>211</sup> Accrued benefits which have not yet become vested are not covered by the prohibition on forfeitures. By contrast, the prohibition of assignment or alienation of pension benefits by ERISA section 206(d), 29 U.S.C. § 1056(d), applies to all accrued pension benefits, regardless of the participant's service.

The statute, regulations, and Supreme Court cases do not discuss the precise extent to which the forfeiture prohibitions apply to forfeitures caused not by plan provisions, but by plan practices.<sup>212</sup> These prohibitions do, however, prevent plans from making it a practice to require participants or their beneficiaries to agree to waive a portion of the value of their benefits in order to obtain a specific form of benefit payment.<sup>213</sup> It may be similarly argued that the prohibition applies to any individual agreement in which an individual purportedly gives up all or part of the individual's non-forfeitable accrued pension benefits, such as a release acknowledging the receipt of complete payment of the benefits to which the individual was entitled.

#### VIII. THE APPLICATION OF ERISA FIDUCIARY PRINCIPLES BY COURTS TO RELEASES OF CLAIMS OF ENTITLEMENT TO ERISA BENEFITS

Except as provided in section 405(b)(1) and 405(d) [which refer to liability for breaches by other fiduciaries] any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility under this Part [the ERISA part entitled "Fiduciary Responsibility"] shall be void as

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210. Under Reorganization Plan Number 4 of 1978, 43 Fed Reg. 47,713 (1978), and 29 C.F.R. § 2570.200a-2, the IRS has the responsibility for establishing the regulations with respect to the prohibition on the forfeiture of pension benefits. See ERISA § 203, 29 U.S.C. § 1053. Those regulations are associated with the similar prohibition in I.R.C. § 411. See Treas. Reg. §§ 1.401(a)-4, 4T (as amended in 1993).

211. Treas. Reg. § 1.411(a)-4(a) (as amended in 2004).

212. This prohibition does not prevent plans from complying with the requirement that spousal waivers must be obtained before the plan may make certain forms of benefit payments to a participant. See ERISA § 205(c)(2)(A), 29 U.S.C. § 1055(c)(2)(A).

213. See Treas. Reg. § 1.411(a)-4(a).



against public policy.<sup>214</sup>

A fiduciary and a beneficiary can settle a disputed claim that the fiduciary breached its fiduciary responsibilities under ERISA if the claim is knowingly and voluntarily released. To determine whether a release is knowing and voluntary, we apply general principles of contract construction. Because we are guided by principles of trust law, however, we must examine the totality of the circumstances in which the release was signed to ensure the fiduciary did not obtain the release in violation of its duties to the beneficiary.<sup>215</sup>

*Rosenbaum v. Davis Iron Works*,<sup>216</sup> an unpublished decision of the Sixth Circuit, found that ERISA prohibited fiduciaries from being released of a future unspecified obligation to pay the ERISA benefits to which an individual is entitled.<sup>217</sup> *Leavitt v. Northwestern Bell Co.* held that ERISA permits a release of a claim for ERISA plan benefits directed at a specific issue in a settlement of such specific claim.<sup>218</sup> A district court in the Third Circuit concurred with the Eighth Circuit's reasoning.<sup>219</sup>

The Eighth Circuit has applied fiduciary principles to determine the effectiveness of releases of entitlements to ERISA benefits using a totality-of-circumstances analysis.<sup>220</sup> The applicability of fiduciary principles was obvious because most of the plaintiffs filed fiduciary breach claims under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), rather than the more customary benefit claims under ERISA section 501(a)(1)(b), 29 U.S.C. § 1131(a)(1)(B). Almost all the releases pertained to the same underlying issue: the eligibility for benefits.<sup>221</sup> Releases associated with settlements of bona fide disputes about the specific claim at issue were upheld.<sup>222</sup> The courts found ineffective all the releases

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214. ERISA § 410, 29 U.S.C. § 1110.

215. *Leavitt v. Northwestern Bell Co.*, 921 F.2d 160, 162 (8th Cir. 1990) (internal citations omitted).

216. No. 88-1245, 1989 U.S. App. LEXIS 5223, at \*1 (6th Cir. Apr. 19, 1989).

217. The Court distinguished its earlier unpublished decision at \*13, *Miller v. GM Corp.*, 1988 U.S. App. LEXIS 5601 (6th Cir. 1988), as pertaining to benefits arising from an employment contract rather than from an ERISA plan.

218. *Leavitt*, 921 F.2d at 161.

219. *Blessing v. Struther, Dunn, Inc.*, 1985 U.S. Dist LEXIS 17311 (E.D. Pa.) (a release of all pension plan claims as consideration for the payment of an individual's pension benefits as a lump sum rather than an annuity was found to foreclose a claim about the computation of the lump sum). It was not clear whether this computation was in dispute when the release was executed. *Id.*

220. *Leavitt*, 921 F.2d at 162.

221. The *Blessing* plaintiff, however, claimed the lump sum value of pension benefits was computed incorrectly and the release was executed to obtain a lump sum payment.

222. *Mange v. Petrolite Corp.*, 960 F. Supp. 206 (E.D. Mo. 1997), *aff'd*, 135 F.3d 570 (8th Cir. 1998); *Martino-Catt v. E.I. DuPont de Nemours & Co.*, 317 F. Supp. 2d 914, 917 (S.D. Iowa 2004).

not associated with such settlements.<sup>223</sup> The Eighth Circuit's approach places lesser burdens on Releasing Fiduciaries than the Proposed Fiduciary Release Rules,<sup>224</sup> which require fair consideration and fair disclosure (so that the individual fully understands the release).

*A. The Sixth and Eighth Circuits' Consideration of Whether ERISA Benefit Releases for Plan Fiduciaries May Ever Be Effective*

In *Rosenbaum v. Davis Iron Works*, the court concluded that a release in an agreement settling a dispute with respect to the computation of a participant's pension benefit entitlement on the basis of the participant's employment history could not preclude the distinct claim that the participant's benefit includes a portion of the plan's surplus.<sup>225</sup> The plan had been terminated and the parties knew the plan had a surplus, but the amount of the surplus had not been computed when the release was executed.<sup>226</sup>

The court held that ERISA section 410, 29 U.S.C. § 1110 voids any release of future unspecified claims against the plan.<sup>227</sup> The court distinguished an earlier Sixth Circuit unpublished decision, *Miller v. GM Corp.*,<sup>228</sup> that found severance plans were not precluded from obtaining releases from participants by such section:

Miller concerned the waiver of rights under an employment contract, not the waiver of claims that the administrators of a plan violated their fiduciary duty to the plan. The present case, on the other hand, involves exactly the type of case § 1110 was meant to apply to, a waiver of claims of breach of fiduciary duty. The prohibition should apply.<sup>229</sup>

Moreover, the court found that there could not have been an effective release because it was not clear at the time of the

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223. *Barbera v. Minn. Mining & Mfg. Long-Term Disability Plan*, No. 04-1598 (DWF/SRN), 2004 U.S. Dist. LEXIS 21862, at \*1 (D. Minn. Oct. 26, 2004); *Seman v. FMC Corp. Ret. Plan*, 334 F.3d 728, 733 (8th Cir. 2003).

224. Less lenient local fiduciary rules were applied by a district court in the Third Circuit. *Auslander v. Abraham Helfand*, 988 F. Supp. 576 (D. Md. 1997)

225. 1989 U.S. App. LEXIS 5223, at \*11.

226. *Id.* at \*15.

227. *Id.* at \*14.

228. No. 87-1493, 1988 U.S. App. LEXIS 5601, at \*13 (6th Cir. Apr. 27, 1988). The court held therein that GM employees had effectively released their GM severance plan rights when they executed releases in exchange for stock in a GM affiliate, EDS, on being transferred to EDS. *Id.* at \*11. The court's decision, that ERISA section 410, 29 U.S.C. § 1110, was inapplicable, was, however, based on its assertion that the section was enacted "to preclude a fiduciary from being reimbursed from the employee benefit trust funds for a personal loss incurred by the trustee or administrator as a result of a breach of fiduciary duty." *Id.* However, the statute contains no such limitation. See generally ERISA § 410, 29 U.S.C. § 1110.

229. *Rosenbaum*, 1989 U.S. App. LEXIS 5223, at \*13.

agreement whether any plan surplus would be available for the plan participants.<sup>230</sup> In addition, no claim could accrue until the Plan paid the surplus to the employer rather than to the participants.

The Eighth Circuit in *Leavitt* found that ERISA section 410(a), 29 U.S.C. § 1110(a), did not prohibit releases by participants of benefit claims against plan fiduciaries.<sup>231</sup> The court's decision rested on three assertions and a presumption that releases are limited to the specific issues that were the subject of bona fide disputes about the entitlement to benefits, such as the executive's entitlement to severance benefits in this case.<sup>232</sup>

First, is the assertion that "[a] release, however, does not relieve a fiduciary of any responsibility, obligation, or duty imposed by ERISA; instead, it merely settles a dispute that the fiduciary did not fulfill its responsibility or duty on a given occasion."<sup>233</sup>

However, the issue is not the fiduciary's obligation when the release was executed but whether at the time the claim is subsequently filed the fiduciary may use the release to avoid paying the individual's benefit entitlement. The fiduciary is thereby breaching its fiduciary duty to pay the participant those benefits at such later time. The fiduciary is using the release to relieve itself of "responsibility or liability" for that later alleged breach. Thus, the statutory prohibition voids the release.<sup>234</sup>

Second, the *Leavitt* court asserted that Congress could not have meant to require the "terminal[sic] litigation" that would result from a prohibition on releases.<sup>235</sup> But, the Supreme Court rejected this argument in *D.A. Schulte when it upheld* the implicit prohibition on FLSA releases<sup>236</sup> because litigating parties may always ask a court to approve a stipulated settlement and thereby

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230. The ability of plan participants to a portion of such surplus was established by a post-settlement case. *Bryant v. Int'l Fruit Prods. Co.*, 793 F.2d 118 (6th Cir. 1986).

231. 921 F.2d at 161-62. The applicability of ERISA section 410, 29 U.S.C. § 1110, was also rejected in *Hogan v. Eastern Enterprises*, 165 F. Supp. 2d 55, 65-66 (D. Mass. 2001), and *Spann v. AOL Time Warner*, 219 F.R.D. 307, 319 (S.D.N.Y. 2003). Both rejections cite decisions that did not consider the applicability of the prohibition.

232. *Leavitt*, 921 F.2d at 162. *But see Rosenbaum*, 1989 U.S. App. LEXIS 5223, at \*14.

233. *Leavitt*, 921 F.2d at 161-62.

234. *See IT Corp. v. Gen. Am. Life Ins. Co.*, 107 F.3d 1415, 1418-19 (9th Cir. 1997) (concluding that ERISA section 410, 29 U.S.C. § 1110, voided a contractual provision purporting to deny fiduciary status by plan administrator, who was subject to fiduciary claim by plan participants).

235. This argument about "terminal litigation," which was explicitly taken from *Stobnicki v. Textron*, 868 F.2d 1460, 1463 (5th Cir. 1989), is discussed more fully, *infra*.

236. *D.A. Schulte*, 328 U.S. at 114.

avoid interminable litigation.

Third, the *Leavitt* court asserted that the explicit prohibition could be disregarded because the group of employees protected by ERISA, "many of whom are well educated, well compensated, experienced in business, and aware of their legal rights," require much less protection than the "lowest paid workers" protected by the FLSA.<sup>237</sup> However, ERISA protects all employees, whether highly paid or lowly paid, who participate in covered employee benefit plans.<sup>238</sup> Furthermore, ERISA's primary focus is not on severance plans for executives<sup>239</sup> but on pension and welfare plans that often cover many very unsophisticated workers who are not highly paid and often are also protected by the FLSA.

Courts are obligated to adhere to the laws Congress enacted to protect all participants in covered employee benefit plans, such as the very strong fiduciary ERISA requirements. Congress unambiguously declared that those requirements could not be undermined by exculpatory agreements within or without the plan documents.<sup>240</sup> The one exception to those rules, permitting insurance to cover fiduciary breaches, enhances protection for plan beneficiaries by providing that an insurer may be liable for the breaches committed by a fiduciary.<sup>241</sup> There is no justification for presuming there is any implicit exception, particularly one that would undermine the very statutory policy of ERISA, namely the protection of the employee benefits to which individuals are entitled.<sup>242</sup>

A Fourth Circuit district court in Pennsylvania, *Blessing*, supplemented the *Leavitt* arguments by comparing the ERISA prohibition to "sufficiently similar" securities statutes, such as:

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.<sup>243</sup>

The Court referred to a Fifth Circuit holding that such provision did not void as a matter of law settlements of securities violations disputes.<sup>244</sup> This comparison has three flaws. First, the Fifth Circuit quote in *Blessing* only permitted certain "settlement agreements [which] do not themselves continue the precise

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237. *Leavitt*, 921 F.2d at 162.

238. *Id.*

239. This was the issue in *Leavitt*.

240. ERISA §§ 401(a)(1)(D), 410(a), 29 U.S.C. §§ 1104(a)(1)(D), 1110(a).

241. ERISA § 410(b), 29 U.S.C. § 1110(b).

242. See *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697, 704 (1945) (Releases of statutory rights are not permitted which contravene the statutory policy).

243. Securities Exchange Act of 1934, 15 U.S.C. § 78cc

244. *Murtagh v. Univ. Computing Co.*, 490 F.2d 810, 816 (5th Cir. 1974).

conduct which violates the laws.<sup>245</sup> However, as discussed with *Leavitt's* first assertion, the ERISA releases at issue would permit the plan fiduciaries to violate ERISA after the release is executed by not paying plan benefit entitlements to an individual when he subsequently files a claim. Second, the statute differs significantly from the narrower ERISA section 410. Section 410 prevents a fiduciary from breaching its current plan obligations and thus requires that the fiduciary pay individual's their plan entitlements pursuant to ERISA section 404(a)(1)(D). By contrast, the broad securities law breach prohibition does not correlate with a similar specific remedy for any kind of securities breach. Third, the ERISA purposes of assuring that individuals receive their benefit entitlements differs significantly from the securities law purpose of preventing securities fraud—thus, different considerations determine whether releases are available under the two different statutory schemes.

*B. The Eighth Circuit's Application of General ERISA Principles to Releases of Claims of Entitlement to ERISA Benefits*

The Eighth Circuit, the only circuit to have considered the applicability of ERISA fiduciary principles to employee benefit releases in a published decision,<sup>246</sup> found in *Leavitt* that they apply.<sup>247</sup> The court referred to the same three basic trust sources that the Supreme Court regularly consults to establish a federal

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245. *Blessing*, 1985 U.S. Dist. LEXIS 17311, at\*15; *Murtagh*, 490 F.2d at 816.

246. *But see* *Nichol v. Pullman Standard*, 889 F.2d 115, 118-19 (7th Cir. 1989). The Seventh Circuit found that a release of non-pension benefit claims was effective after the plaintiff withdrew its claim that fiduciary principles prohibit such waivers. *Id.* at 121. However, the court, *sub silentio*, applied a fiduciary-like analysis and considered the fairness of the consideration received by the participant, the knowledge of the participant, and his understanding of the rights he released. *Id.* at 118-19. On the other hand, the Seventh Circuit subsequently applied a more traditional contract analysis to releases that determined entitlements to ERISA plan benefits. For example, there was no focus on the fairness of the consideration in *Fair v. International Flavors & Fragrances*, 905 F.2d 1114 (7th Cir. 1990); *Licciardi v. Kropp Forge Division Employees Retirement Plan*, 990 F.2d 979 (7th Cir. 1993); and *Lynn v. CSX Transportation, Inc.*, 84 F.3d 970 (7th Cir. 1996). Moreover, instead of requiring that the individual fully understand the claim for an effective release the Court found that it sufficed if the individual had "constructive knowledge" of a claim arising under a settlement agreement. *Id.* at 975. A panel of judges from the Second Circuit, including one of members of the panel that decided *Leavitt*, considered but declined to decide in an unpublished decision whether ERISA fiduciary rules determine the effectiveness of purported releases of claims to benefit entitlements against an employee benefit plan and its fiduciaries. *See Yablon v. Stroock Stroock & Lavan Ret. Plan*, 93 Fed. Appx. 55, 57 n.1 (2d Cir. 2004) (en banc hearing denied 2005).

