

PENSION TREATMENT UNDER THE COLLATERAL SOURCE RULE

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Collateral Source Rule (CSR): Background

- Concept has been around since at least 1854 (U.S. Supreme Court-The Propeller Monticello v. Mollison, 58 U.S. 152): Admiralty action in which damages awarded to plaintiff should not be reduced by insurance proceeds;
- Common collateral sources: Insurance (unemployment, medical, life), Social Security (regular and disability), Medicare, & pensions;
- Rationales for exclusion:
 - Such benefits may be viewed as part of employment contract, for which tortfeasor is not entitled to any credit;
 - Purpose is not to prevent plaintiff from being overcompensated, but rather to prevent tortfeasor from paying twice (if employer is source of funds, may deduct from award).
- Evidence of medical insurance payments to an insured plaintiff (esp. medical) has been main exception to inadmissibility of collateral source income

How has CSR been applied to pensions?

- Exclusion of pension benefits as collateral source offset to earnings loss is well established in federal and many state court jurisdictions
- Limited discretion has been afforded lower courts on appeal by allowing selected information, e.g., statistical evidence on retirement patterns of railroad workers and incentives to retire early (FELA cases)
- Conflicting case law involves disability and survivor's pensions:
 - In CA (Rotolo, 2003), disability pension evidence was allowed as offset to lost regular pension but not to lost earnings; in NY (Oden, 1995) same allowance was made but limited to amount of lost regular pension, i.e., no offset to earnings; but in CA employment law case (Mize-Kurzman, 2012), "availability" of retirement pension was disallowed under CSR as no different than compensation from insurance policy;
 - In CA (McKinney, 2002), survivor's/widow's pension excluded, even though benefit came from same source as husband's earnings, as pension was considered "new benefit" in widow's name and excluded under CSR; but in DE (Sears, 2006), survivor's existing pension benefit was allowed as offset to decedent's potential future pension benefit; in FL (Russo, 2011), similar logic as Sears, with court ruling that death benefit from retirement plan was not "life insurance" within meaning of collateral source statute;
 - In CA (Lovett, 2004) discrimination case (employer didn't accommodate disability) where evidence of disability pension not allowed under CSR; but in First Circuit (Lussier, 1995), court held "that it is within trial court's jurisdiction to tailor a front pay award to take account of collateral benefits in a discrimination case. But in MI (Hamlin, 1996), after agreeing with Lussier in principal, it said that allowing collateral pension benefits as an offset in a discrimination case should not be left to individual discretion of each district court.

Important Injury, Death, & Employment Law Cases Identified by CSR Subtopic & Grouped in Appendix

- Subtopics: EL (employment law); WD (wrongful death); and two types of PI (personal injury): PI-FELA and PI-Non-FELA
- Selected cases by grouping and subtopics:
 - Cases establishing CSR as prohibiting pensions of any type to offset lost earnings. 6 cases: EL=4; WD=1, PI-FELA=1;
 - Unsuccessful challenges to CSR as applied to pensions. 5 cases: EL=2; PI-FELA=2; WD=1;
 - Successful challenges to CSR as applied to pensions. 4 cases: 2=WD; 1=PI-Non-FELA; 1=EL;
 - Qualifications Involving Admissibility of Evidence Pertaining to Age of Retirement. 4 cases: all PI-FELA;
 - Qualifications Involving Admissibility of Evidence Not Pertaining to Age of Retirement. 4 cases: 3=PI-Non-FELA; 1=WD

Comparison of 2 Methods with Disability Pensions as Offsets to Lost Regular Pensions

