



## Worldwide Tax Daily

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### U.S. Appeals Court Dismisses Suit by 'Tax Cheats' Against UBS

by [David D. Stewart](#)

Summary by [taxanalysts](#)

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In *Thomas v. UBS AG*, the former UBS clients sought class action status for account holders who had been forced to pay penalties and interest after the bank reached a settlement with U.S. authorities. The plaintiffs sought to recover the 20 percent penalty and other costs associated with their disclosures under the 2009 offshore voluntary disclosure program.

"The plaintiffs are tax cheats, and it is very odd, to say the least, for tax cheats to seek to recover their penalties from the source, in this case UBS, of the income concealed from the IRS," (parenthetical omitted), wrote Judge Richard Posner in a unanimous opinion dated February 7.

After criticizing the parties for failing to adequately identify under what law the case should be decided, Posner noted that the question of whether to certify as class should be decided first, unless "the suit can quickly be shown to be groundless."

Turning to the merits of the case, Posner wrote that the plaintiffs did not allege that UBS had given them inaccurate advice, but that the bank had breached its fiduciary duty to inform them of their obligations under U.S. tax law and to prevent their violations.

"It has no duty to treat them like children or illiterates, and thus remind them that they have to pay taxes on the income on their deposits," Posner wrote. "It has no duty to read aloud to them line 7a on Schedule B of Form 1040."

Posner suggested that UBS's role in the tax evasion was one of an "aider and abettor" and compared the case before the court to the 1725 decision in *Everet v. Williams*, aka the Highwayman's Case, in which a thief sued his accomplice over the proceeds of their crimes and the court refused to decide the case.

"The principle is the same; the law leaves the quarrelling accomplices where it finds them," Posner wrote.

The court also rejected a theory proposed by the plaintiffs that they were third-party beneficiaries to the 2001 qualified intermediary agreement between UBS and the IRS. The plaintiffs had contended that they were entitled to damages for the bank's breach of the agreement. However, Posner found that there was no intention on the part of the IRS or UBS to make the plaintiffs third-party beneficiaries.

"This lawsuit, including the appeal, is a travesty," concluded Posner. "We are surprised that UBS hasn't asked for the imposition of sanctions on the plaintiffs and class counsel."

Mark Matthews of Caplin & Drysdale said that the case arose from widespread anger among the former UBS clients over the decision to turn over account information. He noted that many UBS clients believed that through its fee structure, UBS had, in practice, split the proceeds of tax evasion with them while leaving the clients to shoulder the majority of the risk. Also, many clients may have believed that UBS bore a responsibility for its role in getting clients into a pattern of noncompliance, with some clients essentially inheriting the pattern, with the accounts, from their parents.

"There are no heroes and no white knights in this scenario," said Matthews.

Matthews said that he sees among former UBS account holders a genuine anger that may or may not be well-placed. It has led to discussions over whether a suit such as this could be maintained.

"Not only does it appear that it cannot be maintained, but a very distinguished jurist is dismissing it in pretty derogatory language," Matthews said.

"Judge Posner is plainly correct in his opinion," said Edward M. Robbins Jr. of Hochman, Salkin, Rettig, Toscher & Perez PC. "How do you expect to win this? You have two sets of wrongdoers -- in my experience, the law doesn't allow one wrongdoer to sue another wrongdoer."

Robbins said the case is a "rerun," on a class action scale, of the unsuccessful 2008 federal lawsuit brought by California billionaire Igor Olenicoff against UBS in which he alleged that the bank, along with its employee Bradley Birkenfeld, had misled him about whether he had to declare income earned in his offshore accounts to the IRS. "The only difference is that Olenicoff argued he was misled," he said. In the Seventh Circuit case, he said, "the plaintiffs admitted they cheated on their taxes." (Prior coverage.)

"I agree with Judge Posner's observation at the end of his opinion that he was surprised UBS didn't ask for sanctions," Robbins added.

Larry Campagna of Chamberlain, Hrdlicka, White, Williams & Aughtry said that while he has not reviewed the pleadings in the case, he has always been skeptical of the claims against UBS by its former clients.

"The idea that a conspirator in a felony could claim damages for the co-conspirators' failure to keep the scheme a secret has always seemed

far-fetched to me," Campagna said. "I had a number of UBS customer clients who wanted to sue the bank, and I suggested they consult other lawyers."

*Kristen A. Parillo contributed to this article.*

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#### Tax Analysts Information

**Jurisdictions:** United States; Switzerland

**Subject Areas:** Litigation and appeals

Financial institution tax issues

Fraud, civil and criminal


Tax avoidance and evasion


Tax havens

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