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***ENSURING THAT CRIME DOESN'T PAY: HOW
THE FIDELITY CARRIER CAN USE RESTITUTION TO
DEFEAT IRS CLAIMS TO A DEFENDANT'S ASSETS***

PRESENTED BY:

ADAM P. FRIEDMAN, ESQ.

Wolff & Samson
5 Becker Farm Road
Roseland, NJ 07068
(973) 740-0500

ENSURING THAT CRIME DOESN'T PAY: HOW THE FIDELITY CARRIER CAN USE RESTITUTION TO DEFEAT IRS CLAIMS TO A DEFENDANT'S ASSETS

By: Adam P. Friedman, Esq.

Picture the following set of facts: In Fidelity issued a fidelity bond to Humongous Co. to insure against employee defalcation. Thereafter, Rob, an employee of Humongous, engaged in a scheme to defraud Humongous out of substantial sums. Through an anonymous tip, Humongous eventually learned of the scheme and alerted the authorities. After a lengthy investigation, Rob was arrested and charged with mail fraud, wire fraud, and tax evasion for failing to declare the proceeds of his crime as income on his 1040.

An analysis by Humongous revealed that it sustained a \$1 million loss as a result of the scheme. It filed a claim with In Fidelity which, after performing an extensive but briskly-paced investigation, determined that the claim was legitimate and paid it. In connection with the settlement of this claim, In Fidelity obtained an assignment from Humongous of all of Humongous's rights to recovery from Rob.

Rob was prosecuted in federal court. Due to wrangling and consensual delays not atypical in a criminal matter, Rob's case took over a year to go to trial. Shortly after Rob's arrest, the IRS determined that he owed back taxes and penalties of \$750,000. The IRS's written explanation to Rob of its assessment states that the assessment arises **solely** from Rob's failure to declare the \$1 million proceeds of the crime as income.

Rob, however, had a rough year. He foolishly believed Patrick Ewing's promise that the Knicks would "win it all" (not realizing that Patrick makes this promise every year) and wagered all of his money on the Knicks to win the championship. Due to various brawls and the resulting suspensions, the Knicks were forced to suit up the coach and trainer for the playoffs, where they were swept by Michael Jordan and four ball-boys. Rob lost the entirety of the \$1 million proceeds of the crime, along with whatever other money he had, and has little in the way of assets to satisfy the assessment. Well before the commencement of the trial, at about the time In Fidelity and Humongous were settling the claim, the IRS learned that Rob had earned a pension of \$500,000 during his years of employment with Humongous, which Humongous still held. Fearing that the pension would be paid to Rob and that he would quickly dispose of the proceeds, the IRS quickly obtained a "jeopardy assessment"¹ and levied upon the pension. In compliance with applicable law, unaware that Rob has squandered the proceeds of the theft and that the pension may be needed to satisfy a future restitution obligation, Humongous turned the pension over to the IRS.

¹ A "jeopardy assessment" allows the IRS to forego usual collection procedures and expedite assessment and collection where exigent circumstances indicate that collection may be jeopardized if immediate action is not taken. See 26 U.S.C. § 6861(a) (describing jeopardy assessments); 26 U.S.C. § 6331(a) (providing for immediate levy in jeopardy situation); J. Willkens & T. Matthews, "A Survey of Federal Tax Collection Procedure: Rights and Remedies of Taxpayers and the Internal Revenue Service", 3 Alaska L. Rev. 269, 286 (1986).

Rob was convicted after trial. Eighteen months after the IRS seized the pension, Rob was sentenced to a lengthy prison term and to make restitution in the full amount of the loss, \$1,000,000. Thanks to the IRS's seizure of the pension, which was Rob's only substantial remaining asset, there is little likelihood that any portion of this restitution order will be satisfied.

In Fidelity stews over the fact that it may not be able to recoup a meaningful portion of its loss, while the IRS profited from Rob's crime at In Fidelity's expense. Unfortunately, restitution awards are not included in the list of interests granted a "superpriority" against the IRS.² Nor does there appear to be any statute or case law which expressly states that In Fidelity has a claim to the pension superior to the IRS's interest therein. Nevertheless, In Fidelity should not give up hope. In reliance upon the order of restitution, it may be able to craft an argument whereby it can challenge the IRS's seizure of the pension and attempt to have a court compel the IRS to turn the pension over to it, with interest. This paper will discuss how In Fidelity can pursue such a course of action. First, the paper will discuss the relevant restitution statutes and how they indicate that restitution orders should take priority over federal tax obligations arising from the subject crime. Second, the paper will discuss the procedure by which In Fidelity can challenge the IRS levy. Finally, the paper will focus upon the equitable nature of In Fidelity's argument and the importance of stressing these equities in In Fidelity's application.

