

ENSURING THAT CRIME DOESN'T PAY

HOW THE FIDELITY INSURER CAN USE RESTITUTION TO DEFEAT INTERNAL REVENUE SERVICE CLAIMS TO A CRIMINAL DEFENDANT'S ASSETS

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I. INTRODUCTION

In this era of victims' rights, who would believe that the government would seek to profit from crime at the expense of the victim or its insurer? One would expect that the crime victim, or the insurer that reimbursed the victim for its loss, would be able to obtain restitution from the assets of the perpetrator before the government could seize those assets to satisfy a debt arising from income generated as a result of the subject crime. Unfortunately, in those instances where the Internal Revenue Service (IRS) is the government agency seeking recovery from the perpetrator, the insurer might have a battle on its hands. There are, however, steps a prudent insurer can take to contest an attempt by the IRS to obtain the proceeds resulting from the crime.

The typical fact pattern in which this issue arises is one where an employee steals substantial sums from his employer. After the employee is arrested and charged with various federal crimes (such as mail fraud), the employer submits a claim under its fidelity bond. After an investigation, the fidelity insurer pays the claim and, to secure its subrogation rights, takes an assignment of the employer's claims against the employee.

Shortly after the employee's arrest, the IRS determines that the employee owes substantial income taxes on the proceeds of the crime which, of course, the employee never declared on his tax returns as income. The IRS's written explanation of the tax assessment expressly states that the assessment arises solely from the income obtained by the employee through the crime. Because the employee largely has squandered the crime proceeds,

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the IRS seizes his only significant asset, a pension he earned through his many years of employment with his employer. Pursuant to its obligations under the law and unaware that the employee has squandered the crime proceeds, the employer, upon receipt of the IRS's Notice of Levy, turns the pension proceeds over to the IRS.

Many months down the road, the employee finally is tried and convicted. At sentencing several months later, the employee is ordered to pay restitution to the insurer (or the employer) in the amount of the loss, as required by law. The employee, however, has no assets left to satisfy this restitution obligation. Thus, the insurer, the true victim of the crime, seemingly is left without the ability to recover its loss, while the IRS has benefited from the theft in that it collected a tax obligation which would not have arisen had the crime not been committed.

This article will discuss those steps a fidelity insurer can take to challenge an IRS levy such as that described above, so that if successful, the defendant's assets will be applied first to his restitution obligations, permitting the insurer to recover at least a portion of its loss. This article initially will discuss the relevant restitution statutes and how they indicate that restitution orders should take priority over federal, tax obligations arising solely from the subject crime. Second, this article will discuss considerations relevant to challenging an IRS levy. Third, this article will review special considerations relevant to pensions. Finally, this article will focus upon the equitable nature of the fidelity insurer's argument and the importance of stressing the equities involved.

II. RESTITUTION ORDERS SHOULD BE SUPERIOR

No statute or other authority expressly provides that an order of restitution takes precedence over an IRS claim against a dishonest employee solely in connection with the fruits of his crime. There is, nevertheless, strong support for that notion in the legislative history of recent amendments to the restitution statutes. An analysis of the established means by which the government can enforce an order of restitution also supports this proposition.

A. The Mechanics of Restitution

The general restitution statute is the Victim and Witness Protection Act (VWPA).¹ In 1996, Congress amended the VWPA with the Mandatory Victims Restitution Act (MVRA),² which significantly enhanced a victim's

¹ 18 U.S.C. §§ 3663-3664 (1995)

² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, Title II, Subtitle A

right to restitution from a criminal defendant.³ Most notably, the MVRA made full restitution mandatory where the defendant is convicted of a crime involving fraud, such as in the example set forth above.⁴

The procedure for the issuance of a restitution order is fairly straightforward. The probation officer assigned to the case prepares a pre-sentence report, which includes an accounting of the victim's losses and information relating to the defendant's financial circumstances.⁵ Before submitting the pre-sentence report, the probation officer must inform the victim as to the crimes of which the defendant was convicted and must give the victim an opportunity to submit information concerning the amount of its losses.⁶ The defendant is obligated to file with the probation officer an affidavit fully describing his financial resources, which should include a complete listing of all of the assets owned or controlled by him and a description of his financial needs and those of his family.⁷ This information also is included in the presentence report. The government bears the burden of establishing the amount of the victim's loss, and the defendant bears the burden of demonstrating his financial circumstances and needs.⁸

