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Kennedy v. Plan Administrator for DuPont Savings & Investment Plan: Anti-Alienation and Anti-Cutback Rules

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KENNEDY v. PLAN ADMINISTRATOR FOR DUPONT SAVINGS & INVESTMENT PLAN: ANTI-ALIENATION AND ANTI-CUTBACK RULES

Christina Payne-Tsoupros*

INTRODUCTION

In Kennedy v. Plan Administrator for DuPont Savings & Investment Plan, the Supreme Court held that a waiver of pension-plan benefits through a divorce decree that was not a qualified domestic relations order (QDRO) did not violate the anti-alienation provision of ERISA.1 The anti-alienation rule prohibits a pension-plan participant from assigning or alienating benefits payable under the plan.2 QDROs are exceptions to the anti-alienation rule such that an order made pursuant to state domestic relations law allows an alternate payee to receive benefits payable under a plan.3 The Court also held that such a (non-QDRO) waiver is effective only if consistent with the plan documents.4 This decision resolved circuit splits among the courts of appeals on these two issues. The Kennedy decision fleshed out the scope of the anti-alienation provision of ERISA. The decision implicated the anti-cutback rule as well. The anti-cutback rule, which was not mentioned in the Court’s decision, prohibits a plan amendment from reducing a participant’s accrued benefit (or eliminating an optional form of benefit available under the plan). Treasury regulation section 1.411(d)-4, Q&A (3)(a)(3) states that a waiver of protected benefits is prohibited under the anti-cutback rule.5 Kennedy allows waivers under

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3. Id. § 1056(d)(3)(A).
4. Id. at 868.
anti-alienation, but this arguably conflicts with the Treasury regulation. This Article explains this conflict and, as a possible means of resolving it, recommends that the Internal Revenue Service (IRS) provide guidance on the (potentially) conflicting portion of the regulation.

Part I will discuss the Supreme Court’s decision in *Kennedy* and explain the splits among the courts of appeals that the *Kennedy* decision resolved. Part II discusses the ERISA prohibition on alienation of pension-plan benefits under ERISA section 206(d) and the effect of the decision in *Kennedy* on the anti-alienation rule. Part III discusses the anti-cutback rule under ERISA section 204(g) and how *Kennedy* implicates the anti-cutback rule. *Kennedy* allows a waiver of pension benefits under anti-alienation, but Treasury regulation section 1.411(d)-4 prohibits them under the anti-cutback rule. Part III explores whether the regulation is valid, whether it applies only to participants or to their beneficiaries as well, and the dilemma in which taxpayers are left as a result of the uncertainty. The Article concludes with a recommendation that the IRS provide guidance as to the scope and applicability of the waiver prohibition in the regulation in light of *Kennedy*.

I. THE *KENNEDY* DECISION

Prior to *Kennedy*, there was a split among the courts of appeals as to whether a divorced spouse could waive pension benefits through a divorce decree that was not a QDRO. Further, there was a split among the courts of appeals as to “whether a beneficiary’s federal common law waiver of plan benefits [was] effective where that waiver [was] inconsistent with plan documents.”

A. The Court’s Decision in *Kennedy*

William Kennedy was a DuPont employee and participant in DuPont’s savings and investment plan (SIP), a pension plan governed by ERISA. William designated his wife, Liv, as the sole beneficiary of his retirement plan in 1974. Under the terms of the SIP, a participant had the power “both to ‘designate any beneficiary or beneficiaries . . . to receive all or part’ of the funds upon his death, and to ‘replace or revoke

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7. *id.*
8. *id.* at 868.
9. *id.* at 869.
such designation." William and Liv divorced twenty years later. According to the divorce decree, Liv disclaimed all of her “right, title, interest, and claim . . . related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [William’s] past or present or future employment.” The divorce decree was not a QDRO because it did not create or recognize the rights of an alternate payee or assign the alternate payee the right to receive a portion of the benefits of the plan; it simply eliminated Liv’s rights. William “retired from DuPont in 1998 and died in 2001.” William never removed nor replaced Liv as his SIP beneficiary. William had not named a contingent beneficiary if Liv disclaimed her interest. Upon William’s death, William and Liv’s daughter, Kari Kennedy, was named the executor of William’s estate. Kari, as executor, requested DuPont to distribute the funds to the estate. Kari claimed that Liv had waived her benefits in the divorce decree. DuPont denied Kari’s request on behalf of the estate, and following the beneficiary designation, paid the balance (which amounted to $400,000) to Liv.

Kari sued to recover the benefits, claiming that Liv waived her benefits in the divorce decree, invalidating the beneficiary designation. She claimed that DuPont incorrectly distributed the benefits. The District Court for the Eastern District of Texas granted summary

11. Id. at 869.
12. Id. at 869 (second omission in original) (alteration in original). Disclaimers are based on section 2518 of the Internal Revenue Code. When someone disclaims a benefit, it is as if she never received that interest. See I.R.C. § 2518(a) (West 2010).
15. Kennedy, 129 S. Ct. at 869. William did designate his daughter, Kari Kennedy, as the new beneficiary for DuPont’s Pension and Retirement Plan, another plan governed by ERISA, which William had with DuPont. Id. The Pension and Retirement Plan was not at issue in the Kennedy case. See id. Under the Supreme Court’s decision in Egelhoff v. Egelhoff ex rel. Breiner, the divorce itself could not defeat Liv’s claims to benefits. See Egelhoff, 532 U.S. 141, 143 (2001); see also Kennedy, 129 S. Ct. at 877 (“[I]n Egelhoff we held that ERISA preempted a state law providing that the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce.”).
17. Id.
18. Id.
21. Id.
22. Id.
judgment for the estate, finding that the "named ERISA beneficiary may waive his or her entitlement to the proceeds of an ERISA plan... provided that the waiver is explicit, voluntary, and made in good faith."23 The Court of Appeals for the Fifth Circuit vacated the District Court's judgment, holding that Liv's waiver was an impermissible assignment or alienation of benefits.24 The Fifth Circuit stated that a QDRO is the only means by which a participant or beneficiary can waive pension benefits.25

The Supreme Court's decision to grant certiorari is significant because it resolved the issue of whether a QDRO is the only valid means a divorcing spouse has to waive the right to an ex-spouse's pension benefit.26 In fact, the Court held that a QDRO cannot be used to waive these rights.27 The Court explained that, by definition, Liv's waiver could not be a QDRO because a QDRO requires the designation of an alternate payee "to receive all or a portion of the benefits payable with respect to a participant under a plan."28 A waiver simply disclaims the benefits; it does not provide for an alternate payee.29 The Fifth Circuit was therefore incorrect in holding that a QDRO was the proper way to effectuate the waiver.30 Had Liv's waiver satisfied the requirements of a QDRO, the order still would not have allowed for a waiver of benefits.31

The Supreme Court affirmed the Fifth's Circuit's decision, but on
different grounds.\textsuperscript{32} The Supreme Court held that a waiver of pension-plan benefits through a divorce decree is not an assignment or alienation and thus does not violate ERISA's anti-alienation provision.\textsuperscript{33} The Court also held that in instances in which a beneficiary's waiver of plan documents is inconsistent with the plan documents, the plan documents control.\textsuperscript{34} DuPont was therefore correct in distributing the funds to Liv because under the terms of William's plan, she was the beneficiary.\textsuperscript{35}

