

## **CRIMINAL RESTITUTION ORDERS CAN REACH ERISA PLAN ASSETS**

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Practitioners generally recognize that ERISA Plan assets cannot be reached by a creditor of a participant. Numerous courts have held that the anti-alienation clause broadly protects covered retirement benefits from dissipation through payment to third parties, even if the payments are authorized by a plan participant or would otherwise be valid by force of law. There are, however, two well known exceptions: (1) domestic relations orders and (2) offsets to recover for wrongs committed against the retirement plan. In addition, federal tax liens may be enforced against plan assets because ERISA specifically states that it is not to be construed to modify federal tax law and the rights of the IRS to pursue all property and rights to property of delinquent taxpayers. Now the Ninth Circuit Court of Appeals in U.S. v. Novak, 476 F.3d 1041 (2007) has held that criminal restitution orders are to be treated similarly to tax liens in terms of accessing qualified plan assets. Although a number of District Courts have reached a similar conclusion, this is the first Circuit Court decision on this issue.

This case is important in terms of advising a client who has been convicted of a crime and as part of the sentencing, the court has granted a judgment to a victim under the Mandatory Victims Restitution Act. If the victim is the US government (such as in a health care fraud case), it can proceed against the plan under the Federal Debt Collection Procedures Act. In Novak, the Court approved this procedure in pursuing the defendant's account in two separate plans for the \$3.36 million in restitution the Court ordered.

If you encounter this situation in your practice, there are several critical issues to be aware of. First, even if subject to a valid restitution order, the plan assets cannot be accessed until they are in pay status. This is very key in negotiating with the creditor. The creditor may well take less than the full amount in exchange for cash. Second, to what extent can the entity sponsor of the plan make amendments to the plan, either after the restitution order is issued or in anticipation of it being issued, in order to delay the time at which the participant will be in pay status. For example, changing the normal retirement age in the plan from 60 to 65. Would enacting such an amendment constitute a fraudulent transfer under the Uniform Fraudulent Transfer Act? These issues raise interesting questions that will be the subject of future articles.