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Challenges to Beneficiary Designations under ERISA

Barry L. Salkin

Under the *Restatement (Second) of Contracts*, a voidable contract is one in which one or more parties have the power by a manifestation of election to do so, to avoid the legal obligation created by the contract, or by ratification of the contract to extinguish the power of avoidance.[1] Grounds upon which a contract is voidable include fraud, duress, mental illness, lack of mental capacity, intoxication, and infancy.[2] In other contexts, such as the validity of releases, the doctrine of contractual ratification is applicable. That doctrine provides for the enforcement of a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not voided prior to the making of the promise.[3] For example, if an employer makes contributions under a voidable agreement after learning of the fraud or duress, or other default that makes the contract voidable, then the employer has ratified the contract. More generally, a failure to act promptly to repudiate a voidable contract may be treated as a ratification.[4] However, in the context of a designation of beneficiary, the circumstances are frequently such that there is no realistic opportunity for the designation of a beneficiary to be ratified. The change in designation may have occurred on the individual's deathbed or while his or her medical condition was severely deteriorating. As

Barry L. Salkin is Of Counsel at Olshan Frome Wolosky, LLP. He is a fellow of the American College of Employee Benefits Counsel, and is the author of numerous articles and book chapters dealing with employee benefits issues.

> a result, as a practical matter, if the designation of a beneficiary is the product of duress, undue influence, intoxication from medication, or lack of mental capacity, it is, at least under generally understood principles of contract law and wills, null and void.[5]

ERISA PREEMPTION AND FEDERAL COMMON LAW

Most courts have held that challenges to a properly executed designation-of-beneficiary form on the grounds of undue influence or lack of mental capacity are preempted by ERISA,[6] although there is authority to the contrary[7] and only rarely would the choice between federal or state laws be determinative of the outcome.[8]

Perhaps the clearest illustration of this sentiment is *Manahan v. Meyers,*[9] a pre-*Egelhoff*[10] case that was likely incorrectly decided[11] but is nonetheless instructive for its comments on this issue. In holding that undue influence and lack of mental capacity claims were not governed by ERISA, the Texas Court of Appeals stated:

> We are not here dealing with a state or testamentary law that varies from state to state. We have found no state that recognizes change of beneficiary designation made by mental incompetents and none that recognizes changes caused by undue influence. These doctrines of state law do not threaten inconsistent state regulation of anyone.

The court analogized the application of these doctrines to the uniform treatment under the state slayer statutes,[12] a grouping not typically made, although, as the court noted, in *Ridgeway v Ridgeway*[13] the US Supreme Court indicated that its holding did not apply to "extreme fact situations or instances in which the beneficiary has obtained the proceeds through fraudulent or illegal means as, for example, where the named beneficiary murdered the insured service-member."[14]

However, ERISA preemption does not provide any doctrinal guidance. ERISA is silent on the matter of which beneficiary shall be deemed the beneficiary among disputing claimants,[15] nor is there any language in ERISA as to the manner in which a plan administrator should deal with fraud, forgery, duress, undue influence, or mistake in a change-of-beneficiary form.[16] As a result courts have looked to federal common law.[17]

Even when there is agreement that federal common law applies, an issue may arise as to the appropriate source.[18] Thus, in *Tinsley v. General Motors Corp.*, the US Court of Appeals for the Sixth Circuit, finding the issue to be one of first impression, looked to the laws of the states within the Sixth Circuit.[19] In *Sun Life Assurance Co. v.*

Tinsley,[20] the US District Court for the Western District of Virginia noted that the US Court of Appeals for the Fourth Circuit had held in *Singer v. Black & Decker Corp.*[21] that federal common law should be "consistent across the circuits," a formulation[22] that "would suggest that district courts should regard even precedent from outside their circuit as controlling as long as no conflicting in-circuit law exists."[23] The district court understood the implication of *Singer*:

> Giving effect to *Singer* by simply accepting the Sixth Circuit's approach would mean imposing the law of Michigan, Ohio, Kentucky, and Tennessee on the entire country merely because the issue arose first there. For courts located in Virginia, it means deviating significantly from the more easily proven three-pronged approach taken by the local courts.[24]

While acknowledging that the implication of *Singer* caused the court to have "some uncertainty,"[25] it nonetheless found that:

> [T]he interests of national uniformity which ERISA's preemption clause is designed to secure makes adoption of the Sixth Circuit's enunciation of [the] undue influence test the most prudent course. The Tinsley test is not highly idiosyncratic or otherwise problematic for nationwide application. Even if it does not comport exactly with what this Court or the Fourth Circuit might have adopted in its absence, it provides a perfectly suitable framework for analysis of this case.[26]

Similarly, in *Alliant Techsystem, Inc. v. Marks and Irwin Bank & Trust*,[27] the Minnesota District Court accepted the argument of Irwin Bank that the court should look to the majority approach of states in the Eighth Circuit to determine the appropriate burden of proof for undue influence, while rejecting the claim of the other that a district court in determining the appropriate federal common law standard should look to the law of the state in which it sits. Minnesota applies a clear and convincing evidence standard, while other states in the Eighth Circuit apply a preponderance of the evidence standard.