B. The Effect of Kennedy

Kennedy resolved the split among the circuit courts as to whether a divorced spouse could waive pension benefits through a divorce decree that was not a QDRO.\textsuperscript{36} The lower federal courts had danced around this issue of whether such a waiver implicated (and thus potentially violated) the anti-alienation rule.\textsuperscript{37} Prior to Kennedy, there was a rough dividing line in the case law between courts that held a waiver to be outside the scope of the anti-alienation rule and courts that held a waiver subject to the anti-alienation rule, finding that "beneficiaries may not waive their rights to a plan's benefits because the waiver is a prohibited assignment."\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{32} Id. at 870.
\item \textsuperscript{33} Kennedy, 129 S. Ct. at 873 ("Liv did not attempt to direct her interest in the SIP benefits . . . and accordingly we think that the better view is that her waiver did not constitute an assignment or alienation rendered void under the terms of § 1056(d)(1)").
\item \textsuperscript{34} Id. at 875 ("The plan administrator did its statutory ERISA duty by paying the benefits to Liv in conformity with the plan documents.").
\item \textsuperscript{35} Id. The Supreme Court noted that it would have been easy for William to change his beneficiary designation, as the plan provided a way to do so, but William did not take this option. Id. at 877. The plan provided forms where William would have been able to change his beneficiary designation. Kennedy, 129 S. Ct. at 868.
\item \textsuperscript{36} See id. at 870.
\item \textsuperscript{37} Examples of cases in which lower courts have held that a federal common law waiver of benefits in a divorce decree does not run afoul of the anti-cutback provision include: Estate of Altolelli v. International Business Machines Corp., 77 F.3d 78 (4th Cir. 1996), abrogated by Kennedy, 129 S. Ct. 865, and Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990), abrogated by Kennedy, 129 S. Ct. 865. McGowan v. NJR Services Corp., 423 F.3d 241 (3d Cir. 2005), abrogated by Kennedy, 129 S. Ct. 865, is an example of a case in which a lower court held that the anti-alienation rule prohibits a federal common law waiver of benefits. The Supreme Court listed these decisions in discussing the circuit split. See Kennedy, 129 S. Ct. at 870 n.4.
\item \textsuperscript{38} Michael P. Barry, Kennedy, ERISA Beneficiary Designations, and the Plan Documents Rule, PENSION & BENEFITS DAILY, Dec. 17, 2009, at 2; see also Eric D. Chason, Settlements and Waivers Affecting Pension Benefits Under ERISA, BENEFITS L.J., Winter 2001, at 61, 64-65 (distinguishing courts that consider waivers valid "if they are 'knowing
For example, in Estate of Altobelli v. International Business Machines Corp., the decedent participant’s estate sought a declaratory judgment that the ex-spouse had waived her interest in the decedent’s pension and life insurance proceeds in the divorce decree. The Fourth Circuit held that the anti-alienation rule does not apply to waivers. The Fourth Circuit noted the purpose of the anti-alienation rule is “to safeguard a stream of income for pensioners (and their dependents . . .)” and stated, “[t]o bar a waiver in favor of the pensioner himself would not advance that purpose.” Thus, the waiver was valid and the former spouse was not entitled to the benefit.

By contrast, other courts held that a waiver is subject to the anti-alienation rule, and considered it invalid on this basis. For example, in McGowan v. NJR Service Corp., the participant had designated his former wife as the beneficiary of his retirement benefits. The participant then sought a declaratory judgment that his former wife’s waiver was valid and therefore his benefits would pass to his current wife. The Third Circuit stated that what the participant sought was “to use the concept of waiver in order to effectuate what is the functional equivalent of an assignment of benefits from his former wife to his current wife.” Recognizing that the waiver would effectuate an “indirect arrangement” to the current wife, which would “fit within the and voluntary,” and courts that only consider waivers “valid if they do not result in the alienation of ‘established’ pension rights”).

39. Estate of Altobelli, 77 F.3d at 80; see also Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan, 935 F.2d 1360, 1367–68 (2d Cir. 1990) (setting forth a list of factors to be used in determining whether a waiver or settlement meets the “knowing and voluntary” standard that were used in subsequent anti-alienation cases).

40. Estate of Altobelli, 77 F.3d at 81.

41. Id at 81 (omission in original) (quoting Guidry v. Sheet Metal Workers Nat’l Pension Fund, 493 U.S. 365, 376 (1990), superseded by statute, 18 U.S.C.A. § 3613(a) (West 2010)).

42. Id. at 82.


44. McGowan, 423 F.3d at 244.

45. Id. at 249. Foreshadowing the Supreme Court’s decision in Kennedy, the Third Circuit stated that a “‘waiver’ is not the same thing as assignment or alienation. Assignment or alienation involves an affirmative transfer of benefits to another person, whereas waiver usually involves only a refusal of benefits on the part of the individual slated to receive them.” Id. at 248.
definition of ‘assignment or alienation,’” the Third Circuit held that the waiver was invalid under the anti-alienation rule.\textsuperscript{46}

In addition, \textit{Kennedy} resolved the split among the circuits as to whether a federal common law waiver is effective if the waiver is inconsistent with the plan documents.\textsuperscript{47} Prior to \textit{Kennedy}, a split existed between courts following the “plan documents” approach (or the “statutory approach”) and the courts following the “federal common law waiver” approach.\textsuperscript{48} Under the plan documents approach, “ERISA does not allow a named beneficiary to waive rights to plan benefits through a divorce decree or other contract.”\textsuperscript{49} Under this approach, the plan administrator should ignore the waiver if it conflicts with the beneficiary designation filed with the plan documents.\textsuperscript{50} The rationale supporting the adoption of the plan documents rule is that it is simple and administrable.\textsuperscript{51} The plan administrators and beneficiaries immediately learn of their rights and abilities.\textsuperscript{52} “The plan documents rule saves

\textsuperscript{46} Id. at 249. The Third Circuit also stated that recognizing the waiver in these circumstances would undermine the anti-alienation rule. McGowan, 423 F.3d at 249.

\textsuperscript{47} See Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865, 870 (2009). “In effect, the Supreme Court in \textit{Kennedy} sided with those courts which previously took a ‘plan documents’ approach, rather than a ‘federal common law approach,’ \textit{i.e.}, looking at the surrounding circumstances, including language waiving benefits in divorce decrees.” Staelens \textit{ex rel.} Estate of Staelens v. Staelens, 677 F. Supp. 2d 499, 506 (D. Mass. 2010). The court in \textit{Staelens}, however, noted that \textit{Kennedy} is distinguishable from other plan documents decisions because \textit{Kennedy} is not based on a failure to file a QDRO. Id.; see also infra notes 103-07 and accompanying text (explaining requirements for a court order to qualify as a QDRO).


\textsuperscript{49} Vannoy, supra note 48, at 211.

\textsuperscript{50} Furlow & Pennell, supra note 26, at 122. Furlow and Pennell note that the plan documents approach was the minority approach prior to \textit{Kennedy}. Id.; accord Barry, supra note 38, at 3.