247. 921 F.2d at 160.

common law of ERISA rights and obligations.<sup>248</sup> It then presented a totality-of-circumstances test with nine factors.<sup>249</sup> Three focus on whether there was fair dealing, the hallmark of fiduciary transactions, and appear to be fiduciary factors: (1) did the participant know his rights and the relevant facts when he executed the release; (2) did the participant receive adequate consideration for the release; and (3) did improper conduct by the employer induce the participant's release.<sup>250</sup> The other six factors focus on whether there was a knowing and voluntary contract: (4) the participant's education and business experience; (5) the participant's input in negotiating the terms of the settlement; (6) the clarity of the release language; (7) the amount of time the participant had for deliberation before signing the release; (8) whether the participant read the release and considered its terms before signing it; and (9) whether the participant had an opportunity to consult with an attorney before signing the release.<sup>251</sup> None of the nine criteria ask for the most fundamental contract criteria, did the agreement actually released the plan and its fiduciaries from the claim to an entitlement to a benefit. The language criterion addresses the agreement's clarity rather than its coverage.<sup>252</sup>

The court found effective a release which was part of a settlement of a bona fide dispute about the participant's eligibility for benefits under a severance plan for senior managers.<sup>253</sup> The company, when it wished to eliminate an executive position, would offer separation benefits from the plan to executives in descending order of seniority until the company obtained an acceptance.<sup>254</sup> The plaintiff declined severance plan benefits when, contrary to normal procedure, he was asked to make an immediate decision because a less senior executive wished to obtain the benefits.<sup>255</sup>

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248. *Id.* at 162.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* *But cf.* *Mange v. Petrolite Corp.*, 960 F. Supp. 206 (E.D. Mo. 1997), *aff'd*, 135 F.3d 570 (8th Cir. 1998), *and sub nom.* *Mead v. Intermec Tech. Corp.*, 271 F.3d 715, 717 (8th Cir. 2001). Both cases used the *Leavitt* contractual criteria to show that severance agreements had been entered into in a knowing and voluntary manner. In the former case, the release was irrelevant because the issue was the treatment of unused vacation time provided by the severance agreement that contained the release. *Mange*, 960 F. Supp. at 210. In the latter, the release precludes a claim of entitlement to short-term disability benefits, which the court found in any case to have no merit. *Mead*, 271 F.3d at 716.

253. *Leavitt*, 921 F.2d at 162-63. The plan was not funded by insurance or a trust fund. *Id.* at 163. Thus there were no plan trustees and the employer was directly liable for the plan benefits at issue. *Id.*

254. *Id.* at 161.

255. *Id.*

However, he then sought the benefits when he gave notice that he intended to resign.<sup>256</sup> Shortly after leaving the company to become president of another company, he concluded extensive negotiations regarding his entitlement to plan benefits and accepted \$15,000 in exchange for an “unambiguous release” of his disputed plan claim for a much larger amount.<sup>257</sup> The court found that the plaintiff understood his rights, had access to an attorney, and had entered into a voluntary and knowing agreement.<sup>258</sup> There was no discussion of the strength of the plaintiff’s claim, the amount he was seeking, or an explanation of why \$15,000 was adequate consideration.<sup>259</sup>

Similarly, in *Martino-Catt v. E.I. DuPont de Nemours & Co.*, an Iowa district court found effective a waiver of severance benefits in exchange for 29,100 DuPont stock options pursuant to a settlement of a bona fide dispute about the participant’s eligibility for benefits under a severance plan for executives.<sup>260</sup> The underlying issue was whether the plaintiff resigned for a “stated good reason.” The court rejected the participant’s claim that the release, which referred to the claims with respect to the named severance plan, lacked clarity because the word “ERISA” was not used to describe those claims.<sup>261</sup>

Finally, the court found that the consideration the plaintiff received was adequate, but again there was no explicit discussion of the strength of the plaintiff’s case or the amount being sought.<sup>262</sup> However, the court went further than in *Leavitt*.<sup>263</sup> It described the consideration as “substantial,” and may have made an implicit determination of adequacy of the consideration.<sup>264</sup> In *Bublitz v. E.I. DuPont de Nemours & Co.*, the same court approved a settlement offer containing a release that was issued to all participants in a severance plan who were members of a class seeking a declaratory judgment with respect to several issues, including the significance of the phrase “Stated Good Reason” in the severance plan.<sup>265</sup>

By contrast, in *Seman v. FMC Corp. Retirement Plan*, the court reaffirmed that a release of an ERISA benefit claim was

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256. *Id.*

257. *Id.* at 162-63.

258. *Id.* at 163.

259. *See generally id.*

260. 317 F. Supp. 2d 914, 917 (S.D. Iowa 2004). This also appears to have involved a plan that was funded with neither a trust nor insurance, so that the company would have been directly liable for the benefits at issue. *Id.* at 919.

261. *Id.* at 922.

262. *Id.* at 923-24.

263. *Leavitt*, 921 F.2d at 162-63.

264. *Martino-Catt*, 317 F. Supp. 2d at 923-24.

265. 149 F. Supp. 2d, 816, 819 (S.D. Iowa 2001) (discussing the phrase “Stated Good Reason”).

effective only "if the fiduciary did not obtain the release in violation of its duties to the beneficiary,"<sup>266</sup> even though in that case it appeared that there was no need to review those duties. The court concluded that a participant had not released his rights to a disability pension as part of a settlement of his age and disability discrimination claim against his firm when he released "any and all claims . . . in any way incurred or arising out of any matter or thing whatsoever prior' to September 18, 1997."<sup>267</sup> The parties had acknowledged their "intent to make this release as broad and as general as the law permits with respect to Seman's employment relationship and/or termination from FMC."<sup>268</sup> The court correctly concluded that the general release language was superseded by a provision in which the parties agreed that the plaintiff would be paid benefits in accord with the specified pension plan's provisions.<sup>269</sup> However, rather than simply finding that the release didn't cover any claims for pension plan benefits, the court referred to the agreement's lack of clarity.<sup>270</sup>

In *Barbera v. Minnesota Mining & Manufacturing Co. Long-Term Disability Plan*,<sup>271</sup> a district court denied a motion to dismiss a claim that a plaintiff was eligible for benefits from a long-term disability plan.<sup>272</sup> Again a court found that the plan could not rely on a general release in a severance agreement of "all federal, state or local charges, claims, demands, actions or liabilities I now have or might have in the future based on events through the date I sign this Agreement (even if I don't know of them when I sign this Agreement) against 3M of whatever kind."<sup>273</sup>

The nine *Leavitt* criteria were applied and the motion to dismiss was rejected because the plaintiff alleged he had not even been informed of the availability of the long-term disability benefits so there could not have been a knowing and voluntary release.<sup>274</sup> Unlike *Seman*, the coverage of the release was not in question, but rather knowledge of the coverage.<sup>275</sup>

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266. 334 F.3d at 732.

267. *Id.*

268. *Id.* at 731.

269. *Id.* at 732.

270. *Id.*

271. No. 04-1598, 2004 U.S. Dist. LEXIS 21862, at \*1 (D. Minn. Oct. 26, 2004).

272. *See id.* at \*14-15. The court granted Defendant's motion to dismiss under the standards set forth *supra*.

273. *Id.* at \*3.

274. *Id.* at \*9-10 (citing *Leavitt*, 921 F.2d at 162).

275. Traditional contract law allows releases of claims not known when a release is executed if such coverage is clearly understood. *See, e.g., WILLISTON, A TREATISE ON THE LAW OF CONTRACTS*, § 73.4 (General Releases), 73.11 (Claims not Known at the time of release) (4th ed. 2003). By contrast, fiduciaries are required to convey full understanding of the claim for an effective release, *supra*.



In *Auslander v. Abraham Helfand*,<sup>276</sup> a defendant was denied summary judgment on a claim that a plaintiff was eligible for benefits from a profit-sharing plan.<sup>277</sup> The court, which is in the Fourth Circuit, found that the employer could not rely on a release of all claims arising before the date of a settlement of a law suit arising from the plaintiff's alleged embezzlement because the defendants had not satisfied "the [fiduciary] burden of proving that the release at issue was not obtained by fraud, undue influence or overreaching."<sup>278</sup> This standard was derived from the Maryland rules for fiduciary releases.<sup>279</sup> It was thus unnecessary for the court to consider whether the plaintiff fully understood that he was purportedly releasing his claim for entitlement to profit-sharing benefits.<sup>280</sup>

#### IX. THE COURTS CONSIDER WHETHER ERISA VOIDS RELEASES OF CLAIMS OF ENTITLEMENT TO ACCRUED PENSION BENEFITS

*Pension entitlements are, without exception, subject to the anti-alienation provision of ERISA.*<sup>281</sup>

*A participant may not elect a forfeiture [of vested pension benefits].*<sup>282</sup>

*We decline to ascribe to ERISA's anti-alienation provision an unreasonable interpretation which would frustrate knowing and voluntary settlements, such as the one entered into by Casey [the employer's CEO to waive his undisputed retirement plan benefits in settlement of allegations that he had committed fiduciary breaches while serving as the plan's trustee].*<sup>283</sup>

Courts in three circuits have explicitly considered whether ERISA prohibits releases of a claim of entitlement to accrued pension benefits. *Lynn v. CSX Transportation, Inc.* held that the ERISA prohibition on the alienation or assignment of pension benefits voids releases by individuals of their claims for entitlements to accrued pension benefits.<sup>284</sup> *Esden v. Bank of Boston* held that a "participant may not elect a forfeiture" of vested accrued pension benefits.<sup>285</sup> However, *Esden* did not mention *Finz*

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276. 988 F. Supp. 576 (D. Md. 1997).

277. *Id.* at 582.

278. *Id.* at 581.

279. *Id.* at 579.

280. *Id.* at 580.

281. *Lynn v. CSX Transp., Inc.*, 84 F.3d 970, 975 (7th Cir. 1996) (emphasis added).

282. *Esden v. Bank of Boston*, 229 F.3d 154, 173 (2d Cir. 2000) (emphasis added).

283. *Rhoades v. Casey*, 196 F.3d 592, 599 (5th Cir. 1999) (emphasis added).

284. 84 F.3d at 975 (citing *Patterson v. Shumate*, 504 U.S. 753, 760 (1992)).

285. 229 F.3d at 173.

*v. Schlesinger*,<sup>286</sup> which is often quoted for the proposition that releases of claims for entitlements to accrued pension benefits are permitted, even though *Finz* didn't discuss the anti-alienation or non-forfeiture prohibitions. Finally, the Fifth Circuit, which had been overruled in *Boggs v. Boggs*,<sup>287</sup> held that claims of entitlement to accrued pension benefits may be released as part of a settlement of a bona fide dispute about an individual's plan obligations, even if the obligations are not included among the statutory exceptions to the anti-assignment prohibition.<sup>288</sup>

A. *The Seventh Circuit Uses the ERISA's Anti-Assignment Prohibition to Void Releases of Claims of Entitlement to Accrued Pension Benefits*

In *Lynn*, the Seventh Circuit held that the ERISA prohibition on the assignment or alienation of pension benefits voids any release of a claim for the entitlement of accrued pension benefits.<sup>289</sup> The court also clarified that such releases were not permitted under its earlier decisions in *Fair v. International Flavors & Fragrances*,<sup>290</sup> *Lumpkin v. Envirodyne Industries, Inc.*,<sup>291</sup> and *Licciardi v. Kropp Forge Division Employees Retirement Plan*.<sup>292</sup> Nevertheless, despite the court's unequivocal voiding of such releases, *Fair*, *Lumpkin*, and *Licciardi* have been cited repeatedly to uphold such releases.<sup>293</sup>

In *Fair*, the court held that a release precluded a former executive from claiming that her pension benefits should take into account a lump sum payment of \$85,000.<sup>294</sup> This payment was part of the consideration<sup>295</sup> for the termination of her sex discrimination litigation and her agreement not to institute any claim against her employer for any matter arising out of her employment.<sup>296</sup> The plaintiff's agreement not to institute any claims related to her employment was held to have released her pension benefits claim.<sup>297</sup> The court decided that ERISA did not

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286. 957 F.2d 78 (2d Cir. 1992).

287. 520 U.S. 833 (1997).

288. *Rhoades*, 196 F.3d 592 at 599.

289. 84 F.3d at 975.

290. 905 F.2d 1114 (7th Cir. 1990).

291. 933 F.2d 449 (7th Cir. 1991).

292. 990 F.2d 979 (7th Cir. 1993).

293. *See, e.g., Wilson v. Nabisco*, 2002 U.S. Dist. LEXIS 12265 (E.D. Pa) (citing *Fair* and *Licciardi* but not *Lynn*), *rev'd other grounds*, No. 02-2148, 2003 U.S. App. LEXIS 24673, at \*5 (3d Cir. Dec. 8, 2003).

294. 905 F.2d at 1116.

295. She also received an enhanced salary for eighteen months during which she was required to provide no additional services.

296. *Id.*

297. *Id.* at 1117. There was no discussion why a release of claims against the plaintiff's employer also released the pension plan, which was a distinct entity. The plaintiff, however, did not appear to have made a claim against

prohibit a release of such pension benefit claim. There was no discussion beyond a statement that the plaintiff had not presented any reason why ERISA prohibited such an agreement.<sup>298</sup>

The pension plan's summary plan description clearly and accurately provided that salary payments, but not lump sum payments, were to be included in pension computations.<sup>299</sup> Moreover, the settlement agreement was silent about the plaintiff's pension rights, so the plaintiff appeared to have no basis to claim that the lump sum payment was included in the pension plan computation.<sup>300</sup>

The *Fair* release did not pertain to the focus of the anti-assignment prohibition, i.e., the individual's undisputed claim to entitlement to accrued pension benefits.<sup>301</sup> Instead, the release indirectly determined the treatment by the pension plan of payments provided by and characterized by the settlement agreement.<sup>302</sup> The court found that the plaintiff understood that the pension plan included the agreement's regular payments but not the lump sum payment in her pension benefits computation; thus she could not complain about the allocation between such payments within the agreement.<sup>303</sup> It should be noted that if the settlement payments were in part attributable to back pay, then there would be an issue whether the pension benefits associated with such back pay were accrued pension benefits and thus protected by the ERISA anti-assignment provision.

In *Lumpkin v. Envirodyne Industries, Inc.*, the court reversed the lower court's dismissal of ERISA benefit claims by former employees who sought to recover sufficient funds from their former employer's grandparent so that their bankrupt employer's inadequately-funded pension fund could pay their accrued pension benefits.<sup>304</sup> The grandparent would have been liable for this deficiency if it had not been released from such obligation.<sup>305</sup> The court, however, held that the anti-assignment ban did not void the release the plaintiffs had executed in favor of their former

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the plan but only against the employer in its individual status. *Id.* at 1114.