- **Rotolo/Oden method:** Disability pension allowed to offset only lost future regular pension (not lost future earnings);
- **Alternative method (used by some FE's):**
 - (1) Calculate the regular pension earned by an injured plaintiff up to the date of injury as the disability pension basis;
 - (2) If lost pension has COLA, grow disability pension basis by a general inflation rate until an appropriate retirement age had the plaintiff not been injured, e.g., 65;
 - (3) Project the disability pension over time beginning from same uninjured expected retirement age as for the lost regular pension, with continued growth for both pensions at future inflation rates, if applicable. The annual net pension loss is obtained by deducting the disability pension from the lost regular pension over the period from the uninjured expected retirement age through life expectancy. Yearly net pension differences (regular less disability) are discounted back to present value.
 - (4) Since employee contributions via payroll deductions are usually required to obtain a regular pension, these contributions may be netted against lost future earnings. But if one just wants to compare net pension losses between Rotolo-Oden method and this Alternative method and ignore lost future earnings, the present value of these employee contributions would need to be counted as a reduction in the net pension loss.

Arguments that have been made for each method

- **For Rotolo-Oden method:**

- Quoting Rotolo court: Not fully accounting for disability pension would result in “triple compensation”, i.e., lost income, lost regular pension benefits, & receipt of actual disability retirement benefits; an “inequitable result”;
- Disability pensions are conceptually same as early retirement pensions, representing an “actuarial adjustment” by paying smaller amounts over a longer period. (However, this is not always the case);
- Simple & direct argument is that an FE would only ignore pension payments between incident date & likely retirement date if there were some legal requirement, e.g., case law or statute, or attorney’s advice, to do so

- **For Alternative method described above:** Unlike under Rotolo, this method ignores any source of income not provided by the defendant that is replacing earnings during his working life (i.e., the disability pension that would be earned during the working life of the plaintiff is obviously replacing his lost earnings).

For comparison of both disability pension valuation methods, we use:

- Two different pension system models (Cases 1 and 2):
 - Federal Employee Retirement System (FERS)
 - Maryland's Reformed Contributory Benefit System as applied to new hires as of 7-1-2011, with "Ordinary Disability Retirement" benefits; (formula differs if accident while on duty).
 - In both models, we assume regular step rate increases but no promotions; and for simplicity, 2% annual COLAs and salary increases, with 3% discount rate
 - But important difference: Disabled FERS employees have lower "high-3" avg. salary and lower multiplier for yrs of svc; but for disabled MD employees w/ 5 yrs of creditable service, under "Ordinary Disability", no reduction to yrs of service or multiplier for retiring before age 65
- Three different sets of case facts (Cases a, b, and c):
 - Case a: Base Case No Injury, Normal Retirement;
 - Case b: Injured at 55 (on day of birthday); Disability Retirement with 30 years of service;
 - Case c: Injured at age 35 (on day of birthday); Disability Retirement with 10 years of service;

Table 2: FERS Retirement Pension; Rotolo/Oden Method and Alternative Method of Applying Disability Pension Offset:

Case 1a v. 1b - Lost Regular Retirement Pension (1a), Offset with Disability Pension, Retire at 55 w/ 30 Years of Service (1b)