\textsuperscript{51} Barry, supra note 38, at 7 (“The plan documents rule is indeed the simplest and most uniform way to adjudicate matters when a conflict exists between a domestic relations order and an ERISA plan’s beneficiary designation form(s).”). Barry notes that during oral arguments in \textit{Kennedy}, Chief Justice John Roberts stressed that the Supreme Court sought “to develop a rule for all cases and . . . the easiest, most administrable rule is to say whoever’s name appears there [on the beneficiary form] gets the money.” Id. (alteration in original) (omission in original) (quoting Transcript of Oral Argument at 20, Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009) (No. 07-636)); see also Vannoy, supra note 48, at 211 (stating that courts that adhere to the plan documents approach look to policies underlying ERISA in support of “holdings [that] afford simple, uniform administration and allow parties to avoid the expense of litigation because they can be certain of their rights at all times”).

\textsuperscript{52} Barry, supra note 38, at 7. (“Strict adherence to the plan documents rule allows plan
money," because if parties involved can easily discern the correct beneficiary, there is less chance of costly and time-consuming litigation. The plan administrator will not need to interpret vague or unclear waiver language. The plan administrator will not have to master the laws of fifty states. Finally, the plan documents rule is simple and administrable because it helps a plan administrator avoid double liability.

In addition, according to the language in fiduciary provisions, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan . . . ." Under a strictly textual reading or argument, the statute itself compels an interpretation consistent with the plan documents.

Boggs v. Boggs and Egelhoff v. Egelhoff cited in Kennedy, support this interpretation. In Egelhoff, David Egelhoff worked at the Boeing Company. David designated his wife, Donna Egelhoff, as the administrators, beneficiaries, participants, and employees to immediately 'learn their rights and obligations at any time.'" (quoting Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995))).

In addition, such litigation and other administrative expenses "could 'discourage' employers from continuing to offer benefit plans, or from offering such plans in the first place." (Id. (citing Varity Corp. v. Howe, 516 U.S. 489, 497 (1996)); see also Jo-el J. Meyer, Beneficiary Designations: High Court Adopts 'Plan Documents' Rule for Resolving ERISA Beneficiary Disputes, PENSION & BENEFITS DAILY, Jan. 27, 2009, at 1 ("[A] ruling to the contrary that would have required administrators to look beyond plan documents would have created the burdens of delay and expense for plan administrators.").

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Id. (citing Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 142 (2001)).

Id. at 7–8 (providing an example in which double liability could arise).

29 U.S.C.A. § 1104(a)(1)(D) (West 2010) (emphasis added); see also Barry, supra note 38, at 5 (citing Egelhoff, 532 U.S. at 151 n.4) ("ERISA's use of the word 'shall' in this section constitutes a 'command' which plan fiduciaries are obligated to follow.");


Egelhoff, 532 U.S. 141.

Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865, 876–77 (2009); see, e.g., Barry, supra note 38, at 7 (stating that ERISA requires “plans be administered, and benefits paid, in accordance with plan documents” (quoting Egelhoff, 532 U.S. at 159)). “ERISA’s scheme is 'built around reliance on the face of written plan documents.'” Barry, supra note 38, at 5 (quoting Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995)).
beneficiary under his life insurance and pension plans, both of which were governed by ERISA. David and Donna divorced; shortly thereafter, David died. Donna remained the listed beneficiary under both plans and Boeing paid her the $46,000 in life insurance proceeds. David’s children from a previous marriage were his heirs under a Washington state divorce revocation statute. The children sued Donna to recover the life insurance proceeds. Concluding that the Washington law provided a different means of governing the distribution of benefits, the Supreme Court held that the law affects a “central matter of plan administration.”

In Boggs, Isaac Boggs retired from South Central Bell and received various benefits including “a lump sum distribution . . . which he rolled over into an Individual Retirement Account,” which was worth approximately $180,000 when he died in 1989. Isaac’s second wife, Sandra, claimed she was entitled to the benefits because she was the plan’s designated beneficiary. Isaac’s sons from his prior marriage to Dorothy (who predeceased Isaac) claimed they were entitled to the proceeds under Louisiana community property law. The Court held that the Louisiana law directly “clashed” with the objectives of ERISA such that allowing the sons’ claim to stand would undermine the objective of “ensur[ing] a stream of income to surviving spouses.”

In Kennedy, the Court relied on these cases, which primarily focused on preemption issues. Part of the rationale for these decisions was the importance of following what was specified in the plan documents to avoid the problems of following varying state laws. For example, in Egelhoff, the Court noted that the (preempted) state law “has a prohibited connection with ERISA plans because it interferes with

63. Id.
64. Id.
65. Id.
66. Egelhoff, 532 U.S. at 144. Under the state law, a divorce revokes the former spouse’s interest in any non-probate assets, which includes a life insurance plan. Id.
67. Id.
68. Id. at 148. The Court also stressed concerns of plan uniformity. Egelhoff, 532 U.S. at 148.
70. Id. at 837.
71. Id. at 836.
72. Id. at 843.
73. Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865, 876 (2009). In both cases, the Court held that ERISA preempted state law. See Egelhoff, 532 U.S. at 143; Boggs, 520 U.S. at 836.
74. See Egelhoff, 532 U.S. at 148–49; Boggs, 520 U.S. at 840.
nationally uniform plan administration.” 75 In Boggs, in rejecting the respondent’s argument that the Court look beyond the ERISA section 3(8) definition of beneficiary to include a new class of people for whom plan assets are held or managed, the Court stated that a decision in the respondent’s favor would lead to a “complex set of requirements varying from State to State.” 76

The written instrument rule requires that every plan “shall be established and maintained pursuant to a written instrument.” 77 The written instrument must “specify the basis on which payments are made to and from the plan.” 78 The written instrument rule, it can be argued, gives weight to the plan documents approach. For example, in Metropolitan Life Insurance Co v. Pressley, the Sixth Circuit cited ERISA section 404(a)(1)(D), which requires “a plan administrator [to] discharge his duties ‘in accordance with the documents and instruments governing the plan . . . .’” 79 Another example of a case utilizing the plan documents rule is McMillan v. Parrott. 80 In McMillan, the Sixth Circuit held that plan documents that named the former spouse as the beneficiary controlled, even though the ex-spouse had waived the benefits in the divorce decree. 81 The Sixth Circuit stated this result conformed to congressional intent “that ERISA plans be uniform in their interpretation and simple in their application.” 82

Justice Souter, writing for the Court in Kennedy, adopted this approach:

The plan administrator is obliged to act “in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA],” and the Act provides no exemption from this duty when it comes time to pay benefits. 83

75. Egelhoff, 532 U.S. at 148. The Court went on to note the burden on plan administrators of following numerous state statutes. Id. at 148–49.
76. Boggs, 520 U.S. at 850–51.
78. Id. § 1102(b)(4).
80. McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990), reh’g granted, 922 F.2d 841 (6th Cir. 1990).
81. Id. at 311–12.
The Court continued: "[B]y giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule . . . ." The Court referred to itself as "holding the line" in adhering to the bright line rule of following the plan documents, citing both Boggs and Egelhoff as supporting precedent.