I. How the Relevant Restitution Statutes Indicate that Restitution Orders Should be Superior to Federal Tax Obligations Arising from the Subject Crime

Research has not located any express authority for the proposition that an order of restitution should be accorded priority over the claims of the IRS arising from federal taxes assessed against a dishonest employee in connection with income received in the commission of the subject crime. Nevertheless, an examination of the legislative history behind recent amendments to the restitution statutes and the manner in which the government can enforce an order of restitution reveals strong support for the argument for the priority of In Fidelity's restitution order.

A. The Mechanics of Restitution

The general restitution statute is the Victim and Witness Protection Act ("VWPA").³ In 1996, Congress amended the VWPA with the Mandatory Victims Restitution Act ("MVRA"),⁴ which significantly enhanced a victim's right to

² For a list of those interests granted a "superpriority", see 26 U.S.C. § 6323.

³ 18 U.S.C. §§ 3663-3664.

⁴ Title II, Subtitle A of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. 110 Stat. 1214.

restitution from a criminal defendant.⁵ Most notably, the MVRA made full restitution mandatory where the defendant is convicted of a crime involving fraud, such as is the case here.⁶

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.⁷ Prior to submitting the pre-sentence report, the probation officer must notify the victim as to the crime(s) of which the defendant was convicted and must give the victim an opportunity to submit information concerning the amount of its losses.⁸ 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.⁹ This information is also included in the pre-sentence 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.¹⁰

In the case of a crime involving fraud, as we have here, and assuming that there is no dispute concerning the amount of the victim’s loss and the defendant’s financial circumstances as set forth in the pre-sentence report, the court must require the defendant to make restitution in the full amount of the victim’s loss irrespective of the defendant’s financial condition.¹¹ 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.¹²

⁵ The amended restitution provisions apply to defendants convicted after April 24, 1996. See, e.g., notes to 18 U.S.C. § 3663.

⁶ 18 U.S.C. § 3663A(c)(1)(A)(ii). The MVRA is discussed in greater detail in section “B” infra.

⁷ 18 U.S.C. § 3664(a).

⁸ 18 U.S.C. § 3664(d)(2).

⁹ 18 U.S.C. § 3664(d)(3).

¹⁰ 18 U.S.C. § 3664(e).

¹¹ 18 U.S.C. § 3664(f)(1)(A). Prior to the MVRA, whether restitution would be awarded and, if so, the amount thereof, was within the discretion of the sentencing court.

¹² 18 U.S.C. § 3664(f)(1)(B), (j)(1).

B: The Legislative History Strongly Suggests that 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 required to examine the defendant's ability to pay restitution and craft a restitution order based in large part thereon.¹³

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.¹⁴ The MVRA also enhanced the penalties for a defendant's default in his restitution obligations,¹⁵ and made the enforcement procedures previously available to the government only for collection of fines available for the collection of restitution.¹⁶

The relevant legislative history plainly states Congress's 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 of 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

¹³ See 18 U.S.C. §§ 3663, 3664 (1995).

¹⁴ 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 Proposed USSG § 5E1.1 (eff. Nov. 1, 1997).

¹⁵ 18 U.S.C. § 3613A.

¹⁶ 18 U.S.C. § 3613(f).

means of recouping the personal and financial losses resulting from crime.¹⁷

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 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.¹⁸

Congress's pronouncements in connection with the amendments are simply a reaffirmance 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."¹⁹ In discussing the VWPA, one congressman noted Congress's intent "that Federal crime victims receive the fullest possible restitution from criminal wrongdoers."²⁰

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

¹⁷ H.R. Rep. No. 16, 104th Cong., 1st Sess. 1995, 1995 WL 43586.

¹⁸ S. Rep. No. 179, 104th Cong., 1st Sess. 1995, in 1996 U.S. Code Congr. & Admin. News 924, 1995 WL 731704.

¹⁹ S. Rep. No. 532, 97th Cong., 2d Sess. 1982, in 1982 U.S. Code Congr. & Admin. News 2515, 1982 WL 25068.

²⁰ 128 Cong. Rec. 27391 (1982) (remarks of Rep. Rodino).

