Analysis

In the Name of Graduate Medical Education: What Mount Sinai Medical Center's FICA Tax Victory Means for Today's Teaching Hospitals

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After a multi-year battle in federal district and appellate courts, a nonprofit teaching hospital in south Florida was able to walk through a door that the Eighth Circuit and a district court in Minnesota first opened in the cases of *Minnesota v. Apfel*[1] and *United States v. Mayo Found. for Med. Educ. & Research*[2] (Mayo I). The issue presented in these earlier cases and then later in the *Mount Sinai Medical Center of Florida, Inc.* case was the applicability of the so-called "student exception" to FICA[3] taxes, found at 26 U.S.C. § 3121b(10), as interpreted in the related Treasury Regulations at 26 C.F.R. § 31.3121(b)(10)-2. Mount Sinai's case, above all other FICA refund suits pending at the time, was selected by the Department of Justice (DOJ) as the best "test case." How Mount Sinai debunked the government's theories and seemingly altered the FICA tax landscape is a trail-blazing tale bound to benefit many of Mount Sinai's teaching hospital brethren.

Sowing the Seeds of Victory in Minnesota

In the *Mayo I* decision, a Minnesota federal district court specifically concluded that the FICA student exception could apply to medical residents and fellows (collectively, "residents") based on the hospital's ability to meet the tests set forth in the applicable statute and Treasury regulations. The *Mayo I* decision followed *Apfel*, where the Eighth Circuit found that residents were not required to contribute to FICA, ultimately because "the primary purpose for the residents' participation in the program is to pursue a course of study rather than earn a livelihood."[4] The court did not consider the nature of the payments to the residents, but instead focused on "the nature of the residents' relationship with the university," examining whether their main purpose was pursuing a course of study rather than "earning a livelihood."[5]

Five years later, *Mayo I* provided the district court an opportunity to elaborate and expand upon the *Apfel* court's rejection of a bright-line rule that "residents are not students."[6] After engaging in a thorough consideration of the facts and circumstances of the residents' participation in Mayo's residency programs, the *Mayo I* court announced its conclusions along the two-part student exception rubric. First, the court held that Mayo's residents were employed by the Mayo Foundation; a "school" under the facts and Section 3121(b)(10).[7] Second, taking the "student" prong in its component parts, the court found that Mayo's residents were, in fact, "students," both "enrolled" and "regularly attending classes" at the Mayo Foundation.[8] With particular focus on "the basis of the relationship" between the residents and the Mayo Foundation,[9] the court found that as in *Apfel*, the residents engaged in their residency program primarily for educational purposes and not to earn a living.[10] Moreover, any patient care services provided by the residents "were incidental to and for the purpose of pursuing a course of study in postgraduate medical education."[11]

The Government Responds

Within the government, the *Mayo I* decision sounded the clarion call to turn back the mounting tide of administrative refund claims being filed with the Internal Revenue Service (IRS).[12] Instead of pursuing an appeal of the 2003 district court decision, the IRS amended the Treasury regulations interpreting the student exception statute, effective April 1, 2005.[13] The new interpretative Treasury regulations are an attempt specifically to close the door cracked opened by *Mayo I* and *Apfel*. In fact, the amended regulations expressly focused on the FICA student exception as it applies to medical residents, and included as an example of an individual not covered: "[A] person employed by a university to provide patient care services at an affiliated teaching hospital if the employee works at least forty hours per week, even if the services have an educational or training aspect."[14] We will return later to a discussion of the 2005 regulation.