In the case of a crime involving fraud, as in the illustration, and assuming that there is no dispute about the amount of the victim's loss and the defendant's wherewithal in the pre-sentence report, the court must order the defendant to make restitution in the full amount of the victim's loss, regardless of the defendant's financial condition.⁹ The amount of the victim's loss is not affected by any potential recovery from an insurer. However, if the victim collects insurance, the court is to order that the defendant make restitution payments directly to the insurer.¹⁰

B. Legislative History Strongly Suggests Restitution Should Take Priority Over IRS Claims

Under restitution law before the MVRA, a victim could not realistically expect to receive complete restitution. A sentencing court was not required to sentence a defendant to restitution, and, if it did, it was not required to order restitution in the amount of the victim's loss. Rather, the court was

³ The amended restitution provisions apply to defendants convicted after April 24, 1996. *See, e.g.*, 18 U.S.C. § 3663, notes.

⁴ 18 U.S.C. § 3663A(c)(1)(A)(ii). Under the prior law, the amount of a restitution award depended upon number of factors, including the defendant's ability to pay.

⁵ *Id.* at §3664(a).

⁶ *Id.* at §3664(d)(2).

⁷ *Id.* at §3664(d)(3).

⁸ *Id.* at §3664(e).

⁹ *Id.* at §3664(f)(1)(A).

¹⁰ *Id.* at §3664(f)(1)(B), (j)(1).

required to examine the defendant's ability to pay restitution and craft a restitution order based in large part thereon.¹¹

By enacting the MVRA, Congress codified its intention that full restitution to crime victims be paramount. Where restitution previously was in the sentencing court's discretion, the MVRA provides for mandatory, full restitution for broad categories of crimes, including, as discussed previously, crimes involving fraud.¹² The MVRA also enhanced the penalties for a defendant's default in his restitution obligations¹³ and made the enforcement procedures previously available to the government only for collection of fines available for the collection of restitution as well.¹⁴

The relevant legislative history plainly states Congress' goals. The House report discussing the amendments notes:

There has been significant progress over the last 15 years in addressing the needs of crime victims. Their voices are no longer missing from the national debate concerning criminal justice. In spite of this progress, however, additional reforms are needed. Under existing law, crime victims' rights are still too often overlooked. Even though the law provides the means to address the rights of victims, the law does not, however, provide for a means to make victims whole.

H.R. 665, the "Victim Restitution Act of 1995," is an important step forward in ensuring justice for victims of crime and accountability for convicted criminals. By requiring full financial restitution, the Act requires the offender to face the harm suffered by his victims and, to others harmed by his unlawful actions. Further, it strives to provide those who suffer the consequences of crime with some means of recouping the personal and financial losses resulting from crime.¹⁵

The Senate report similarly states:

The purpose of [the amendments] is to improve the administration of justice in Federal criminal cases by requiring Federal criminal defendants to pay full restitution to the identifiable victims of their crimes.

...

This legislation is needed to ensure that the loss to crime victims is recognized, and that they receive the restitution that they are due. It is also necessary to ensure that the offender realizes the damage caused by the

¹¹ See 18 U.S.C. §§ 3663, 3664.

¹² 18 U.S.C. §§ 3663A(c)(1)(A)(ii); 3664(f)(1)(A). The sentencing court can, however, consider a defendant's financial condition in setting a payment schedule. See U.S. Sentencing Guidelines Manual, proposed guidelines [hereinafter USSG], 35E1.1 (Effective Nov. 1, 1997).

¹³ 18 U.S.C. § 3613A.

¹⁴ 18 U.S.C. § 3613(f).

¹⁵ H.R. Rep. No. 16, 104th Cong., 1st Sess. 1995, 1995 WL 43586.

offense and pays the debt owed to the victim as well as to society.

...