Under the alternative approach, the federal common law approach, courts looked at surrounding circumstances in a particular case, including any language in a divorce decree purporting to waive benefits. An example of a case utilizing the federal common law approach is Fox Valley & Vicinity Construction Workers Pension Fund v. Brown. In Fox Valley, although the ex-spouse was still designated as the beneficiary in the plan documents, the Seventh Circuit held that the waiver of benefits in the divorce decree was valid.

Kennedy jettisoned the distinction among the lower courts as to whether a common-law waiver ran afoul of the anti-alienation rule, essentially giving a green light to waivers. Kennedy also sided with the courts that held that the plan documents control if there are inconsistencies between the plan documents and a common-law waiver.

II. ANTI-ALIENATION AFTER KENNEDY

A. The Anti-Alienation Rule Defined

Under section 206(d), ERISA requires that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned
The anti-alienation rule applies to both voluntary assignments and involuntary alienations.92 The anti-alienation provision stems from trust law.93 Under trust law, spendthrift clauses prohibit a trust beneficiary from "alienating the corpus of the trust."94 Whereas the spendthrift clause is optional in trust law,95 the anti-alienation provision is required for pension plans under ERISA.96 Under ERISA's broad preemption power, state laws that seek to alter distribution mechanisms of the plan are preempted97 such that anti-alienation coupled with preemption "provides qualified plan participants with an almost impenetrable shield against third party creditors."98

The purpose of the anti-alienation provision is protective; it prevents participants from "spending retirement savings before retirement."99 The anti-alienation rule reflects Congress's policy choice to safeguard a stream of income for participants (as well as their dependents who usually are not at fault), even if that decision prevents others from securing relief for wrongs done to them.100

There are four exceptions to the anti-alienation rule.101 The exception that Kennedy brings to the forefront is the exception for a

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93. See id.
94. Id.
95. Id.
96. See 29 U.S.C.A. § 1051(1) (West 2010) (detailing the mandatory provisions and to which plans they apply); see also LANGBEIN ET AL., supra note 92, at 269 ("ERISA's anti-alienation rule, by contrast [to the optional spendthrift clause of a trust], is a mandatory term that the statute requires every pension trust to contain."). Anti-alienation does not apply to welfare benefits. COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 228 (2d ed. 2007) (citing ERISA § 201(1), which states that the provisions of Part 2 do not apply to employee welfare benefit plans); see also Chason, supra note 38, at 62-63 (citing Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825 (1988)).
98. MEDILL, supra note 96, at 226.
99. LANGBEIN ET AL., supra note 92, at 269 ("It would scarcely make sense to stop the participant from drawing down his or her pension account for current consumption if the participant's creditor could present the bills arising from the participant's consumption spree to the pension plan by way of assignment or in the form of a judgment debt.").
101. MEDILL, supra note 96, at 228.
According to ERISA section 206(d)(3), the anti-alienation rule "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that [the anti-alienation rule] shall not apply if the order is determined to be a qualified domestic relations order." Congress added the QDRO exception as part of the Retirement Equity Act of 1984 to make a participant’s retirement benefits “available to support the family in the context of a divorce or separation.”

A QDRO is a domestic relations order that “creates or recognizes the existence of an alternate payee’s rights to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.” An “alternate payee” is a dependent of the participant, such as a spouse, former spouse, or child.

B. The Effect of Kennedy on Anti-Alienation

Despite some lower court decisions to the contrary, as a result of

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103. 29 U.S.C.A. § 1056(d)(3)(A) (West 2010). The other statutory exceptions to the anti-alienation rule are for a loan by the plan made to the participant from assets held in the participant’s account, a voluntary and revocable assignment of not more than ten percent of any benefit payment made to the participant, made by a participant to a third party, id. § 1056(d)(2), and if the fiduciary breached a fiduciary duty causing losses to the plan, then a state or federal court order, judgment, consent decree, or settlement agreement attaching the plan benefits if that fiduciary is also a participant. Id. § 1056(d)(4)(A).
104. See Zanglein & Ford, supra note 26, at 947 n.559; see also 1 MICHAEL J. CANAN, QUALIFIED RETIREMENT PLANS § 7:27 (2010) (“It is now clear that plan administrators may comply with a state court order requiring benefit payments to former spouses and other ‘alternate payees’… but only if the order meets the statutory criteria for a ‘qualified domestic relations order’ (QDRO).”).
105. Sharon Reece, The Times Are “A-Changing” Towards a Living Statute Jurisprudence in ERISA, 40 U. MEM. L. REV. 55, 101 (2009); see also LANGBEIN ET AL., supra note 92, at 272 (“The guiding purpose of the 1984 legislation was to enhance the retirement income security of the homemaker, characteristically the wife, in traditional support marriages, in which only the employed spouse has significant earnings opportunities outside the home.”).
106. 29 U.S.C.A. § 1056(d)(3)(B)(i)(I) (West 2010). To qualify as a QDRO, the order must “relate[] to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant.” Id. § 1056(d)(3)(B)(ii)(I). To meet the requirements of a QDRO, the order must meet certain specifications of ERISA section 206(d)(3)(C). See id. § 1056(d)(3)(C). A QDRO may not require more than is allowed by the plan, either in the context of increased benefits or by providing options not otherwise available under the plan. See id. § 1056(d)(3)(D).
108. See, for example, Kennedy v. Plan Administrator for DuPont Savings and
Kennedy, QDROs cannot serve as mere waivers. This is because of the alternate payee requirement of the QDRO—a QDRO requires an alternate payee to be designated. A QDRO thus cannot be used to disclaim benefits.

Kennedy narrows the scope of the anti-alienation rule such that waivers do not implicate (and therefore do not risk running afoul of) the anti-alienation rule. Kennedy did not, however, actually invalidate the common-law waivers. Some argue that other avenues for enforcing the waiver, including directly suing the party granting the waiver may still be available. This does not appear possible under Boggs, however, because ERISA will preempt the claim.

Additionally, the Court in Kennedy specifically noted that the decision “[does] not address a situation in which the plan documents provide no means for a beneficiary to renounce an interest in benefits.” William’s SIP had a mechanism whereby a beneficiary could disclaim benefits; Liv did not follow it. Some scholars have argued that this footnote in the Court’s opinion may allow lower federal courts to distinguish those situations where the plan does not provide a procedure for disclaiming benefits from Kennedy and not adhere to the plan documents rule. This was indeed the result in a 2009 decision in Matschiner v. Lewis in the District of Nebraska. The district court held that because the plan documents did not contain a disclaimer or waiver provision, Kennedy did not apply.

