

DOJ Loses One Argument and Wins Others in Easement Suit

by Kristen A. Parillo

A conservation easement consultant has scored a legal win in the Justice Department's promoter injunction lawsuit after a federal judge in Georgia dismissed one of the counts against her.

The department's claim that Nancy Zak engaged in conduct subject to appraiser penalties under section 6695A was dismissed because the government provided no evidence that Zak prepared appraisals within the meaning of the statute, according to a December 10 order from Judge Amy Totenberg of the U.S. District Court for the Northern District of Georgia.

Totenberg refused to dismiss the remaining counts against Zak and denied appraiser Claud Clark III's motion to dismiss in its entirety.

Anson H. Asbury of the Asbury Law Firm, who has extensive experience representing taxpayers in conservation easement disputes, told *Tax Notes* he believes Totenberg "got it right" in dismissing the section 6695A allegations against Zak.

"I don't think she or anyone else ever considered her an appraiser," Asbury said.

The department's claim that Zak engaged in conduct subject to appraiser penalties under section 6695A was dismissed because the government provided no evidence that Zak prepared appraisals within the meaning of the statute, the order said.

However, Asbury said he is concerned about Totenberg's refusal to dismiss the tax return preparer claims against Clark.

"I recognize that the IRS takes an expansive view of tax return preparer — for example, in the *Loving v. IRS* litigation — but I'm not sure if the statutory construct really supports it here," Asbury said.

Stephen J. Small of the Law Office of Stephen J. Small Esq. PC said that he and others in the land trust community view the court's decision as much more favorable than not. "Zak had one count dismissed, but the court did a good job

walking through the others and essentially said, 'Yes, there are enough claims of bad acting here to proceed with the litigation.'"

Zak and Clark were named in a promoter injunction lawsuit brought by the Justice Department in December 2018. The other defendants are Atlanta-based real estate company EcoVest Capital Inc. and three of its officers: Alan Solon, Robert McCullough, and Ralph Teal Jr.

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 five-count complaint alleged violations of section 6700 (promoting abusive tax shelters), section 6701 (aiding and abetting understatement of tax liability), section 6694 (understatement of taxpayer's liability by tax preparer), and section 6695A (substantial and gross valuation misstatements attributable to incorrect appraisals).

Dismissal Urged

In her March 22 motion to dismiss, Zak argued that count 2, which alleged violations of section 6695A, must be dismissed because she doesn't prepare appraisals, and that provision applies only to individuals who do.

Zak further contended that count 1, which alleged violations of section 6700, and count 4, which seeks an injunction for those violations, must also be dismissed because they fail to satisfy the particularity requirement of Rule 9(b) of the Federal Rules of Civil Procedure.

She also argued that count 5, which seeks a disgorgement order, must be dismissed because allowing disgorgement would constitute an excessive fine under the Eighth Amendment and would circumvent Congress's "carefully constructed penalty regime."

Zak's motion made no arguments regarding count 3 involving alleged violations of the section 6694 tax preparer provisions because it pertains only to Clark.

In his own motion to dismiss filed March 26, Clark asked the court to dismiss all counts against him except count 2. Clark argued that count 3

must be dismissed because he doesn't fit within the definition of a tax return preparer.

For counts 1, 4, and 5, Clark said he joined in the arguments made in Zak's motion.

Partial Victory

Totenberg agreed with Zak that she isn't an appraiser within the meaning of section 6695A.

The judge noted that the government's complaint made extensive factual representations as to Clark's appraisal-related activities but didn't make similar allegations against Zak.

"The Government repeatedly alleges that Zak 'assisted' in the appraisals or 'reviewed' the statements provided by Clark or other appraisers, but it does not provide any specific factual allegations as to how that qualifies her for liability as an appraiser under the statute," Totenberg wrote.

However, the judge wasn't as convinced that the other counts should be dismissed against Zak or Clark. Regarding the count 1 tax shelter promoter allegations, Totenberg said that the government's complaint "adequately apprises defendants with sufficient specificity of the type of conduct which makes up the alleged illegality" and satisfied "the heightened pleading standard of Rule 9(b) as it applies to these allegations of fraud which are widespread, complex, and occurring over a long period of time."

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As for Clark's argument that count 3 should be dismissed because he isn't a tax preparer, Totenberg concluded that the government "has adequately pleaded sufficient factual matter to state a claim that Clark's appraisals represented a 'substantial portion' of the tax returns, and therefore he may be liable under section 6694."

Totenberg denied both defendants' motion to dismiss count 4, concluding that because that count seeks a remedy (an injunction) and isn't a cause of action, it would be premature to dismiss it at the pleading stage. Likewise, because count 5 seeks a remedy (disgorgement), Totenberg said it was too early to dismiss.

The case is *United States v. Zak*, No. 1:18-cv-05774 (N.D. Ga. 2018). Zak is represented by attorneys from Sidley Austin LLP and S. Fenn Little Jr. PC. Clark is represented by attorneys from Caplin & Drysdale Chtd. and the Khayat Law Firm. ■