

# CERTAIN RESTITUTION ORDERS OVERRIDE ERISA'S ANTI-ALIENATION PROVISIONS

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Over a ten year period, Jon Frank embezzled over \$19,000,000 from his former employer. Frank pleaded guilty to one count of wire fraud. The District Court ordered Frank to serve time in prison and also to pay restitution in an amount of slightly over \$19,000,000. The government had collected over \$7,000,000 from Frank. The government then sought to garnish Frank's 401(k) retirement account under the provisions of the Mandatory Victims Restitution Act of 1996 ("MVRA"). The MVRA grants the government broad authority to seek funds in order to provide restitution to victims of certain criminal acts.

The issue that arose was whether ERISA's strong anti-alienation provision, sometimes known as the "spendthrift clause," prevents the government from seeking access to Frank's 401(k) account balance.

The Fourth Circuit faced this issue on appeal. The first issue the Court decided was whether the broad language in the MVRA granting the right to garnish funds overrides the anti-alienation provision under ERISA. The Fourth Circuit, following similar reasoning of cases decided in the Fifth and Seventh Circuits, found that the 'notwithstanding clause' of the MVRA served to override the anti-alienation provision of ERISA.

Once finding that the government could garnish the 401(k) account, the Court faced other issues. The Court found that the government stands in the shoes of the participant and the government may only receive those funds which the participant could receive. Therefore, the Court found that the government's garnishment may only occur at the time that the plan participant had a right to receive those funds. In addition, the question arose regarding the effect of the requirement, under tax law, of 20% mandatory withholding and Frank also raised a question of the 10% additional income tax applicable to distributions under age 59½. The Fourth Circuit handed the case back to the District Court to decide these issues under the terms of the relevant plan documents. It may well be the case that the 20% withholding requirement is not specified in the plan document. However, it appears that the mandatory 20% income tax withholding should limit the government's right to restitution of those amounts and the withholding would have to be paid to the IRS. With respect to the 10% additional tax, that issue is less clear as it does not involve a withholding obligation, it only involves Frank's tax obligation. Additionally, the

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amount garnished by the government would appear to be exempt from the additional 10% income tax under IRC § 72(t)(2)(A)(vii). Note, the Fourth Circuit did not remand to the district court whether amounts should be set aside to allow Frank to pay the regular income tax on the amounts garnished from his 401(k) account. (*United States v. Frank*, 4th Cir., 2021).