To combat those teaching hospitals pursuing their refund claims in federal court,[15] the DOJ renewed its argument for a "bright-line" rule by deploying a strategy of moving for summary judgment (after limited discovery) on the argument that residents were categorically ineligible to claim an exemption from FICA. One such case, in particular, involved Mount Sinai—a nonprofit teaching hospital in South Beach, FL sued in 2002 by the United States for an erroneous refund of FICA taxes covering quarters from 1996-1999.[16] And despite the holdings in *Apfel* and *Mayo I* that promised Mount Sinai its day in court, Mount Sinai first would have to overcome an adverse summary judgment decision that the court entered in 2005 after the completion of limited factual discovery.[17] At the government's urging, the court first found the student exception statute "ambiguous," and thus considered the legislative history of the establishment of social security coverage in the United States.[18] Based on its review of the legislative history, the court determined that the statute excluded medical residents from *any* FICA exemption, including the student exception,[19] and held that residents were categorically "ineligible" for the FICA student exception.[20] The "bright-line" rule seemingly

had been achieved: Medical residents and fellows could never be exempt from FICA regardless of their relationship, roles, or duties with respect to the teaching hospital that employed them.[21]

After the adverse decision in Florida, other district courts presiding over refund cases for quarters covering the pre-2005 regulation followed suit. For example, in December 2006, district courts in Michigan and New York held that medical residents were similarly categorically precluded from the student exception to FICA.[22] Notwithstanding the setback in these district courts, three other district courts considering pre-2005 refund claims held otherwise, finding that residents were not categorically precluded from being subject to the FICA student exception, thus creating substantial confusion among the district and circuit courts concerning the status of medical residents for purpose of assessment and payment of FICA taxes on the stipends they earned.[23] The initial result in *Mount Sinai* was also a far cry from the courts in the Eighth Circuit that decided *Mayo* and *Apfel*, which held that the statute was unambiguous and not prone to interpretation via review of the legislative history. The *Apfel* and *Mayo* courts found a case-by-case analysis was necessary to determine whether the residents were exempt from FICA taxation, which requires considering the "facts and circumstances" of the particular residency program and the relationship of the employer.

The FICA issue was important to Mount Sinai, and ultimately should be of keen interest to any teaching hospital that houses a residency program. Among other reasons, payment of residents' FICA taxes is a significant cost to teaching hospitals, whose residency programs are hardly a break-even proposition.[24] Mount Sinai's role in the education of its residents, however, had long been a part of its mission since its founding in 1940: To "provide quality health care enhanced through education, research teaching and volunteer services."[25] However, the issue of FICA taxation of medical residents was, and is, of even greater significance to the United States. Since the *Apfel* decision in 1998, the IRS has been inundated with more than 7,000 claims for refunds of FICA taxes filed by teaching hospitals, seeking refunds of over $1.135 billion in social security taxes that they paid on behalf of their residents.[26]

Mount Sinai Gets Its Long-Awaited Day in Court

Despite the Florida district court's admonition that resolution of each of these FICA cases by a review of the "facts and circumstances" on a "case-by-case" basis would be "unworkable,"[27] the Eleventh Circuit heard the appeal of the adverse *Mount Sinai* decision. The Eleventh Circuit sided with the Eighth Circuit and reversed and remanded the case.[28] The Eleventh Circuit required the Florida district court to consider whether FICA applied to medical residents, using as a guide the applicable interpretative Treasury regulations at 26 C.F.R. § 31.3121(b)(10)-2.

On remand, the district court noted that the regulations require the application of a "case-by-case approach to determine whether particular services qualified for the student exception."[29] Accordingly, the court undertook a rigorous analysis of the facts and circumstances unique to the residency program at Mount Sinai. Specifically, it applied a two-part test enunciated by the statute and interpreted by the governing regulations: Whether Mount Sinai qualified as a "school, college or university" (as that term is used in its "common or generally accepted sense"[30]), and whether Mount Sinai's residents qualified as "students" during the tax years 1996-1999.[31] In order to engage effectively in such an analysis, the parties endured dozens of depositions of former medical residents and fellows from all residency programs offered by Mount Sinai, produced volumes of documents, and engaged in expert discovery concerning the purpose and role of residency programs in medical education for the tax years at issue—1996 through 1999. Both sides presented testimony and documentary evidence during an 11-day trial in early 2008. The trial included testimony from Mount Sinai's Director of Medical Education, its Chief Financial Officer, former residents drawn from each program offered during the 1996-1999 academic years, and attending physicians with responsibility for administering several of the residency programs at issue. It also included testimony from the nation's leading experts in graduate medical education, including David Leach, MD, former executive director of the Accreditation Council of Graduate Medical Education (ACGME),[32] Jordan Cohen, MD, former president of the Association of American Medical Colleges, and Molly Cooke, MD, a nationally known expert in medical education.