298. *Id.* at 1117.

299. *Id.*

300. *Id.*

301. *Id.* See discussion of the anti-assignment prohibition, *supra*.

302. On the other hand under certain circumstances the pension plan fiduciaries may have the ability to characterize payments differently than the settlement agreement. For example, if the settlement agreement were obtained in a manner that violated the Proposed Fiduciary Releases Rules the agreement's characterization could be voided on the same basis as a release obtained in such manner.

303. *Id.* at 1116.

304. *Lumpkin*, 933 F.2d at 466. There was a substantial benefit deficiency because the PBGC insurance did not cover all of the former employer's promised benefits. *Id.* at 451-52. See *supra* note 36.

305. *Id.* at 454.

employer and "related parties"<sup>306</sup> as follows:

*The anti-alienation provision, while clearly manifesting Congress's intent to protect workers from unknowingly signing away their vested pension benefits, does not impose a bar on settlement agreements wherein pension claims are knowingly and intentionally resolved by employees. Fair v. International Flavors & Fragrances, Inc., 905 F.2d 1114, 1115-1116 (7th Cir. 1990); Nichol v. Pullman Standard, Inc., 889 F.2d 115, 121 (7th Cir. 1989). To apply the anti-alienation provision in this case would establish the untenable rule that ERISA prevents plaintiffs from ever entering into a settlement in a dispute over lost pension benefits.*<sup>307</sup>

Although the emphasized language is often quoted, in *Fair*, the court did not mention the anti-alienation provision.<sup>308</sup> In *Nichol*, the court held that the anti-alienation prohibition pertained to claims to entitlement of benefits from pension plans but not to benefits from welfare plans.<sup>309</sup> Thus, the prohibition could not preclude settlements of welfare benefit claims. The *Nichol* court did not even suggest therein that the provisions permitted pension plan benefit settlements.<sup>310</sup>

The *Lumpkin* release did not pertain to the focus of the anti-assignment prohibition, an individual's undisputed claim to an entitlement to accrued pension benefits.<sup>311</sup> Instead the release pertained to a "dispute over lost pension benefits."<sup>312</sup> The claim at issue was whether the defendant, the grandparent of the plan sponsor, was liable to fund those uncontested "benefits" that the sponsor had not funded.<sup>313</sup> The plaintiffs were in effect bringing a derivative suit on behalf of the plan.<sup>314</sup> If they were successful, the plan would have had sufficient assets to meet its undisputed benefit obligations to the plaintiffs.<sup>315</sup> Thus, the case had nothing to do with an assignment or alienation of a participant's pension benefits because the agreement did not change any participant's entitlement to those benefits. Therefore, the court correctly found irrelevant the Supreme Court's holding in *Guidry* that there are no equitable exceptions to the prohibition on the assignment or

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306. *Id.* at 455. This ruling did not resolve the case. The lower court was directed to determine which "related parties" were released from their liability to fund the plan benefits to which the plaintiffs were entitled but were not being paid. *Id.*

307. *Id.* (emphasis added).

308. 905 F.2d at 1114.

309. 889 F.2d at 119.

310. *Id.*

311. 933 F.2d at 455.

312. *Id.*

313. *Id.* at 453-54.

314. *Id.* at 453.

315. *Id.* at 453-54.

alienation of pension benefits.<sup>316</sup>

In *Licciardi v. Kropp Forge Division Employees Retirement Plan*, the court upheld the dismissal of a participant's claim that his pension benefits should take into account a lump sum payment of \$650,000 that he received in exchange for resigning as company president and releasing all claims he might have had against the company.<sup>317</sup> The participant, who was the plan administrator, could have been expected to be aware that this payment would be so excluded.<sup>318</sup> The participant brought suit against the pension plan and his former employer several years later, when the company wished to terminate the plan, and offered him benefits which did not take the lump sum payment into account.<sup>319</sup> The termination agreement and an associated omnibus agreement, which had been executed when he terminated his employment, did not mention the plaintiff's pension rights.<sup>320</sup> The court's holding was based on its characterization of the claim as one based on ambiguous terms in a settlement agreement, which it called "contestable benefits," rather than on the plaintiff's "incontestable benefits" under the terms of the pension plan.<sup>321</sup> Moreover, it stated that any entitlement to benefits under the terms of the pension plan was not affected by the lack of such statement in the settlement agreement.<sup>322</sup> The court then considered the actual plan terms and stated that its best interpretation was that the lump sum was not to be taken into account to compute pension benefits.<sup>323</sup> Consequently, as in *Fair*, even if the suit were not barred, the plaintiff's claim would have been disallowed.

The *Licciardi* release did not pertain to the focus of the anti-assignment prohibition, i.e., an individual's undisputed claim to entitlement to accrued pension benefits.<sup>324</sup> Instead, the release indirectly determined the treatment by the pension plan of payments provided by and characterized by the settlement agreement.<sup>325</sup> The court also found that the plaintiff understood

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316. *Id.* at 455-56. See *Guidry*, 493 U.S. at 376-77.

317. 990 F.2d at 982, 984.

318. *Id.* at 982.

319. *Id.* at 981-82.

320. The court observed that the agreements could have, but did not, describe the lump sum payment in a manner that would have been taken into account under the pension plan. *Id.* at 982.

321. *Id.* at 983. This distinction created ambiguity because all pension benefits are based on plan terms. The real issue is the extent to which a settlement agreement may reduce, if at all, an individual's claim to an entitlement to benefits under a pension plan. The court in *Lynn* clarified which benefits were incontestable and thus not subject to change by a settlement agreement, whether or not such agreement contained a release.

322. *Id.* at 982.

323. *Id.* at 982-83.

324. *Id.*

325. On the other hand under certain circumstances the pension plan

that the pension plan did not include the agreement's lump sum payment in his pension benefits computation; thus he could not complain about such characterization.<sup>326</sup>

In *Lynn v. CSX Transportation, Inc.*, the court reversed and remanded a lower court decision that a release precluded an individual from pursuing a claim that a pension plan's terms entitled him to credits for the time he was in the military.<sup>327</sup> The individual was an ordinary worker who, with many of his colleagues, accepted an early retirement package that enhanced his retirement plan benefits by treating his age and service as each being increased by five years.<sup>328</sup> This package was given in exchange for a resignation agreement not to assert any claims against his employer that resulted from his employment relation.<sup>329</sup>

The *Lynn* case differed significantly from *Fair, Licciardi, and Lumpkin*. The focus in *Lynn* was a discussion of the plaintiff's entitlement to accrued pension benefits, the very focus of the anti-assignment prohibition. This time the issue was not the treatment of settlement payments but rather whether the agreement could adversely affect those accrued pension benefits.<sup>330</sup>

The court stated unequivocally that the prohibition of the assignment or alienation of pension benefits precludes any release of a participant's or a beneficiary's claim to entitlement to accrued benefits under the terms of an ERISA pension plan.<sup>331</sup>

*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*

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fiduciaries may characterize payments differently than the settlement agreement. For example, if the settlement agreement were obtained in a manner that violated the Proposed Fiduciary Releases Rules the agreement's characterization could be voided on the same basis as a release obtained in such manner.

326. *Id.* at 984.

327. 84 F.3d at 977.

328. *Id.* at 972.

329. *Id.*

330. *Id.* at 976-77.

331. *Id.* at 975. The *Lynn* court also noted that the plaintiff had far less knowledge than the plaintiff-executives in *Fair* and *Licciardi* when they executed their respective releases. *Id.* The *Lynn* plaintiff also played no role in negotiating the agreement and received no advice from an attorney regarding the agreement. *Id.* at 976.

entitlements.<sup>332</sup>

*Fair*, *Licciardi*, and *Lynn* illustrate the critical distinction. Pension entitlements that accrued before the execution of the release, such as the military service credits of the *Lynn* plaintiff,<sup>333</sup> are incontestable. Thus, they may not be released and are not affected by settlement agreements.<sup>334</sup> By contrast, pension benefits associated with settlement payments are contestable and thus releasable.<sup>335</sup> The pension benefits associated with different kinds of settlement payments may differ significantly, such as lump sum payments or salary payments for future service, without any explicit reference to the pension plan.<sup>336</sup>

The Court may have created confusion by the manner in which it introduced the term "contested claims." Rather than simply stating that contested claims are those contestable claims, whose releases are effective it declared:

Our earlier cases have referred to claims arising under settlement agreements as "contestable." *We think "contested claim" may be a more accurate phrase, as the claims falling in this category are ones that have been contested, either actually or constructively.* Where a claim was not previously contested, it has been considered a "contestable claim" if the claimant had actual or constructive knowledge of the claim at the time of signing the release. While this latter type of claim may also be described as "previously contestable," in that it could have been contested and resolved at the time the release was entered into (but was not), such a claim has been constructively contested. A claim may be considered contested where a claimant knew of the claim at the time a dispute was settled. *Whether the parties actually wrangled over a particular claim is not determinative. What matters is whether the claimant knew of the claim and knowingly relinquished it (relinquishment of course including failure to act or to raise the issue at all).* While this difference in phrasing may seem minor, a review of the record in this case shows that our previous choice of words has led to confusion. "Contested claim" strikes us as the clearer, and therefore preferable, choice.<sup>337</sup>

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332. *Id.* at 975 (emphasis added and internal citations omitted).

333. *Id.* at 977.

334. *Licciardi*, thus correctly stated the proposition that no explicit provision is needed in the agreement to assure that a participant's benefits are paid pursuant to the terms of the pension plan. *Licciardi*, 990 F.2d at 982.

335. This raises the question of whether the pension treatment of settlement payments for back pay are accrued benefits and thus incontestable.

336. *Fair* correctly observed that the plaintiff's pension benefits incorporated the enhanced salary obtained by the plaintiff under the settlement agreement even though the agreement had no such explicit provision. The Court in *Lynn* similarly did not rely on the fact that the plaintiff's resignation agreement had a clause stating he was entitled to retirement payments pursuant to a specific pension plan provision to decide upon the effectiveness of the releases.

337. *Id.* at 975 (emphasis added).

In the discussion immediately following this quote the Court clarifies that a contested claim is a contestable claim whose release is effective and the limited circumstances in which an individual is treated as having constructive knowledge of such claim. In particular, the Court distinguished the *Lynn* plaintiff from those in *Fair* and *Licciardi*. First and most "central," the *Lynn* plaintiff's claim was based solely on the pension plan and was thus incontestable and thus could not be released. By contrast, the claims of the *Fair* and *Licciardi* plaintiffs pertained to settlement payments and thus were based on the settlement and were releasable.<sup>338</sup> Second, even if the *Lynn* plaintiff's claim had been based on the settlement agreement and thus could be released, i.e., contestable, it was not contested because the *Lynn* plaintiff could not have been "reasonably" expected to have understood the specific pension claim being released under the form agreement with which he was presented. By contrast, the *Fair* and *Licciardi* plaintiffs, who had negotiated individualized settlements with the assistance of counsel, could have been "reasonably" expected to have understood the specific pension claims being released.<sup>339</sup> Under this reasoning if the plaintiff could not have been reasonably expected to understand the pension implications of the settlement agreement's apparent characterization of its payments, such pension claim may not be contested. Thus, the release of the pension plan is void and the pension plan may determine the correct characterization of the payments.<sup>340</sup>

Under this analysis, if the claim is based solely on the settlement agreement, such as for additional pension benefits not set forth in the pension agreement, then the release does not affect the plaintiff's plan benefit entitlement. An example of this would be a former employer who agreed to enhance an employee's benefits by adding five years of service and age for purposes of the participant's retirement benefits, as in *Lynn*, but who had failed to

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338. *Id.* at 976-77.

339. As discussed, *supra*, this is contract analysis rather than fiduciary analysis. Contract analysis focuses on whether the individual could have been expected to understand the released rights. By contrast, fiduciary analysis focuses on whether an individual fully understood the released rights

340. For example, if the plaintiff receives \$30,000 under a settlement agreement that generated no pension benefits because it was not explicitly characterized as back pay; but if characterized as back pay would have generated \$400,000 in pension benefits, it would appear that the plaintiff did not fully understand the release, which would be voided under this analysis. The Proposed Fiduciary Release Rules would give the same result. The plan could then decide how to characterize the payment. *But see Anderson v. W. Conference of Teamsters Pension Trust Fund*, No. CIV. S-92-1482 WBS, 1993 U.S. Dist. LEXIS 12437, at \*1 (E.D. Cal. June 23, 1993); *Wilson v. Nabisco*, 82 Fed. Appx. 282 (3d Cir. 2003).



so amend the plan. Consequently, the plaintiff could not look to the plan for the promised benefits, but could look to the employer for those benefits.<sup>341</sup>

*Lumpkin* is not an example of this fact pattern because the participants had an undisputed entitlement to pension plan benefits.<sup>342</sup> The issue was whether the corporate grandparent had been relieved of its obligation to fund the pension plan's obligations.<sup>343</sup> If so, the plan lacked the assets to pay those undisputed benefits.

After *Lynn*, The Seventh Circuit district courts have consistently voided releases of entitlement claims for accrued pension benefits.<sup>344</sup> Voiding a release does not mean that the plaintiff is entitled to the claimed benefit.<sup>345</sup> In *Malloy v. Ameritech Pension Plan*, a court found that a release of "all claims arising out of their employment," including "ERISA claims" executed by employees in exchange for severance plan benefits, did not prevent the employees from claiming that the lump sum forms of their pension benefits were not computed using the correct actuarial factors.<sup>346</sup> In *Berger v. Nazametz*,<sup>347</sup> a court found that a form release of "any and all claims or causes of action of any kind, known or unknown, arising out of his employment" executed by employees in exchange for additional benefits under a reduction in force program did not preclude a claim that the employees' lump sum benefits from the pension plan were not computed in accord with the ERISA requirements.<sup>348</sup> No review of the individual

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341. The plaintiff may, however, seek reformation of the plan to include such additional benefits. See ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). The plaintiff may prefer to receive payment from the plan because he could avoid tax on such payments by rolling over the payment to another qualified plan or IRA. See I.R.C. § 402(f)(2)(A).

342. *Lumpkin*, 933 F.2d at 452.

343. *Id.* at 452-53.

344. *But see* *Matthews v. Sears Pension Plan*, No. 95 C 1988, 1996 U.S. Dist. LEXIS 5357, at \*1 (N.D. Ill. Apr. 23, 1996) (decided before *Lynn*). In that case, a plaintiff was found to lack the typicality required for a class action claim because of what appeared to be a general release executed by the plaintiff. *Id.* at \*12. Although the claim pertained to the entitlement of an individual's accrued pension benefits rather than the pension implications of a settlement payment, namely that the plan used an impermissible interest rate to compute the lump sum value of the individual's pension benefits, the court cited *Fair* for the proposition that such a release may have been effective. *Id.* at \*13.

345. See *e.g.*, *Lynn*, 1997 U.S. Dist. LEXIS 7342, at \*1 (approving the rejection by the pension plan of the plaintiff's claim for service credits for his time in the military on remand).

