

Steve Leimberg's Employee Benefits and Retirement Planning Email Newsletter - Archive Message #774

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From: Steve Leimberg's Employee Benefits and Retirement Planning Newsletter

Subject: [Marc Soss on Caballero v. Fuerzas Armadas Revolucionarias de Colombia: When ERISA/Federal Benefits and Anti-Terrorism Laws Collide](#)

“On September 30, 2021, in Caballero v. Fuerzas Armadas Revolucionarias de Colombia, Judge Indira Talwani of the U.S. District Court for the District of Massachusetts ruled that Fidelity Investments must turn over 401(k) assets under its management to the son of Carlos Caballero pursuant to the Terrorism Risk Insurance Act of 2002. The Judge found the turnover not to be in violation of the federal law protecting retirement plan assets from being used for other purposes. The ruling ends a long journey that began in 2012 with a civil lawsuit in Miami District Court against the FARC.”

Marc Soss provides members with his analysis of [Caballero v. Fuerzas Armadas Revolucionarias de Colombia](#).

Marc Soss' practice focuses on estate planning, probate and trust administration, and corporate matters in Southwest Florida. Marc is a frequent contributor to [LISI](#) and has published articles in the Florida Bar, Rhode Island Bar, and North Carolina Bar. Marc is also a retired United States Navy Supply Corps Officer.

Here is Marc's commentary:

[EXECUTIVE SUMMARY:](#)

On September 30, 2021, in [Caballero v. Fuerzas Armadas Revolucionarias de Colombia](#) (2021 BL 373566, D. Mass., No. 1:21-cv-11393, 9/30/21), Judge Indira Talwani of the U.S. District Court for the District of Massachusetts ruled that Fidelity Investments must turn over 401(k) assets under its management to the son of Carlos Caballero pursuant to the Terrorism Risk Insurance Act of 2002. The Judge found the turnover not to be in violation of the federal law protecting retirement plan assets from being used for other

purposes. The ruling ends a long journey that began in 2012 with a civil lawsuit in Miami District Court against the FARC.

COMMENT:

Background:

In 1999, Carlos Caballero, a former Colombian senator, president of the Colombian Liberal Party and a vocal critic against FARC and drug trafficking, was allegedly kidnapped and killed by the Revolutionary Armed Forces of Colombia and other rebel groups. In 2012, his son, Antonio Caballero, commenced a civil action in Miami district court against the perpetrators. The Miami-Dade Circuit Court lawsuit alleged that his father was held hostage for more than six months, denied him food and water and forced him to traverse dense jungles. The lawsuit also alleged that the FARC demanded a \$6 million ransom before shooting Carlos Caballero multiple times. As a result, Antonio Caballero alleged that he was forced to abandon his businesses and property and flee to safety in Florida after his father's death.

As a result of the lawsuit, Mr. Caballero obtained a substantial judgment. He then proceeded to attempt to satisfy the judgment by obtaining assets from Venezuela's state-owned oil company, Petróleos de Venezuela SA and its subsidiaries, arguing they're instrumentalities of FARC. Records from the Colombian government's human rights observatory blame ELN for the death of Caballero's father. But the court judgment found "such a high-profile assassination" to not be possible without the "approval and acquiescence" of the ELN, FARC and NDVC.

Mr. Caballero then brought his cause of action against Fuerzas Armadas Revolucionarias de Colombia ("FARC") and Norte de Valle Cartel ("NDVC") in the United States District Court for the Southern District of Florida. On May 20, 2020, the Court for the Southern District of Florida issued a Final Judgment in favor of Caballero based on the kidnapping, torture, and murder of Caballero's father under the Terrorism Risk Insurance Act (TRIA) in actual compensatory non-economic damages, actual compensatory economic damages, and post-judgment interest at 0.15% per annum. The ruling further determined that defendants, FARC and Norte de Valle. Cartel, were narco-terrorist organizations engaged in international terrorism. Mr. Caballero then registered the judgment in the District Courts of the states of New York, Texas, Massachusetts, and Utah.

The Terrorism Risk Insurance Act (TRIA)

The Terrorism Risk Insurance Act (TRIA) was signed into law by President George W. Bush on November 26, 2002. TRIA provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism, even when the victims' insurance plans do not cover acts of terror. TRIA provides that notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605(a)(7) (2000)], the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

New York Proceedings:

On December 18, 2020, United States District Court for the Western District of New York granted Caballero's motion for post-judgment execution on the blocked assets of Petroleos de Venezuela, S.A ("PDVSA"), held at M&T Bank Corporation ("M&T") in Buffalo, New York. On January 29, 2021, the Court District Court Western District of New York further found that PDVSA was an agency or instrumentality of FARC and that PDVSA's assets are "blocked assets" within the meaning of the TRIA. As a result, M&T Bank froze the \$7,253,050.01 in funds held in the putative name of, or for the benefit of, PDVSA.