On July 28, 2008, the Honorable Alan S. Gold ruled that Mount Sinai's medical residents and fellows were indeed "students" enrolled and regularly attending classes at a "school college or university" and thus subject to FICA's "student" exception.[33] In so ruling, the judge found of little matter whether the hospital was a "school" in the traditional sense (i.e., that it did not confer formal academic "degrees," uniformly call itself a "school," or was purportedly "profitable"[34]). After a detailed review of the "common or generally accepted meaning" of a school, the court determined that Mount Sinai is a "school" according to how that term is used "in its commonly or generally accepted sense."[35] The court considered, among other things, the educational focus of Mount Sinai as stated in its mission, the fact that it maintained a separate Department of Education, and that it created individualized curricula for its residency programs. It also relied on testimony establishing the integral, critical nature of the educational component of patient care performed by residents.[36]

The court also noted that the purpose of medical residencies is to continue the education of medical school graduates so that they will become proficient, and indeed board certified, in their chosen medical specialty, finding specifically that a

residency program is an extension of the residents' medical education and the "ultimate objective of residency programs is to ensure that residents will acquire the knowledge bases and the experience to manage the common problems in their specialty and function independently" as board certified practitioners in their chosen specialty.[37] With the advent of more specialized medicine, it is "generally accepted that physicians are not deemed fully trained to independently practice medicine in a specialty or subspecialty without completing a residency program."[38] The court found, moreover, that "satisfactory completion of a residency program also is mandatory for physicians to become eligible for 'board certification' and to become credentialed (i.e., receive privileges) at the vast majority of hospitals" in the United States.[39] The court recognized that a progressive system of training in a subspecialty similarly requires additional training as a fellow in that particular subspecialty in order to obtain board certification; a residency program is more than simply on the job training.[40] Finding that patient care and meaningful, progressive patient responsibility was an "*essential*" component of the education of residents, the court agreed with Mount Sinai's experts and fact witnesses that the "teaching that occurs at the patient bedside in the clinical environment, is the 'key learning environment for residents.'"[41] After a review of the role of the ACGME in credentialing the educational components of residency programs at Mount Sinai and elsewhere, the court also understood that Mount Sinai's educational objectives for its residents were not compromised by "excessive reliance on residents to fulfill institutional service obligations."[42]

The court next determined that Mount Sinai's residents established the "student" portion of the two-part student exception inquiry—more specifically, Mount Sinai's medical residents were "students enrolled and regularly attending classes at a school, college or university. . . ."[43] Relying on guidance from the underlying Treasury regulations, the court considered whether: (1) Mount Sinai's residents were enrolled and regularly attending classes; (2) whether the "resident's relationship with Mount Sinai was primarily for educational purposes or primarily to earn a living"; and (3) whether the "services performed by residents were 'incident to and for the purpose of pursuing a course of study.'"[44] With respect to the first factor, the court found persuasive, among other things, the fact that Mount Sinai's residents engaged in an application and enrollment process that "closely resembled" traditional admissions at a school, college, or university.[45] It similarly found persuasive Mount Sinai's evidence that its residents attended classes and were evaluated in the traditional sense, pursuant to a mandatory set of requirements, noting evidence that demonstrated the imperative that residents learn, and indeed the most critical learning occurs, in non-traditional classrooms—where the patients are located—in the operating room or at the patient's bedside.[46]

With respect to factor two—whether the residents' focus was primarily "educational"—the court noted that, "what residents earn can hardly be called a livelihood."[47] The court placed significant weight on the testimony of Mount Sinai's experts, all of whom explained the rigid nature of residency program curricula, the necessity of completing residencies before sitting for board examinations, and the testimony of the residents themselves that their residency at Mount Sinai was indeed "educational."[48]