It is essential that the criminal justice system recognize the impact that crime has on the victim, and, to the extent possible, ensure that offender [sic] be held accountable to repay these costs.¹⁶

Congress's pronouncements in connection with the amendments are simply a reaffirmation of the original goal of the VWPA, which was to "insure that the wrongdoer is required to the degree possible to restore the victim to his or her prior state of well-being."¹⁷ In discussing the VWPA, one congressman noted Congress's intent "that Federal crime victims receive the fullest possible restitution from criminal wrongdoers."¹⁸

The legislative history of both the MVRA and VWPA illustrates that Congress could not have intended that the insurer's right to complete restitution should take a back seat to the IRS's claim to the pension. The procedure for enforcing a restitution order further supports this argument.

C. How the Procedure for Enforcing an Order of Restitution Indicates Restitution's Priority

A restitution order can be enforced by either the government or the victim.¹⁹ The victim can enforce an order of restitution by any "available and reasonable means."²⁰ For the government, the responsibility for collection lies with the Attorney General.²¹ In addition to permitting the government to enforce an order of restitution as a civil judgment,²² an order of restitution acts as a federal tax lien on the defendant's property.²³

The stated similarity between an order of restitution and a federal tax lien gives rise to something akin to a conflict of interest on the part of the government — a conflict that should be resolved in

¹⁶ S. Rep. No. 179, 104th Cong., 1st Sess. 1995, reprinted in 1996 U.S.C.C.A.N. 924, 1995 WL 731704.

¹⁷ S. Rep. No. 532, 97th Cong., 2d Sess. 1982, reprinted in 1982 U.S.C.C.A.N. 2515, 1982 WL 25068.

¹⁸ 128 CONG. REC. 27391 (1982) (remarks of Rep. Rodino).

¹⁹ 18 U.S.C. § 3664(m)(1)(A)(i), (m)(1)(A)(ii), (m)(1)(B).

²⁰ *Id.* at § 3664(m)(1)(B). Under the prior law, a victim could only enforce the order of restitution as it could a civil judgment. The new section 3664 makes enforcement of a restitution order through the mechanisms available for civil judgments easier: it provides a procedure for the clerk of the court to issue an "abstract" of judgment, which the victim can docket like a judgment, thereby creating a lien on the defendant's property in the state where docketed.

²¹ 18 U.S.C. § 3612.

²² *Id.* at § 3613.

²³ *Id.* at § 3613(c). *See also* U.S.C. § 6323 regarding enforcement of a federal tax lien.

favor of the priority of restitution awards. That is, if an order of restitution does not have priority over a federal tax obligation arising from the crime, there is nothing to prevent the government from applying the funds or property it seizes first to the tax liability. The result will be a race between the IRS and the victim to the defendant's assets, which the IRS will always win because of its superior and immediate enforcement powers, particularly in light of the length of time it can take for a defendant to be sentenced and a restitution award to be issued. The only way a restitution obligation can be expected to be satisfied when faced with a competing IRS claim arising solely from the crime is if the government is required to give priority to the restitution award. Any other approach would contravene Congress's intent that victims be made whole.

The statutes concerning distribution of funds collected by the government also indicate that, under the circumstances presented in the illustration, the restitution award should be superior. 18 U.S.C. § 3612 describes the order in which funds collected by the government pursuant to a sentence are to be distributed:

Any money received from a defendant shall be disbursed so that each of the following obligations is paid in full in the following sequence:

A penalty assessment under section 3013 of title 18, United States Code.²⁴

Restitution of all victims.

All other fines, penalties, costs, and other payments required under the sentence.

This statute is concerned with the collection of funds by the Attorney General in connection with a sentence and does not address the seizure of assets by IRS. However, the statute is valuable in that it illustrates Congress's intent that the funds not be used to satisfy a debt owed to the government until the defendant's restitution obligation has been satisfied. Other

²⁴ The purpose of the special assessment required by 18 U.S.C. § 3013 is to finance the Crime Victim's Fund. S. Rep. No. 497, 98th Cong., 2d Sess., reprinted in 1994 U.S.C.C.A.N. 924, 1995 WL 731704.

statutes and the sentencing guidelines contain similar requirements.²⁵ A seizure of assets by IRS which deprives a victim of a chance to receive restitution defeats Congress's intent.