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.²¹ The victim can enforce an order of restitution by any "available and reasonable means".²² For the government, the responsibility for collection lies with the Attorney General.²³ In addition to permitting the government to enforce an order of restitution as a civil judgment,²⁴ an order of restitution acts like a federal tax lien on the defendant's property.²⁵

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 requiring that restitution awards be afforded priority. Specifically, if an order of restitution does not have priority over a federal tax obligation arising from the crime, there will be 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 in light of a competing IRS claim which arises 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 here, 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:

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

²² 18 U.S.C. § 3664(m)(1)(B). Under the old law, a victim could only enforce the order of restitution as it could a civil judgment. The new section 3664 makes enforcing a restitution order through the mechanisms available for civil judgments easier by providing 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.

²³ 18 U.S.C. § 3612.

²⁴ 18 U.S.C. § 3613.

²⁵ 18 U.S.C. § 3613(c). See also 26 U.S.C. § 6323 for how a federal tax lien is enforced.

- (1) A penalty assessment under section 3013 of title 18, United States Code.²⁶
- (2) Restitution of all victims.
- (3) All other fines, penalties, costs, and other payments required under the sentence.

It should be noted that 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 the IRS unconnected to the sentence. 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 statutes and the sentencing guidelines contain similar requirements.²⁷ A seizure of assets by the IRS which deprives a victim of a chance to receive restitution defeats Congress's intent.

II. The Procedure for Contesting the Levy

The procedure for In Fidelity to contest the levy is set forth at 26 U.S.C. § 7426, which 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 considered to be the taxpayer's property.²⁸ In order to succeed on a § 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 pension was wrongful.²⁹

²⁶ 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., 1994 U.S. Code Cong. & Admin. News 924, 1995 WL 731704.

²⁷ 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.

²⁸ 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)(1) allows for the recovery of interest from the time of the wrongful levy.

²⁹ 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).

Making the actual argument in support of the § 7426 claim is not complicated. The first requirement, that the IRS levied upon property in Humongous's possession,³⁰ should be undisputed. The argument in support of the second requirement, that In Fidelity's interest in the pension is superior, is based upon the discussion in Point I above. To satisfy the third requirement and establish that a levy is "wrongful", In Fidelity must show that the pension is the only source from which it can realize collection.³¹ This allegation may also be undisputed, as the facts are clear that, without the pension, In Fidelity cannot reasonably expect to collect the entirety of the restitution award.

The major obstacle to the procedural portion of In Fidelity's claim will be the limitations period, set forth at 26 U.S.C. § 6532(c), which is nine months from the date of the levy.³² Rob was not sentenced, and the restitution order was not issued, until well after this limitations period had expired. Since neither In Fidelity nor Humongous 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.³³

Should the IRS contend that In Fidelity's action is time-barred, as can be expected, In Fidelity should argue that the doctrine of "equitable tolling" should be employed to excuse the delay. As one court stated: "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."³⁴ 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,³⁵ particularly where there is no prejudice to the party against whom the tolling is to apply.³⁶ Various courts have utilized equitable tolling specifically to extend the limitations period for claims under § 7426.³⁷

³⁰ The reader should recall that In Fidelity is assignee and subrogee of Humongous.

³¹ Texas Commerce Bank, 896 F.2d at 156.

³² 26 U.S.C. § 6532(c)(1).

³³ 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 In Fidelity nor Humongous 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.

³⁴ Central States, Southeast & Southwest Areas Pension Fund v. Slotky, 956 F.2d 1369, 1377 (7th Cir. 1992).

³⁵ Irwin v. Department of Veteran Affairs, 498 U.S. 89, 96 (1990); Robinson v. Dalton, 107 F.3d 1018, 1022 (3d Cir. 1997).

³⁶ Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1207 (9th Cir. 1995).

³⁷ 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

In addition to describing the unusual circumstances which have prevented In Fidelity from enforcing its rights and how it has vigorously pursued its judicial remedies, In Fidelity's argument in favor of equitable tolling should also discuss the equitable considerations which weigh largely in In Fidelity's favor. In Fidelity's argument should thus proceed something like this:

- (1.) In Fidelity's insured, Humongous, 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 Rob's pension to satisfy a tax obligation which the IRS knew arose entirely from the subject crime;
- (3.) Rob has no other assets available to satisfy the restitution order;
- (4.) Until the issuance of the restitution award, In Fidelity was powerless to challenge the levy due to the fact that it lacked a choate interest in the pension;
- (5.) In Fidelity 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 In Fidelity contravenes express congressional intent;
- (7.) A refusal to equitably 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.) Since 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, In Fidelity 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 decision in United States v. Brockamp, 519 U.S. ____, 117 S. Ct. 849 (1997). This argument should fail. In Brockamp, the Supreme 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 § 6511, the Court specifically noted that § 6511's limitations period is set forth in a "highly detailed technical manner, that linguistically speaking, cannot

government in the same manner as to claims involving private parties. Irwin, 498 U.S. at 96.

be read as containing implicit exceptions. Moreover, § 6511 reiterates its limitations several times in several different ways.”³⁸ The Court also noted that § 6511 contains explicit exceptions, none of which include equitable tolling.³⁹ The Court concluded that § 6511 differed significantly from the ordinary statute of limitations, and held that equitable tolling could not be used to toll § 6511’s limitations period.