UNDUE INFLUENCE

In *Tinsley v. General Motors Corporation*,[28] the US Court of Appeals for the Sixth Circuit decided that although the general rule was that courts are not required to look beyond the designation-of-beneficiary form to determine the appropriate beneficiary under an ERISA plan, it did "not believe this rule is applicable here … where the validity of a plan document itself is in question."[29] It began its analysis by observing that because there was no established case law in the Sixth Circuit dealing with forgery and undue influence, it was necessary to look

to state law principles for guidance.[30] The court extracted general principles from state law in the Sixth Circuit to guide its federal common law analysis. First, undue influence is defined as influence that is "sufficient to overcome volition, destroy free agency, and impel the grantor to act against the grantor's inclination and free will."[31] Second, "a showing of mere motive or opportunity to exert excessive control over another is not enough to make out a claim of undue influence; rather, the influence must actually be exerted, either prior to or at the time of the execution of the relevant document."[32] In making the determination, courts look to a number of factors, including the following:

- The physical and mental condition of the benefactor;
- Whether the benefactor was given any disinterested advice with respect to the disputed transaction;
- The "unnaturalness" of the gift;
- The beneficiary's role in procuring the benefit;
- The beneficiary's possession of the document providing the benefit;
- Coercive or threatening acts on the part of the beneficiary, including efforts to restrict contact between the benefactor and his relatives;
- Control of the benefactor's financial affairs by the beneficiary; and
- The nature and length of the relationship between the benefactor and the beneficiary.[33]

In light of the foregoing, it is not surprising that the Sixth Circuit concluded that the inquiry into the exercise of undue influence is a "highly fact-intensive one."[34]

There is a split of authority as to the evidentiary standard when an undue influence allegation is made. Because undue influence can be characterized as a type of fraud, some courts hold that it must be proven by clear and convincing evidence,[35] while other courts would only require a preponderance of evidence.[36] There is agreement, however, that the analysis is fact-sensitive,[37] and that it is insufficient merely to show that a person had the opportunity to exercise undue influence.[38]

As an illustration of what a plaintiff would need to establish to successfully fend off a summary judgment motion on an undue influence claim, in *Washington v. Ganaway*[39] the US District Court for the Northern District of Texas found that the plaintiff had sufficiently pled

a cause of action for undue influence by alleging that the defendant had exerted an undue influence on the decedent sufficient to subvert or overpower the decedent's mind at the time that the decedent designated the defendant as beneficiary and, but for the defendant's influence, the decedent would not have designated the defendant as the beneficiary.

MENTAL CAPACITY[40]

The federal common law standard for mental incompetence requires that the donor know the nature of his property, the nature of his acts, and the material objects of his bounty, including his relationship toward them and the consequences of his act uninfluenced by any material delusion.[41] This is a more detailed breakdown than the *Restatement (Second) of Contracts* formulation, which provides that a person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect: (1) he is unable to understand in a reasonable manner the nature and consequence of the transaction, or (2) he is unable to act in a reasonable manner in relation to the transaction, and the other person has reason to know of the condition.[42] A state law formulation of the test may be somewhat different. For example, in *Metropolitan Life Ins. Co. v. Baker*[43] the Missouri District Court indicated that the test is whether

> at the time of the execution of the will or codicil, the testator understood the ordinary affairs of life, the value and extent of his property, the persons who are the material objects of his bounty, and that he is giving his property to the persons mentioned in the will or codicil in the manner stated.[44]

Although the different federal and state formulations of the substantive test for mental competence are not likely to be outcome-determinative, the procedural aspects might be. Thus, for example, it has been held that, under the federal common law standard, a party challenging competency must establish lack of mental capacity by a preponderance of the evidence,[45] however, some state courts hold that to overcome the showing of mental capacity, the evidence must be clear, cogent, and convincing.[46] Also, under federal common law, the evidentiary burden is on the party challenging competency,[47] while, by way of example, under Missouri law, when a beneficiary designation is challenged on the grounds that the person executing the instrument lacks the capacity, the proponent of the challenged instrument has the burden to establish a *prima facie* case of the due execution of the beneficiary designation and the sound mind of the grantor at the time of the execution.[48] A determination of capacity may

require a district court to consider information outside the administrative record.[49]

In *Metropolitan Life Ins. v. McCloskey*,[50] a Missouri District Court found that the evidence that the participant did not have the clearness of mind and memory sufficient to know the consequences of her act was considerably greater than the evidence required to overcome the presumption of competence. The evidence that the decedent was competent was not credible. Decedent had undergone a tracheotomy and, per the hospital records, she was in intense pain. On the date that she signed the forms, she received several doses of Demerol and Valium in addition to those she had been receiving for weeks. The court concluded that the decedent was too impaired to concentrate on reading or to understand the consequences of a major legal decision. Further, the treatment and medication were intended to impair her cognitive abilities and make her more comfortable.

DURESS

Allegations of duress with respect to a designation of beneficiary are an infrequent occurrence with ERISA.[51] Under the *Restatement (Second) of Contracts*, two types of duress must be distinguished. An improper threat by a party to a contract makes the contract voidable by the other party for reasons of duress when the threat leaves the victim with no reasonable alternative to manifesting consent to the contract. In contrast, an improper threat by a party not a party to the contract renders the contract voidable only if the uninvolved party to the contract has not, in good faith and without reason to know of the duress, either given value or relied materially on the transaction.[52] With respect to challenges to a beneficiary designation, the former type will be relevant.

Duress can further be broken down into three types: duress by physical compulsion; undue influence,[53] and duress by threat.[54] A difficult economic choice does not constitute duress.[55] With respect to any of these three types of duress, there is an interesting open question with respect to federal common law: is fear that is sufficient to overcome the will of a person of ordinary fitness the standard for duress, or fear to overcome the will of the party thereto? That is, is the evidentiary standard subjective or objective?[56]

THE EFFECT OF THE *KENNEDY* CASE

In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*,[57] the US Supreme Court reaffirmed the "plan document rule." It noted that ERISA requires every employee benefit plan [to] be established pursuant to a written instrument,[58] specifying the bases on which payments are made to and from the plan.[59] Under the plan document rule, payments from the plan are to be made in accordance

with the plan documents.[60] The Court also stressed the importance of "holding the line" and not "blur[ring] the bright-line requirement to follow plan documents in distributing benefits."[61] The Court noted that "the cost of less-certain rules would be to a plan" because it would force plan administrators "to examine a multitude of external documents that might purport to affect the dispensation of benefits."[62]

The Supreme Court also noted the benefits of "protecting" the plan document:

