

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
	:	
	:	
v.	:	
	:	
ANTHONY J. GRICO	:	
BENEFICIAL SAVINGS BANK	:	NO. 99-202-01
	:	
	:	

Newcomer, S.J. May , 2003

O P I N I O N

Presently before the Court is the United States of America's Motion to Approve Writ of Garnishment, the Defendant's response as well as the parties' supplemental briefs. For the reasons set forth below, the Government's Motion is granted.

BACKGROUND

The Defendant, Anthony J. Grico, was convicted of conspiracy to defraud the United States, tax evasion, and filing a false federal income tax return, in violation of 18 U.S.C. § 371 and 26 U.S.C. §§ 7201 and 7206(1). On July 19, 2000, this Court sentenced the Defendant and ordered him to pay a criminal fine of \$75,000. Pursuant to the Third Circuit's mandate, on July 31, 2002, this Court re-sentenced the Defendant and reimposed the \$75,000 fine. The Defendant has failed to pay a substantial portion of this fine.

The Government's financial discovery has located assets belonging to the Defendant which include, among other things, an individual retirement account ("IRA") in the amount of \$30,065.88. Currently at issue before this Court is whether the Government is able to garnish the funds in the Defendant's IRA. Pursuant to 28 U.S.C. § 3205(c)(5), no hearing was held on this matter as the Defendant failed to request such a hearing.¹

DISCUSSION

In considering this matter of first impression for this Circuit, this Court adopts the two-prong approach as used in United States v. Sawaf, 74 F.3d 119, 122 (6th Cir. 1996), by the Sixth Circuit, that is: (1) whether the property in question is the type of property that may be reached by Federal Debt Collection Procedure Act ("FDCPA") garnishment orders; and (2) if so, whether ERISA exempts property such as an IRA from such orders.

¹ The Court notes that the docket reflects an April 16, 2001, request by the Defendant for a hearing (Document 135) and a subsequent denial by this Court on April 23, 2001 (Document 136). Said request was denied for failure to elicit any reason for such a hearing. More importantly, Defendant's request came prior to the sentence in question which was not imposed until August 12, 2002, some sixteen months after the Defendant's hearing request. Because the Defendant's original sentence was vacated by the Third Circuit, such a hearing would have been an exercise in futility. Finally, with the above hearing request in mind, this Court contacted Defendant's counsel and inquired as to whether the Defendant wished to renew his request for a hearing. The Court's inquiry went unaddressed by counsel.

I. The Defendant's IRA is Garnishable under the FDCPA

The first prong of the garnishment test concerns the Government's ability to garnish property such as an IRA in order to satisfy the assessment of a criminal penalty. The FDCPA clearly answers this question in the affirmative. In the FDCPA, Congress expressly provides that "a judgment imposing a fine may be enforced against all property or rights to property of the person fined...." 18 U.S.C. § 3613(a). This broad provision comes with limitations, none of which are applicable to IRAs. 18 U.S.C. § 3613(a). Therefore, the first prong of the test is met. The Defendant's IRA is property that the Government can reach through issuance of a FDCPA garnishment order.

II. ERISA Does Not Exempt the Defendant's IRA From Garnishment

Unsurprisingly, the Defendant argues that even though the Government has the ability to reach his IRA via the FDCPA, actual garnishment of the account is not permitted according to ERISA. Specifically, the Defendant cites ERISA's anti-alienation provision which indicates that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). The Defendant's argument fails for the following two reasons.

First, Congress provides in 18 U.S.C. § 3613(c) that

"[a] fine imposed pursuant to the provisions of [the FDCPA], is a lien in favor of the United States on all property and rights to property of the person fined as if the liability of the person fined were a liability for a tax assessed under the Internal Revenue Code of 1986." In a tax-collection context ERISA's protective provisions "give way to the collection provisions of the Internal Revenue Code and the FDCPA." Sawaf, 74 F.3d at 123. This is the case as Treasury Regulation § 1.401(a)-13(b)(2)(ii) specifically states that the anti-alienation requirements of ERISA shall not preclude "[t]he collection by the United States on a judgment resulting from an unpaid tax assessment."

Second, regardless of whether the above is correct, Congress broadly directs the Government to enforce a fine against "all property or rights to property of the defendant" with the exception of property enumerated in 18 U.S.C. §§ 3613(a)(1), 3613(a)(2) & 3613(a)(3). Had Congress intended to limit the enforceability of the FDCPA to prevent IRAs from being garnished, IRAs would have been listed in § 3613(a) along with the other types of property immune from garnishment under the FDCPA. In other words, Congress' decision to exclude IRAs from this list indicates an intention to include IRAs in the types of property susceptible to garnishment under the FDCPA. The Defendant, however, suggests that Congress intended IRAs to be immune from garnishment when it crafted ERISA's anti-alienation provision.

Such an argument fails to account for ERISA's saving clause which provides that ERISA's provisions shall not "alter, amend, modify, invalidate, impair, or supercede any law of the United States." 19 U.S.C. § 1144(d). Congress clearly defines its intention not to alter other laws, such as the FDCPA, in ERISA's saving clause provision. Therefore, Defendant's contention that ERISA somehow protects against garnishment permitted by the FDCPA clearly fails. The notion that ERISA's saving clause permits enforcement of a garnishment order issued under the FDCPA is not a novel approach. Sawaf, 74 F.3d 119; United States v. Rice, 196 F.Supp.2d 1196 (N.D.Okla. 2002). Those cases relied on by the Defendant in arguing against the ability to garnish under ERISA bear little applicability to the matter at hand. For the reasons outlined above, the Government's Motion to garnish the Defendant's IRA account is granted.

AN APPROPRIATE ORDER SHALL FOLLOW.

Clarence C. Newcomer, S.J.

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O R D E R

AND NOW, this day of May, 2003, upon consideration of the Government's Motion to Approve Writ of Garnishment, the Defendant's response and the Government's reply, it is hereby ORDERED as follows:

- 1) The Motion of the Government is GRANTED

- 2) The garnishee, Beneficial Savings Bank, shall immediately pay to the United States of America all funds due and owing to the above-named Defendant until the debt imposed in this case is paid in full; until the garnishee no longer has custody, possession or control of any property belonging to the Defendant; or until further Order of this Court.

- 3) The garnishee shall immediately forward payment by bank check or certified funds payable to the "Clerk, united States District Court" to the United States Attorney's Office,

615 Chestnut Street, Suite 1250, Philadelphia, Pennsylvania,
19106-4476 (Attn: Financial Litigation Unit).

AND SO IT IS ORDERED.

Clarence C. Newcomer, S.J.