Massachusetts Proceedings:

On February 5, 2021, in the U.S. District Court for the District of Massachusetts, Mr. Caballero moved for the issuance of a post-judgment summons directing trustee process on Fidelity Investments ("Fidelity") to allow enforcement of his judgment. Fidelity responded that it had "identified accounts belonging to the individuals/entity identified in the Order and Summons" and confirmed that five accounts had been attached with an approximate total value of \$200,000. Mr. Caballero then sought attachment of the assets held by Fidelity in the name of, or for the benefit of, Rafael Marquez Alvarez, Leonardo Gonzalez Dellan, and MFAA Holdings Limited

(“MFAA”). None of the entities or individuals appeared or moved to dissolve or modify the summons to Fidelity. On November 24, 2020, the court granted the motion and issued the summons to Fidelity.

On February 19, 2021, Fidelity filed a neutral response that made all parties aware that the assets held for the benefit of Marquez Alvarez were in a 401(k) plan account subject ERISA. It further sought the court’s determination as to whether the 401(k) assets were subject to turnover, thereby overriding ERISA’s anti-alienation rule, pursuant to TRIA.

On March 26, 2021, Major League Soccer, LLC (“MLS”), as sponsor of the Major League Soccer 401(k) Plan (the “Plan”) also filed a neutral response but asked the court to consider the following concerns: “(1) that the Supreme Court’s holding in *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 376 (1990), directs that exceptions to ERISA’s anti-alienation rule be created only by Congress, and (2) that any turnover order be consistent with the terms of the Plan and not require the Plan to breach any of its other obligations.”

29 U.S.C. § 1056(d)(1)

Chapter 18 of Title 29, the Employee Retirement Income Security Program (“ERISA”). The “anti-alienation” provisions contained therein were designed to protect the interests of participants and their beneficiaries in private pension plans. ERISA effectively prohibits a creditor from reaching funds in an ERISA-covered plan as a means of collecting a judgment against a beneficiary. Further, the Supreme Court has held that only Congress can craft exceptions to ERISA’s anti-alienation provision beyond those contemplated in ERISA itself.

Legal Issues and Argument:

ERISA’s anti-alienation provision

Caballero argued that TRIA’s opening clause superseded ERISA’s anti-alienation provision and that he was entitled to execution on the blocked assets. He analogized TRIA to other statutes containing similar “notwithstanding” clauses, which courts have found to override ERISA’s anti-alienation provision. Consistent with existing case law, Caballero argued that where Congress included a “notwithstanding” clause in TRIA,

Congress did create such an exception, signaling its unambiguous intent to override prior conflicting laws.

Rights in the Plan

The issue as to the Plan was whether Mr. Caballero's rights were the same as those of Marquez Alvarez himself. This meant a "present, unconditional right to access," or whatever he could "presently demand." The Plan therefore sought the court to fashion a remedy that is consistent with the terms of the Plan and not in breach of any other obligation.

Caballero argued that the Plan mistakenly analogized him to a commercial creditor seeking to recover a debt and that, based on the same broad language discussed above, he is not bound by the terms of the Plan. He argued that because "TRIA is explicit that no 'other provision of law' can prevent a TRIA judgment collector from executing against the blocked assets of a terrorist party (including an agency or instrumentality of same) to satisfy the full extent of damages for which a terrorist party is liable."

However, courts have considered the issue previously and concluded that the government "steps into the taxpayer's shoes" and acquires only "whatever rights the taxpayer himself possesses." This comports with the Plan's request that the court limit Caballero's rights to Marquez Alvarez's 401(k) to those which Marquez Alvarez himself has in the account.

Massachusetts Ruling:

On September 29, 2021, Judge Indira Talwani of the U.S. District Court for the District of Massachusetts found the clear and broad language of TRIA signals Congress's intent to override conflicting statutory provisions, including the Employee Retirement Income Security Act. As a result, "[w]here the clear and broad language of TRIA signals Congress's intent to override conflicting statutory provisions, the court concludes that ERISA's anti-alienation provision does not prevent" Antonio Caballero "from executing on the attached assets." As a result, Fidelity could distribute the funds to Caballero, but only under the same terms that the owner of the 401(k) account would have been able to access the money.

Conclusion

ERISA's anti-alienation provisions will protect retirement plans, including funds and contributions made to them, from assignment, alienation, collection as a civil debt, and even state tax liens, but not acts of terrorism. While this may not be a common client issue, it is important to be able to educate your client when the possibility does exist.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Marc Soss

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CITES:

The Terrorism Risk Insurance Act; *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990); *United States v. Sayyed*, 862 F.3d 615, 619 (7th Cir. 2017); *United States v. Hyde*, 497 F.3d 103, 108 (1st Cir. 2007); *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); *United States v. Nat'l Bank of Com.*, 472 U.S. 713, 725 (1985)