

1st Tax Easement Convictions Will Likely Embolden DOJ, IRS

By **Bill Curtis and Lauren DeSantis-Then** (October 31, 2023)

On Sept. 22, after a nine-week trial in the U.S. District Court for the Northern District of Georgia, a federal jury convicted two promoters — accountant Jack Fisher and attorney James Sinnott — in the U.S. Department of Justice's first criminal tax fraud trial over allegedly abusive syndicated conservation easements.

The same jury acquitted Clayton Weibel, an appraiser, of all charges.

This split verdict in *U.S. v. Lewis* is a major development in the DOJ's investigation into syndicated conservation easements and adds two convictions to the six guilty pleas related to the Inland Capital Management LLC conservation easement funds.

Two more alleged co-conspirators, accountants Herbert Lewis and Victor Smith, are set to be tried in January 2024.

A syndicated conservation easements is a transaction entered into by a pass-through entity, where the entity acquires an interest in a parcel of real property and then donates the right to develop the property to a qualified land trust. The investors in the pass-through entity receive a charitable deduction for the fair market value of the donated conservation easement.

The DOJ and IRS clearly believe that certain syndicated conservation easements that provide investors with charitable contribution deductions over 2.5 times^[1] the amount invested are conspiracies to defraud the U.S. Department of the Treasury using "partnership arrangements devoid of a legitimate business purpose" and "inflated appraisals."^[2]

At the end of the day, the jury's willingness to convict Fisher and Sinnott on all counts and based on multiple theories, including the economic substance doctrine, will embolden the IRS and DOJ to pursue other promoters for allegedly participating in a conspiracy to defraud the U.S.

False Documents and Backdating

The Fisher case can be characterized as a trial over two alleged conspiracies. The first conspiracy, as alleged by the government, was a garden-variety fraud case involving the backdating of more than \$41 million in payments and other agreements, and does not appear at first look to have broad applicability to the rest of the conservation easement industry or the IRS' increasing scrutiny of syndicated conservation easements.

However, those who focus solely on the backdating do so at their own risk. To sustain a conviction, the jurors had to find the defendants did only one of the following:^[3]

- (1) designing, and using materials for, the syndicated conservation easement transactions to disguise the true nature of the transactions;
- (2) causing the preparation and filing of false and fraudulent fund company, property company and individual tax returns related to each of the syndicated conservation easement transactions;
- (3) using false as well as backdated documents in their syndicated conservation easement transactions;
- (4) using biased, false, misleading, pre-



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determined as well as inflated appraisals; ... (5) agreeing to submit false and backdated documents to the IRS during civil examinations of the syndicated conservation easement transaction; ... [and (6)] [e]ngaging in syndicated conservation easement transactions that lacked economic substance.[4]

While the use of backdating may be specific to Fisher, the alternative theories have broad implications for other syndicated conservation easement transactions.

The DOJ's Case Against the Syndicated Conservation Easement Industry

Practitioners should focus on the second conspiracy that may be applicable to other syndicated conservation easements. The second case focuses on the economic substance doctrine and the method of valuation of conserved property.

The DOJ and IRS clearly believe that certain syndicated conservation easements lack true economic purpose and, consequently, are criminal conspiracies to defraud the Treasury Department using illegal tax shelters and fraudulently inflated appraisals.

According to the IRS,

promoters are syndicating conservation easement transactions that purport to give an investor the opportunity to claim charitable contribution deductions and corresponding tax savings that significantly exceed the amount the investor invested. These abusive arrangements, which generate high fees for promoters, attempt to game the tax system with grossly inflated tax deductions.[5]

Practitioners and professionals can also view the Fisher trial as a potential template for the government's continued scrutiny of syndicated conservation easements.

Over the course of the trial, the DOJ focused on the critical components common to many of these deals: the relatively low purchase price with an elevated appraisal within a short period of time, and the economic substance of the partnerships.

First, the DOJ focused on the price paid for the property and the amount of the claimed charitable tax deductions.

According to the government, the increase between the purchase price and the amount of the charitable deduction was just "too good to be true," and potentially fraudulent on its face.

For example, the government questioned the appraisal of Figure 8 (Highlands) LLC, which Inland purchased on Aug. 2, 2017, for approximately \$12 million. Inland donated the conservation easement on Dec. 28, 2017. Weibel valued the Dec. 28 donation at \$182.5 million.