Finally, addressing the third inquiry, the court found that the greater weight of the evidence plainly demonstrated that the residents' services were "incident to and for the purpose of performing a course of study."[49]

Thus, after a detailed analysis of Mount Sinai's residency program following a lengthy bench trial, the district court ruled that Mount Sinai is a "school, college or university," medical residents at Mount Sinai between 1996 and 1999 were "employed" by Mount Sinai, and its residents were "students," "enrolled in and regularly attending classes" at Mount Sinai within the meaning of 26 U.S.C. § 3121(b)(10). The court entered judgment for Mount Sinai and ordered the United States to refund Mount Sinai its employer- and employee-portion FICA taxes, plus statutory interest.[50] The United States did not appeal the district court's ruling in favor of Mount Sinai and its residents.

The Legacy of Mount Sinai's FICA Victory and the Next Litigation Frontier

After the *Mount Sinai III* decision in mid-2008, three additional circuits followed suit, holding (in cases arising under the pre-2005 regulations) that the FICA student exception is unambiguous, and thus services of medical residents qualify for the exemption.[51] The thoughtful, well-reasoned opinion in *Mount Sinai III* has proven to be a fork in the road for the government. Teaching hospitals with pending refund claims covering pre-2005 regulation quarters can pursue a recovery in federal court, knowing they have a rigorous guiding framework for the application of a "facts and circumstances" analysis of the student exception. The United States, in turn, faces the daunting task of undercutting the *Mount Sinai III* analysis and decision. To date, it appears to be a fight better left unfought. Mount Sinai's bench trial victory remains the only post *Mayo I* case to go to trial. Moreover, the United States has proven amenable to settling refund cases brought in federal court. Several federal court dockets indicate completed or active settlement negotiations between the DOJ and a teaching hospital over FICA refund monies.[52] There seems to be little doubt that the United States has lost its appetite to fight these refund claims to a conclusion—an impressive legacy for a moderately sized nonprofit teaching hospital from South Beach, FL to claim.

Having won the battle for taxable quarters prior to the second quarter of 2005, what courts giveth, the IRS taketh away in the realm of exceptions to exemptions to FICA taxes. As mentioned above, instead of appealing the earlier *Mayo I* decision that provided the initial, and comprehensive, frame-

work for the analysis undertaken by the *Mount Sinai* court for the 1996-1999 tax years, the IRS published an amended interpretative Treasury regulation in 2005 to address specifically the maelstrom of refund claims that were filed as a result of the *Apfel* and *Mayo I* decisions. That interpretative regulation, Section 31.3121(b)(10)–2, was meant to serve as the death knell to FICA refund claims by teaching hospitals and their resident employees. The amended regulation specifically added the following hurdle to proving "student" status:

> [S]ervices of a full-time employee are not incident to and for the purpose of pursuing a course of study. The determination of whether an employee is a full-time employee is based on the employer's standards and practices, except regardless of the employer's classification of the employee, *an employee whose normal work schedule is 40 hours of more per week is considered a full-time employee*. . . .[53]

Furthermore, this determination is not affected by the fact that "the services performed by the individual may have an educational, instructional, or training aspect."[54] The amended regulations also added a "primary function test" to the definition of a "school, college, or university,"[55] even though the *Mayo I* court rejected the government's argument that the "primary purpose" of an organization determines whether the organization is a "school, college, or university" for purposes of the student-FICA exception.[56]

Thus, teaching hospitals are faced with the next litigation frontier. Whereas the United States appears to have accepted that settlement of pre-2005 regulation quarters is an acceptable and calculable cost of doing business in this field of tax litigation, it has most certainly dug in its heels on the 2005 Treasury regulation. DOJ will not settle a refund case in the face of a binding Treasury regulation directly on point. However, as 2009 came to a close, the landscape can only be described as unsettled. Already, a once promising victory invalidating the 2005 regulation has been reversed. This time, the Mayo Foundation's victory would not be upheld by the Eighth Circuit. After prevailing at the district court level in Minnesota, convincing the court that the full-time employee exception and the primary function test in the amended regulations were invalid,[57] the appeals court reversed and upheld the amended regulations.[58]

