



Pat Smith's Tax Notes Article on the D.C. Circuit Decision in *Florida Bankers* Cited in the Dissent in Sixth Circuit Decision in *CIC Services*; Smith Also Quoted in Tax Notes Story on the Sixth Circuit Decision

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The Sixth Circuit issued its decision yesterday in the *CIC Services* case. The majority opinion affirmed the district court's holding that the Anti-Injunction Act barred the challenge to the validity of an IRS notice designating certain micro-captive insurance transactions as transactions of interest and as a result subjecting these transactions to various reporting requirements. The district court and the Sixth Circuit majority relied on the D.C. Circuit's 2015 decision in *Florida Bankers*, in which the majority opinion was written by now-Supreme Court Justice Brett Kavanaugh. However, there was a very strong dissent in the Sixth Circuit decision, written by recent appointee Judge John Nalbandian, which argued that the *Florida Bankers* decision had not given proper weight to the Supreme Court's 2015 decision in *Direct Marketing*. In partial support of that position, Judge Nalbandian cited several articles that had criticized the *Florida Bankers* decision on that basis, including IPB attorney Pat Smith's 2015 *Tax Notes* article *D.C. Circuit in Florida Bankers Mis-Applies Anti-Injunction Act*. Pat further elaborated on the relevant points in a later *Tax Notes* article, *Pre-Enforcement Challenges and the Anti-Injunction Act*.

In addition, Pat was quoted in the *Tax Notes* story on the Sixth Circuit decision, *Court Nips Pre-Enforcement Challenge of Microcaptive Notice*.

Patrick J. Smith of Ivins, Phillips & Barker Chtd. told *Tax Notes* that while he was disappointed the Sixth Circuit affirmed the district court, "it is heartening that the dissent in this case



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expresses very cogently why the majority opinion is wrong."

A key point in Nalbandian's dissent is that the mere existence of the notice does not impose a tax in the form of a penalty, Smith said.

"Instead, it is only a violation of the notice that would result in imposition of the penalty, and the plaintiffs in this case have not violated the notice, just as the plaintiffs in *Florida Bankers* had not violated the regulations in that case," Smith continued. "This is the very important point that was ignored by then-Judge Kavanaugh in the *Florida Bankers* decision and by the majority here."

Smith said he hopes the strong dissent will prompt *CIC Services* to file a petition for rehearing or for rehearing *en banc*.

"The death of one of the original judges on the panel might provide further ammunition for a petition for rehearing," Smith said, adding that while the Sixth Circuit properly appointed a replacement judge, that judge didn't have the benefit of participating in the oral arguments.