Weibel's closing argument responded that while purchase price is one factor to consider in the appraisal of a conservation easement, it is not the "end-all-be-all factor." [6]

Second, based on the success of the Fisher case, the government may be emboldened to use this as a standalone theory moving forward, especially if it withstands appeal.

At trial, the jury instructions explained that "the series of transactions associated with syndicated conservation easement tax shelters ... are disregarded for tax purposes if the transactions lacked 'economic substance.' The economic substance rule requires looking past the form of a transaction to see its true character." [7]

The court further explained that "for a transaction to have economic substance, it must both change the participant's economic position in a meaningful way apart from the tax benefit, and the participants must have a substantial purpose for entering into the transaction apart from the tax benefit." [8]

The government alleged that the syndicated conservation easement partnership transactions had no true business purpose and were only abusive tax shelters. [9]

Inland allegedly used numerous strategies to add economic substance to the deals, such as holding back a residual piece of property that was not donated and stating that it was held for investment or future development for investors to share in down the road. [10]

The funds also asked investors to vote between three options for the property — to hold it for future development, develop the property or donate a conservation easement.

The government argued that Inland never intended to do anything other than place and donate a conservation easement, and the false promotional materials including residual property and the "sham vote" were merely tools to disguise the true nature of the transaction from the IRS. [11]

For the Inland funds, the DOJ successfully used emails, audio recordings and testimony to convince the jury that Inland's due diligence was window dressing designed to deceive the IRS.

To convict based on the economic substance doctrine, the jury found [12] that:

(1) the Defendant knew that claiming a deduction for a transaction that lacked economic substance was unlawful; (2) the Defendant knew that the economic substance rule applied to the transaction; (3) the Defendant knew that the transactions, in this case, lacked economic substance and claiming the deduction was unlawful; and (4) the transactions in this case (or one or more transactions) in fact did lack economic substance as [the judge] will define that term. [13]

Weibel's Acquittal

Appraisers are an essential component of every conservation easement donation. [14] A 2020 U.S. Senate Finance Committee report found that "[s]uch appraisals are the engines of syndicated conservation-easement transactions." [15]

At trial, the DOJ focused on the defendants' alleged fraudulent pattern of overinflating the value of the conservation easement charitable donations to create the tax benefit Inland promised and marketed to investors.

James Benkoil, an accountant who was involved with Inland, pled guilty in April. In the information filed against him, the government claimed that Benkoil knew that the deductions were too good to be true because of his tax training and experience. [16]

Similarly, the DOJ focused on Weibel's education, stating that as an appraiser he knew that the purchase price was the best evidence of the fair market value of the properties, [17] and urged the jury to convict Weibel on this basis.

Yet the jury acquitted Weibel. Perhaps one potential reason for the split verdict is the gap between Weibel and the other two defendants.

The DOJ had a tremendous amount of evidence against Fisher, including undercover recordings and other evidence of fraudulent conduct. And the DOJ was able to tie Sinnott to Fisher through numerous witnesses, emails, recordings, whistleblowers and co-conspirators that put both Fisher and Sinnott at the center of case.

In the end, the DOJ did not have that type of evidence against Weibel, and provided the jury with only sparse direct evidence of his agreement to cooperate in the alleged conspiracies, in stark contrast to his co-defendants.

The jury instructions for conspiracy may have aided Weibel as well. The instructions added that "merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also, a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator." [18]

In addition, while the government's closing stated that the purchase price is "the best evidence of what a willing buyer would pay a willing seller," [19] the jury instructions provided a detailed guide for determining the value of a conservation easement donation, including the before-and-after valuation method which involves consideration of the highest and best use of the land.

For the professionals and professional firms involved in syndicated conservation easement deals, Weibel's acquittal shows that, for at least one jury, a high ratio and arguments that a tax deduction was too good to be true was not necessarily enough to convict.

Weibel's appraisals may have been the fuel for the conservation easement engine, but there was not enough evidence to show that Weibel knowingly and willingly violated the law, at least beyond a reasonable doubt.

Nevertheless, this fact alone did not spare Weibel the cost, stress and risk of a federal indictment and subsequent investigation.

The acquittal also helps limit the spillover to other funds, many of which are currently pending before the U.S. Tax Court on appeal from IRS tax decisions disallowing the charitable deductions.

According to the DOJ, Weibel was a prolific appraiser who worked on approximately 450 deals between 2012 and 2020. Only 12 of these appraisals were at issue in the Fisher case.