Still, for those teaching hospitals that continue to file refund claims in spite of the amended regulation,[59] the merits of the amendment appear ripe for challenge. Despite the recent 2009 Eighth Circuit decision in *Mayo III*, other teaching hospitals have taken up the challenge and are seeking to invalidate the regulation. The bases on which a successful claim can be brought are a debate for another day. What is beyond debate is the need for the next teaching hospital to prevail. Who will be the next Mount Sinai and uphold the educational mission of America's teaching hospitals? C

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Endnotes

1 151 F.3d 742 (8th Cir. 1998). *Minnesota v. Apfel* (decided under the Social Security Act's general student exclusion, 42 U.S.C. § 410(a)(10)—identical in text to the FICA "student exception" codified at § 3121(b)(10) of the Internal Revenue Code) presented a challenge brought against the Minnesota's social security commissioner by the state university's medical residency program, which university was the employer of the residents. It sought a redetermination of an assessment of liability for unpaid social security contributions attributable to stipends paid the university's medical residents. The case represented the first time that a court held that whether residents were exempt from FICA required a "case-by-case" determination that is not subject to any "bright line" test. *Id.* at 748.

2 282 F. Supp. 2d 997, 1010-19 (D. Minn. 2003).

3 FICA stands for the "Federal Insurance Contributions Act." FICA taxes are used to support the social security system—the avowed purpose being the funding of the social security trust fund in order to support Medicare, and "old age, survivor and disability insurance." *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, Civ. No. 02-22715, 2008 U.S. Dist. LEXIS 57808, *8 (S.D. Fla. July 28, 2008) (*Mount Sinai III*). FICA taxes are imposed on both employers and employees based on wages paid to those employees. *See* 26 U.S.C. §§ 3101, 3111. Wages are deemed remuneration for employment. 26 U.S.C. § 3121(a). However, numerous relationships are exempted

from FICA taxation by statutory exceptions to the definition of "employment." Internal Revenue Code § 3121(b), in particular, lists a number of forms of service that are not "employment" within the meaning of the statute, including services performed by "students," as codified at 26 U.S.C. § 3121(b)(10). *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d 1248, 1250 (11th Cir. 2007) (*Mount Sinai II*).

4 *Apfel*, 151 F.3d at 748.

5 *Id.* at 747 (citing 29 C.F.R. § 404.1028(c), which requires a "case-by-case examination" to determine whether an individual's relationship with a school is primarily educational or for the purpose of earning a living).

6 In adopting the same case-by-case analysis used in *Apfel*, the *Mayo I* court noted that Treas. Reg. § 3121(b)(10)-1(c) "is comparable to the implementing regulation the Eighth Circuit considered in *Apfel*; both focus on the relationship between the resident and the organization for which the services were performed." *Mayo I*, 282 F. Supp. 2d at 1015. *See Mount Sinai II*, 486 F. Supp. 2d at 1252 n.3 (holding that "as interpreted by the United States Department of Treasury, Section 3121(b)(10) contemplates a case-by-case approach to determining whether particular services qualified for the student exemption); *Univirsity of Chicago Hosps. v. United States*, No. 05-C5120, 2006 U.S. Dist. LEXIS 68695, 2006 WL 2631974, at *5 (N.D. Ill. Sept. 8, 2006) (same), *aff'd* 545 F.3d 564 (7th Cir. 2008).

7 *Mayo I* at 1010-15.

8 *Id.* at 1015-16.

9 *Id.* at 1010 (quoting Treas. Reg. § 31.3121(b)(10)-2(c) (2003)),

10 *Id.* at 1015-17.