346. No. 98-488-GPM, 2000 U.S. Dist. LEXIS 20490, at \*1 (S.D. Ill. Feb. 7, 2000).

347. No. 00-CV-0584-DRH, 2001 U.S. Dist. LEXIS 11638, at \*1 (S.D. Ill. July 5, 2001).

348. The court, however, did not focus on the inability to release a pension plan entitlement but focused on the fact that, as in *Lynn*, the release was part

circumstances was needed to make this determination. Thus, class certification could be granted. The Seventh Circuit affirmed the subsequent judgment of the district court that the class of plaintiffs was owed in excess of \$300 million by the plan, which was a cash balance plan.<sup>349</sup>

*B. The Second Circuit Issues Mixed Decisions on the Effectiveness of Releases of Claims of Entitlement to Accrued Pension Benefits*

In its first decision, *Finz v. Schlesinger*, the court upheld a release by a retired judge of his claim that he was entitled to benefits under a pension plan operated by a law firm of which he was a name partner.<sup>350</sup> The release was part of a separation agreement between the plaintiff and his former law firm in which partnership assets and liabilities were allocated between the plaintiff, Finz, and the remaining partners.<sup>351</sup> The court based its conclusion that pension benefits could be effectively released<sup>352</sup> on *Leavitt*,<sup>353</sup> which as discussed, pertained to the eligibility for severance benefits rather than to pension benefits, and *Laniok v. Advisory Committee of Brainerd Manufacturing Co. Pension Plan*,<sup>354</sup> which did not consider the release of accrued pension benefits. The *Finz* court did not consider the ERISA prohibition on the assignment of pension benefits.

The Second Circuit ruled in *Laniok* that a release of the right to participate in a pension plan could be permissible because ERISA did not require universal participation in pension plans.<sup>355</sup> The court, however, held that the release at issue had not been

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of a form settlement in which the employee's lawyer played no role in drafting or negotiating. The *Lynn* court noted that the plaintiff had not been advised by counsel and had far less knowledge than the plaintiff-executives in *Fair* and *Liccardi* when the respective releases were executed.

349. See generally Barry Kozak, *The Cash Balance Plan, an Integral Component of the Defined Benefit Plan Renaissance*, 37 J. MARSHALL L. REV. 753 (2004); Edward A. Zelinsky, *The Cash Balance Controversy Revisited: Age Discrimination and Fidelity to Statutory Text*, 20 VA. TAX REV. 557 (2001).

350. 957 F.2d at 84.

351. *Id.* at 80. The plaintiff claimed the release was invalid because he had not been given any plan documents and did not know the plan terms when he signed the release. *Id.* at 81. The court did not discuss ERISA's fiduciary principles or the prohibition on assignments of pension benefits. *Id.* It held the release effective relying on (a) the general principle that a party settling a fraud claim may not subsequently assert that the settlement was invalid because he did not understand the fraud; (b) the sophistication of the plaintiff; (c) the plaintiff's access to legal counsel; (d) the plaintiff's failure to show he was eligible for pension plan benefits and thus entitled to any plan information; and (e) the substantial consideration of \$75,000 he received under his separation agreement. *Id.* at 82.

352. *Id.* at 81-82.

353. 921 F.2d at 162.

354. 935 F.2d 1360 (2d Cir. 1991).

355. *Id.* at 1364.

shown to be effective.<sup>356</sup> The court also stated therein that “[o]ur decision should by no means be interpreted as approving the individual waiver of [unspecified] pension plan standards that ERISA does mandate.”<sup>357</sup>

The Second Circuit identified one of the pension standards which could not be waived when, without mentioning *Laniok*, it declared in the course of reviewing a cash balance plan<sup>358</sup> that “[a] participant may not elect a forfeiture [of vested pension benefits].”<sup>359</sup> The court rejected the plan’s claim that it was entitled to pay a participant a lump sum smaller than the actuarial equivalent of the participant’s normal retirement benefit of a lifetime annuity beginning at their normal retirement age<sup>360</sup> because the participant had consented to such reduction.<sup>361</sup> Thus, releases of vested pension benefits are always void.

The *Esdén* court also discussed the limits on the ability of employers and employees to contract with respect to ERISA plan benefits:

*ERISA was enacted to restrict employers’ and employees’ freedom of contract when bargaining over pensions. Employers do not have to provide pension plans, but when they do, those plans must comply with Title I of ERISA [entitled “Protection of Employee Rights”] . . . . The Plan is correct that a pension benefit is defined according to the terms of the plan; but ERISA is quite explicit that those terms are circumscribed by statutory requirements and restrictions. The Plan cannot contract around the statute.*<sup>362</sup>

356. *Id.*

357. *Id.* at 1366.

358. *Id.*

359. *Esdén*, 229 F.3d at 173. Compare *Holt v. Winpisinger*, in which the D.C. Circuit held that rights arising under ERISA may not be released, such as the requirement that all service with an employer be considered to determine the portion of a participant’s pension benefit which was vested and thus not forfeitable. 811 F.2d at 1542. By contrast, those derived from a specific plan’s terms could be released prior to the accrual of benefits. *Id.* at 1536. Thus, an officer manager was entitled to service credits for her first ten years of employment even though she was called and compensated as an independent contractor in the first year. *Id.* at 1519-42. ERISA would have permitted the plan to provide her with no pension if she had not been entitled to ten years of service. *Id.* at 1537 n.35.

360. *Esdén*, 229 F.3d at 157. See ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3) (prohibiting a pension plan from paying a lump sum with a value smaller than the participant’s normal retirement benefit, i.e., the life annuity benefit beginning at the participant’s normal retirement age).

361. See *Esdén*, 229 F.3d at 163-64 (holding that a participant’s lump sum benefit under a cash balance plan must be the actuarial equivalent of the participant’s normal retirement benefit of a lifetime annuity beginning at the participant’s normal retirement age). The court concurred with a similar holding of the Seventh Circuit in *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003).

362. *Esdén*, 229 F.3d at 172-73 (emphasis added).

None of the post-*Esdén* district courts in the Second Circuit,<sup>363</sup> however, automatically rejected releases of claims for accrued pension plan benefits or even mentioned *Esdén*.<sup>364</sup>

In *Spann v. AOL Time Warner*, the court denied class certification for a claim that the plan had made a systematic error in annualizing the computation of compensation for partial years of service, which amount was used to compute pension benefits, because the court held that the precise circumstances of two pension plan waivers needed to be considered individually to determine their validity.<sup>365</sup> Some class members had signed none of the waivers, some only one waiver, and some both waivers.<sup>366</sup>

Participants agreed in the first waiver not to make any claims against the pension plan or its fiduciaries in exchange for being able to receive a lump sum payment.<sup>367</sup> There was no discussion of why such a waiver did not violate the non-forfeiture regulations,<sup>368</sup> which do not permit "a plan to offer an employee the voluntary choice of a partial forfeiture in exchange for a particular form of payment."<sup>369</sup>

The second waiver released the employer, its officers, and representatives from all claims arising from the participant's employment in exchange for a severance payment.<sup>370</sup> As with *Laniok*,<sup>371</sup> which this case cites, there is no discussion of why, even if this release applied to the pension plan, an entity distinct from the employer, its officers, and representatives, the release did not violate the prohibition on the assignment of pension benefits.<sup>372</sup> There was a similar denial of class certification when questions were raised about the benefits provided by a cash balance plan to a large number of terminated workers.<sup>373</sup>

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363. The Second Circuit in a later unpublished decision, *Yablon*, 98 Fed. Appx. at 55, upheld a release of pension benefits. Neither the district nor the appellate court mentioned the prohibition on pension forfeitures or the prohibition on the assignment of pension benefits, although references were made to *Finz*, 957 F.2d at 78 and *Laniok*, 935 F.2d at 1360.

364. However, an earlier case, *Coviello v. Retirement Plan for National Cleaning Contractors*, No. 92 Civ. 7139, 1993 U.S. Dist. LEXIS 6483 (S.D.N.Y. May 17, 1993), had also used the prohibition on forfeitures to hold that a release of claims to an entitlement to pension benefits could not diminish and individual's vested benefits. *Id.* at \*1.

365. 219 F.R.D. at 317-18.

366. *Id.* at 314.

367. *Id.* at 312.

368. *Id.* at 307. See also Treas. Reg. § 1.411(a)-4.

369. *Esdén*, 229 F.3d at 173.

370. *Spann*, 219 F.R.D. at 312.

371. 935 F.2d at 1360.

372. *Spann*, 219 F.R.D. at 307. See also *Laniok*, 935 F.2d at 1360.

373. *Walker v. Asea Brown Boveri, Inc., Cash Balance Pension Plan*, No. 3:02-CV-550, 2003 U.S. Dist. LEXIS 3454, at \*1 (D. Conn. Feb. 25, 2003). In that case, the court found that the precise circumstances of the execution of form waivers, which were part of severance agreements given to more than

As a result of the two courts' improper denial of class certification, the participants may have been wrongfully deprived of promised pension benefits because the small individual losses will not justify individual actions requiring substantial attorney fees that might not be reimbursed even if the participant prevails.<sup>374</sup>

*C. The Fifth Circuit Holds that Offsets Against Accrued Pension Entitlements in Settlements of Bona Fide Disputes with Pension Plans Do Not Violate the Anti-Assignment Prohibition*

The Fifth Circuit in *Rhoades v. Casey*,<sup>375</sup> held that even after *Boggs v. Boggs*,<sup>376</sup> releases of claims for accrued pension benefits as part of settlements of bona fide disputes with pension plans pertaining to allegations of a fiduciary-participant's misbehavior do not violate the anti-assignment prohibition.<sup>377</sup> In *Rhoades*, the individual was credited with his entire benefit entitlement, but the sum was applied to satisfy an obligation of the participant to the plan.<sup>378</sup> In particular, the court decided that a former CEO of a bank, and sole trustee of its retirement plan, could be required to release his rights to his retirement plan pursuant to a settlement he concluded with the banking authorities with respect to his alleged misbehavior as both a bank officer and plan trustee.<sup>379</sup>

The court asserted that three circuits permitted knowing and voluntary releases of claims for pension benefits as parts of settlements.<sup>380</sup> However, all the cases are distinguishable from *Rhoades*. The first was *Finz v. Schlesinger*,<sup>381</sup> which did not consider the applicability of the prohibition against the assignment or alienation of pension benefits and did not involve a dispute about the individual's obligation to the plan. The second was *Lumpkin*,<sup>382</sup> which did not involve any dispute about a participant's benefit entitlement, but rather a dispute about the

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8,000 former employees, needed to be considered individually to determine their validity. *Id.* The waivers at issue released the employer, its officers and representatives, and [unnamed] employee benefit plans from all claims arising out of the participant's employment. *Id.*

374. ERISA section 502(g)(1), 29 U.S.C. § 1132(g)(1), gives courts the discretion to allow a reasonable attorneys' fee and costs for either party. This means the courts may decide to give the counsel fees which the counsel considers far from adequate. *Id.*

375. 196 F.3d 592 (5th Cir. 1999).

376. 520 U.S. 833 (1997) (the offset was not included in the statutory exceptions from the anti-assignment prohibition).

377. *Rhoades*, 196 F.3d at 598-99.

378. *Id.* at 600-01.

379. *Id.* at 594-95.

380. *Id.* at 598-99.

381. 957 F.2d 78 (2d Cir. 1992).

382. 933 F.2d 449 (7th Cir. 1991).

funding obligation of a party related to the plan sponsor. The pension plan could have paid its benefit obligations if it could have obtained sufficient funds from the related party.<sup>383</sup> The *Rhoades* court did not mention *Lynn*,<sup>384</sup> which explained the significance of *Lumpkin* and held that releases of claims to the entitlement of accrued pension benefits are void, such as the one in question in *Rhoades*.<sup>385</sup> The third was *Stobnicki v. Textron*,<sup>386</sup> which also did not involve an offsetting individual obligation to the plan. In *Stobnicki*, the court upheld a settlement of a dispute between two good faith claimants of pension benefits, the beneficiary named under the plan, and a common-law wife because as the Court stated in *Rhoades*:

We held that courts "will not ascribe to Congress the intent of making unreasonable law—one requiring terminal[sic] litigation rather than settlements as does the general law," and therefore the apparent statutory bar against alienation of pension benefits should yield to reason and allow benefits to be voluntarily waived for settlement purposes.<sup>387</sup>

The *Stobnicki* argument, which was mentioned in *Leavitt*,<sup>388</sup> has three flaws in addition to being mooted by *Boggs*.<sup>389</sup>

First, a ban on releases of accrued pension benefits will not result in "terminal" or interminable litigation to resolve all pension disputes. Settlements are not banned, but are binding only if judicially approved. Courts may be expected to approve stipulated settlements that are result from the fair dealing required by the ERISA fiduciary provisions, just as they approve similar settlements of bona fide disputes about FLSA claims.<sup>390</sup> The ban on non-judicially approved releases is not likely to lead to any flood of inappropriate litigation. Most bona fide disputes will continue to conclude neither with litigation nor any formal

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383. *Id.*

384. 84 F.3d 970 (7th Cir. 1996).

385. *Rhoades*, 196 F.3d at 600.

386. 868 F.2d 1460 (5th Cir. 1989).

387. *Rhoades*, 196 F.3d at 599 (internal citations omitted).

388. 921 F.2d at 162.

389. In overruling a Fifth Circuit decision, *Boggs* held that ERISA preempted community property rules on the disposition of a deceased participant's pension benefits. 520 U.S. at 852-53. Thus, the common law wife would clearly not have been entitled to any of the participant's benefits and there would have been no dispute that needed to be settled.

390. *D.A. Schulte*, 328 U.S. at 113 n.8. See, e.g., *EEOC v. Local 28 of the Sheet Metal Workers Int'l*, 2002 U.S. Dist. LEXIS 24448 (S.D.N.Y.) in which court required discrimination settlement explicitly address plaintiff's accrued pension rights. The U.S. Department of Labor was, however, in 1949, also authorized to approve FLSA settlements. 29 U.S.C. § 216(c). A similar ban on releases is contained in regulations of the Family and Medical Leave Act of 1993 (the "FMLA"). See Preamble to the Final Regulations Implementing the Family and Medical Leave Act of 1993, 60 FR 2180,2218 (Jan. 16, 1995).

settlement, but rather by the decision of a participant or beneficiary not to even challenge the benefit denial. Litigation costs are so significant that few fair settlements will be challenged.<sup>391</sup>

Second, respected commentators disagree with the concept that settlements, even judicially approved ones, are the preferred way of resolving legal disputes.<sup>392</sup> Moreover one of the major Congressional purposes for ERISA was to provide ready access to the courts,<sup>393</sup> rather than to deprive them of such access. Thus, "[t]he civil enforcement scheme of § 502(a) [which provides court access to those who claim ERISA violations] is one of the essential tools for accomplishing the stated purposes of ERISA."<sup>394</sup>

Third, and most important, the anti-assignment statute<sup>395</sup> prohibits the Fifth Circuit from compelling the plaintiff to transfer to the plan the benefits to which he is entitled under the terms of the plan. The Supreme Court has made it quite clear that there are no implicit or equitable exceptions to the statutory prohibition.<sup>396</sup> The phrase "may not be alienated or assigned" has an unambiguous meaning under the statute, the regulations thereunder, and the Supreme Court cases interpreting those sections. All agree that benefit releases by a participant to the pension plan by which the participant relinquishes his or her interest in plan benefits to the plan, are assignments of the participant's interest. This determination is not affected by whether the participant voluntarily agrees to such relinquishment or is forced to make the relinquishment by a local domestic relations statute. In particular, the plaintiff in *Rhoades* agreed to give up his claim to benefits under the terms of the pension plan.<sup>397</sup>

391. Moreover, courts will retain the power to assess attorneys' fees against any plaintiff who behaves improperly. ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1).

392. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). It is not clear that plaintiffs, defendants or society as whole is better served with settlements rather than the determinations of the parties' respective rights.

393. ERISA § 2(b).

394. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). The Supreme Court went on to describe the "detailed provisions of § 502(a) as set[ting] forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Id.* at 54.