> The point is that by giving a plan participant a clear set of instructions for making his own instructions clear, ERISA forecloses any justification for inquiries into nice expressions of intent, in favor of adhering to an uncomplicated rule: simple administration, avoid[ing] double liability, and ensur[ing] that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules.[63]

A few cases have relied upon *Kennedy* in addressing arguments that a participant election under an ERISA plan was the product of undue influence. In *Young v. Terrance Anderson and Ford Motor Company,*[64] the plaintiff alleged that Terrence Anderson, the plaintiff's brother, a defendant in the case as well as the Ford Motor Company, exerted undue influence in obtaining the designation of beneficiary under the decedent's retirement benefit with Ford Motor Company. Although Terrence Anderson had commenced receiving some benefits under the Ford plan, the plaintiff obtained an order that the defendant was holding the funds in constructive trust for the benefit of the plaintiff. With this order, Young went to Ford requesting that it cease making payments to Anderson and instead make the payments to the plaintiff. Ford refused to cease making payments to Anderson. The plaintiff then filed an action in federal district court, which found that Ford had acted properly. After discussing *Kennedy*, the US District Court for the Eastern District of Michigan concluded that:

> [T]he relevant Plan document, the application, clearly designates Anderson as the beneficiary. There is nothing in the document to indicate any error of any kind. Ford is therefore entitled to rely on the application.[65]

With respect to the probate court order, the district court indicated it was important to note that the order did not direct Ford to pay benefits to the plaintiff.[66] Rather, it stated that since the probate court order was directed to Anderson, who was holding the payments from Ford to him in trust for the plaintiff, there was "no need to determine whether the probate court order preempts ERISA because it simply does not direct Ford to make any payments whatsoever regarding the benefit."[67]

In *Dunlap v. Ormet Corporation*,[68] Unum paid the spousal beneficiary under a group life insurance policy pursuant to a designation

signed by the plan participant a few days before his death. Thereafter, the previously designated beneficiary sued Unum, the employer, and the two beneficiaries, contending that the revised beneficiary designation form was signed while the participant was in a confused and disoriented state. However, as in *Young v. Anderson,* at no time before payments began did the plaintiff indicate that it wished to submit a competing claim. The plaintiff nonetheless argued that both Unum and the employer had acted negligently in accepting a modified designation of beneficiary form without investigating its validity. Not surprisingly, the district court, after a detailed analysis of *Kennedy*, rejected the rule, explaining that:

> The record before this Court establishes that defendant Ormet, as the Plan Administrator, and the Unum defendants, as the Claims Fiduciary, followed the procedures set forth in the Plan. The corporate defendants did their statutory duty by paying the benefits to the named beneficiaries in conformity with the procedures set forth in, and the records identified by, the plan documents. The Court believes that neither defendant was required to consider external circumstances in light of the clear distribution instructions in Mr. Dunlap's beneficiary form.[69]

There is also authority that *Kennedy* does not apply once ERISA plan assets have been distributed.[70]

Courts continue, however, to carve out exceptions to the plan document rule for those defenses that go to the validity of the designation-of-beneficiary application.[71] Thus, in *Unicare Life & Health Ins. Co. v. Wheatley*, the US District Court for the Southern District of Ohio indicated that designation in a plan document made by a plan decedent controls the distribution of insurance proceeds, absent an allegation that the documents are fraudulent, otherwise unreliable, or are the product of undue influence.[72] If a designation-of-beneficiary form is challenged as a forgery or a product of fraud, then the plan administrator (or a district court if the plan filed an interpleader):

> To determine whether a signature is forged … would be forced to look at other copies of the decedent's signature [and to] determine whether the change of beneficiary was fraudulently submitted … would be forced to look at circumstances surrounding its submission.[73]

CONCLUSION

From both a factual and legal perspective, issues of undue influence, mental capacity, and duress present difficulties for a plan administrator. Although the issues may be analogous to those presented in

the more frequently encountered divorce context, there are also significant differences. In all scenarios, the plan administrator may be faced with deciding among competing claimants, but that determination is more difficult from an evidentiary perspective when one of the defenses that make a contract voidable is raised. As noted previously, the resolution of the issues is fact intensive,[74] and the analysis, particularly with respect to undue influence, requires a consideration of multiple factors—a commonplace task for a judge but one far less so for a plan administrator. Further, the issues tend to be subtle ones. There is always influence present, but when does it cross the line and become undue? The designated beneficiary whose receipt of death benefits is being challenged may have had ample opportunity to exercise undue influence, but did the person actually exercise that influence? A decedent may have had Alzheimer's disease, his or her medical condition may have been seriously deteriorating, or he or she may have been on substantial medication that could affect one's cognitive processes. But none of these elements in and of themselves would establish a lack of mental capacity, for the issue is the decedent's lucidity at a specific point in time, namely, the time the designation of the beneficiary form was completed. As these illustrations also indicate, these are not cases that can be avoided by improved plan administration with respect to monitoring the designation of beneficiary applications.[75]

Further, the legal issues presented have no relationship to the plan document, and, although it would in theory be possible for a plan to address these issues, in my experience no plans do so. Additionally, many of the issues are evidentiary. Thus, there is a federal presumption of mental capacity in the insurance context;[76] should that presumption be equally applicable to a tax-qualified plan and, if so, what does a legal presumption mean to a plan administrator? How does it relate to the burden of proof, and what should the evidentiary standard be: preponderance of the evidence, or clear and convincing evidence? If the latter, what does "clear and convincing" mean?[77] Is hearsay evidence admissible before a plan administrator? These may be appropriate questions for a law school evidence class but perhaps not for a plan administrator. Conflicts of laws issues may be presented, for example, when the plan is administered in the Fourth Circuit, in which district court cases apply a clear and convincing standard, but the plan challenging the designation could bring a lawsuit in a state located in the Eighth Circuit or the Tenth Circuit, in which the standard is preponderance of the evidence.[78]