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111. See Supreme Court Rules That Waiver of Benefits in Divorce Decree Does Not Override Beneficiary Designation, 37 TAX MGMT’T. COMPENSATION PLAN. J. 99, 99 (2009) (noting that Kennedy does not invalidate waivers, but that, in order to give effect to a waiver, “a plan will need to contain language to this effect”); supra note 37 and accompanying text.
114. See supra notes 69–72 and accompanying text.
116. Id. at 877.
117. See, e.g., Barry, supra note 38, at 9.
119. Id. ("Although the factual circumstances of Kennedy and the present case under consideration are quite similar, an important distinction between the two exists: in contrast to
On appeal, the Eighth Circuit reversed and remanded the case, stating that the Supreme Court "did not intend to exempt from the plan documents rule all welfare benefit plans that do not contain an express waiver-of-benefits provision."\textsuperscript{120} The Eighth Circuit further noted, "[w]e suspect that footnote 13 was simply a reminder that 'common sense and common law' may apply to prevent the plan documents rule combined with ERISA's anti-alienation provision from precluding a pension benefit plan beneficiary from disclaiming an unwanted interest."\textsuperscript{121}

The Fourth Circuit reached the same result on a case with similar facts. In \textit{Boyd v. Metropolitan Life Insurance Co.}, the life insurance plan at issue did not set forth a procedure for disclaiming benefits.\textsuperscript{122} The Fourth Circuit discussed \textit{Matschiner} and agreed with the Eighth Circuit that footnote 13 "only addresses situations where a plan 'preclud[es] a pension benefit plan beneficiary from disclaiming an unwanted interest.'"\textsuperscript{123}

To some extent, the full scope of the anti-alienation rule after \textit{Kennedy} has yet to be fleshed out. The view among the lower courts at this point appears to be that \textit{Kennedy} endorsed a sweeping view of the plan documents rule.

\section*{III. IMPLICATIONS FOR THE ANTI-CUTBACK RULE IN LIGHT OF KENNEDY}

\subsection*{A. The Anti-Cutback Rule Defined}

\textit{Kennedy} provides the scope of the anti-alienation rule,\textsuperscript{124} but another ERISA provision is also potentially implicated. Under ERISA section 204(g), the anti-cutback rule, an amendment to a qualified plan cannot reduce a participant’s accrued benefit under the plan or eliminate an optional form of benefit under the plan.\textsuperscript{125} The purpose of the anti-
The anti-cutback rule is critical to the integrity of the vesting rules for qualified plans; otherwise vesting would be meaningless. If a plan amendment runs afoul of the anti-cutback rule, ERISA section 204(g) authorizes the plan’s participants to bring a private civil action challenging the amendment.

In the context of a defined benefit plan, the anti-cutback rule protects the age sixty-five annuity. The accrued benefit is “the individual's accrued benefit determined under the plan... expressed in the form of an annual benefit commencing at normal retirement age.” ERISA sets forth specific accrual methods for defined benefit plans. These methods determine the benefit at age sixty-five, which is generally considered the normal age of retirement. The purpose of these benefit accrual methods is to prevent the employer from “backloading benefits under a defined benefit plan.” By contrast, with

pension plans. See id. § 1051(1) (stating that the provisions of the participation and vesting sections of ERISA do not apply to welfare plans). By contrast, a plan sponsor has essentially free reign with respect to unilaterally amending or terminating welfare plans, subject to any contractual restrictions the plan agreed to with the participants. See, e.g., Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995); McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1991); see also LANGBEIN ET AL., supra note 92, at 169-70.

126. MEDILL, supra note 96, at 132.
127. Id. For example, in Shaw v. International Association of Machinists & Aerospace Workers Pension Plan, the plaintiff’s pension plan included cost of living adjustments. Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan, 563 F. Supp. 653, 654 (C.D. Cal. 1983), aff'd, 750 F.2d 1458 (9th Cir. 1985). The defendant began to phase out of the cost of living adjustments on the advice of plan actuaries, who stated that the plan would “suffer serious financial instability” if such actions were not taken. Id. The court found that the cost of living adjustment constituted an accrued benefit under ERISA section 3(23), and, therefore, could not be taken away under ERISA section 204(g). Id. at 657.
128. MEDILL, supra note 96, at 132; see also LANGBEIN ET AL., supra note 92, at 169 (“Without § 204(g), a retroactive plan amendment could subvert the plan’s vesting regime.”).
129. MEDILL, supra note 96, at 132; see also I.R.C. § 411(d)(6) (West 2010). Benefits protected by the anti-cutback rule are often called “411(d)(6) benefits.” See LANGBEIN ET AL., supra note 92, at 172; MEDILL, supra note 96, at 132.
130. MEDILL, supra note 96, at 135.
132. There are three permissible methods for calculating the accrued benefit for a defined contribution plan: the 133-1/3% method, the fractional method, and the 3% method. See I.R.C. § 411(b)(1) (West 2010).
133. See LANGBEIN ET AL., supra note 92, at 157.
134. MEDILL, supra note 96, at 135. Before ERISA was enacted, “it was not uncommon” for employers to set up the defined benefit plan so that the participant would not accrue a significant portion of the benefits until just before retirement. Id. This way, if the
a defined contribution plan, the anti-cutback rule protects the participant's account balance—the vested and nonvested balance of the individual account under the plan.\(^{135}\)

The anti-cutback rule also prevents an employer from eliminating optional forms of benefit available to participants.\(^{136}\) The classic example of the optional form of benefit is the option to take a lump sum distribution.\(^{137}\) The anti-cutback rule, however, does not apply to plan features that are ancillary benefits or administrative features of the plan, such as accident or life insurance benefits, or the valuation dates for account balances.\(^{138}\) The anti-cutback rule applies to those benefits already accrued by the participant,\(^{139}\) it does not prohibit an employer from amending the plan prospectively in a way that would reduce the participant's future benefit accrual or to eliminate an optional form of benefit regarding benefits that have not yet accrued under the plan.\(^{140}\)

B. How Kennedy Implicates the Anti-Cutback Rule

Kennedy does not speak to plan amendments or the anti-cutback rule.\(^{141}\) Although the Supreme Court held that a waiver does not violate the anti-alienation rule, it is possible that a waiver may run afoul of the anti-cutback rule.\(^{142}\) The IRS has determined that the anti-cutback rule applies to waivers.\(^{143}\) According to Treasury regulation section 1.411(d)-4, Q&A (3), “a participant may not elect to waive section 411(d)(6) protected benefits,” subject to an exception for elective transfers or benefits between defined contribution plans.\(^{144}\) Thus,
according to the IRS, a participant may not waive a benefit protected by the anti-cutback rule. Liv was a beneficiary, not a participant in the plan, so the Kennedy decision did not contradict the precise terms of the regulation. A reading of the regulation, however, prompts the question of whether the regulation, when properly interpreted, does in fact apply only to participants and not to their beneficiaries as well.

1. Whether Regulation Section 1.411(d)-4, Q&A (3) is Valid

Kennedy also raises the issue of whether the regulation is actually valid. Kennedy brings forth a potential conflict: If the regulation includes both participants and beneficiaries, then according to the IRS, Liv’s waiver in Kennedy was impermissible—if her benefit is protected under the anti-cutback rule. It seems that either the IRS or the Supreme Court is in error, as these two views do not appear to be reconcilable. A preliminary question is whether the IRS has exceeded its regulatory authority in applying the anti-cutback rules to waivers.

The IRS’s authority to promulgate Treasury regulation section 1.411(d)-4 comes from section 1502 of the Internal Revenue Code, according to the text of the regulation. It is not unlikely that the IRS thinks Treasury regulation section 1.411(d)-4 is invalid to the extent that it brings waivers under the scope of the anti-cutback rule. A waiver is not the same thing as an amendment. Neither of these terms is defined in ERISA. The terms are used in the case law according to their plain meaning definitions. A waiver is a legal instrument evincing “the act accummulated funding deficiency cannot be deemed corrected by having plan participants ‘waive’ their accrued benefits.” (quoting IRM 7.7.2.2.4 (Apr. 20, 1999)).