III. THE PROCEDURE FOR CONTESTING AN IRS LEVY

The procedure for a third-party, such as a fidelity insurer, to contest an IRS levy like the one described in the illustration is set forth at 26 U.S.C. § 7426. This statute allows a third-party to bring an action to challenge what it contends to be a wrongful levy by the IRS against what the IRS considers to be the taxpayer's property.²⁶ In order to succeed on a section 7426 claim, the claimant must establish: (1) that the IRS levied against property in the victim's possession; (2) that the victim has an interest in the property superior to that of the IRS; and (3) that the IRS's levy upon the property was wrongful.²⁷

Making the actual argument in support of the section 7426 claim is not complicated. The first requirement, that the IRS levied upon property in the defendant's possession, should be undisputed.²⁸ The argument in support of the second requirement, that the fidelity insurer's interest in the pension is superior, is based upon the discussion in Section I above. To satisfy the third requirement and establish that a levy is wrongful, the fidelity insurer must show that the property is the only source from which the insurer can realize collection.²⁹ This allegation may also be undisputed: as the illustration established, the fidelity insurer cannot reasonably expect to collect the restitution award, absent access to the pension.

²⁵ See, e.g., 18 U.S.C. § 3572(b): "Fine not to impair ability to make restitution - If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution." See also USSG § 5E1.1.

²⁶ 26 U.S.C. § 7426(a)(1) provides:

If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such an action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

Section 7426(g)(l) allows for the recovery of interest from the time of the wrongful levy.

²⁷ *Texas Commerce Bank-Fort Worth, N.A. v. United States*, 896 F.2d 152, 156 (5th Cir. 1990); *Marshall v. United States*, 831 F. Supp. 988, 997 (E.D.N.Y. 1993).

²⁸ After all, the fidelity insurer will be the subrogee of the insured and may also be an assignee of the insured as well.

²⁹ *Texas Commerce Bank*, 896 F.2d at 156.

The major obstacle to the procedural portion of the fidelity insurer's claim may be the limitations period, which is nine months from the date of the levy.³⁰ In the illustration, the defendant was not sentenced; and the restitution order was not issued until well after this limitations period had expired. Since neither the fidelity insurer nor the insured had a choate interest in the pension at any time during the limitations period, neither of them ever had a chance to challenge the levy.³¹

Should the IRS contend that the fidelity insurer's action is time barred, as can be expected, the insurer can argue that the doctrine of equitable tolling should be employed to excuse the delay. As one court has observed: "All equitable tolling means is that a person is not required to sue within the statutory period if he cannot in the circumstances reasonably be expected to do so."³² Equitable tolling is specifically applicable where a party, although having actively pursued its judicial remedies, has been unusually deprived of an opportunity to assert its rights,³³ particularly where there is no prejudice to the party against whom the tolling is to apply.³⁴ Various courts have utilized equitable tolling specifically to extend the limitations period for claims under section 7426.³⁵

The equitable considerations presented by the illustration should weigh largely in the insurer's favor. In the above illustration, these factors include:

- (1) The insured was the victim of a \$1 million fraud;
- (2) More than a year before the issuance of the subject restitution order, the IRS used its superior enforcement powers to seize the defendant's pension to satisfy a tax obligation which the IRS knew arose entirely from the subject crime;

³⁰ 26 U.S.C. § 6532(c)(1).

³¹ Upon the filing with the IRS of a request for the return of the property seized pursuant to the levy (here, the pension), the limitations period will be extended to the shorter of twelve months from the date of the filing of the request or six months from the date of mailing by the IRS of a notice disallowing the claim. 26 U.S.C. § 6532(c)(2). However, because neither the Insurer nor the Insured had a choate interest in the pension before the restitution order was issued, they lacked standing to challenge the levy at the time the IRS seized the pension and could not have availed themselves of the extension of the limitations period.

³² *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1377(7th Cir. 1992).

³³ *Irwin v. Department of Veteran Affairs*, 498 U.S. 89, 96 (1990); *Robinson v. Dalton*, 107 F.3d 1018, 1022 (3d Cir. 1997).

³⁴ *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995).

³⁵ *See Supermail Cargo, Inc.*, 68 F.3d 1204; *Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir. 1995); *Belton v. Commissioner of Internal Revenue Service*, 562 F. Supp. 30 (D.D.C. 1982). Equitable tolling is not considered a violation of the government's waiver of sovereign immunity and can be applied to claims against the government in the same manner as to claims involving private parties. *Irwin*, 498 U.S. at 96.