395. ERISA § 206(d), 29 U.S.C. § 1056(d).

396. This is why the same Fifth Circuit refused to permit pension plans to set off damages caused by a misbehaving fiduciary participant against the participant's plan benefits. See *Herberger v. Shanbaum*, 897 F.2d 801, 804 (5th Cir. 1990). In *Rhoades*, the issue is not an involuntary offset but the validity of a voluntary agreement to execute documents to achieve such offset, which violates the same anti-assignment prohibition. 196 F.3d at 594-95.

397. 196 F.3d at 599.

Thus, he agreed to alienate or assign his interest. None of the exceptions applies,<sup>398</sup> so the prohibition on the alienation or assignment of pension interests would prevent the release from being effective even if the plaintiff had executed the release as required under the settlement agreement.

#### X. THE NON-FIDUCIARY ANALYSIS COURTS HAVE APPLIED TO RELEASES OF CLAIMS FOR ENTITLEMENT TO ERISA BENEFITS

ERISA does not prohibit knowing and voluntary relinquishment of employee benefits. *Dist. 29, United Mine Workers v. New River Co.*, 842 F.2d 734, 737 (4th Cir. 1988). Further, the 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. See, e.g., *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir.), cert. denied, 113 S. Ct. 72 (1992). Issues of relinquishment of rights and waiver are governed by federal common law developed in ERISA cases rather than by particular state law although state law may inform the development of the federal common law. *Matter of Heci Exploration Co., Inc.*, 862 F.2d 513, 523 (5th Cir. 1988). To be valid, a waiver of ERISA benefits must be an intentional relinquishment or abandonment of a known right or privilege.<sup>399</sup>

Although we believe that ERISA permits individuals, including older individuals like Laniok, to waive their opportunity to participate in pension plans even if the employer could not exclude them, such individuals are relinquishing a right that ERISA indicates a strong congressional purpose of preserving. In order to ensure that an individual decision characterized as a waiver is not, in fact, an impermissible exclusion, it is appropriate that an individual's waiver of his right to participate in a pension plan be carefully examined to ensure that it is knowingly and voluntarily made.

In the analogous ADEA [Age Discrimination Employment Act] waiver situation, we have similarly required that a waiver be strictly scrutinized. *Bormann v. AT&T Communications, Inc.*, 875 F.2d at 403. In *Bormann*, we adopted the "totality of the circumstances" standard applied by the Third Circuit, *id.* (citing *Coventry v. United States Steel Corp.*, 856 F.2d at 524), and Congress has explicitly indicated approval of this approach to determining whether ADEA waivers are knowing and voluntary.<sup>400</sup>

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398. There was no loan being repaid, so ERISA section 206(d)(2), 29 U.S.C. § 1056(d)(2), is inapplicable. The exception in ERISA section 206(d)(4), 29 U.S.C. § 1056(d)(4), is not applicable because it was not enacted until 1996, whereas the agreement in question, requiring the plaintiff to execute the release, was executed in 1993. *Rhoades*, 196 F.3d at 594.

399. *Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 587 (1st Cir. 1993).

400. *Laniok*, 935 F.2d at 1367.



The Fourth Circuit, several Third Circuit district courts, and a Ninth Circuit district court have applied general contract principles to determine the effectiveness of releases. The First and Second Circuits have added the totality-of-circumstances overlay that is applicable to Title VII waivers. The presence of any consideration exchanged for the release is a factor favoring the effectiveness of the release in the Second Circuit and certain district court decisions in the Second, Third, Fourth, Sixth and Ninth Circuits. The First and Fifth Circuits, by contrast, focuses on the "nature" and adequacy of the consideration. Finally, some courts have merely asked whether a release of a claim to entitlement to ERISA benefits under the terms of a plan is voidable on the basis of duress or lack of mental capacity and found that such releases may be subsequently ratified. By contrast, the Proposed Fiduciary Release Rules require the Releasing Fiduciary to show the release was obtained by fair dealing, i.e., the individual received fair consideration and fully understood the release.<sup>401</sup>

*A. The Third and Fourth Circuits' Contract Analysis of Releases of Claims of Entitlement to ERISA Benefits*

In *District 29, United Mine Workers of America v. New River Co.*, the Fourth Circuit held that an individual settling a wrongful termination grievance against a company (the "Initial Employer") may have thereby unknowingly given up his entitlement to lifetime medical benefits.<sup>402</sup> This holding illustrates why the Proposed Fiduciary Release Rules are required by ERISA to apply fiduciary principles rather than contract principles to assure that participants receive their earned employee benefits.

The plaintiff was receiving lifetime medical benefits from the United Mine Workers of America 1974 Benefit Plan (the "UMW Plan"), which had become secondarily liable for such lifetime benefits when the company from which the plaintiff retired (the "Final Employer") went out of business.<sup>403</sup> The plaintiff had joined the Final Employer after leaving the Initial Employer.<sup>404</sup> The UMW Plan increased the plaintiff's pension benefits to reflect the wage payments under the agreement containing the release,<sup>405</sup> but also informed him that he would no longer be entitled to lifetime

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401. The Courts in each of these Circuits almost never considered whether the Releasing Fiduciary has any fiduciary obligations to the individual from whom it sought the release of a claim to an entitlement to ERISA plan benefits.

402. 842 F.2d 734, 736 (4th Cir 1988).

403. *Id.* at 735-36.

404. *Id.*

405. This was based on the arbitrator's award of back pay, which was part of the settlement. *Id.* at 735.

medical benefits from the UMW Plan because the solvent Initial Employer would be treated as his final employer as a result of the settlement and would therefore be liable for the lifetime medical benefits.<sup>406</sup>

The court found that the Initial Employer was not liable for the plaintiff's lifetime medical benefits because he had released this company from all claims resulting from his employment in the wrongful termination settlement agreement.<sup>407</sup> The court stated that the plaintiff may not have known, when he executed the release, that he would deprive himself of the lifetime medical benefits that the Initial Employer would otherwise be obligated to provide.<sup>408</sup> The court, however, pointed to a settlement provision in which the plaintiff expressly assumed the risk that his loss "might be greater than then known or anticipated."<sup>409</sup> Moreover, the court noted that the plaintiff had been advised by UMW counsel during the settlement negotiations.<sup>410</sup>

The Former Employer was thus acting as the Releasing Fiduciary for both the employer's plan and the UMW Plan when it requested the release, since the plaintiff purportedly released his rights to benefits under both those plans.<sup>411</sup> The Proposed Fiduciary Release Rules would prevent any deprivation of these earned employee benefits by voiding the release.

There was no showing that the plaintiff knew that, by signing the release, he may have been waiving his right to lifetime health benefits from both the UMW Plan, which was then providing those benefits, and his Initial Employer's plan, which would arguably become liable for post-release benefits.<sup>412</sup> The fact that UMW counsel advised the plaintiff did not show that the plaintiff knew this deprivation could result from the settlement when he executed the release.<sup>413</sup> In fact, the Court explicitly conceded that the plaintiff may not have known when he executed the release that he would thereby deprive himself of the lifetime medical benefits that the Former Employer would otherwise have been obligated to provide him.<sup>414</sup> The plaintiff thus, had not been shown to have the requisite understanding when he executed the release.

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406. *Id.*

407. *Id.* at 736.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at 735-36. The plaintiff's civil action against the UMW Plan for the medical benefits would continue under the court's decision. *Id.* at 736. If the Plan ultimately prevailed it would have obtained an unexpected windfall.

412. *Id.*

413. *Id.*

414. The Court relied on a settlement provision in which the participant expressly assumed the risk that his loss "might be greater than then known or anticipated."

The plaintiff was not shown to have received fair and reasonable consideration. The court referred to the substantial consideration paid to the plaintiff under the agreement.<sup>415</sup> The court, however, did not consider whether the consideration was adequate in view of both the purportedly foregone lifetime medical benefits and the wages and other current compensation he had been deprived of by the wrongful termination.<sup>416</sup>

Similar questions arose when two district courts applied contractual principles to determine the effectiveness of releases pertaining to claims to the entitlement of pension benefits based on the payments under agreements settling Title VII actions for wrongful terminations.<sup>417</sup> Both concerned the same issue, whether the individuals were entitled to service credits<sup>418</sup> for the period of the time for which they received settlement payments. None of the agreements explicitly described the payment as being in whole or in part as back pay or the precise number of hours for which payments were made.<sup>419</sup> In each case, there was no showing that the individuals fully understood that the lack of such characterization would prevent them from receiving the substantial pension benefits that ERISA would have required to be associated with the compensation they were purportedly denied.<sup>420</sup> In one class action settlement, the lack of understanding and the lack of fair and reasonable consideration seemed apparent from the difference between the \$3 million settlement payment and the \$40 million in pension benefits associated with those same payments.<sup>421</sup>

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415. *Id.*

416. *Id.*

417. See *Anderson v. W. Conference of Teamsters Pension Trust Fund*, 1993 U.S. Dist. LEXIS 12437 (E.D. Cal. June 23, 1993), at \*14-15; *Wilson v. Nabisco*, No. 01-CV-415, 2002 U.S. Dist. LEXIS 12265, at \*2 (E.D. Pa. Apr. 2, 2002).

418. Service credits determine rates of benefit accruals and the extent to which benefits are non-forfeitable.

419. The focus would probably have been on the significance of 29 C.F.R. § 2530.200b-2(a)(3), which defines an "hour of service" in relevant part to include: "each hour for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by the employer."

420. This characterization issue arose without a release of ERISA claims in *Patrick v. Westinghouse*, 1990 U.S. Dist. LEXIS 16667 (E.D. Pa. Dec. 6, 1990) and *Francis v. Rodman Local Union 201 Pension Fund*, 367 F.3d 937 (D.C. Cir. 2004). In both cases lump sum settlements of discrimination litigation did not result in additional pension accruals. However, in *Patrick* the plan appears to have been drafted in a manner that would have prevented any pension credit accruals for the period in which back pay was granted, although the plaintiff asserted he had been led to believe the contrary. Thus, it is appropriate to apply the Proposed Fiduciary Release Rules to a party relying on an agreement which implicitly affect employee benefit entitlements even if ERISA claims are not explicitly released.

421. *Anderson*, 1993 U.S. Dist. LEXIS 12437, at \*9, \*20.

These releases violated each of the Proposed Fiduciary Release Rules, and thus ERISA would void them. The plaintiffs lacked understanding of the released claims to pension benefits and the released parties. The plaintiffs failed to receive fair consideration for those rights. Finally, the agreements failed to release the pension plans or the fiduciaries. The pension plan fiduciaries would then have the right and obligation as ERISA fiduciaries to determine the extent to which the plaintiffs were entitled to service credits in concert with the payments made on the pension plan. This was in fact the result reached by the parties at oral argument in *Wilson v. Nabisco*.<sup>422</sup>

*B. The Second and Sixth Circuits' Totality-of-Circumstances Analysis of Whether an Individual Made a Knowing and Voluntary Waiver of the Individual's Entitlement to ERISA Benefits*

In *Laniok*, the Second Circuit denied summary judgment to a pension plan that claimed an individual released his right to participate in the plan (i.e., a pre-accrual release) even though the plan conceded that he did not know the terms of the plan when he began his employment and executed the release.<sup>423</sup> Under the Proposed Fiduciary Release Rules, the participant's lack of knowledge of the pension plan terms would have voided the release, regardless of the plaintiff's education, his role in negotiating the release, the clarity of the release, or his legal representation. Moreover, the unreasonableness of the consideration appeared to be almost obvious in *Laniok* because of the tremendous disparity between the plaintiff's substantial accrued benefits and his insubstantial wage compensation.<sup>424</sup>

The court stated that, "[t]he 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>425</sup> The court set forth the following factors that may be

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422. 82 Fed. Appx. 282 (3d Cir. 2003) (unpublished opinion). It may be argued that the plan would not agree to such reconsideration unless there is a good chance that the pension plan will reach a different result than their initial denial of the service credits. On the other hand plans often move to dismiss claims on the basis the plaintiff has not exhausted internal reviews and after such dismissals deny those same claims.

423. 935 F.2d at 1363-69.

424. *Id.* at 1362-64. The plaintiff went to work at Brainerd Company as a machinist beginning at an hourly wage of \$8.00/hour after retiring, i.e., approximately \$1,250/month or \$15,000/year. *Id.* He had retired from a similar job paying \$8.20/hour. *Id.* The release appeared to have no provision relating his wages to the waived pension plan benefits. *Id.* He left Brainerd after ten years when, if the release were not effective, he would have been entitled to \$750/month annuity or a lump sum of \$70,500. *Id.* Thus, he appears to have received no significant part of this benefit in increased wages.

425. *Id.* at 1368.

used to analyze the circumstances, which it had used to analyze the effectiveness of ADEA waivers in *Bormann v. AT & T Communications*.<sup>426</sup>

1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so], and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.<sup>427</sup>

The court made an ERISA waiver easier to uphold than an ADEA waiver by adding to the fifth ADEA factor "whether an employer encourages or discourages an employee to consult an attorney, and whether the employee had a fair opportunity to do so."<sup>428</sup> This makes it less likely that the employee will fully understand an ERISA benefits release than an ADEA release. Thus, the court thereby violated standard fiduciary principles that impose greater fair dealing requirements on fiduciaries than non-fiduciaries.<sup>429</sup>

The participant is presumed to have acquired the knowledge he would have obtained if advised by an attorney with presumed ERISA expertise. As discussed in *District 29, United Mine Workers*, even an attorney who could be expected to understand the plan terms may not provide a participant with such understanding.<sup>430</sup> This presumption disregards the fiduciary's common law obligation to assure that its beneficiary, who is asked to consent to a trust transaction, fully understands his legal rights and the material facts of the transactions, in particular, the benefit claims that he is being asked to release.<sup>431</sup>

Basing the standards for the effectiveness of releases of claims for benefits from an ERISA plan on those applicable to Title VII and ADEA claims has two major flaws. First, no fiduciary standards govern those who seek releases of such claims.

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426. 875 F.2d 399 (2d Cir. 1989).

427. *Id.* at 403 (original added bracketed material).

428. *Id.*

429. Fiduciaries, unlike non-fiduciaries, are generally required to deal fairly with their beneficiaries, i.e., assure that they fully understand any transactions the fiduciary encourages them to enter and the beneficiary receive fair consideration. RESTATEMENT (SECOND) OF TRUSTS § 216 (1959) (Consent of Beneficiary); *id.* § 217 (Discharge of Liability by Release or Contract).

430. 842 F.2d at 736-37.

431. See RESTATEMENT (SECOND) OF TRUSTS § 216(2) (Consent of Beneficiary); *id.* § 217 (Discharge of Liability by Release or Contract).

Employers generally have no fiduciary responsibilities to their employees.<sup>432</sup> Fiduciary principles thus have no applicability in determining the effectiveness of a release of Title VII or ADEA claims. By contrast, seeking releases of entitlements to claims to ERISA benefits is a fiduciary act and thus governed by ERISA's fiduciary provisions.

