

Appraiser Accuses IRS, DOJ of Violating Taxpayer Privacy Rules

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An appraiser named as a defendant in the Justice Department's syndicated conservation easement lawsuit contends that government officials have violated taxpayer confidentiality rules by publicly disparaging his appraisals.

Those officials' comments at tax conferences and in press releases constitute an impermissible disclosure of Claud Clark III's return information under [section 6103\(b\)\(2\)\(A\)](#), according to Clark's December 24 [answer and counterclaim](#).

Clark's filing came two weeks after Judge Amy Totenberg of the U.S. District Court for the Northern District of Georgia [denied his motion to dismiss](#) most of the counts against him. Clark was named in a [promoter injunction lawsuit](#) brought by the Justice Department in December 2018. The other defendants are conservation easement consultant Nancy Zak, Atlanta-based real estate company EcoVest Capital Inc., and three EcoVest officers.

The government alleges that the defendants promoted or sold ownership interests in a conservation easement syndication scheme that "amounts to nothing more than a thinly veiled sale of grossly overvalued federal tax deductions under the guise of investing in a partnership."

The Justice Department contended in its complaint that because of grossly inflated appraisals provided by Clark and other real estate appraisers, those who invested in the defendants' syndication scheme were able to realize tax benefits that were many times larger than their purported investment. Since 2009, the defendants have sold at least 96 conservation easement syndicates that have generated over \$2 billion in claimed charitable contribution tax deductions, according to the complaint.

In his answer, Clark denied the government's allegations and asserted there was no conservation easement syndication scheme.

Unauthorized Disclosures

Upping the ante, Clark contended in a [section 7431](#) counterclaim that IRS and Justice Department officials "have intentionally, knowingly, in bad faith, grossly negligently, and/or negligently made numerous statements that constitute unauthorized and unlawful disclosures of Mr. Clark's return information."

Clark asserts that the government officials' comments in press releases and at speaking engagements violated [section 6103\(b\)\(2\)\(A\)](#) because they impermissibly disclosed "data

received by, recorded by, prepared by, furnished to, or collected by the Secretary . . . with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of [Clark] under [the tax code] for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense."

According to the counterclaim, the improper disclosures were made in a [December 2018 Justice Department news release](#) announcing the filing of the lawsuit, which included a statement from Richard Zuckerman, principal deputy assistant attorney general in the Tax Division, that the government was working to "shut down fraudulent conservation easement shelters, which in this case were based on willfully false valuations."

The counterclaim also cites a March 19 IRS news release naming syndicated conservation easements to the agency's "dirty dozen" list of tax scams to avoid, as well as a November 12 news release announcing that the IRS is increasing enforcement action on syndicated easements.

Clark's filing also pointed to a [Tax Notes article](#) that quoted two IRS officials — Douglas O'Donnell, commissioner of the Large Business and International Division, and Sunita Lough, deputy commissioner of services and enforcement — discussing inflated appraisals at the November 14 American Institute of CPAs National Tax Conference in Washington.

"No provision of the Code authorized the IRS and DOJ Officials to circumvent this statutorily mandated protection and disclose Mr. Clark's return information to the general public and members of the press," the counterclaim asserts.

Clark's filing further asserts that the disclosures "were made by IRS and DOJ Officials with the deliberate intent of affecting Mr. Clark's reputation and business adversely" and "have had the actual effect of adversely affecting" him.

In addition to asking the court to order government officials to stop making public comments about Clark and his appraisals until litigation is over, the counterclaim asks for at least \$1,000 for each unauthorized disclosure and actual damages for "substantial professional and personal embarrassment."

Is the Government Out of Line?

According to Frank Agostino of Agostino & Associates PC, Clark's counterclaim seems to implicate [section 6103](#) and the right to privacy under [section 7803](#). The [section 7602](#) provisions regarding third-party contacts could also come into play if the government is contacting Clark's clients and competitors, Agostino told *Tax Notes*.

"If the government is arguing that an appraiser's appraisals are not qualified appraisals or that the appraiser is not a qualified appraiser, does the government need to do anything other than hire an expert to review the appraisers and offer a counter opinion?" Agostino wondered. "Isn't contacting the appraiser's customers before the government has disallowed the deduction interfering with the appraiser's business and interfering with the appraiser's 'commercial free speech'?"

Another wrinkle is that syndicated conservation easement deductions have become a major enforcement priority for the IRS, Agostino said. "The deductions can't be claimed without a qualified appraisal and a qualified appraiser," he said. "Thus, investigating appraisers to cause them to be more diligent may be consistent with the current enforcement priority."

However, even if the government's ultimate goal of eradicating abuse is "pure," the method and means used may not be appropriate, Agostino said.

"I would need more facts," Agostino added. "But in the right case — and I don't know if this is one — the government's goal to stop bad conservation easement deductions could cause the destruction of the business of a good conservation easement appraiser. In that rare case, the court can and should award damages."

Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP said that IRS efforts to publicize an enforcement program don't seem to rise to the level of a [section 6103](#) violation.

If they did, "then the IRS would be prohibited from sharing transactions of concern with tax practitioners," Ungerman said. "Practitioners want and need to know the specific types of transactions that are garnering the attention of the IRS."

In *United States v. Zak*, No. 1:18-cv-05774 (N.D. Ga. 2018), Clark is represented by attorneys from Caplin & Drysdale Chtd. and the Khayat Law Firm.