146. Kennedy, 129 S. Ct. at 869.
147. I.R.C. § 1502 (West 2010); see also Treas. Reg. § 1.411(d)-4 (as amended in 2007); see also infra note 195 (discussing the sources of authority for promulgating Treasury regulations).
148. As Chason notes:
[This regulation probably is invalid. It is black-letter law that the anticutback rule applies only to plan amendments. . . . “[T]he word amendment is used as a word of limitation . . . . Congress did not state that any change would trigger [the anticutback rule]; it stated that any change by amendment would do so. . . . In its present form, [the anticutback rule] is specifically limited to actual amendments.”
Chason, supra note 38, at 64 (alterations in original) (second and third omissions in original) (quoting Andes v. Ford Motor Co., 70 F.3d 1332, 1335 (D.C. Cir. 1995)).
149. See, e.g., Kennedy, 129 S. Ct. at 873 (treating relinquishment of rights as a waiver); see also Cent. Laborers’ Pension Fund v. Heinz, 541 U.S. 739, 741 (2004) (treating a change to the plan as an amendment).
of intentionally relinquishing or abandoning a known right, claim, or privilege."\textsuperscript{150} By contrast, an amendment is a formal "modification, deletion, or addition."\textsuperscript{151} These definitions are consistent with how the terms are used in the case law.\textsuperscript{152} By the text of ERISA section 204(g), the anti-cutback rule applies to "an amendment of the plan."\textsuperscript{153} There is no mention of the rule applying to a waiver of benefits.\textsuperscript{154} Moreover, the widespread use of waivers may indicate at least tacit acceptance by the IRS that waivers do not implicate the anti-cutback rule.\textsuperscript{155}

Employers have the right to modify or amend the plan provided that it complies with the procedure for doing so as set out in the plan documents.\textsuperscript{156} ERISA section 204(b)(3) requires a procedure set forth in the plan that describes both the amendment procedures and identifying who has authority to amend the plan.\textsuperscript{157} A possible argument, therefore, is that the regulation, which states that waivers by participants are invalid, conflicts with the settlor function by prohibiting employers from amending the plan to include a waiver. According to the settlor function, employers retain the ability to set the terms of the plan, which could include disclaimer provisions, such as the one in \textit{Kennedy}.\textsuperscript{158} The IRS cannot promulgate a regulation that is inconsistent with the statute itself,\textsuperscript{159} but there is room for argument that it has done so in this instance if the waiver prohibition conflicts with the settlor function. In

\textsuperscript{150} MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1406 (11th ed. 2003).
\textsuperscript{151} Id. at 39.
\textsuperscript{152} For example, when discussing the waiver, the \textit{Kennedy} court noted that Liv was "a beneficiary seeking only to relinquish her right to benefits." \textit{Kennedy}, 129 S. Ct. at 873. The Court has referred to the anti-cutback rule as "prohibit[ing] an amendment expanding the categories of postretirement employment that trigger suspension of payment." \textit{Cent. Laborers' Pension Fund}, 541 U.S. at 741.
\textsuperscript{153} 29 U.S.C.A. § 1054(g)(1) (West 2010); see also id. § 1054(g)(2) ("For purposes of paragraph (1), a plan amendment which has the effect of . . . ") (emphasis added)).
\textsuperscript{154} Id. § 1054 (2010).
\textsuperscript{155} See, e.g., \textit{Kennedy}, 129 S. Ct. 865; Estate of Altobelli v. Int'l Bus. Machs. Corp., 77 F.3d 78 (4th Cir. 1996), abrogated by \textit{Kennedy}, 129 S. Ct. 865; Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990), abrogated by \textit{Kennedy}, 129 S. Ct. 865; Metro. Life Ins. Co. v. Pressley, 82 F.3d 126, 128 (6th Cir. 1996); McMillan v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990), \textit{reh'g granted}, 922 F.2d 841 (6th Cir. 1990). The IRS did not challenge the waivers as violating the anti-cutback rule in any of these cases.
\textsuperscript{157} 29 U.S.C.A. § 1102(b)(3) (West 2010). ERISA section 204(h) requires that advance written notice be given to participants in defined benefit plans of amendments that will reduce their future benefit accrual. Id. § 1054(h).
\textsuperscript{158} \textit{Kennedy}, 129 S. Ct. at 869.
Clark v. Feder, Serno, & Bard, P.C., the District Court for the District of Columbia held that a Treasury regulation promulgated under section 411(d)(6)(A) of the Internal Revenue Code was inconsistent with ERISA’s anti-cutback rule, and to the extent that was the case, the court was “exempt[ed] . . . from any obligation to defer to it.” Thus, if a court finds that this portion of Treasury regulation section 1.411(d)-4 conflicts with ERISA, the regulation will not bear weight.

The IRS may counter by saying a plan amendment allowing a waiver is invalid, arguing that the amendment itself is a cutback. Under this interpretation, the amendment to allow a waiver would be prohibited under the anti-cutback rule. The exercise of discretion itself can be a cutback. Under regulation 1.411(d)-4, Q&A (4), an employer may not, through the exercise of discretion, deny a participant a 411(d)(6) benefit for which she is otherwise eligible (subject to an exception for certain employee stock ownership plans). This portion of the regulation may be sufficient to protect the interest of participants. Alternatively, the IRS could argue more narrowly that a waiver is not valid if it is not specifically sanctioned by the plan. This argument may have little chance of success if courts continue to hew to the plan documents rule as in Matschiner v. Lewis and Boyd v. Metropolitan Life.

An additional argument may lie in the purpose of the anti-cutback rule, which is to protect the participant’s accrued benefits. Protection of the accrued benefits enables the participants to rely on the vesting rules to protect their benefits. Reliance is at the core of the anti-cutback rule. Courts have noted this emphasis on reliance in anti-cutback cases, including in Kennedy. Part of the reason the Court

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161. Id.
162. Treas. Reg. § 1.411(d)-4, Q&A (3)(a) (as amended in 2007).
164. Id.
165. See supra notes 120–23 and accompanying text.
166. MEDILL, supra note 96, at 132.
167. Id.
168. Id.
169. See, e.g., Cent. Laborers’ Pension Fund v. Heinz, 541 U.S. 739, 744–45 (2004) (noting that the plaintiff acted reasonably in relying on the plan terms in planning his retirement and that the plan amendment “undercut any such reliance”). “[W]hen Congress enacted ERISA, it wanted to . . . mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to
decided on the plan document rule is that following "the terms of the plan...establish[es] a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits." The Court noted that "ERISA’s statutory scheme 'is built around reliance on the face of written plan documents.'" It is unclear, however, that the emphasis on reliance (by the plan participant in the anti-cutback context and by both the participant and administrator in the plan documents rule context) is sufficient to predict how the Court would rule if faced directly with this issue of the effect of Kennedy on the anti-cutback rule. As of the writing of this article, there have been no federal court cases on this issue.

