

When 'If and When' Becomes 'Here and Now'

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Deferred Stock Options. Part Two of a Two-Part Article

Often, wrestling with stock options is an unwelcome complication in a divorce case. As discussed in last month's issue of *The Matrimonial Strategist*, many companies are dissolving or merging to survive. The recent merger of Wyeth and Pfizer illustrates some of the problems arising from these mergers and the resolution of these problems. Part One of this article addressed deferred compensation and performance share awards and provided sample forms dealing with these issues. The conclusion herein addresses options.

Restricted Stock Units and Stock Options

With all the different layers of Wyeth benefits and deferrals, addressing stock options was relatively easy; the form language for deferred distribution is fairly common. In addition, Wyeth employees had restricted stock units (another award of shares of Wyeth stock) based on future considerations outside their control. With reference to the Restricted Stock Units (RSUs) and stock options, the non-employee spouse had an interest those shares if and when they became available or exercisable. Since the shares ultimately would be taxable to the employee, the distribution addressed tax considerations. In the case of options, usually there would be a range of time over which shares could be exercised.

The typical language for allowing the non-employee spouse either to participate in the decision or to direct the employed spouse to sell was contemplated by the terms of a settlement. The one feature of the Wyeth/Pfizer consolidation was that all options awarded in 2006 and earlier were subject to cancellation, cash-out or deferral in exchange for Pfizer stock. Each employee received a statement outlining past awards, the type of award and the grant price. The per-share value of Wyeth stock, under the options, was set at \$49.58, and the outstanding shares, subject to the grant price, were paid out to the employed spouse. RSU shares were also paid out. This resulted in an extraordinary supplemental income in the fourth quarter of 2009. Taxes were withheld by the employer. The parties' divorce agreement contemplated an adjustment for actual tax impact to be assessed when the tax return would be filed, in this case in 2010 for 2009. Distribution would be adjusted if estimated tax withholding were too high or too low.

Performance Share Award Stock Units

The merger accelerated the buy-out of options and some RSUs. Wyeth decided that Performance Share Award Stock Units, plus the RSUs for 2007, would be converted under the merger consideration. The result was the creation of both a cash account, which will accrue interest at market rate, and a stock account in the form of Pfizer stock. Further, the deferral election as a Wyeth employee was continued after the Pfizer merger. By the end of 2009, Pfizer was obligated to issue an account statement to the former Wyeth employees, setting forth the cash in stock held for their benefit. The terms of deferral were subject to the new Pfizer plan. The deferral might occur at the vesting date of the award as originally contemplated, but could be accelerated upon termination of employment. The prospect for early payment of deferred assets under Wyeth became academic. It was redefined by Pfizer, which allowed for deferral on the tenth day of the month following the month in which employment terminates.

The Non-Employee Spouse

The non-employee spouse enjoyed the benefit of the merger due to the acceleration of the Options buyout in 2009. Arguably, one may prefer to convert deferred compensation, deferred bonus, deferred performance share awards, deferred restricted stock units and stock options to present value at the time of negotiating the divorce settlement. Calculating the risk with each of these categories of deferred income or assets may not have contemplated a corporate merger.

Conclusion

The non-employee spouse who waits for distribution "if and when" must consider whether to retain counsel to monitor, year after year, these deferred benefits. Surely the sting of this additional expense is offset if the non-employee spouse receives an award of more than 50% of the marital benefits. It is important to look at each of the plans, the layers of protection available to the non-employee spouse, and the possibility of additional life insurance. It is critical to assure access to both the original employer and successive employers under the terms of the Releases by the employed spouse. In the instant case, with merger talks pending at the finalization of the terms of the divorce, it was easier to anticipate the concerns of both parties. All negotiation or litigation addressing deferred benefits should reflect the lessons learned from Wyeth and Pfizer.

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