Second, damages for the failure to pay an individual his or her ERISA plan benefits are easy to determine; they are the value of the unpaid benefits. By contrast, there is often no accepted set of damages for Title VII or ADEA violations.<sup>433</sup> Thus, it is much harder to assess the adequacy of the consideration received in a Title VII or ADEA case than for an ERISA benefit claim.<sup>434</sup>

In *DePace v. Matsushita Electric Corp. of America*, a district court in the Second Circuit emphasized that the ultimate test of the effectiveness of a waiver was not the *Laniok* factors, but whether a release was "in fact knowing and voluntary."<sup>435</sup> The court declined to dismiss a claim that an employer had fraudulently induced executives to accept severance benefits and resign by providing them with excessive pension benefit estimates.<sup>436</sup> The relief sought was not the pension benefits to which the executives were not entitled, but rather equitable relief under ERISA section 502(a)(3), such as reformation of the pension plan, reinstatement, or the pay they would have received if they had not resigned.<sup>437</sup> The court found that the fraudulent inducement rendered the releases of all ERISA claims against the employer ineffective, even though the *Laniok* factors, including clarity and the presence of additional consideration, seem to have each been satisfied.<sup>438</sup> The releases would also not have been

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432. See e.g., *Stewart v. Jackson & Nash*, 976 F.2d 86, 90 (2d Cir. 1992).

433. See 29 U.S.C. § 626(f)(1)(D). Effective ADEA waivers require the presence of some consideration rather than adequate consideration.

434. Similarly, 29 C.F.R. § 825.220(d) (1997) provides that employees may not release their rights under the FMLA—this is a much more limited prohibition than that of ERISA §410, 29 U.S.C. § 1110. Thus, one circuit has concluded that Title VII release principles are inapplicable to either pre-accrual or post-accrual claims to FMLA rights. See *Taylor v. Progress Energy, Inc.*, 2005 U.S. App. LEXIS 14650 (4th Cir. July 20, 2005). But cf. *Faris v. Williams, Wp C-I, Inc.*, 332 F.3d 316 (5th Cir. 2003)

435. 257 F. Supp. 2d 543, 556 (E.D.N.Y. 2003).

436. *Id.* at 546-47, 574.

437. *Id.* at 565-66.

438. *Id.* at 557. The same court also subsequently denied a summary judgment motion from the same defendants. See *DePace v. Matsushita Elec. Corp. of America*, No. 02-CV-4312 (ERK)(VVP), 2004 U.S. Dist. LEXIS 13316, at \*42-51 (E.D.N.Y. July 16, 2004). It literally repeated its initial analysis of the release, but added that even if the defendants had shown they had not engaged in fraudulent inducement because the defendants shared the plaintiffs' ignorance of the plaintiffs' pension rights, then the release would have been ineffective because of mutual mistake. *Id.* Again, there was no discussion of the fiduciary duties of the employer requesting a release.

effective under the Proposed Fiduciary Rules because the individuals did not fully understand the relevant facts about their pension plan benefits, which were material facts upon which the release was premised.<sup>439</sup>

In *Krackow v. Dr. Jack Kern Profit Sharing Plan*,<sup>440</sup> a district court in the Second Circuit distinguished two waivers of the right to participate in a profit-sharing plan.<sup>441</sup> The first was executed by a dentist at the outset of his employment, even though he had no idea of the benefits to which he was entitled.<sup>442</sup> The second was executed by the dentist in the midst of employment, when he waived in advance three years of contributions—the amounts were specified and credited against a debt the dentist owed his employer.<sup>443</sup> The court correctly found the first waiver ineffective and the second effective by reviewing the plaintiff's degree of understanding of the released rights.<sup>444</sup>

There were also two relatively straightforward applications by district courts of the Second Circuit's focus on the pragmatic question of whether releases were "knowing and voluntary."<sup>445</sup>

In *Hogan v. Petitpren, Inc.*, a district court in the Sixth Circuit used the Second Circuit's totality-of-circumstances analysis to decide that a release prevented a claim that a payment in settlement of age discrimination litigation was to be included in the participant's compensation in order to compute his pension plan benefits.<sup>446</sup> The issue arose because after the agreement was

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439. *Id.*

440. No. 00 CV 2550, 2002 U.S. Dist. LEXIS 20524 (E.D.N.Y. May 29, 2002).

441. *Id.* at \*7.

442. *Id.* at \*2.

443. *Id.* The plan was not a 401(k) plan, which would have permitted participants to elect at least once a year whether to participate in the pension plan. Consequently the dentist would have lost the ability to treat any future plan contributions as pre-tax contributions. See Treas. Reg. § 1.401(k)-1(a)(5).

444. However, the court's statement that an employer's actions to persuade an employee to waive participation in an employee plan do not constitute fiduciary acts of plan administration is at odds with the customary understanding that it is a fundamental plan administration responsibility to describe to employees the implications of participating or not participating in ERISA plans, such as 401(k) pension plans or medical insurance plans. *Id.* at \*15-16.

445. The explicit omission of a term mandating medical coverage and a request that an individual be paid on form 1099 did not constitute a knowing and voluntary release of an individual's right to participate in an employer's medical benefits plan. See *Baraschi v. SILVERWEAR, Inc.*, No. 01 Civ. 11263 (MBM), 2002 U.S. Dist. LEXIS 24515, at \*16 (S.D.N.Y. Dec. 18, 2002). A release of ERISA benefit rights, which was presented for immediate execution at the office of the employer's counsel to which a fired senior executive was directed to go to execute an agreement to sell back employer stock and collect on notes his employer owed him, was not effective. *Gorman v. Earmark, Inc.*, 968 F. Supp. 58 (D. Conn. 1997).

446. *Hogan v. Petitpren, Inc.*, 92 F. Supp. 2d 612, 615 (E.D. Mich. 2000).

executed, the IRS announced a change in the tax treatment of payments for emotional distress caused by discrimination: they became taxable.<sup>447</sup> If the plaintiff had known this, he could have requested that those payments be described as compensation payments and obtained additional pension benefits.<sup>448</sup> The court, at the plaintiff's request, used the totality-of-circumstances analysis presented by *Adams v. Philip Morris, Inc.*,<sup>449</sup> in which the effectiveness of a release of an ADEA claim was reviewed and the focus was on the facts at the time of the execution of the release,<sup>450</sup> as would be required by the Proposed Fiduciary Release Rules.<sup>451</sup> It appears that in any event the participant was not entitled to the claimed inclusion of the payments under the plan terms.<sup>452</sup>

In *West v. AK Steel Corporation Retirement Accumulation Pension Plan*,<sup>453</sup> a district court in the Sixth Circuit denied summary judgment to a defendant relying on a release. The Court held there had been no showing that the plaintiffs knew about the claims that the cash balance plan violated ERISA.<sup>454</sup> Moreover, the release which referred to all employment-related claims did not explicitly refer to pension benefits, the retirement plan or ERISA. The court found there had not been a showing of a knowing and voluntary relinquishment by applying the totality of circumstances analysis set forth in *Walker v. Asea Brown Boveri, Inc.*<sup>455</sup>

The Second Circuit also remanded for further consideration two other participation waivers and directed the lower courts to apply the same careful scrutiny of the totality-of-circumstances test that it had found applicable to pension plan waivers to non-pension plans. First, in *Sharkey v. Ultramar Energy*,<sup>456</sup> it denied summary judgment in favor of an employer who had claimed that a release executed by a rehired employee on his first resignation in

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447. *Id.* at 613.

448. *See id.*

449. 67 F.3d 580 (6th Cir. 1995).

450. *Id.* at 583 (citing *Bormann*, 875 F.2d at 403).

451. *See supra* note 43.

452. This is similar to the results in *Fair*, 905 F.2d at 1114, and *Licciardi*, 990 F.2d at 979.

453. No. 1:02-CV-0001, 2005 WL 1745491 (S.D. Ohio July 25, 2005).

454. Such claims could have not been apparent by looking at the face of the plan or its summary plan description.

455. 214 F.R.D. 58, 65 (D. Conn. Feb. 25, 2003). This case cited the *Laniok* analysis. By contrast, the Fifth Circuit, in *Miller v. GM Corp.*, No. 87-1493, 1988 U.S. App. LEXIS 5601 (6th Cir. 1988), appeared to apply contract analysis when it found that the plaintiffs "fairly and knowingly" released their GM severance plan rights when they agreed to become employees of EDS. The contract appeared to be clear and unambiguous. *Id.*

456. *See generally* *Sharkey v. Ultramar*, 70 F.3d 226 (2d Cir. 1995). However, in an unpublished decision, the Second Circuit upheld releases of unknown claims for accrued pension benefits without careful scrutiny. *See Yablon*, 93 Fed. Appx. at 55.



exchange for severance benefits precluded the employee from obtaining a second set of severance benefits based on his prior employment.<sup>457</sup> The second severance plan was not in existence when he first resigned and executed a release of all claims arising from his employment.<sup>458</sup> The court emphasized that the “release does not clearly and unambiguously waive benefits under plans adopted after he was rehired by the company,”<sup>459</sup> and directed the lower court to review the totality-of-circumstances of the execution of the waiver.<sup>460</sup> In *Yak v. Bank Brussels Lambert*, the court also reversed the dismissal of a claim for employee benefits by an individual who at the onset of employment had signed an agreement stating that she was an independent contractor and was therefore not entitled to any employee benefits.<sup>461</sup> The lower court was directed to review the plaintiff’s actual employment status and the totality-of-circumstances of the execution of the waiver.<sup>462</sup> Neither result would change under the Proposed Fiduciary Release Rules, although different review standards would have been applied to determine whether to void the releases on remand.

*C. The First Circuit’s Totality-of-Circumstances Analysis of Whether an Individual Made a Knowing and Voluntary Relinquishment of the Individual’s Entitlement to ERISA Benefits*

In *Rodriguez-Abreu v. Chase Manhattan Bank*, the First Circuit concluded that an individual who had selected severance plan benefits rather than long-term disability (“LTD”) benefits had made a knowing and voluntary relinquishment of the disability benefits.<sup>463</sup> A question about the significance of certain ambiguous

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457. 70 F.3d at 229-30.

458. *Id.* at 229. The court supported its holding that there was no reason to give severance benefits less scrutiny than pension benefits with a reference to *Brown v. Van Nostrand Reinhold Co.*, No. 89 Civ. 7309, 1991 U.S. Dist. LEXIS 13299 (S.D.N.Y. Sept. 24, 1991). This illustrates the tendency to conflate releases of Title VII claims and ERISA claims. The issue in *Brown* was not the effectiveness of an ERISA waiver of severance benefits, but rather the effectiveness of a Title VII waiver release provided in exchange for severance benefits. *Id.* at \*2-4.

459. *Sharkey*, 70 F.3d at 230-31.

460. *Id.* at 231.

461. 252 F.3d 127, 128-29 (2d Cir. 2001).

462. *Id.* at 131. As in *Lynn*, after the release was voided, the plaintiff was found ineligible for the only employee benefits she pursued on remand. *Yak v. Bank Brussels Lambert*, No. 99 Civ. 12090, 2002 U.S. Dist. LEXIS 18091, at \*1 (S.D.N.Y. Sept. 24, 2002).

463. *Rodriguez-Abreu*, 986 F.2d at 580. The First Circuit referred to the Fifth Circuit’s holding in *In re Heci Exploration Co.*, 862 F.2d 513, 523 (5th Cir. 1988), that an effective “waiver of ERISA benefits must be an intentional relinquishment or abandonment of a known right or privilege.” *Rodriguez-Abreu*, 986 F.2d at 587. Significantly, the *Heci* court had applied neither

release language was resolved by a review of the circumstances of the execution, including the fact that the plaintiff asked, and was told he could not obtain both the severance benefits and the long-term disability benefits.<sup>464</sup> There was no explicit review of the fairness of the agreement; although the fact that plaintiff was a manager who reviewed the severance offer with his accountant suggests that the agreement was fair and that he fully understood his legal rights.<sup>465</sup> Thus, the Proposed Fiduciary Release Rules would have generated the same result.

In *Feret v. First Union Corp.*, a district court in the Third Circuit similarly decided that a release prevented claims for severance benefits by individuals who had executed agreements settling litigation for wrongful termination in which they released all ERISA claims against the employer.<sup>466</sup>

In *Smart v. Gillette Co. LTD Disability Plan*, the First Circuit concluded that an individual who accepted severance plan benefits, which did not include LTD benefits, had made a knowing and voluntary relinquishment of the LTD benefits.<sup>467</sup> In this case, the plaintiff claimed she became entitled to LTD benefits after the severance, even though she was not otherwise entitled to LTD benefits.<sup>468</sup> In fact, LTD benefits were only excluded from the list of post-severance benefits in the final draft of the individually negotiated severance agreement.<sup>469</sup> Thus, the court correctly concluded that it was not confronted with a release of a claim to entitlements to benefits under the terms of an ERISA plan.<sup>470</sup>

Nevertheless, the court considered and rejected the plaintiff's argument that there was no effective release of her claim.<sup>471</sup> The court slightly modified the six *Laniok* totality-of-circumstances

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contract nor fiduciary analysis, but rather determined that it was arbitrary and capricious for the claims reviewer to find that the participant had satisfied the plan requirements for a release of a claim of entitlement to benefits under a pension plan by an implicit oral waiver. 862 F.2d at 525. In particular, the plan required such a release to be explicit and in writing. *Id.*

464. *Rodriguez-Abreu*, 986 F.2d at 582 n.2.

465. *Id.* at 588.

466. No. Civ. 97-6759, 1999 U.S. Dist. LEXIS 570 (E.D. Pa. Jan. 25, 1999). The court cited *Rodriguez-Abreu* and rejected the plaintiffs' claims that (a) they had received no consideration because other people executing other releases received the same consideration, and (b) there had been a misrepresentation about the individuals who had also been offered releases. *Id.* at \*24-25. It does not appear that a different result would have been reached under the Proposed Fiduciary Release Rules.

467. 70 F.3d 173 (1st Cir. 1995).

468. *Id.* at 178-80.

469. *Id.* at 177-78.

470. A similar decision was reached in the same manner about post-employment LTD benefits in *Piehl v. Metropolitan Life Insurance and Raytheon LTD Plan*, 2005 WL 627586 (D. Or.).

471. *Smart*, 70 F.3d at 183.

criteria to determine “whether a party actually knew she was relinquishing a benefit, and whether she acted voluntarily in doing so.”<sup>472</sup> The court referred to the nature of the consideration for the release rather than to its mere existence.<sup>473</sup> The court disregarded the plaintiff’s claim that the release was ineffective on the basis she did not “understand what ERISA was” because the plaintiff knew that she was not being made eligible for benefits under the LTD plan.<sup>474</sup> The participant would have also been found to have fully understood her legal rights under the Proposed Fiduciary Release Rules.<sup>475</sup>

Two California district court decisions illustrate the continued need for a correct contract analysis of releases. In *Zhu v. The Fujitsu Group 401(k) Plan*<sup>476</sup> a California district court held that a release which excluded vested pension benefit rights did not prevent a plaintiff from claiming that a vesting schedule reduction was inapplicable to him.<sup>477</sup> The plaintiff had signed a severance agreement containing a release of all claims against his employer and its employer benefit plans and their fiduciaries. However, the agreement provided that the plaintiff remained entitled to his vested plan benefits, whose amount was unspecified. The court found he had not agreed to accept the plan interpretation of his accrued benefits and he had not given up the right to obtain those benefits, which the employer had tried to eliminate by reducing the participant’s vesting schedule in violation of ERISA section 203(c)(1)(B), 29 U.S.C. § 1053(c)(1)(B).

By contrast, in *Bennett v. CNA Insurance Cos.*,<sup>478</sup> which cites *Smart*, the court upheld a release of a claim to LTD benefits for a pre-termination injury even though the release did not cover the

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472. *Id.* at 182.

473. *Id.* at 179.

474. *Id.* at 182 n.5.