Case law has not addressed these issues for a number of reasons. First, in a majority of cases, there is no administrative record because the insurer or plan sponsor has filed an interpleader action.[79] Second, in other cases, the potential beneficiaries who were challenging the designation of the beneficiary application presented little or no

evidence in support of their allegations.[80] Third, in other cases the plan administrator disregarded evidence of undue influence or lack of capacity.[81] No case was located in which the plan administrator upheld an undue influence or lack of mental capacity challenge on an apparent preponderance of the evidence or greater weight of the evidence standard. But the facts on which the decision was rendered would not appear to satisfy a clear and convincing evidence standard, although it is unclear whether a plan administrator would be required to follow federal common law,[82] particularly when there are no Court of Appeals decisions on the issue in the jurisdiction in which the plan is administered. Under these circumstances, a plan administrator's best approach, consistent with its fiduciary obligations,[83] is to make a detailed finding of fact, perhaps even hold a hearing with the possibility of cross-examination, and then file an interpleader.[84]

NOTES

1. *Restatement (Second) of Contracts* § 7, quoted in *Reid v. IBM Corp.,* 1997 WL 357, 969 (S.D.N.Y. 1997). *Cf Sullivan v. Cap Gemini Ernst & Young,* 518 F.Supp. 2d 983 (N.D. Ohio 2007) (an otherwise valid agreement may be invalidated due to fraud, duress, coercion or mistake).

2. *Restatement (Second) of Contracts* § 7, cmt b., 12, 15, 16 quoted in *Reid*, *supra,* n.1.

3. *Wamsley v. Champlin Ref. & Chem., Inc.,* 11 F3d 534, 538 (5th Cir. 1993) *cert. den.* 115 U.S. 1403 (1995), citing *Restatement (Second) of Contracts* § 85, quoted in *Reid*, *supra,* n.1.

4. *Chicago District Council of Carpenters Pension Fund v. Dombrowski,* 545 F.Supp. 325 (N.D. Ill.1992). *See also Dunn v. Digital Equipment Co.,* 61 F3d 1 (1st Cir. 1995) (the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so); *Clayton v. ConocoPhillips,* 2013 WL 3357574 (5th Cir. 2013) (the plaintiff ratified the fraud by continuing to work for Conoco for two years after filing his initial claim); *Halvorson v. Boy Scouts of America,* 215 F.3d 1326 (6th Cir. 2000) (an agreement that is invalid due to duress or coercion can be ratified by retention of the consideration paid).

5. *Iron Workers Mid-America Pension Plan v. Nevers & Ostertag* (N.D. Ill. Nov. 10, 2005), citing *Sladek v. Bell Systems Management Pension Plan,* 880 F.2d 972, 978, 979 (7th Cir. 1989). Although the primary focus of this article is on issues relating to allegations of undue influence or lack of mental capacity with respect to designation of beneficiary forms, one of the bases for challenging a release is that there is evidence of fraud or undue influence. *Cuchara v. Gai-Tronics Corp.,* 129 Fed. Appx. 728, 730, 731 (3rd Cir. 2005), cited in *Sharer v. Siemens Corporation,* 2007 WL 1006681 (W.D. Pa. 2007), and one of the bases for reformation of a contract is undue influence. *Hackett v. PBGC,* 486 F. Supp. 1357 (D. Md. 1980). Additionally, in the law of trusts, a court may reform a trust to the extent that it was procured by wrongful conduct such as undue influence, duress, or fraud. *See Restatement (Third) of Trusts* § 12, 62 cmt. a (2003); *Restatement (Third) of Property* (Wills and Other Donative Transfers) § 8.3 (2003), both quoted in *Skinner v. Northrop Grumman Retirement Plan,* 2012 WL 887600 (9th Cir. 2012).

6. *Tinsley v. General Motors Corporation,* 227 F3d 700, 704 (6th Cir. 2000) (state law claim of undue influence is preempted); *Davis v. Adelphia Communications Corp.,*

475 F.Supp. 2d 600 (W.D. Va. 2007) (same); *Clark v. Board of Trustees S.S. Trade Assn. International Longshoremen's Association Benevolent Fund,* 896 F.2d 1366 (4th Cir. 1990) (state law claims of improper execution and undue influence preempted); *Washington v. Ganaway,* 2008 WL 2604816 (N.D. Tex. 2008) (claim of undue influence under Texas common law preempted); *Schreffler v. Metropolitan Life Ins. Co.,* 2006 WL 1127096 (D. Ariz. 2006) (ERISA preempts Arizona law of undue influence); *Neidich v. Estate of Neidich,* 2002 WL 3014831 (S.D.N.Y. 2002) (allegations of fraud and undue influence under state law are preempted); *Anthem Life Ins. Co. v. Olgun,* 2007 WL 2904223 (E.D. Cal. 2007) (cross claims asserting three California statutes relating to incapacity; fraud, and deceit; and undue influence are preempted by ERISA); *Unum Life Insurance Co. of America v. Barton,* 2005 WL 3185413 (M.D. Fla. 2005) (counterclaim asserting, *inter alia*, an undue influence claim under state law is preempted). *See also Carmona v. Carmona,* 603 F3d 1041, 1062 (9th Cir. 2010) ("when a state court creates a constructive trust with the explicit purpose of avoiding ERISA's rules, it too must be preempted"), cited in *Orr v. Prudential Life Insurance Company of America,* 2012 WL 2122157 (D. Idaho 2012). Of course, in the context of an individual retirement account which is not subject to ERISA, state law will apply. *Harbrorsen v. Sheive,* 2004 WL 627939 (W.D.N.Y. 2004); In *Sun Life Assurance Company v. Tinsley,* 2007 WL. 1052485 (W.D. Va. 2007), the court considered whether the exception to ERISA preemption for laws regulating insurance might apply and concluded that it did not. It explained that rules governing a change in beneficiary have no effect upon risk-spreading and are not limited to the insurance industry. Rather, the laws of competence and undue influence are predominantly drawn from the law of wills.

