

Criminals Forfeit Retirement Benefits to Victims

Ninth Circuit holds Mandatory Victims Restitution Act trumps ERISA's anti-alienation clause

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The en banc U.S. Court of Appeals for the Ninth Circuit has held that crime victims may garnish a criminal defendant's retirement funds to enforce restitution orders entered pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA), and that MVRA trumps the anti-alienation protections otherwise afforded by the Employee Retirement Income Security Act of 1974 (ERISA). *United States v. Novak*. The Ninth Circuit cited a recent Internal Revenue Service private letter ruling, as well decisions from several federal district courts that had reached the same conclusion.

ERISA's legislative history confirms that Congress intended to protect the pension benefits even of persons who engage in crime or other fraud. The statute provides: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Likewise, a pension plan may not be tax-qualified unless it includes such protections. See 26 C.F.R. §§ 1.401(a)-13(b)(1).

Thus far, the U.S. Supreme Court has interpreted the anti-alienation provisions broadly and has declined to recognize implied exceptions. In *Guidry v. Sheet Metal Workers National Pension Fund*, the Court held that ERISA precluded the imposition of a constructive trust upon the pension benefits of a union official who had embezzled union funds. Although Congress has since eroded ERISA's spendthrift clause in certain respects, the anti-alienation protections have largely remained intact—that is, until courts began finding exceptions in the MVRA.

The Mandatory Victims Restitution Act clashes with the general societal interest in preserving retirement plan assets.

The *Novak* majority distinguished *Guidry* on grounds of the MVRA's express language "allowing the enforcement of criminal restitution orders against 'all property or rights to property' . . . '[n]otwithstanding any other Federal law.'" To the *Novak* court, this means that the MVRA trumps ERISA, and pension benefits are subject to criminal restitution orders.

"There's an interesting tension here," says Howard Shapiro, New Orleans, former Chair of the Section of Litigation's Employment and Labor Relations Law Committee. "You have the Mandatory Victims Restitution Act and its interest in compensating crime victims, clashing with the general societal interest in preserving retirement plan assets."

The *Novak* dissent argues that ERISA treats pension benefits as sacrosanct and that Congress did not express its intent clearly enough to preempt ERISA's protections. According to Shapiro, an ERISA practitioner, the dissent may well have the better policy perspective. He would argue that "preservation of retirement plan assets is more important across the spectrum of society generally than compensating crime victims who may not recover much money in any event from the criminal's retirement plan assets."

Under *Novak*, the crime victim succeeds to the rights of the defendant-plan participant, who is subject to the restitution order; the successor must follow the procedures established by the governing plan documents (which will sometimes mean the victim may attach benefits only on a monthly basis instead of in a lump sum). Nevertheless, the court recognizes that the victim may not attach benefits available to the defendant's spouse. □

Resources:

Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A.

United States v. Novak, 476 F.3d 1041 (2007).

Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365 (1990).

IRS Private Letter Ruling 200342007, available at www.benefitscounsel.com/archives/000718.html.