11 *Id.* at 1018 (citing Treas. Reg. § 31.3121(b)(10)-2(c) (2003)).

12 Shortly after the decision in *Apfel*, teaching hospitals began filing administrative claims for refund with the IRS (typically in the form of protective claims using IRS Form 843 and IRS Form 941c, which were held in suspense by the Service and may or may not have been since perfected by the taxpayer). A three-year statute of limitations (from the date of return) applies to such refund claims, meaning that a teaching hospital could seek a refund of overpaid FICA tax withheld from resident stipends dating back to 1995 in a Form 843 filed on April 15, 1999. 26 U.S.C. § 6511(a).

13 *Mayo Found. for Med. Educ. & Research*, 568 F. 3d 675, 677 (8th Cir. 2009) (*Mayo III*), *rev'g Regents of the Univ. of Minn. v. United States*, 2008 U.S. Dist. LEXIS 26263 (D. Minn., 2008) *& Mayo Found. for Med. Educ. & Research v. United States*, 503 F. Supp. 2d 1164 (D. Minn., 2007) (*Mayo II*).

14 *Mayo III*, 568 F.3d at 678.

15 In order to pursue a refund action in federal court, the administrative claim must be either disallowed or not acted upon within six months after it was filed with the IRS. 26 U.S.C. § 6532(a)(1).

16 In an erroneous refund case such as *Mount Sinai*, the United States bore the burden of demonstrating by a preponderance of the evidence that: (1) it issued a refund of the FICA taxes paid by the employer and employee; (2) the amount of the refund; (3) that the lawsuit to recover the refund was timely filed; and (4) the refund was erroneous. *Mount Sinai*, 2008 U.S. Dist. LEXIS 57807, at *59-60.

17 *United States v. Mount Sinai Med. Ctr. of Fla.*, 353 F. Supp. 2d 1217 (S.D. Fla. 2005) *(Mount Sinai I)*, *rev'd*, 486 F.3d 1248 (11th Cir. 2007).

18 This issue has been the subject of decades-long debate. From approximately 1939 until 1965, Congress exempted medical interns from FICA taxes, but later repealed that "intern" exemption. *United States v. Mount Sinai Med. Ctr. of Fla. Inc.*, 353 F. Supp. 2d 1217.

19 The court also mentioned that Mount Sinai "conceded" its alternative argument for recovery of FICA taxes—that the salaries paid to medical residents are exempt from FICA taxation as "scholarship proceeds" under 26 U.S.C. § 117. *Id.* at 1230 n. 7. The District of Massachusetts and the Second Circuit also have ruled against a hospital on the alternative "scholarship" argument. *See Albany Med. Ctr. v. United States*, 563 F.3d 20, 30-32 (2d Cir. 2009); *United States v. Partners Healthcare Sys.*, 2006 U.S. Dist. LEXIS 97908 (D. Mass. 2006).

20 353 F. Supp. 2d 1217.

21 *Id.*

22 *See United States v. Detroit Med. Ctr.*, No. 05-71772 (E.D. Mich. 2006); *Albany Med. Ctr. v. United States*, 99 A.F.T.R. 2d 2007-585 (N.D.N.Y. 2007), *rev'd*, 563 F.3d 19 (2d Cir. 2009); *United States v. Memorial Sloan-Kettering Cancer Ctr.*, No. 06-CV-00026 (S.D.N.Y. 2007), *rev'd*, 563 F.3d 19 (2d Cir. 2009).

23 *See United States v. University Hosp., Inc.*, No. 1:05-CV-445 (S.D. Ohio July 26, 2006); *Center for Family Med. and Univ. of S.D. Sch. of Med. Residency Corp. v. United States*, 456 F. Supp. 2d 1115 (D.S.D. 2006); *University of Chicago Hosps. v. United States*, 98 A.F.T.R. 2d 2006-6657 (N.D. Ill. 2006).

24 *See Mount Sinai III*, 2008 U.S. Dist. LEXIS 57808, at *80 (court noting on remand that Mount Sinai spent more on a net basis on clinical education during the years at issue than it received from patient care).