7. *MetLife v. Yeary,* 208 F.3d 214 (6th Cir. 2000) (undue influence under an ERISA plan was determined under state law, because the defendant did not brief preemption before the district court or argue it before the appellate court, although the concurring opinion would have held the state law to be preempted); *York v. York,* 46 Fed. Appx. 237 (6th Cir. 2002) (applying Georgia law with respect to a diversity case involving undue influence with respect to the transfer of a retirement benefit); *Harmon v. Harmon* (S.D. Texas, August 2, 2013), reported in August 12, 2013, *BNA Pension & Benefits Daily* (undue influence, fraud, and mental capacity determined under Texas law). *Cf. Hancock v. I. B. of T Excavation and Power Pension Trust Fund,* 2011 WL 5141510 (N.D. Ill. 2011) (citing Illinois law for the proposition that there is a strong presumption that the named beneficiary is entitled to proceeds).

8. State formulations of "undue influence" doctrine are frequently similar to the federal common law statutes. See, for example, Minnesota's law (finding undue influence when "the will of the person exercising [the influence] is substituted for the will of the testator whereby the resulting written testament represents the intent and purpose of that person and not the of the testator.") *In re Estate of Opsahl,* 448 N.W.2d 96, 100 (Minn. Ct. App. 1989), quoted in *Alliant Techsystem*, *infra,* n.28, with the district court commenting that the definition used by Minnesota courts is "virtually identical" with the definition used by the federal court of appeals. Similarly, Minnesota courts have defined undue influence as "force, cohesion [or] over persuasion … which destroys the free will or free agency of a grantor to act." *Metropolitan Life Ins. Co v. Parker,* 721 F.Supp. 227, 229 (E.D. Mo. 1989), cited in *Metropolitan Life Ins. Co. v. Baker* (E.D. Mo. August 1, 2013), quoted in August 7, 2013, *BNA Pension & Benefits Daily.* The formulation of the undue influence doctrine under the *Restatement (Second) of Contracts* requires the "unfair persuasion of a person who, because of his relation to the victim, is justifiably assumed at the time to be one who will not act in a manner inconsistent with the victim's welfare." *Joseph v. Chase Manhattan Bank, N.A.,* 751 F. Supp. 31, 34 (E.D.N.Y. 1990), citing the *Restatement (Second) of Contracts* § 177 (1981), quoted in *Reid*, *supra,* n.1.

9. 862 S.W. 2d 130 (Tx. Ct. App. 1993).

10. 532 U.S. 141 (2001).

11. The court did not note that if ERISA preempted the state law doctrine, federal common law would apply, or the possible differences in evidentiary matters among states with substantially similar substantive laws.

12. *Cf.* Salkin, "Slayer Statutes in the ERISA Context" 23 *Benefits Law Journal* 4 (Summer 2010) for a discussion of *Ahmed v. Ahmed*, 2004 Ohio 5120, which indicated the various ways in which slayer statutes varied in their details.

13. 454 U.S. 46 (1981)

14. *Id.* at 60, fn. 9.

15. *Phoenix Mutual Life Ins. Co. v. Adams,* 30 F.3d 554, 562 (4th Cir. 1994), quoted in *Sun Life Assurance Company v. Tinsley,* 2007 WL 1052485 (W.D. Va. 2007) and *Equitable Life Assurance Society of the United States v. Crysler,* 66 F.3d 944, 948 (8th Cir.1995), quoted in *Jones Funeral Home, Inc. and Halliburton v. Life Insurance Company of North America,* (W.D. Ark. August 19, 2008), quoted in *BNA Pension & Benefits Daily,* August 21, 2008.

16. Albert Feuer, "Determining the Death Beneficiary Under an ERISA Plan and the Rights of Such a Beneficiary," 54 *Tax Management Memorandum* 323 (August 26, 2013); *Franklin v. Gibson & TIAA-CREF,* 38 F. Supp.2d 590 (M.D. Tenn. 1999); *Metropolitan Life Insurance Company v. McCloskey,* 36 *Employee Benefit Cases* (EBC) 2755 (N.D. Ohio 2005); *Alliant Techsystems, Inc. v. Marks,* (D. Minn. March 31, 2008), reported in April 4, 2008, *BNA Pension & Benefits Daily*.

17. *See, e.g., Jones Funeral Home, Inc. and Halliburton v. Life Insurance Company of North America,* (W.D. Ark August 19, 2008), quoted in *BNA Pension & Benefits Daily,* August 21, 2008; *Tinsley v. General Motors Corporation,* 227 F.3d 700, 704 (6th Cir. 2000); *Sun Life Assurance Company v. Tinsley,* 2007 WL 1052485 (W.D. Va. 2007); *Alliant Techsystems, Inc. v. Marks,* (D. Minn. March 31, 2008), reported in April 4, 2008, *BNA Pension & Benefits Daily; Metropolitan Life Insurance Company v. McCloskey,* 36 *EBC* 2755 (N.D. Ohio 2005); *Davis v. Adelphia Com. Corp.,* 475 Supp. 2d 600 (W.D. Va. 2007); *Clark v. Board of Trustees, Steamship Trade Assn. International Longshoremen's Association Benefit Trust Fund,* 896 F.2d 1336 (4th Cir. 1990). It is permissible to look to state law as a guide to the federal common law analysis of undue influence. *Davis v. Adelphia Com. Corp.,* 475 Supp. 2d 600 at *4 (W.D. Va. 2007); *Tinsley v. General Motors Corporation,* 227 F3d 700 (6th Cir. 2000). However, "federal common law should not be a backdoor vehicle for implementing state law." Sarabeth A. Rayho, "Divorcees Turn Around in their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans," 106 *Michigan Law Review* 373, 386 (November 2007).

18. There are alternative sources of federal common law, such as the Restatements. *See, e.g., Gamewell Mfg., Inc. v. HVAC Supply, Inc.,* 715 F.2d 112, 116 (4th. Cir. 1983) (looking to *Restatement (Second) of Contracts* to derive federal common law rule cited in *Reid*, *supra*, n.1.