		Rotolo-Oden Method of Disability Pension Offset					Alternative Method of Disability Pension Offset						
1	2	3	4	5	6	7	8	9	10	11	12	13	14
	Injured at 55: Case 1a vs. Case 1b				PV from Disability Date		Altern. Method: Offset Reg. Pens. w/ Earned				PV from Exp. Ret. Date		
					784,660	1,116,608	Pens. to Disab. Date, Grow @ COLA; net @ Ret.				832,571	770,128	
		Case 1a	Case 1b					Case 1a	Case 1b		PV Emp Cont (1)		Regular pension earned to disability date
											(47,911)		
Age @ Beg yr	Yrs to disc	Lost Reg. Pens. Less Contrib.	Gain Disab. Pension	Disc Fctr	PV Lost Reg. Pens. Less Contrib.	PV Gain Disab. Pension	Yrs to disc	Lost Reg. Pens. Less Contrib.	Gain Disab. Pension	Disc Fctr	PV Lost Regular pension	PV Gain Disab. Pension	
55	1	(5,154)	33,782	0.97087	(5,004)	32,798	1			0.97087	-	-	33,782
56	2	(5,257)	34,458	0.94260	(4,956)	32,480	2			0.94260	-	-	34,458
57	3	(5,362)	35,147	0.91514	(4,907)	32,165	3			0.91514	-	-	35,147
58	4	(5,470)	35,850	0.88849	(4,860)	31,852	4			0.88849	-	-	35,850
59	5	(5,579)	36,567	0.86261	(4,813)	31,543	5			0.86261	-	-	36,567
60	6	(5,691)	37,299	0.83748	(4,766)	31,237	6			0.83748	-	-	37,299
61	7	(5,805)	38,045	0.81309	(4,720)	30,934	7			0.81309	-	-	38,045
62	8	(5,921)	52,646	0.78941	(4,674)	41,559	8			0.78941	-	-	52,646
63	9	(6,039)	53,699	0.76642	(4,628)	41,156	9			0.76642	-	-	53,699
64	10	(6,160)	54,773	0.74409	(4,583)	40,756	10			0.74409	-	-	54,773
65	11	60,398	55,868	0.72242	43,633	40,360	11	60,398	55,868	0.72242	43,633	40,360	55,868
66	12	61,606	56,986	0.70138	43,209	39,969	12	61,606	56,986	0.70138	43,209	39,969	56,986
67	13	62,838	58,125	0.68095	42,790	39,581	13	62,838	58,125	0.68095	42,790	39,581	58,125
""	""	""	""	""	""	""	""	""	""	""	""	""	""
83	29	86,264	79,794	0.42435	36,606	33,860	29	86,264	79,794	0.42435	36,606	33,860	79,794
84	30	87,989	81,390	0.41199	36,250	33,531	30	87,989	81,390	0.41199	36,250	33,531	81,390
85	31	89,749	83,017	0.39999	35,898	33,206	31	89,749	83,017	0.39999	35,898	33,206	83,017

(1) In Alternative method, one way to reflect required employee contributions while working is to net them against lost future earnings.

**Table 4: MD Ordinary Disab. Pension; Rotolo/Oden Method and Alternative Method of Applying Disability Pension Offset:
Case 2a v. 2b - Lost Regular Retir't Pension (2a), Offset with Ordinary Disab. Pension, Retire at 55 w/ 30 Years of Service (2b)**

	Rotolo-Oden Method of Disability Pension Offset						Alternative Method of Disability Pension Offset						
1	2	3	4	5	6	7	8	9	10	11	12	13	14
	Injured at 55: Case 2a vs. Case 2b				PV from Disability Date		Altern. Method: Offset Reg. Pens. w/ Earned				PV from Exp. Ret. Date		Regular pension earned to disability date
					1,277,031	2,129,231	Pens. to Disab. Date, Grow @ COLA; net @ Ret.				1,370,883	1,370,883	
		Case 2a	Case 2b					Case 2a	Case 2b		PV Emp Cont (1)		
Age @ Beg yr	Yrs to disc	Lost Reg. Pens. Less Contrib.	Gain Disab. Pension	Disc Fctr	PV Lost Reg. Pens. Less Contrib.	PV Gain Disab. Pension	Yrs to disc	Lost Reg. Pens. Less Contrib.	Gain Disab. Pension	Disc Fctr	PV Lost Regular pension	PV Gain Disab. Pension	
55	1	(10,097)	81,583	0.97087	(9,803)	79,207	1			0.97087	-	-	81,583
56	2	(10,299)	83,215	0.94260	(9,707)	78,438	2			0.94260	-	-	83,215
57	3	(10,505)	84,879	0.91514	(9,613)	77,677	3			0.91514	-	-	84,879
58	4	(10,715)	86,577	0.88849	(9,520)	76,923	4			0.88849	-	-	86,577
59	5	(10,929)	88,309	0.86261	(9,427)	76,176	5			0.86261	-	-	88,309
60	6	(11,148)	90,075	0.83748	(9,336)	75,436	6			0.83748	-	-	90,075
61	7	(11,371)	91,876	0.81309	(9,245)	74,704	7			0.81309	-	-	91,876
62	8	(11,598)	93,714	0.78941	(9,156)	73,978	8			0.78941	-	-	93,714
63	9	(11,830)	95,588	0.76642	(9,067)	73,260	9			0.76642	-	-	95,588
64	10	(12,066)	97,500	0.74409	(8,979)	72,549	10			0.74409	-	-	97,500
65	11	99,450	99,450	0.72242	71,845	71,845	11	99,450	99,450	0.72242	71,845	71,845	99,450
66	12	101,439	101,439	0.70138	71,147	71,147	12	101,439	101,439	0.70138	71,147	71,147	101,439
67	13	103,468	103,468	0.68095	70,456	70,456	13	103,468	103,468	0.68095	70,456	70,456	103,468
"	"	"	"	"	"	"	"	"	"	"	"	"	"
83	29	142,039	142,039	0.42435	60,274	60,274	29	142,039	142,039	0.42435	60,274	60,274	142,039
84	30	144,879	144,879	0.41199	59,688	59,688	30	144,879	144,879	0.41199	59,688	59,688	144,879
85	31	147,777	147,777	0.39999	59,109	59,109	31	147,777	147,777	0.39999	59,109	59,109	147,777