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- (3) The defendant does not have any other assets available to satisfy the restitution order;
 - (4) Until the issuance of the restitution award, the insurer arguably was powerless to challenge the levy due to the fact that it lacked a choate interest in the pension;
 - (5) The insurer actively pursued its judicial remedies by bringing this action against the IRS immediately upon issuance of the restitution award;
 - (6) Any result which does not award the pension to the insurer contravenes express congressional intent;
 - (7) A refusal to toll the limitations period will encourage the IRS to levy upon a defendant's assets as quickly as possible so that it can avail itself of a limitations defense when the crime victim later attempts to collect its restitution award; and
 - (8) Because a tolling of the limitations period simply exposes the IRS to the possibility that a judgment will be entered against it in the amount of the pension funds recovered by it (plus interest), the IRS cannot demonstrate that it will suffer any prejudice as a result of a tolling of the limitations period.

By stressing the peculiar facts and inequitable result if the court does not intervene, the insurer may be able to distinguish its claim from the garden variety case of excusable neglect and have the court toll the limitations period.

The IRS may oppose the application of the equitable tolling doctrine by relying upon the Supreme Court's recent decision in *United States v. Brockamp*.³⁶ In *Brockamp*, the Court held that equitable tolling could not be used to toll the limitations period of 26 U.S.C. § 6511 (concerning claims for credits or refunds for overpayment of tax). In holding that equitable tolling was unavailable in connection with section 6511, the Court specifically noted that the statutes limitations period is set forth in a "highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions. Moreover, section 6511 reiterates its limitations several times in several different ways."³⁷ The Court also noted that section 6511 contains explicit exceptions, none of which include equitable tolling.³⁸ The Court concluded that section 6511 differed significantly from the ordi-

³⁶ 519 U.S. 347 (1997).

³⁷ 117 S.Ct. at 851.

³⁸ *Id.* at 852.

nary statute of limitations, and held that equitable tolling could not be used to toll the statute's limitations period.

Brockamp appears to be inapplicable to the subject circumstances. Section 6532(c) is the complete antithesis of section 6511. It contains a mere single sentence: "Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action." The statute hardly can be considered "highly detailed" or "technical," as the *Brockamp* court found section 6511 to be, and recites its limitations period only once, in only one way. No exceptions to the limitations period are stated. Thus, the Supreme Court's rationale for barring equitable tolling does not appear to apply to the limitations period contained in section 6532(c).³⁹

IV. CONSIDERATIONS PARTICULAR TO PENSIONS

Most pensions are governed by the Employee Retirement Income Security Act of 1974 (ERISA).⁴⁰ ERISA contains what is commonly referred to as an "anti-alienation provision," which states "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."⁴¹

ERISA's anti-alienation provision may not preclude the insurer in the above-described illustration from obtaining the pension proceeds and applying them to the defendant's restitution obligation. Indeed, the weight of

³⁹ But see *Compagnoni v. United States*, 1997 WL 416482 (S.D. Fla. 1997), in which the district court found that § 6532(c), "like section 6511(a), contains highly detailed technical [language], that linguistically speaking, cannot easily be read as containing implicit exceptions." See also *RHI Holdings, Inc. v. United States*, 142 F.3d 1459, 1462-63 (Fed. Cir. 1998) (refusing to apply equitable tolling to limitations period of § 6532(a), pertaining to claims of the taxpayer himself).

Other decisions since *Brockamp* have applied equitable tolling to other briefly-stated, nontechnical statutes of limitations. See, e.g., *Fadem v. United States*, 113 F.3d 167 (9th Cir. 1997) (equitable tolling available to toll limitations period in 28 U.S.C. § 2409(g), which is "non-technical, non-substantive and comprised of two short sentences"); *Calderon v. United States Dist. Court*, 128 F.3d 1283, 1288 n.4 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 899 (1998) (Antiterrorism and Effective Death Penalty Act's one-year limitations period for filing habeas corpus petitions is subject to equitable tolling, as statute "is neither detailed nor technical; it reads like an everyday, run-of-the-mill statute of limitations."), *cert. denied*, 118 S. Ct. 899 (1998).