2. Whether Regulation Section 1.411(d)-4, Q&A (3) Applies to Participants Only

Separate from whether the IRS has exceeded its regulatory authority in issuing this regulation, the issue arises of whether the regulation applies only to participants or if it applies to beneficiaries as well. The IRS's rationale for prohibiting waivers appears to be the same as the rationale underlying the anti-alienation rule—to protect participants and beneficiaries from their own financial imprudence. Although the IRS argues that the waiver prohibition falls under the anti-cutback rule, it may more appropriately fall under the anti-alienation rule. The IRS may argue that the waiver prohibition is correctly within the anti-cutback rule because it serves to protect employees from employer coercion to disclaim benefits. In that regard, it would make

obtain a vested benefit—he actually will receive it." *Id.* at 743 (second alteration in original) (internal quotation marks omitted) (quoting Lockheed Corp. v. Spink, 517 U.S. 882, 887 (1996); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan, 563 F. Supp. 653, 656 (C.D. Cal. 1983), *aff'd*, 750 F.2d 1458 (9th Cir. 1985) ("[T]he plan must specify the basis on which payments are to be made to participants and beneficiaries so as to meet the legislative purpose of having each participant know exactly where he stands with respect to the plan." (quoting Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 914 (2d Cir. 1982))).


172. See I.R.C. § 411(d)(6)(B); see also Treas. Reg. § 1.411(d)-4, Q&A (4).

173. See MEDILL, supra note 96, at 132.


sense for the regulation to refer only to participants. This is a weak argument, however, because of the knowing and voluntary standard for waivers.

The waiver prohibition is in 1.411(d)-4, Q&A (3), which addresses the transfer of benefits between defined benefit and defined contribution plans. Thus, it is possible that the prohibition here is limited to those circumstances, but the prohibition provision does not indicate such a limitation. Another subsection of the same regulation, however, may apply. According to 1.411(d)-4, Q&A (2)(e)(4), “[s]ection 411(d)(6) protected benefits may not be eliminated merely because they are payable with respect to a spouse or other beneficiary.” So, it is possible that this provision modifies 1.411(d)-4, Q&A (3) such that beneficiaries have been included throughout the regulation. 1.411(d)-4, Q&A (2)(a)(4) addresses the issue of beneficiaries quite broadly, questioning the extent to which “section 411(d)(6) protected benefits under a plan [may] be reduced or eliminated.” Thus, this section can be interpreted to provide a broad baseline for the entire regulation, such that including “beneficiary” within the other subsections would be unnecessary. Under this interpretation, the regulation would be not consistent with Kennedy, as Kennedy allowed for a waiver of benefits. Thus, taxpayer employers are left in a quandary as to whether waivers will in fact be allowed by the IRS.

3. Taxpayer Options

The IRS enforces administratively via a determination letter, which confirms with the employer that the plan document has been correctly written. There are several options available under the Employee Plans Compliance Resolution System (EPCRS) to allow an employer to remedy plan errors that would lead to plan disqualification if uncorrected. Most severe of these is the Audit Closing Agreement

176. See MEDILL, supra note 96, at 132.
177. See, e.g., Rodriguez-Abreu v. Chase Manhattan Bank, 986 F.2d 580, 587 (1st Cir. 1993) (discussing the knowing and voluntary standard for waivers).
181. Treas. Reg. § 1.411(d)-4, Q&A (2) (as amended in 2007).
182. See KOZAK, supra note 139, at 284. A determination letter is not required but is highly recommended. Id.; MEDILL, supra note 96, at 224.
183. MEDILL, supra note 96, at 224.
program (Audit CAP). The Audit CAP occurs when a failure in the plan is identified during an audit by the IRS. The employer must rectify the error and pay a penalty to the IRS. Fear of the Audit CAP, which is "the correction method of last resort for the employer," makes taxpayers unlikely to buck IRS rules, which may therefore put taxpayer employers in a difficult position if they are unclear as to whether waivers are allowable under Kennedy and the anti-cutback rule.

Instead of risking an Audit CAP (and potential plan disqualification), employers may refrain from including waiver provisions in their plan documents. Employers will not be willing to bet their entire pension plan against the validity of a waiver. The risk exists that the IRS would withhold the determination letter if it appeared clear (to the IRS) that the waiver was authorized by the plan terms. The taxpayer could challenge the denial of a determination letter, but would face an uphill battle in doing so. Alternatively, the taxpayer could wait to get disqualified and then try to resist the adverse consequences of disqualification, but the risks are enormous.

If a taxpayer did challenge the regulation, however, the taxpayer would face significant challenges. The taxpayer would be required to exhaust her administrative remedies before she would be able to bring suit in federal court. The standard of review the taxpayer would then face in federal court could be quite daunting. According to the

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184. Kozak, supra note 139, at 288. Kozak notes that the EPCRS "has been designed so that the Audit CAP sanction will be much more punitive than the fees for [voluntary correction with service approval]." Kozak, supra note 139, at 288.
185. Id.
186. Medill, supra note 96, at 225.
187. Id.
188. Id. at 223.
189. Id.
190. See Kozak, supra note 139, at 284–85 (discussing the process of the determination request program).
191. See Jacob A. Stein et al., Administrative Law § 49.01 (2009).
192. See Medill, supra note 96, at 223 (discussing the tax problems companies may face as a result of plan disqualification); see also Kozak, supra note 139, at 288 (describing the punitive nature of an Audit CAP).
193. See Stein et al., supra note 191, § 49.01.
194. See id. ("[P]arties may not ask a court to rule on an adverse administrative determination until they have availed themselves of all possible remedies within the agency itself.").
195. The Treasury and the IRS have to follow the Administrative Procedures Act (APA), which requires that agencies promulgating regulations abide by public notice and comment procedures. See Kristin E. Hickman, The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference, 90 Minn. L. Rev. 1537, 1543 (2006) (citing 5 U.S.C. §§ 551–559
landmark Chevron case, unless Congress has spoken to the precise issue in question, courts should defer to agencies on pure questions of statutory interpretation as long as the agency arrived at a reasonable or permissible construction of the statute, even if the court does not believe it is the best interpretation of the statute. The rationale is that, when selecting among various policy objectives, it is best left to agency determination to make the appropriate policy choice.

The circuit courts and the Tax Court are divided as the applicability of Chevron. According to Professor Kristin Hickman, some Circuits apply Chevron deference to all Treasury regulations, both those promulgated under the general authority of section 7805(a) of the Internal Revenue Code and those promulgated under a specific authority. Some courts treat Chevron and National Muffler (which provides an arguably more convoluted standard than Chevron) as indistinguishable and apply Chevron deference. Other courts, the

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(2000)). The APA distinguishes “legislative” from “interpretive” rules such that public notice and comment procedures are required only for the former. Id. Hickman notes that there are two sources of authority behind the promulgation of Treasury regulations. Id. at 1544. The authority for many regulations is section 7805(a) of the Internal Revenue Code, “which grants Treasury the power to develop ‘all needful rules and regulations for the enforcement of’ the Code.” Id. at 1544 (quoting I.R.C. § 7805(a) (2010)). Other provisions contain specific grants of authority. Id. at 1545. Treasury regulation section 1.411(d)-4 is one of these: at the end of the regulation, the authority for the regulation is listed. Treas. Reg. 1.411(d)-4 (2010).