475. In *Lund v. Citizens Financial Group, Inc.*, a district court in the First Circuit applied similar analysis to a company President who similarly claimed entitlements from a benefit program in which he had no right to continue to participate on the basis that an individually negotiated severance agreement which had a list of continuing benefits that did not reference the program was not an effective release of his participation rights in such a program. No. Civ. 97-183-M, 1999 U.S. Dist. LEXIS 22590, at \*46–47 (D.N.H. Sept. 30, 1999). No benefits were being released, and in any case the totality-of-circumstances showed the exclusion even if characterized as a release was effective. *Id.* at \*57. In *Lund*, the benefit program was an unfunded deferred compensation arrangement and thus not subject to the ERISA fiduciary rules. *Id.* at \*3 n.3. See also ERISA § 401(a)(1), 29 U.S.C. § 1101(a)(1).

476. 2005 U.S. Dist. LEXIS 5134 (N.D. Cal). This was pure contract analysis, no totality of circumstances were considered.

477. This was a class action case in which the plan tried to eliminate the initial plaintiff on the basis of release.

478. 2001 U.S. Dist. LEXIS 107 (N.D. Cal.)

claim, the LTD plan, or its fiduciaries.<sup>479</sup> The plaintiff released all employment related claims as part of a settlement of a dispute about alleged sexual harassment/discrimination. The court found that the LTD plan and its fiduciaries were "agents of the employer" and "entities owned by the employer," and thus released parties. In fact, employee benefits plans and their fiduciaries are distinct from the employer and may not be their agents,<sup>480</sup> thus they were never released.

*Bennett* also illustrates how the totality of circumstances analysis may fail to consider whether the individual understood the release or received fair consideration. The court relied on the following factors from that analysis to show that the release was knowing and voluntary: the individual's business sophistication, representation by counsel, role in drafting the agreement and time she had to review the agreement.<sup>481</sup> The court noted the substantial consideration for the entire settlement agreement but did not ask if the plan had shown that a reasonable amount was allocable to the LTD release rather than the release of the other claims.

By contrast, neither the First Circuit nor the Second Circuit applied the totality of circumstances analysis, *sua sponte*, when participants claimed that releases were not effective solely on the assertion that they had been obtained under duress.<sup>482</sup> In *Deren v. Digital Equipment Corp.* the First Circuit upheld a dismissal after finding that the participants had effectively released their claims to benefits under a severance plan when they accepted smaller benefits than they may have been entitled to under the plan after the employer withdrew its original offers.<sup>483</sup> The court found that by filing the civil action more than three and half years after they received the payments the participants had thereby forfeited the right (to have the contract voided for the economic duress to which the plaintiffs claimed they had been subjected to when they were

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479. *Smart* by contrast involved a claim of post-termination LTD coverage, i.e., an alleged pre-accrual release.

480. Plan fiduciaries may not act as agents of the employer. ERISA § 404(a)(1). Moreover, ERISA treats plans as distinct entities rather than as entities owned by the employer. See generally ERISA § 502(d). See also *Leonelli v. Pennwalt Corp.*, 887 F.2d 1195 (2d Cir. 1989); *Crocco v. Xerox Corp.*, 137 F.2d 105 (2d Cir. 1998) (employer which is not welfare plan administrator or trustee may not be held liable for benefits under the plan). See also *infra* note 543.

481. The court made no further attempt to show that these factors showed that the plaintiff understood she was giving up her LTD claims.

482. See *Samms v. Quanax Corp.*, No. 95-27356, 1996 U.S. App. LEXIS 27356 (6th Cir. Oct. 17, 1996) and *Halvorson v. Boy Scouts of America*, No. 99-5021, 2000 U.S. App. LEXIS 9648 (6th Cir. Mar. 3, 2000). Those plaintiffs were found to have waived their ability to attack releases because they had not returned any part of the consideration received for the ERISA releases.

483. 61 F.3d 1 (1st Cir. 1995).

losing their jobs and executed the release).<sup>484</sup> Similarly, in *Harless v. RIA*, a plaintiff in the Second Circuit who claimed he had signed an agreement to settle a dispute about LTD benefits under economic distress for \$150,000 was similarly not permitted to go forward with his claim that he was entitled to greater benefits because of his failure to repudiate the voidable contract promptly.<sup>485</sup>

*D. The First, Fourth, Fifth and Sixth Circuits' Adequate Consideration Requirement for an Effective Release of an Individual's Entitlement to ERISA Benefits in a Settlement of a Bona Fide Dispute*

The Fifth Circuit, in *Chaplin v. NationsCredit*, held that executives who settled a bona fide dispute about eligibility for severance benefits had effectively released their claims for such benefits.<sup>486</sup> The court found that the plan had the burden of showing that a participant received "adequate consideration" in exchange for the release.<sup>487</sup>

The court correctly stated that if the participants were "already legally entitled to receive severance benefits under the plan, then the smaller severance package they received in exchange for the releases" could not be "adequate consideration."<sup>488</sup> Presumably if the participants were entitled to no additional benefits, any consideration would be adequate. However, after describing the underlying issues as not having an unambiguous resolution,<sup>489</sup> the court stated:

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484. *Id.* at 3. The plaintiff in *Hogan v. Eastern Enterprises* also claimed duress in executing a release as part of an enhanced early retirement agreement. 165 F. Supp. 2d at 60. However, the court referenced *Deren* and also applied the totality-of-circumstances test because the plaintiff attacked the release on a variety of grounds. *Id.* at 61-63. The case does not appear to have involved a release of claims to entitlement to benefits under the terms of an ERISA plan because the plaintiff received all the benefits to which he was entitled when the release was executed. *Id.* Rather he claimed he had a right to post-release benefit enhancements, which the court considered and rejected. *Id.*

485. 1 F. Supp. 2d 235, 242-43 (S.D.N.Y. 1998). See also *Sarver, Jr. v. Bellsouth Telecommunications, Inc.*, in which an individual, who may have lacked capacity when he executed a purported release of a claim for unspecified ERISA benefits, was also found to have failed to repudiate promptly after regaining his incapacity. No. 96-1283 R, 1996 U.S. Dist. LEXIS 12184, at \*4-5 (E.D. La. Aug. 23, 1996).

486. 307 F.3d 368, 373-74 (5th Cir. 2002).

487. *Id.* at 374.

488. *Id.*

489. The two issues were whether the individuals had been designated as participants pursuant to the plan terms, and if so designated, whether they satisfied the other benefit prerequisites before the plan had been allegedly terminated. *Id.*

Perhaps plaintiffs would have proven their eligibility for the plan if they had not signed the releases and instead had taken their underlying ERISA claims to trial; but perhaps not. That is a story whose ending we shall never know, *because plaintiffs signed the releases*. By doing so, *they surrendered their disputed right to a larger payment for a certain right to a smaller payment, which is to say, they received adequate consideration for the releases.*<sup>490</sup>

Under this reasoning any payment would have been adequate consideration. The Proposed Fiduciary Release Rules, however, require that the amount and strength of the claim be valued to determine if the consideration for the release was fair and reasonable.

In *Morais v. Central Beverage Corp. Union Employees' Supplemental Retirement Plan*, the First Circuit concluded that an individual was bound by a release of his disability pension benefit rights because (1) the \$5,000 he had received was reasonable consideration for the release of those rights; (2) the individual fully understood what was being released when he executed an agreement resolving a dispute about the reduction of the participant's benefits by a workers' compensation award under the plan terms; and (3) the individual had no basis for his claim for additional benefits.<sup>491</sup>

The participant began receiving a disability pension in 1993.<sup>492</sup> In 1995, the plan learned he had received workers' compensation benefits and informed him that his future pension benefits would thus be reduced.<sup>493</sup> The participant filed a union grievance and, with the union's assistance, negotiated the settlement agreement.<sup>494</sup> Twenty months later, he filed a benefit claim with the plan that his disability pension benefit should have been only reduced for the month in which he received the workers' compensation lump sum award.<sup>495</sup>

The *Morais* court concluded that \$5,000 was a reasonable estimate for the lump sum value of the participant's plan benefits.<sup>496</sup> The court did this after reviewing and rejecting the plaintiff's interpretation of the pension plan.<sup>497</sup> Moreover, it rejected the participant's assertions about the circumstances of the

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490. *Id.* (emphasis added)

491. 167 F.3d 709 (1st Cir. 1999). The court thus upheld a fair settlement of a bona fide dispute about the specific ERISA plan entitlements at issue under the Proposed Fiduciary Release Rules. In such a case there was no question about the coverage of the release.

492. *Id.* at 711.

493. *Id.*

494. *Id.*

495. *Id.*

496. *Id.* at 714.

497. *Id.* Thus, the court's holding would not have changed if it had voided the release.

execution of the release agreement because releases of claims for benefits under ERISA plans are governed by the principle that “contracts containing unambiguous language must be construed according to their plain and natural meaning.”<sup>498</sup> In particular, a contract description of the circumstances of execution takes precedence unless the plaintiff shows he was incapacitated when he executed the contract, which he had not done.<sup>499</sup>

In *Unum Life Insurance Co. of America v. Cappello*, a Rhode Island district court in the First Circuit used the totality of circumstances analysis to conclude that a release of an individual’s wrongful termination claims, including ERISA-based claims<sup>500</sup> against her employer and its plan fiduciaries in exchange for ninety-six weeks of severance benefits, did not effectively release her right to LTD benefits from the employer’s Unum plan.<sup>501</sup>

The court found that the agreement’s language did not clearly release Unum.<sup>502</sup> The reference to releasing plan fiduciaries did not unambiguously refer to Unum, and the employer continued to deduct LTD premiums after the execution of the agreement.<sup>503</sup> However, more importantly, neither party contemplated releasing the plaintiff’s LTD benefits.<sup>504</sup> In reviewing the nature of the consideration for the release, the court looked at its adequacy.<sup>505</sup> The court agreed that the consideration received under the agreement was substantial,<sup>506</sup> but did not find that Unum had shown that the consideration was sufficient to cover both the termination claims and the LTD disability benefits.<sup>507</sup> The release would have also been void under the Proposed Fiduciary Release Rules because the individual did not fully understand the released rights and did not receive fair consideration for such release.

In *West v. AK Steel Corporation Retirement Accumulation Pension Plan*<sup>508</sup> a Sixth Circuit district court required a showing of more than fair consideration for a defendant to obtain summary judgment based on a release. The court asked if there had been a

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498. *Id.* at 712.

499. *Id.* at 713.

500. The release contained an explicit exception for workers’ compensation claims but not for LTD claims.

501. 278 F. Supp. 2d 228, 236 (D.R.I. 2003).

502. *Id.* at 234-36.

503. *Id.* at 234-35.

504. *Id.* at 234-36. The Proposed Fiduciary Releases impose an even greater burden for an effective release. The plaintiff must have understood not only that certain benefit claims were being released but the extent of the released benefits.

505. *Id.* at 235-36.

506. *Id.* The consideration was \$140,000 and nearly twice that offered to other employees who lacked her twenty-four years of experience and a strong claim of a wrongful termination.

507. *Id.* at 236.

508. 2005 WL 1745491

showing that the plaintiff had received an amount in excess of the plaintiff's claim. Thus, the court assumed the validity of the plaintiff's claim rather than assessing its strength to determine its value. This requirement arose because the court it held that releases of federal claims are not permitted if "overreaching or exploitation is inherent in the situation."<sup>509</sup> The court was concerned about this possibility because the releases had been executed in concert with a reduction in force.<sup>510</sup>

In *Davis v. Bowman Apple Products*,<sup>511</sup> a Virginia district court in the Fourth Circuit relied on the totality-of-circumstances analysis presented in *Morais*<sup>512</sup> to invalidate a release of a participant's breach of fiduciary claim for pension benefits.<sup>513</sup> The release had been executed when he received what had been represented as his total plan benefits.<sup>514</sup> There was no showing that the plaintiff had been made aware, when he executed the release that he was thereby purportedly giving up his claim for benefits worth \$40,000 in exchange for \$12,000.<sup>515</sup> The basis for the plaintiff's claim was that he was entitled to have been treated as working on the final day he came to work and therefore entitled to 100% rather than thirty percent vesting of his pension benefits.<sup>516</sup>

#### XI. THE ANALYSIS COURTS HAVE APPLIED TO DETERMINE IF GENERAL RELEASES EFFECTIVELY RELEASE CLAIMS TO UNKNOWN OR UNCONTESTED ENTITLEMENTS TO ERISA BENEFITS

*[T]he language . . . clearly and specifically released "all claims and/or demands of whatever kind or nature."*

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509. This condition was not derived from any cases considering ERISA claims but one upholding an ADA waiver, *Mararri v. WCI Steel*, 30 F.3d 1180 (6th Cir. 1997). This case rested upon one upholding an ADEA waiver, *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986), which in turn was derived from the dissent to the decision voiding FLSA releases in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).

510. 2005 WL 1745491, at \*3.

511. No. 5:00CV00033, 2002 U.S. Dist. LEXIS 6204 (W.D. Va. Mar. 29, 2002).

512. 167 F.3d at 709.

513. The breach that was complained of was not the failure to pay the individual his earned benefits but rather the failure to make fair disclosure about the material terms of the release. Under the Proposed Fiduciary Rules, such a fair dealing breach voids the release.

514. *Davis*, 2002 U.S. Dist. LEXIS 6204, at \*28.

515. *Id.* at \*28-29.

516. *Id.* at \*2-4. The fiduciaries nevertheless prevailed because the statute of limitations period to file the breach of fiduciary claim had expired. The court also found that the distinct statute of limitation for an ordinary benefits claim to the plan under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), had expired. *Id.*



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The release was signed in November 1985. Because Wright did not assert his ERISA claim until this lawsuit was filed in December 1988, it was impossible for either SWB or Wright to know of this claim when the release was signed. Although we agree the language of the release is sufficiently clear to release the pending discrimination claims we hold *it is insufficient to release future claims against SWB about which neither party knew.*<sup>517</sup>

In short, a general release of "any and all" claims applies to all possible causes of action, unless a statute specifically and expressly requires a release to mention the statute for the release to bar a cause of action under the statute. ERISA contains no such requirements. The releases therefore cover plaintiffs' claims for ERISA benefits.<sup>518</sup>

Specific releases explicitly describe both the claim for employee benefits that is being released and the party that is being released, such as the plan, which may differ from the employer for a trustee or insured plan. General releases, which lack one or both of these references, raise two distinct issues, under both the Proposed Fiduciary Release Rules and any reasonable contractual analysis.<sup>519</sup> These issues are sometimes conflated.

The first is the coverage prerequisite for an effective release. Does the release cover both the claim at issue and the party claiming to be released? As discussed, *supra*, the courts sometimes disregard this issue and assume that there is no difference between an ERISA plan, its fiduciaries and the plaintiff's employer and its agents.

The second issue is the full understanding prerequisite for an effective release. The Proposed Fiduciary Release Rules ask whether the plaintiff fully understood the release. As discussed, *supra*, the courts often do not seek full understanding; rather they seek "knowing relinquishments" or "requisite knowledge." Unlike coverage, this knowledge may not be shown by reviewing the agreement in isolation because a general release by definition does not specify the released claim, the released party or both. This reality is not changed by boilerplate provisions that the participant (a) understood the agreement containing the release; (b) unknown claims are covered, and (b) was advised and given the

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517. *Wright v. Southwestern Bell Tel. Co.*, 925 F.2d 1288, 1293 (10th Cir. 1991) (emphasis added and citations omitted).

518. *Chaplin*, 307 F.3d at 373-74 (emphasis added).

