

A Challenge to Circular 230's Limitation on Contingent Fees Is Rejected.

Circular 230, 31 C.F.R. § 10.0 *et seq.*, regulates the conduct of attorneys, certified public accountants and other professionals in practice before the IRS, including regulation of the fees that they can charge. Circular 230 only permits contingent fees in three specific contexts:

- In connection with an examination of, or challenge to an original tax return or an amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.
- In connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties.
- In connection with a judicial proceeding arising under the Internal Revenue Code.

31 C.F.R. § 10.27(b).

A significant area where contingent fees are not permitted is in ordinary refund claims: while a practitioner can charge a contingent fee for handling litigation over a refund claim, she cannot do so for preparing the amended return necessary to perfect that claim. In the view of the IRS, permitting contingent fee in this context might encourage the adoption of return positions that are designed to exploit the audit selection process.

In *Ryan v. Lew*, 2013 U.S. Dist. LEXIS 45430 (D.D.C. Mar. 29, 2013), the U.S. District Court for the District of Columbia addressed a challenge to Circular 230's ban on contingent fees in the context of ordinary refund claims. The two plaintiffs were Ryan LLC, a global tax services firm, and G. Brint Ryan, its founder. Ryan LLC asserted that the ban on contingent fees in the context of ordinary refund claims violated the Petition clause of the First Amendment, while Mr. Ryan argued that it violated his due process rights under the Fifth Amendment. Neither claim was successful.

Mr. Ryan's due process claim failed because he lacked standing. The basic thrust of the due process claim was that the complexity of the tax system and the cost of obtaining qualified representation mean that some taxpayers will be barred from pursuing a refund claim if they cannot employ a practitioner on a contingent fee basis. *Ryan v. Lew*, 2013 U.S. Dist. LEXIS 45430, slip op. at *28-*29. While the Court viewed the due process theory as potentially plausible, it concluded that Ryan did not suffer injury in fact, as he had alleged that he had filed ordinary refund claims since the ban on contingent fees went into effect. *Id.* at *29-*31.

On the First Amendment claim, the Court concluded that Ryan LLC could assert that it had *jus tertii* standing, based upon the chilling effect that the contingent fee ban had on the ability of its clients to assert refund claims. *Id.* at *16-*25. On the merits, however, the court concluded that the restriction on the right of taxpayers to petition was a reasonable one designed to maintain the integrity of the governmental process. *Id.* at *37-*39.

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