19. *Tinsley v. General Motors Corp.,* 227 F3d 700, 704 (6th Cir. 2001).

20. 2007 WL 1052485 (W.D. Va. 2007).

21. 964 F.2d 1449 (4th Cir. 1992).

22. *Id.* at 1453

23. 2007 WL 1052485 at *2.

24. *Id.*

25. *Id.* at *3.

26. *Id.*

27. (D. Minn. March 31, 2008), quoted in April 4, 2008, *BNA Pension & Benefits Daily* on remand from 8th Circuit (465 F3d 864) (8th Cir. 2006).

28. 227 F3d 700 (6th Cir. 2000). For a further discussion of *Tinsley v. General Motors Corp. see* Jeaneen Johnson & Colleen K. O'Brien, "Beneficiary Designations—Show Me the Money" p. 6, and Sarabeth A. Rayho, "Divorcees Turn About in their Graves as Ex-spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Employee Benefit Plans," 106 *Michigan L. Rev.* 373, 386, fn 84 (November 2007), and Stephen M. Schatz, Stephen L. Cotter, & Bradley S. Wolff "Insurance," 56 *Mercer L. Rev.* 259, 280, fn 280 (2004).

29. *Id.* at 706, fn 1. *See also* Salkin, "Slayer Statutes in the ERISA Context," 23 *Benefits Law Journal* 12, fn 2 (Summer 2010).

30. *Id.* at 704.

31. *Id.*

32. *Id.* at 705. *Alliant Techsystems v. Marks*, (D. Minn. March 31, 2008), reported in April 4, 2008, *BNA Pensions & Benefits Daily*; *Metropolitan Life Ins. Co. v. Baker* (E.D. Mo. August 1, 2013), reported in August 7, 2013 *BNA Pension & Benefits Daily; Rice v. The Office of Servicemembers' Group Life Insurance,* 260 F3d 1240 (10th Cir. 2001).

33. *Id.*

34. *Id.* Other courts have utilized the Sixth Court's framework when considering claims for undue influence in an ERISA context. *See Rice v. The Office of Servicemembers' Group Life Insurance,* 260 F3d 1240 (10*th* Cir. 2001); *Sun Life Assurance Company v. Tinsley,* 2007 WL 1052485 (W.D. Va. 2007) at *2-3 (adapting the Sixth Circuit's undue influence test and declining to derive a separate rule from states within the Fourth Circuit), *aff'd* 2008 WL 78707 (4th Cir. 2008), both cases cited in *Washington v. Ganaway* 2008 WL 2609816 (N.D. Texas, July 2, 2008); *The Guardian Life Ins. Co. of America v. Bowes,* 2012 WL 1378556 (W.D. Va. 2012).

35. *The Guardian Life Ins. Co. of America v. Bowes,* 2012 WL 1378556 (W.D. Va. 2012); *Sun Life Assurance Company v. Tinsley,* 2007 WL 1052485 (W.D. Va. 2007); *Friendly Ice Cream Corp. v. Beckman,* 268 Va. 23, 597 SE 2d 34, 38 (2004), cited in *Davis v. Adelphia Communication Corp.,* 475 F. Supp. 2d 600, 604 (W.D. Va. 2007). More concretely, the courts indicated that to establish undue influence there must be *prima facie* evidence of "great weakness of mind and grossly inadequate consideration or suspicious circumstance or the existence of a fiduciary or confidential relationship." *Friendly* at 39; *Davis v. Adelphia Communications Corp.,* at 604. The district court in Davis noted but did not decide whether, when the plaintiff establishes there was undue influence, the burden of proof may switch to the proponent of the transaction. *Davis v. Adelphia Communications Corp.,* 475 F. Supp. 2d 600 at 606, fn 3 (W.D. Va. 2007).

36. *Alliant Techsystems Inc. v. Marks* (D. Mo. 2008) cited in *BNA Pension & Benefits Daily*, April 4, 2008.

37. *Alliant Techsystems Inc. v. Marks,* 465 F.3d 864 (8th Cir. 2006); *The Guardian Life Ins. Co. of America v. Bowes,* 2012 WL 1378556 (W.D. Va. 2012).

38. *Alliant Techsystems, Inc. v. Marks,* (D. Minn, March 31, 2008), cited in April 4 2008, *BNA Pension & Benefit Daily; Metropolitan Life Ins. Co. v. Baker* (E.D. Mo. August 1, 2013), quoted in August 7, 2013, *BNA Pension & Benefit Daily. See also supra,* n.33.

39. 2008 WL 2609816 (N.D. Tx. 2008). *See also Kubek v. Jones,* 2011 WL 452984 (M.D. Ala. 2011) and *Sun Life Assurance Co. v. Tinsley,* 2007 WL 1052485 (W.D. Va. 2007) (holding that a death bed change of beneficiary from a long-term girlfriend to a relative had been shown to have resulted from undue influence), discussed in Albert Feuer, "Determining the Death Beneficiary Under an ERISA Plan and the Rights of Such a Beneficiary," 54 *Tax Management Memorandum* (August 26, 2013).

40. Although the issue of incapacity arises most frequently in the employee benefits context in connection with designation of a beneficiary, it is not limited to such situations. *See, for example, Reinking v. Philadelphia American Life Insurance, Co.,* 910 F.2d 1210 (4th Cir. 1990) (exclusion in an insurance policy for intentionally inflicted injury does not apply when the individual lacked mental capacity.) For a more detailed analysis of the effect of lack of mental capacity on plan administration, *see* Barry Kozak, "How Plan Administrators Should Assess and React to a Plan Participant with Diminished Capacity," 26 Benefits Law Journal 12 (Winter 2013).