Section 6532(c) is the complete antithesis of § 6511. It contains a mere one 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 is hardly “highly detailed” or “technical”, as the Court in Brockamp found § 6511 to be, and recites its limitations period only once, in only one way. No exceptions to the limitations period are stated. Simply put, the Supreme Court’s rationale for barring equitable tolling does not apply to the limitations period contained in § 6532(c).⁴⁰

III. The Importance of the Equitable Considerations

Stressing the equitable considerations of its argument will be critical to the success of In Fidelity’s application. In crafting its argument, In Fidelity must accentuate throughout the outlandish result which would be achieved if its application is denied. It is simply outrageous that the IRS should profit as a result of Rob’s crime at the expense of In Fidelity, the victim’s subrogee. This result not only contravenes congressional intent but common sense as well. If funds are available to reimburse the victim or its subrogee,

³⁸ 117 S. Ct. at 851.

³⁹ 117 S. Ct. at 852.

⁴⁰ 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.” With all due respect to the court, the author wonders if the court was interpreting the correct statute. The author believes that a conclusion that § 6532(c) bears any similarity to § 6511 is completely illogical. The reader is invited to draw his/her own conclusions.

Other decisions since Brockamp have applied equitable tolling to other briefly-stated, non-technical statutes of limitations. See, e.g., Fadem v. United States, ___ F.3d ___, 1997 WL 228692 (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 for the Cent. Dist. of Cal., ___ F.3d ___, 1997 WL 197546 n.4 (9th Cir. 1997) (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”).

The reader should note that the Brockamp court stated “Tax 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 these circumstances cry out for a judicial pronouncement that restitution supersedes federal tax obligations arising from the subject crime.

restitution of the victim's loss must, in equity, surely have priority over an assessment which would allow the IRS to profit from the criminal act at the victim's expense. The inequitable nature of the IRS's position and the shocking 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 In Fidelity's claim the careful scrutiny it merits.

IV. Conclusion

As the above demonstrates, In Fidelity should not simply surrender when the IRS seizes the dishonest employee's pension. Relying upon the relevant restitution statutes and the legislative history, In Fidelity can proffer a strong argument that the IRS's seizure of the pension contravenes everything Congress intended in amending the federal restitution statutes and strengthening a victim's right to receive full restitution. Based thereon, In Fidelity may be able to establish that the order of restitution is superior to the IRS's interest in the pension, and that the IRS's levy upon the pension was wrongful vis-a-vis the employer-victim's subrogee.

Having established that the levy was wrongful, In Fidelity simply needs to follow the procedure for challenging the levy described above. Since In Fidelity is unable to make its claim within the limitations period, it can ask the court to equitably toll the limitations period. In Fidelity must stress that, until the restitution order was issued, it lacked standing to challenge the IRS levy as it had no interest in the pension, and that, without equitable tolling, it will have been unfairly deprived of an opportunity to assert its right to the pension. To enhance its chances of success on the equitable tolling argument, In Fidelity must be proactive in taking steps to enforce its rights as soon as the restitution award is issued.

By following the approach outlined herein, In Fidelity may succeed in obtaining the pension proceeds from the IRS and thereby recover a significant portion of its loss.

Adam P. Friedman is associated with Wolff & Samson, P.A., in Roseland, New Jersey and New York, New York, where his practice is concentrated in the areas of surety and fidelity law and commercial litigation. While he practices primarily in the state and federal courts of New York, he is also admitted to practice in New Jersey. He is a member of the Fidelity and Surety Law Committee of the Tort and Insurance Practice Section of the American Bar Association.

Mr. Friedman received a Bachelor of Science degree in 1988 from Cornell University and his Juris Doctor degree in 1991 from Yeshiva University, Benjamin N. Cardozo School of Law, where he was an editor of the Cardozo Law Review. Upon graduation from Cardozo, he clerked for the Honorable Arthur D. Spatt, United States District Judge for the Eastern District of New York.