A conviction would have made it easier for the IRS to attack all the funds Weibel appraised as fraudulent, disallowing the deductions for syndicated conservation easement investors, and adding on high fraud penalties — often up to an additional 75% of the value of the claimed deduction — at the civil level.

Impact on Professionals

The DOJ has secured six plea deals. The common element of all the pleas is that each defendant received commissions and other direct compensation from Inland.

The DOJ was not able to show that Weibel had a clear-cut financial incentive for participating. Instead, the DOJ asked the jury to use its common sense and find, based principally on the high property company ratios, that Weibel was a willing participant.

For the professionals, the split verdict leaves a lot of questions unanswered, as there is a lot of gray area between the evidence the DOJ presented against Fisher and Sinnott, and the

evidence against Weibel.

Those searching for answers to these questions will be squarely focused on the upcoming trial in January 2024 against Lewis and Smith.

Continued Investigations and Enforcement Expected

Following the conviction of two promoters, the IRS and DOJ are likely to continue to target syndicated conservation easement deals. The IRS has publicly stated that it "is committed to ensuring compliance with the conservation easement deduction law as amended in the 2023 legislation and will continue to scrutinize transactions that are 'too good to be true.'"[20]

Finally, it is worth noting this case took tremendous resources. The investigation took years, and involved whistleblowers acting as government informants, fake audits of the Inland funds used to collect evidence, and undercover agents recording the defendants making incriminating statements.

The IRS investigators waded through millions of pages of documents and put together a very strong case presented at trial over nine weeks.

The government and the industry can both claim some tactical victories that will help the attorneys better evaluate a particular client's exposure.

However, at the end of the day, the DOJ likely will look at the verdict as a strategic win. The DOJ's approach to the trial and the jury's verdict provide valuable lessons for those closely watching the trial for its impact on the syndicated conservation easement industry.[21]

The jury's willingness to convict Fisher and Sinnott, at least in part based on the economic substance doctrine, should cause concern for those in the industry who have done conservation easements in the past, as it will embolden the IRS and DOJ to pursue other promoters for allegedly participating in a conspiracy to defraud the U.S.

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[1] IRS Notice 2017-10; <https://www.irs.gov/newsroom/irs-wraps-up-2022-dirty-dozen-scams-list-agency-urges-taxpayers-to-watch-out-for-tax-avoidance-strategies>.

[2] <https://www.irs.gov/newsroom/irs-wraps-up-2022-dirty-dozen-scams-list-agency-urges-taxpayers-to-watch-out-for-tax-avoidance-strategies>.

[3] Jury Instructions 31–32, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 13, 2023).

[4] Id.

[5] <https://www.irs.gov/newsroom/dirty-dozen-beware-of-abusive-tax-avoidance-schemes#:~:text=In%20abusive%20arrangements%2C%20promoters%20are,the%20amo>

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[6] Trial Tr. vol. 40, 24, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 13, 2023).

[7] Jury Instructions 69, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 13, 2023).

[8] Id. at 70.

[9] Trial Tr. vol. 39, 44, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 13, 2023).

[10] Agee Testimony 126:7–128:1 (July 26, 2023).

[11] Trial Tr. vol. 39, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 13, 2023).

[12] See Verdict 2–3, 5–6, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 22, 2023).

[13] Id. At 70.

[14] See 26 CFR §1.170A-14(h).

[15] Syndicated Conservation-Easement Transactions, S. Prt. 116-44 (2020).

[16] Information §11, United States v. Benkoil, Case No. 23-334-01 (D.N.J. May 2, 2023).

[17] Trial Tr. vol. 39, 50–51, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 13, 2023).

[18] Jury Instructions 29, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 13, 2023).

[19] Trial Tr. vol. 39, 33, United States v. Fisher, No. 1:21-cr-023102, 3, 6 (N.D. Ga. Sept. 13, 2023).

[20] <https://www.irs.gov/newsroom/dirty-dozen-beware-of-abusive-tax-avoidance-schemes>.

[21] The trial itself may end up in most criminal law textbooks for a reason completely unrelated to conservation easements. One of the jurors apparently refused to deliberate or convict based on overtly racist criteria, telling the judge in chambers she was a "white person standing up for white people" and she could not "put some old men in jail for the rest of their lives." The judge replaced this juror with an alternate.