(1) In Alternative method, one way to reflect required employee contributions while working is to net them against lost future earnings.

Table 1: Summary of Results Under Different Net Pension Loss Methods

(PV of Lost Regular Pension Less Gain from Disability Pension Under Each Method)

Retirement & Disability Plan	Age at Time of Injury	Years of Service	Results shown in:	ESTIMATED NET PENSION LOSS UNDER BOTH METHODS				
				Rotolo-Oden Method (1)		Alternative Method (2)		
				Losses begin w/ Disability Date; then discounted to (PV)	Net pension loss=0, can't be negative	Losses begin @ Expected Retirement Date; then disc to PV	Employee Contributions (PV)	Alternative Method "Effective PV"
FERS	55	30	Table 2	- \$331,949 (= \$784,660 - \$1,116,608)	Net pension loss=0, can't be negative	\$62,443 (= \$832,571 - \$770,128)	-\$47,911	\$14,532
FERS	35	10	Table 3	-\$ 240,763 (= \$385,610 - \$626,373)	Net pension loss=0, can't be negative	\$76,067 (= \$474,803 - \$398,736)	-\$89,193	-\$13,126
State/MD (3)	55	30	Table 4	-\$ 852,200 (= \$1,277,031 - \$2,129,231)	Net pension loss=0, can't be negative	\$0 (= \$1,370,883 - \$1,370,883)	-\$93,852	-\$93,852
State/MD (3)	35	10	Table 5	-\$ 1,125,279 (= \$610,936 - \$1,736,215)	Net pension loss=0, can't be negative	\$168,586 (= \$781,796 - \$613,210)	-\$170,860	-\$2,274

Conclusions/Observations About CSR & Pensions

- CSRs applied to pensions is quite variable, with limited or non-existent case law apparently in many jurisdictions;
- For PI, more favorable methods to defense were in Rotolo and Oden cases (CA and NY): disability pensions at least fully offset lost regular pensions but not lost earnings. However, the effective net pension loss of applying Rotolo/Oden vs. Alternative methods will depend on many factors, not least how pension premiums are accounted for;
- For WD, diametrically different case laws have addressed survivor's/widow's pensions:
 - When viewed as "new benefit", survivor's pensions excluded (McKinney, CA);
 - When viewed as result of retirement plan and not life insurance, survivor's pensions allowed as evidence (Russo, FL) or as appropriate offset to the decedent spouse's potential future pension benefit (Sears, DE), in which Rotolo case was cited;
- For EL, mixed results in terms of trial court **discretion**
 - Disability pension not allowed (Lovett, CA),
 - Disability pension allowed under trial court's discretion (Lussier, First Circuit) although excluded on procedural grounds; then again allowed in principal citing Lussier but overruled as not appropriate for each district court to have such discretion (Hamlin, MI).
- Bottom line: In absence of explicit court guidance in a jurisdiction, FEs and their attorneys may apply their own discretion on how to address pensions under CSR