Note the *Brockamp* court's observation that "[t]ax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities." 117 S. Ct. at 852. While the court in *Compagnoni* appears to have seized upon this language, this statement hardly constituted the basis for the Court's decision. Moreover, our facts present more than "individualized equities". The author believes that the circumstances discussed in this article cry out for a judicial pronouncement that restitution supersedes federal tax obligations arising from the subject crime.

⁴⁰ 29 U.S.C. § 1001.

⁴¹ 29 U.S.C. § 1056(d)(1).

authority appears to favor the insurer's attempt to obtain the pension. Both the Third Circuit and the Tenth Circuit have held that the anti-alienation provision does not apply to pension proceeds which have been distributed to the beneficiary and that such distributed proceeds can be seized to satisfy a restitution obligation.⁴² The Fourth Circuit is the only appellate court to take the opposing view.⁴³

The Sixth Circuit has taken a different approach in indicating that a pension can be seized to satisfy a criminal restitution obligation.⁴⁴ Since the government can enforce a restitution order in the same manner as a federal tax lien,⁴⁵ that court looked to tax law to decide the issue. Section 6334(a) lists the property exempt from a tax lien, subsection 6 of which specifically enumerates certain pensions, such as those under the Railroad Retirement Act. Since the relevant pension was not specifically excluded from seizure by the tax code, the court indicated that the pension could be seized to satisfy the defendant's criminal restitution obligation.⁴⁶

V. THE IMPORTANCE OF EQUITABLE CONSIDERATIONS

Stressing the equitable considerations of its argument will be critical to the success of an insurer's attempt to obtain the pension proceeds from the IRS. In crafting its argument, the insurer must accentuate throughout the unfair result that would be achieved if its application is denied. It appears unjust that the IRS could profit from a crime at the expense of the insurer, who holds a restitution award and is the victim's subrogee. This result not only contravenes congressional intent but common sense as well. If funds are

⁴² *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *Trucking Employees of North Jersey Welfare Fund, Inc. v. Colville*, 16 F.3d 52 (3d Cir. 1994). While neither of these cases involved a restitution obligation in a criminal context, the logic applied in these cases is entirely applicable to the circumstances discussed in this paper. *See United States v. Tencer*, 986 F. Supp. 361 (E.D. La. 1997) (noting that if defendant/beneficiary seeks distribution of proceeds of pension, they can be applied to his criminal restitution order, relying upon *Guidry* and *Colville*).

⁴³ *United States v. Smith*, 47 F.3d 681 (4th Cir. 1995). *Smith* involved a criminal restitution order and includes a strong dissent in favor of the rationale espoused by the *Guidry* and *Colville* courts. *See also United States v. Lampien*, No. 96-3337, 1997 WL 800850 (7th Cir. April 22, 1997) (Seventh Circuit noted split in circuits and declined to address question).

⁴⁴ *United States v. Comer*, 93 F.3d 1271 (6th Cir.), *cert. denied*, 117 S. Ct. 595 (1996).

⁴⁵ 18 U.S.C. § 3613(c).

⁴⁶ *Comer* involved a postal pension, which has its own anti-alienation provision outside of ERISA not relevant to private pensions. The court remanded to the district court to determine the applicability of the postal anti-alienation provision. Under the *Comer* rationale, private pensions could be seized to satisfy criminal restitution obligations. In addition, the district court ordered the defendant to apply for his retirement benefits so they could be remitted to the government to satisfy his criminal restitution obligation. This indicates support for the *Guidry* and *Colville* theory described above.

available to reimburse the holder of a restitution award, restitution of the loss surely must have priority over a federal tax assessment.

The inequitable nature of the IRS's position and the result it seeks may be the characteristics of this claim which distinguish it from the myriad of other actions alleging IRS impropriety and which should impel the court to give the insurer's application the careful scrutiny it merits.

VI. CONCLUSION

As the above discussion demonstrates, a fidelity insurer should not simply surrender when the IRS seizes a dishonest employee's assets. Relying upon the relevant restitution statutes and the legislative history, the insurer can construct a strong argument that the IRS's seizure of those assets contravenes what Congress intended in amending the federal restitution statutes and strengthening a victim's right to receive full restitution. Based thereon, the insurer may be able to establish that the order of restitution is superior to the IRS's interest in the assets, and that the IRS's levy upon those assets was wrongful. By so doing, the insurer may be able to recover the pension proceeds from the IRS.