According to section 1502 of the Internal Revenue Code, “[t]he Secretary shall prescribe such regulations as he may deem necessary. . . . in such manner as clearly to reflect the income-tax liability and the various factors necessary for the determination of such liability, and in order to prevent avoidance of such tax liability.” I.R.C. § 1502 (West 2010). Hickman notes the Treasury’s long-standing practice of considering its general authority regulations (those promulgated under section 7805(a)) as interpretive. Hickman, supra, at 1545. The implication of this is that the Treasury will rarely agree that the APA’s notice and comment requirements apply, because the Treasury “regularly cites I.R.C. § 7805(a) as the legal basis even for regulations that seemingly fall within the scope of a specific authority provision.” Id.

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197. Id; see also STEIN ET AL., supra note 191, § 51.01 (2009). This is typically formulated as a two-part test: Step one is to determine “whether the statute being interpreted clearly and unambiguously resolves the issue.” See Hickman, supra note 195, at 1547. The second step asks whether the agency’s interpretation is permissible. Id. In United States v. Mead Corp., 533 U.S. 218 (2001), the Supreme Court clarified the applicability of Chevron, leading to the result that if Chevron deference does not apply, then the more scrutinizing Skidmore deference does. Hickman, supra note 195, at 1550–51.


199. Id. at 1556–57.

200. Id. at 1557.

201. In Nat’l Muffler Dealers Ass’n v. United States, 440 U.S. 472 (1979), the Court articulated a “full grab-bag of relevant factors” to be used in determining the validity of a Treasury regulation. Hickman, supra note 195, at 1555.

202. Id. at 1557.
Fourth Circuit and the Federal Circuit, for example, consider National Muffler a less deferential standard; these courts then apply Chevron deference to regulations promulgated under specific authority and National Muffler deference to regulations promulgated under the general authority of section 7805(a) of the Internal Revenue Code. Under any of these approaches, Treasury regulation section 1.411(d)-4 would be entitled to Chevron deference as it was promulgated under the specific authority of section 1502 of the Internal Revenue Code. Hickman notes that the Tax Court has been essentially all over the map in deciding the appropriate standard for judicial review: the Tax Court has applied Chevron, Skidmore (which pre-dated Chevron), and National Muffler seemingly without any consistency.

Although the Tax Court has not been consistent in its standard of judicial review, considering that regulation section 1.411(d)-4 was promulgated under specific authority, it is reasonable to assume it would receive Chevron deference in Tax Court, and it is quite likely it would receive that level of deference on appeal to the appropriate Circuit Court.

C. Recommendation: Provide Guidance on the Applicability of Regulation 1.411(d)-4, Q&A (3)

In light of the potential confusion and uncertainty surrounding 1.411(d)-4, Q&A (3) in the wake of Kennedy, this Article recommends that the IRS provide guidance as to the scope and applicability of that section of the regulation. The regulation specifies that "a participant may not elect to waive section 411(d)(6) protected benefits." This portion of the regulation does not appear to apply to beneficiaries. So, according to the regulation, although it would not be permissible for a participant to waive her benefits, a beneficiary doing so would not run afoul of the anti-cutback rule. This seems an odd outcome. According to ERISA, a participant is "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . or whose beneficiaries may be eligible to receive any such benefit." A beneficiary is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may

203. Id.
204. Id.
205. See Hickman, supra note 195, at 1555.
206. Id. at 1558–59.
become entitled to a benefit thereunder."\(^{209}\) The goal of the anti-cutback rule, as previously discussed, is to protect the accrued benefits from a retroactive repeal or reduction in benefits via a plan amendment.\(^{210}\) Beneficiaries, just as participants, would be served by this, thus it seems inconsistent that the regulation applies to one group but not the other. This may be seen as a possible source of consistency with *Kennedy*, however: Liv, the beneficiary, waived her benefits.\(^{211}\) According to the literal terms of Treasury regulation section 1.411(d)-4, because Liv is the beneficiary and not the participant, the regulation is not violated. In light of 1.411(d)-4, Q&A (2)(e)(4), however, a reasonable reading of 1.411(d)-4, Q&A (3) may be that 1.411(d)-4, Q&A (2)(e)(4) has already incorporated beneficiaries. This reading would render 1.411(d)-4, Q&A (3) inconsistent with *Kennedy* as well as the policies underlying the anti-cutback rule.

Alternatively, the Treasury could provide guidance as to why this provision falls under the anti-cutback regulations, rather than the anti-alienation regulations.

**CONCLUSION**

*Kennedy* raises additional unanswered questions that are beyond the scope of this Article. As an immediate practical concern following *Kennedy*, former spouses ought to change their beneficiary designations in their pension plans unless they intend for their former spouses to remain the beneficiary.\(^{212}\) In that regard, *Kennedy* reiterates the point made in *Egelhoff* that the terms of the plan document will control. Additionally, as discussed earlier, there is the issue of federal courts distinguishing *Kennedy* from situations where the plan documents do not specify a means for a beneficiary to disclaim her interests. In addition, after *Kennedy*, the question arises of whether a beneficiary (or participant) could sell her waiver. That situation is difficult to distinguish from *Kennedy* as that is arguably what Liv did. It was not a gratuitous disclaimer; it was made as part of a divorce settlement in which Liv received consideration in return. Another issue posed by

\(^{209}\) Id. § 1002(8).

\(^{210}\) See *supra* notes 126–28 and accompanying text.


\(^{212}\) See, e.g., Finkel & Bloom, *supra* note 86, at 464; see also Mike Beaver, *Supreme Court Says Plan Documents Resolve ERISA Beneficiary Disputes*, COLO. EMP. L. LETTER, Apr. 2009, at 1 (2009) ("[T]he Supreme Court’s decision places virtually all the responsibility for correct beneficiary designation on employees.").
Kennedy is why the absence of a provision of how to disclaim benefits would not lead simply to deference under Firestone. Under Firestone, claims for benefits receive de novo review unless the plan gives the administrator the discretionary authority to determine eligibility for benefits or to construe the terms of the plan. In Kennedy, there was a procedure to disclaim benefits. Accordingly, under Firestone, the plan administrator’s decision should have been reviewed under an arbitrary and capricious standard, meaning the court will not disturb the determination if it is reasonable. But the Court in Kennedy did not address Firestone. These are among the questions that remain open after Kennedy.

The Kennedy decision did, however, resolve issues that had divided the courts of appeals. As both pension plans and divorces (and other domestic relations orders) are widespread, this decision can have a widespread impact. The decision, which has been said to “favor[] plan convenience and simplicity at the expense of equity,” is a bright-line rule providing ease of administration as well as understanding to both participants and plan administrators. Kennedy obviously implicated the anti-alienation rule, but the anti-cutback rule is implicated as well. As a result of the Kennedy decision, which allows waivers without violating the anti-alienation rule, this Article recommends that the IRS provide more specific guidance as to the applicability of Treasury regulation section 1.411(d)-4, Q&A (3) prohibition on waivers and explain any impact of Kennedy on the regulation.

214. See id. at 115.