41. *Taylor v. United States,* 113 F. Supp. 143, 148 (W.D. Ark. 1953), *aff'd sub nom Taylor v. Taylor,* 211 F2d 794 (8th cir. 1954) quoted in *Jones Funeral Home, Inc. and Halliburton v. Life Ins. Co. of NA* (W.D. Ark. August 19, 2008), quoted in *BNA Pension & Benefit Daily* (August 21, 2008). *See also Guardian Life Insurance Co. of America v. Bowers,* 2012 WL 1378556 (W.D. Va 2012); *Sun Life Assurance Co. v. Tinsley,* 2007 WL 1052485 (W.D. Va. 2007); *Metropolitan Life Inc. Co. v. Hall,* 9 F.Supp 2d 560, 564 (D. Md. 1998); *Alliant Techsystems, Inc. v. Marks,* (D. Minn. March 31, 2008) quoted in April 4, 2008, *BNA Pension & Benefits Daily.*

42. § 15(1), quoted in *Reid, supra,* n.1. The *Restatement (Second) of Contracts* suggests that there may be situations in which a court in equity may void a contract as a result of mental illness, even if the other party did not know of the mental illness, but may do so only if circumstances have not changed so that avoidance would not be inequitable, discussed in *Reid v. IBM*, 1997 WL 357, 969 (S.D.N.Y. 1997). A similar standard applies to a contract that is voidable by reason of intoxication. *See Restatement (Second) of Contracts* § 16, cited in *IBM v. Reid*, 1997 WL 357,969 (S.D.N.Y. 1997).

43. (E.D. Mo., August 1, 2013), cited in the August 7, 2013, *BNA Pension & Benefits Daily.*

44. *Id.* Under Missouri law, mental capacity with regard to beneficiary disposition is the same test used to determine whether a testator had the capacity to execute a will.

45. *Jones Funeral Homes, Inc. and Halliburton v. Life Insurance Company of North America,* (W.D. Ark. August 19, 2008), quoted in *BNA Pension & Benefit Daily* (August 21, 2008) *Alliant Techsystems, Inc. v. Marks, supra,* n.28.

46. *Metropolitan Life Insurance Co., v. Baker,* (E.D. Mo., August 1, 2013), cited in August 7, 2013, *BNA Pension & Benefits Daily.*

47. *Jones Funeral Homes, Inc. and Halliburton v. Life Insurance Company of North America, supra,* n.46. *See also Dufort v. Aetna Life Ins. Co.,* 816 F.Supp 583 (S.D.N.Y. 1993), quoted in *IBM v. Reid,* 1997 WL 375,969 (S.D.N.Y. 1997) (A party asserting incompetence must prove that status at the time of the disputed transaction … an extremely heavy [burden].); *Rice v. Office of Servicemembers Group Life Ins.,* 260 F.3d 1240, 1247 (decedent entitled to presumption of competence in life insurance context).

48. *Dorsey v. Dorsey,* 156 S.W.3d 442, 446 (Mo. Ct. App. 2005), cited in *Metropolitan Life Insurance Co. v. Baker, supra*, n.47.

49. *Metropolitan Life Insurance Co., v. Van Meter,* 2010 WL 4237166 (W.D. Ky 2012).

50. 36 *EBC* 2755 (N.D. Ohio 2005).

51. For an example of a case in which a beneficiary disposition was challenged on the basis of duress, *see Iron Workers Mid-America Pension Plan v. Nevers* (N.D. Ill. Nov. 10, 2005), reported in *BNA Pension & Benefit Daily,* November 18, 2005. Note that in other contexts, economic duress is unavailable in an ERISA context. *See Agathos v Starlite Motel,* 977 F2d 1500, 1505–06 (7th Cir. 1992), quoted in *Laborers Pension Fund v. Lay-Com, Inc.,* 2006 WL 2587919, fn23 (N.D. Ill. 2006). *See also Devito v. Hempstead China Shop,* 38 F3d 651, 653 (2nd Cir. 1994), quoted in *Bricklayers and Allied Craftworkers Local 2 v. C.G. Yantch, Inc.,* 316 F.Supp 2d 130 (N.D.N.Y. 2003) (duress is not a permissible defense to an ERISA Section 515 collection action.)

52. *Restatement (Second) of Contracts* § 175(1), discussed in *Berger* TCM 1996-76.

53. As stated previously undue influence is sometimes viewed as a form of fraud.

54. *Restatement (Second) of Contracts* § 176, discussed in *Parker v. Chrysler Corp., 929 F. Supp 162* (S.D.N.Y. 1996); *Frumkin v. IBM,* 801 F. Supp. 1029 (S.D.N.Y. 1992) and *Joseph v. Chase Manhattan Bank, N.A.,* 751 F.Supp 31 (E.D.N.Y. 1990).

55. *Samuelson v. Covenant Healthcare Systems,* 2011 WL 5143156 (E.D. Mich. 2011). *Cf. Reid v. IBM*, 1997 WL 357, 969 (S.D.N.Y. 1997) (To establish that a release is voidable on the grounds of economic duress, a plaintiff must show that the agreement was obtained (1) by means of a wrongful threat that precluded the exercise of free will; (2) under the press of financial circumstances; or (3) when circumstances permitted no other alternatives.).

56. *See Berger, TC Memo* 1996-76 (discussing New Jersey law).

57. 555 U.S. 285, 129 S. Ct. 865 (2009). For differing views of the *Kennedy* decision as it applies to defenses such as undue influence, incompetency, and duress, compare Michael P. Barry, "Kennedy, ERISA Beneficiary Designations, and the Plan Document Rule," December 17, 2009 *BNA Pension & Benefits Daily,*" and "ERISA's 'Plan Document Rule' Reaffirmed in Dispute over Right to Pension Plan Benefits," Smith Moore Leatherwood ERISA and Life Insurance News (Fall 2009) (Smith Moore Leatherwood), with Albert Feuer, "Determining the Death Beneficiary Under ERISA Plan and the Rights of Such Beneficiary," 54 *Tax Management Memorandum* 323 (August 26, 2013). Even before the *Kennedy* decisions some judges believed that the plan documents rule precluded consideration of undue influence. *See* concurring opinion in *Metropolitan Life Insurance Company v. Yeary,* 208 F3d 214 (6th Cir. 2000).