25 *Id.* at *33, 70-71, 81.

26 *Mount Sinai I*, 353 F. Supp. 2d at 1229.

27 *Id.*

28 *Mount Sinai II*, 486 F.3d at 1251-53.

29 *Mount Sinai III*, 2008 U.S. Dist. LEXIS 57808, at *61.

30 A "school," as defined by the Treasury regulations applicable here, is "[a]n establishment for teaching a particular skill or group of skills." *Mount Sinai III*, at *91 (citing *Mayo I*, 282 F. Supp. 2d at 1013).

31 *Id.* at *6, *91.

32 ACGME is the accrediting body for graduate medical education programs throughout the United States.

33 *Mount Sinai III*, 2008 U.S. Dist. LEXIS 57808, at *6, *91.

34 *Id.* at *63-*93. The court instead disagreed with the United States' profitability analysis, and ultimately found its expert on the subject not credible. *Mount Sinai III*, 2008 U.S. Dist. LEXIS 57808 at *79-*80.

35 *Id.* at *92.

36 *Id.* at *86-*87.

37 *Id.* at *10-*11.

38 *Id.*

39 *Id.* at *11.

40 *Id.*

41 *Id.* at *30.

42 *Id.* at *28.

43 *Id.* at *92-*93 (citing 26 C.F. R. § 31.3121(b)(10-2(b)).

44 *Id.* at *94-*95 (citing *Mayo I*, 282 F. Supp. 2d at 1015-1018).

45 *Id.* at * 95.

46 *Id.* at * 97-*98.

47 *Id.* at *105-*106.

48 *Id.* at *114-*115.

49 *Id.* at *117.

50 On initial appeal of the district court's summary judgment ruling, Mount Sinai paid back the FICA tax refunds originally received, plus interest to date, in an effort to cut off the further accrual of interest pending appeal. In doing so, the parties stipulated that Mount Sinai had not prejudiced its right to appeal the summary judgment ruling or to demand repayment of the FICA taxes upon reversal of that ruling. The court's entry of final judgment in 2009 gave effect to the parties' stipulation, awarding Mount Sinai a "refund" even though the case had always remained in an erroneous refund posture.

51 *United States v. Memorial Sloan Kettering Cancer Ctr.*, 563 F. 3d 19, 27, (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417 (6th Cir. 2009); *University of Chicago Hosps. v. United States*, 545 F.3d 564, 567 (7th Cir. 2008).

52 DOJ only obtains jurisdiction of FICA refund cases upon the filing of a federal complaint. Certainly, DOJ has no authority to settle administrative claims, and the IRS has made no settlements available—either piecemeal or upon a global settlement initiative. In other words, a federal refund suit is the only game in town at this juncture for teaching hospitals with preserved administrative claims.

53 Internal Revenue Bulletin 2005-2 at 268 (Jan. 10, 2005) (emphasis added).

54 *Id.*

55 26 C.F.R. § 31.3121(b)(10)-2(c).

56 *Mayo I*, 282 F. Supp. 2d at 1013 (the court reasoned that the IRS "opt[ed] instead for a simple and straightforward statement that the term 'school, college, or university' should be taken in its commonly and generally accepted sense."). *See also Mount Sinai III*, 2008 U.S. Dist. LEXIS 57808, at *67-*68.

57 *Mayo II*, 503 F. Supp. 2d at 1171-1177,

58 *Mayo III*, 568 F. 3d at 677, *rev'g Regents of the Univ. of Minn.*, 2008 U.S. Dist. LEXIS 26263 and *Mayo II*, 503 F. Supp. 2d 1164. On January 14, 2010, appellees Mayo Foundation and the Regents of the University of Minnesota filed a petition for writ of certiorari to the U.S. Supreme Court. A decision on the petition remains pending at press time.

59 Under the three-year statute of limitations, refund claims for 2006 must be filed by April 15, 2010. *See* note 12 *supra*.