519. We are assuming, arguendo, for purposes of this section that ERISA sections 206(d) and 410, 29 U.S.C. §§ 1056(d) and 1110, do not void any releases of claims for entitlements of ERISA benefits.

opportunity to seek legal or other professional counsel.<sup>520</sup> Courts have found that the requisite knowledge is present for a general release by reviewing the circumstances of the execution<sup>521</sup> or the plaintiff's concessions.<sup>522</sup> Two Fifth Circuit cases illustrate the difference between the two issues about the effectiveness of general releases.

In *Chaplin v. Nationscredit*, the Fifth Circuit concluded that executives who settled a bona fide dispute about eligibility for severance benefits had effectively released their claims for such benefits in a general claims release.<sup>523</sup> The issue involved the release's coverage.<sup>524</sup> The participants conceded they understood they had released the claims to benefits at issue.<sup>525</sup> The court rightly rejected the participants' assertion that an effective release of ERISA benefit rights must include an explicit reference to "ERISA."<sup>526</sup>

By contrast, in *Carrabba v. Randalls Food Markets*,<sup>527</sup> the Fifth Circuit focused on a lack of understanding rather than coverage and affirmed a decision that the individuals had not effectively released their claims to benefits from a pension plan.<sup>528</sup>

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520. This is consistent with the claims regulations which do not permit general denials of claims for entitlements to benefits under ERISA plans but instead require references to specific plan provisions. The consequence of such deficiency is identical to the ineffectiveness of a release—the participant is given court access.

521. See, e.g., *Leavitt*, 921 F.2d at 160, 162-63 (finding effective a general release of all claims against the employer appeared to have been used in an agreement settling a bona fide dispute about the participant's eligibility for severance benefits, but the participant's understanding of the release rights was shown by the facts surrounding the execution of the agreement). Compare *Barbera v. Minnesota Mining & Manufacturing Co. Long-Term Disability Plan*, No. 04-1598 (DWF/SRN), 2004 U.S. Dist. LEXIS 21862 (finding a general release of "unknown claims" did not include LTD claims when the plaintiff did not know of the plan).

522. See, e.g., *Hogan v. Pettipren Employees Profit-Sharing Plan*, 92 F. Supp. 2d 612 (E.D. Mich.). A release of "any and all claims" against an employer, its agents and representatives" applied to a pension claim after the plaintiff's attorneys conceded that the agreement was intended to be "all-encompassing." But cf. *Dist. 29, United Mine Workers v. New River Co.*, 842 F.2d 734, 737 (4th Cir. 1988) in which the court conceded that the plaintiffs may not have understood the ERISA benefit claims that were being released but upheld the release based on its terms.

523. 307 F.3d at 373-74.

524. *Id.* at 370-71.

525. *Id.* at 372.

526. *Id.* at 373. Compare rejections of similar assertions in *Smart*, 70 F.3d at 173, and *Martino-Catt*, 317 F. Supp. 2d at 914.

527. 145 F. Supp. 2d 763 (N.D. Tex. 2000), *aff'd*, 252 F.3d 721 (5th Cir. 2001).

528. No question was raised about why the plan was not mentioned as a separate released party but only the employer was named as a defendant. The plan had been operated as though it did not need to comply with the ERISA

terminated two years before they executed a general release in a severance agreement that provided that the employee released his employer "from all claims, liabilities, demands and causes of action, known or unknown, fixed or contingent, which [they might] have or claim to have against [defendant] as a result of [their] employment and this termination."<sup>529</sup> The court found that there was no evidence that either the individuals or their employer had any idea that the release pertained to the claims under the terminated pension plan.<sup>530</sup> Thus, the defendants had not met their burden to show that the employees had knowingly relinquished or abandoned a known right.<sup>531</sup>

The court contrasted *Carrabba* with another Fifth Circuit case in which a similar general release was found to encompass ERISA claims because the plaintiff referred to the ERISA claims within the period he was given to revoke the release, yet did not revoke the release.<sup>532</sup> Similarly, the Tenth Circuit held that a general release of "all claims," which was part of an agreement settling a bona fide dispute about race discrimination, did not suffice to establish the requisite knowledge for an effective release of a future disability benefit claim under a totality-of-circumstances analysis applicable to releases of Title VII discrimination claims.<sup>533</sup>

In *Auslander v. Abraham Helfand*, a district court in the Fourth Circuit held that a release of all claims "whether known, unknown, or unforeseen . . . arising out of any event, transaction, or matter that occurred before the date of this Settlement Agreement," did not apply to an unasserted claim for accrued pension benefits.<sup>534</sup> The court held that the general release which was part of a settlement of litigation with respect to allegations of embezzlement by the participant against his former employer applied only to the plaintiff's accrued claims, i.e., those which he then had the right to bring a civil action.<sup>535</sup>

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requirement for a separate trust because it was wrongfully treated as a top-hat plan, which would have been subject to the exemption of ERISA sections 4(b) and 401(a), 29 U.S.C. §§ 1003(b), 1101(a). *Carrabba*, 145 F. Supp. 2d at 768.

529. *Id.* at 771 (alteration in original).

530. *Id.* at 771-72.

531. *Id.* at 771. See also *Smart*, 70 F.3d at 181-82 and *Barbera v. Minn. Mining & Mfg. Long-Term Disability Plan*, No. 04-1598 (DWF/SRN), 2004 U.S. Dist. LEXIS 21862, at \*1 (D. Minn. Oct. 26, 2004).

532. *Wittorff v. Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir. 1994).

533. *Wright*, 925 F.2d at 1293. See also *Antoniu v. Thiokol Corp. LTD Plan (Plan No. 503)*, in which a general release was found inapplicable to LTD benefits which were not considered at the time of the execution of the release and were terminated eight months after the execution. 849 F. Supp. 1531, 1535 (M.D. Fla. 1994).

534. 988 F. Supp. 576, 578-81 (D. Md. 1997).

535. *Id.* at 581-82.

The Fourth Circuit, however, prevents a participant from beginning a civil action for benefits from an ERISA plan until the participant has exhausted the plan's claims review procedures, i.e., the plan has denied the participant's initial claim and the appeal of the denial. In short, the participant is denied court access until the participant's claim has been reviewed by a party with a fiduciary duty to follow the plan terms that are consistent with ERISA.<sup>536</sup> There had been no showing of such claims filing. Thus, the release did not cover his potential claim to accrued benefits from a pension plan. Similarly in an unpublished decision, *Hudson v. Aetna Life Insurance Co.*, the Tenth Circuit found inapplicable a general release to a future claim for disability benefits.<sup>537</sup>

The court in *Lund v. Citizens Financial Group, Inc.*, responded to this argument by stating that "the question is whether the claim is one 'whose facts were well enough known for the maker of the release to frame a general description of it and request an explicit reservation.'"<sup>538</sup> This was inapplicable to *Lund* because a dispute with respect to the eligibility to the benefits at issue was settled with an explicit list of the benefits to which the parties agreed the participant was entitled.<sup>539</sup> This argument is also inapplicable if, when the release was executed, the claim was unknown as in *Wright*<sup>540</sup> or *Carrabba*.<sup>541</sup> The argument is inappropriate if the claim had not been asserted, whether or not known, as in *Auslander*,<sup>542</sup> because the argument presumes plan fiduciaries will only comply with their future ERISA duties to determine an individual's benefits correctly if explicitly reminded of such duties. This is contrary to the basic ERISA requirement that plan fiduciaries are responsible for knowing and following ERISA plan terms.<sup>543</sup>

In *Cange v. Stotler & Co.*, a non-ERISA release case, the Seventh Circuit found that prospective waivers of other federal statutory protections tend to encourage violations of law and are thus generally void.<sup>544</sup> It may be and has been argued that waivers

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536. See *supra* note 49 and accompanying text for a discussion of the exhaustion requirement to initiate an action for an ERISA benefits claim.

537. No. 94-6392, 1995 U.S. App. LEXIS 25957, at \*6 (10th Cir. Sept. 13, 1995).

538. 1999 U.S. Dist. LEXIS 22590, at \*46.

539. *Id.* at \*41-42.

540. 925 F.2d at 1293

541. 145 F. Supp. 2d 763 (N.D. Tex. 2000), *aff'd*, 252 F.3d 721 (5th Cir. 2001)

542. 988 F. Supp. at 577. The *Auslander* plaintiff probably knew that he had accrued benefits under his employer's profit-sharing plan, although he had not asserted a claim to such benefits on or before the time he executed the general release.

543. See *supra* note 74 and accompanying text.

544. 826 F.2d 581, 594-95 (7th Cir. 1987).

of unasserted claims for ERISA benefit entitlements would similarly encourage the plan fiduciaries to violate their duty to determine correctly the benefits to which the participant or beneficiary is entitled to under the ERISA plan.<sup>545</sup>

The fiduciary obligation of the Releasing Fiduciary may not have been apparent in *Lund* because the deferred compensation plan at issue was restricted to a select group of management employees; thus the ERISA's fiduciary rules did not apply in the *Lund* case.<sup>546</sup>

A New York district court in *Yablon*,<sup>547</sup> however, dismissed<sup>548</sup> a plaintiff's claim for accrued pension benefits when it disregarded the basic principles for reviewing the effectiveness of a general release that was part of form severance agreement that he received and executed on the day his employment was terminated. The plaintiff was held to know the significance of the release because the agreement was only two pages long, he acknowledged "understanding the agreement" and being "encouraged to consult an attorney" and the release referred to a release of "any claims for employee benefits."<sup>549</sup> A pension plan and its fiduciaries were held to be released and the individual understood these parties were released when the released parties were described as "the employer, its officers, agents in their individual and representative capacities."<sup>550</sup> Finally, no basis was given by the court for the

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545. See e.g., *Reighard v. Limbach Co.*, 158 F. Supp. 2d 730, 733 (E.D. Va. 2001) (finding the right to claim life insurance benefits was not waived prospectively).

546. ERISA § 401(a)(1); 29 U.S.C. § 1101(a)(1). For a discussion of the analysis of claims for benefit claim entitlements under such top-hat plans, see *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281 (3d Cir. 1995).

547. *Yablon*, 2002 U.S. Dist. LEXIS 10528, at \*1, *aff'd*, 93 Fed. Appx. 329 (2d Cir. 2004) (unpublished opinion).

548. All presumptions are thus made in favor of the plaintiff.

549. *Id.* at \*16-18. However, as in *Carrabba*, the assets of one pension plan not mentioned in the agreement had been distributed more than eight months before the execution of the agreement. The other plan (the "absorbed plan") had been merged into a new plan that was exempt from the release. Despite the court finding that the release relieved the merged plan of any obligation to make any post-release payments to the plaintiff, the absorbed plan distributed funds to the individual from the merged plan after the release was executed. Thus, the administrators of the new plan, who, like the plaintiff, were aware of the release treated the release as not affecting the plaintiff's right to claim benefits from the merged plan.

550. *Id.* at \*18-19. Plan fiduciaries must act solely in the interests of plan participants and beneficiaries; thus they may not perform such duties as employer representatives. See ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1); *NLRB v. AMAX Coal Co.*, 453 U.S. 322, 329-31 (1982); *Pegram*, 530 U.S. at 223-25. The cited case does not support the assertion that the term "representative" was intended to or did include representatives of the plaintiff-employee or representatives of the distinct pension plans. Nor did the cited case support the application of *res judicata* to the fiduciary releases, if *arguendo* effective, to thereby release the two unmentioned pension plans

plaintiff to suspect that an ADEA release agreement purportedly increasing his compensation and benefits<sup>551</sup> was also reducing his accrued pension benefits.

## XII. CONCLUSION

ERISA section 2, entitled "Congressional Findings and Declaration of Policy," provides:

(b) It is hereby declared to be the policy of this Act to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions and ready access to the Federal courts.

One of the key components of ERISA's protection of employee benefits is the provision of ready access to the federal courts by ERISA participants and beneficiaries who wish to challenge alleged deprivations of those benefits. In particular, releases of claims for ERISA benefit entitlements are void ab initio unless they satisfy very stringent conditions. On the other hand, voiding a release does not entitle an individual to any ERISA benefits, but only to the opportunity to have a full and fair judicial review of the claim to an entitlement to ERISA plan benefits.

ERISA section 410, 29 U.S.C. § 1110 voids all releases of claims to entitlement to ERISA plan benefits. That section prohibits fiduciaries from being relieved of their fiduciary duties, including the most vital of them: the duty to pay participants and beneficiaries all the employee plan benefits to which those individuals are entitled.

ERISA section 206(d), 29 U.S.C. § 1056(d), prohibits pension plans from being released from their obligation to pay participants and beneficiaries the pension benefits to which they are entitled and which have accrued prior to executing the release. Thus, settlements of disputes about accrued pension benefits, like settlements of overtime pay disputes, require judicial approval to become binding.<sup>552</sup>

If, *arguendo*, any releases of claims to entitlements to ERISA

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which were distinct entities. Thus, the plan and its fiduciaries had failed to show that the plaintiff fully understood what or who he was releasing.

551. The agreement was presented as providing the plaintiff with additional consideration because effective ADEA releases must provide consideration. 29 U.S.C. § 626(f)(1)(D). The court made no attempt to determine whether any part of the consideration was attributable to the release of claims to accrued pension benefits, let alone whether such part was fair consideration for the released pension claims.

552. ERISA unlike the FLSA has no provision, such as 29 U.S.C. § 216(c), giving the Department of Labor or any other non-court entity, the authority to make these releases effective.

plan benefits are permitted then ERISA sections 3(21)(A) and 404, 29 U.S.C. §§ 1002 and 1104, void such releases unless the person who wishes to rely on the release may show that the release was obtained in compliance with the following fair dealing requirements, the Proposed Fiduciary Release Rules: (1) the individual voluntarily entered an agreement which covers the claim, and the plan or plan fiduciaries; (2) the individual fully understood, when executing the agreement, what the plan fiduciary should have known or did know about the rights being purportedly released; and (3) the individual received fair and reasonable consideration for the release. These elements of fair dealing are always present in fair settlements of bona fide disputes about an individual's entitlement to ERISA plan benefits.

Boilerplate provisions, by which a participant acknowledges having understood the agreement, having the opportunity to consult legal counsel, and being encouraged to do so, are not enough to establish a valid release of an entitlement to the employee benefits. Nor will validity result from the mere addition of general release language by which participants or beneficiaries purport to release unknown, uncontested, or all claims pertaining to employment, employee benefit plans, ERISA rights, or even the plan name itself. These provisions do not suffice to show that the participant or beneficiary fully understood the specific claims being released. Thus, ERISA prevents such releases from depriving participants or beneficiaries of their earned plan benefits unless, *arguendo*, ERISA permits such releases, and such understanding may be established by circumstances other than the terms of the release.

Finally, releases in severance agreements may never deprive participants and beneficiaries of their accrued pension benefit entitlements. If, *arguendo*, permitted releases pertaining to welfare benefits or to the pension treatment of payments under such agreements are void unless the individual fully understood the rights purportedly released and was compensated fairly for them. By contrast, neither fiduciary safeguards nor anti-assignment prohibitions apply to releases of ordinary contract claims and claims for Title VII or ADEA damages. Employees thus may effectively waive unasserted and unknown contractual and Title VII claims arising from their employment when they execute a severance agreement containing a release of all such claims.<sup>553</sup>

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553. See generally *Oubre v. Entergy Operations Inc.*, 522 U.S. 422 (1998) (holding the plaintiff's failure to tender back consideration prior to filing ADEA claim did not cause an ADEA release, which violated the statutory requirements to become valid); Parisi G. Filippatos & Sean Farhang, *The Rights of Employees Subjected to Reductions in Force: A Critical Evaluation*, 6 *EMPL. RTS. & EMPLOY. POL'Y J.* 263, 298-317 (2002).