58. 29 U.S.C. § 1102(c)(1).

59. 129 S. Ct. 875; 29 U.S.C. § 1102(b)(4).

60. 129 S. Ct. 875.

61. *Id.* at 876.

62. *Id.*

63. *Id.* at 877.

64. 2009 WL 1133498(E.D. Mich., April 27, 2009), discussed in Barry, "Kennedy ERISA Beneficiary Designations and the Plan Documents Rule," and Smith Moore Leatherwood, *supra,* n.58.

65. *Id.*

66. *Id.*

67. *Id.*

68. 2009 WL 763382 (N.D. W. Va. March 11, 2009), discussed in Barry, "Kennedy ERISA Beneficiary Designations and the Plan Documents Rule," and Smith Moore Leatherwood, *supra,* n.58.

69. *Id.*

70. *Alcorn v. Appleton*, 708 SE2d 390 (Ga. Ct. App. 2011) discussed in Jim Witt, "Pensions: ERISA—Effect of Designated Beneficiary's Waiver of Benefits." The Lawletter Blog, Vol. 36, No. 8.

71. Commentators have drawn similar distinctions. *See*, for example, J. Michael Young, "Recognizing Life Insurance Beneficiary Disputes," Dallas Bar Association ("Capacity and undue influence cases are still possible because they are not attacks on the designation based on reference to external documents or state laws regarding designation. Instead, they are attacks on the validity of the designation document itself.").

72. (S.D. Ohio 2010), cited in *Ford Motor Co. v. Wheatly,* 2010 WL 2802758 (N.D. Ohio 2010). *See also Kmatz v. Metropolitan Life Ins. Co.,* 2006 WL 1209362 (S.D. Ohio 2006), *Singleton v. Goldman,* 2011 WL 3844180 (S.D. Mass. 2011), fn1 ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible as evidence to establish … illegality, fraud, duress or other invalidating cause," citing *Restatement (Second) of Contracts* § 214).

73. *Franklin v. Gibson & TIAA-CREF,* 38 F. Supp. 2d 590 (M.D. Tenn. 1990).

74. *See supra,* n.35. *See also*, Johnson & O'Brien, "Beneficiary Designation—Show Me the Money," p. 6, *supra,* n.29.

75. *Cf.* "2012 ERISA Advisory Council Report, Current Challenges and Best Practices Concerning Beneficiary Designations in Retirement and Life Insurance Plans."

76. *Rice v. The Office of Servicemembers' Group Life Insurance,* 260 F3d 1240 (10th Cir. 2001), and cases cited therein.

77. *Parker v. Sullivan,* 891 F.2d 185, 188 (7th Cir. 1989), cited in *Davis v. Combes,* 294 F.3d 931, 936 (7th Cir. 2002).

78. *See* notes 36 through 39 and accompanying text, *supra*.

79. *See, for example, Hutchinson v. Reliastar Life Ins. Co.,* 2007 WL 2887610 (N.D. Tx. 2007); *Metropolitan Life Ins. Co. v. White,* 68 Fed. Appx. 644 (6th Cir. 2003); *Metropolitan Life Ins. Co. v. Gibbs,* 89 F.Supp. 2d 877 (E. D. Mich. 2000); *Metropolitan Life Ins. Co. v. McCloskey* (N.D. Ohio December 23, 2005). Interpleaders also appear in cross claim actions. *See, for example*, *Vanguard Fiduciary Trust Co. v. Stuart,* 2009 WL 186167 (D.N.D. 2009); *Allstate Life Ins. v. Short,* 2005 WL 1972551 (S.D. Ohio 2005); *Jefferson Standard Insurance Co. v. Craven,* 365 F.Supp. 861 (M.D. Pa. 1973).

80. *See, for example*, *Scheffler v. Metropolitan Life Ins. Co.* (D. Ariz. 2006) 2006 WL 1127096 (Case dismissed on summary judgment motion because plaintiff provided no relevant evidence to show that a third party exercised any undue influence over the plaintiff.).

81. *See, for example*, *Franklin v. Gibson & Tate*, 38 F.Supp. 2d 590 (M.D. Tenn. 1999). Of course, there are also a number of instances in which the plan administrators

sought to address these difficult issues. *See Trustees of the Electricians' Salary Deferral Plan v. Wright,* 688 F3d. 922 (8th Cir. 2012) (Appeals Committee directly addressed the issue of undue influence and mental incapacity and found party presented insufficient evidence to support his claim); *Clark v. Board of Trustees of Steamship Trade Association International Longshoremen's Association Benefit Trust Fund,* 896 F.2d 1366 (4th Cir. 1992) (Board of Trustees made a thorough investigation of charge of undue influence, including hiring an outside investigation firm to pursue the matter); *Companion Life Ins. Co. v. Saddler,* 2012 WL 252789 (D.S.C. 2012) (based upon the report of a handwriting expert, a change of beneficiary form was a forgery, and a change in beneficiary was therefore null and void).

82. *Cf. King v. Hartford Life and Accident Insurance Company*, 414 F3d 994 (8th Cir. 2005) (While a court may develop a federal common law of ERISA to interpret a benefit plan provision *de novo*, an administrator with authority to interpret a plan is not bound by the same interpretation, so long as his interpretation is reasonable.).

83. *See Clark v. Board of Trustees of Steamship Trade Association International Longshoremen's Association Benefit Trust Fund,* 896 F2d 1366 (4th Cir. 1992) ("If Board of Trustees had declined to investigate the charge of undue influence against Caldwell, it certainly would have violated its fiduciary duty.")

84. For a more general discussion of possible ERISA issues with respect to interpleader, see Salkin, "ERISA Aspects of Interpleader," 36 *Journal of Pension Planning & Compliance* 73 (Spring 2010).