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U.S. Supreme Court Update

COURT DECIDES TWO STATE AND LOCAL TAX CASES

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***40** After months of briefs, oral arguments, and anticipation (plus several JOURNAL articles along the way), the U.S. Supreme Court issued two opinions in cases involving state and local taxation.

On 3/3/15, the Court reversed and remanded the U.S. Court of Appeals for the Tenth Circuit's ruling in *Direct Marketing Ass'n v. Brohl* (Docket No. 13-1032, cert. granted 7/1/14). The Supreme Court unanimously determined that the federal Tax Injunction Act does not preclude the Direct Marketing Association from challenging Colorado's use tax information, notice and reporting requirements on remote retailers (Colorado's version of the 'Amazon Tax') in federal court.

One surprise was Justice Kennedy's concurring opinion involving the broader issue of nexus and the need for the Court to 'reexamine [its decisions in] *Quill* and *Bellas Hess*,' that affirmed physical presence as the test for use tax collection duties under the Commerce Clause of the U.S. Constitution.

One day later, on 3/4/15, the Court issued its decision in *Alabama Department of Revenue v. CSX Transportation, Inc.* (Docket No. 13-553, cert. granted 7/1/14). In *CSX*, the Court was asked to determine whether Alabama's decision to exempt motor carriers and water carriers, but not rail carriers, from the state's sales and use taxes on diesel fuel discriminated against the rail carriers in violation of the federal Railroad Revitalization and Regulatory Reform Act of 1976 (the '4-R Act').

The Court held that a rail carrier could show discrimination under the 4-R Act by demonstrating that it is subject to differential tax treatment compared to its competitors, but that the tax disparity is permissible if the competitors are subject to another comparable tax or if the state provides another sufficient justification.

The Court remanded the case to the Eleventh Circuit to determine whether Alabama's sales and use taxes on diesel fuel are roughly equivalent to Alabama's diesel fuel excise tax to justify the exemption under the sales and use taxes for motor carriers. The Court also instructed the Eleventh Circuit to review Alabama's justifications for the sales and use tax exemption for water carriers.

****2** At the time of this writing, the Court recently delivered its decision in *Comptroller of the Treasury v. Wynne* (Docket No. 13-485, cert. granted 5/27/14). An analysis of that decision, involving a challenge to Maryland's credit against its personal income taxes for taxes paid to other states, will appear in a future column. Also, we await the Court's ruling in another case on its docket. On 3/4/15, the Court heard oral argument in *King v. Burwell* (Docket No. 14-114, cert. granted 11/7/14), where the

Court must decide whether the Internal Revenue Service may permissibly promulgate regulations to extend tax-credit subsidies to healthcare coverage purchased through exchanges established by the federal government under Section 1321 of the Patient Protection and Affordable Care Act (‘Obamacare‘).

In this issue of the JOURNAL, we review one new petition for certiorari that involves state and local taxes. And, at the time of this writing, two previously reported petitions are still pending.

DMA Wins in Unanimous Decision

On 3/3/15, the Court issued its opinion in *Direct Marketing Ass'n v. Brohl*, Docket No. 13-1032, cert. granted 7/1/14, ruling below at 735 F.3d 904 (10th Cir. 2013), *rem'g, Direct Marketing Ass'n v. Huber*, DC Colo., No. 10-CV-01546-REB-CBS, 3/30/12, 2012 WL 1079175. The Supreme Court unanimously determined that the Tax Injunction Act (‘TIA‘) does not preclude the trade association, the Direct Marketing Association (the ‘DMA‘), from bringing suit in federal court to enjoin enforcement of Colorado's law requiring retailers that do not collect Colorado sales or use tax to notify Colorado customers of their use tax liability and to report tax-related information to the Colorado Department of Revenue. The Court remanded the case to the Tenth Circuit to decide on remand whether a comity argument remains available to the state of Colorado.

Not barred by the TIA—no ‘assessment,‘ ‘levy‘ or ‘collection‘ action.

As explained by Justice Clarence Thomas who delivered the opinion of the Court, the issue before the Court was whether the relief sought by the DMA ‘would ‘enjoin, suspend or restrain the assessment, levy or collection of any tax under State law.’‘ As such, the ‘question becomes whether the enforcement of the notice and reporting requirements is an act of ‘assessment, levy or collection.’‘

The Court looked to federal tax law as a guide in defining the terms of the TIA, since the TIA was modeled on the federal Anti-Injunction Act (AIA), which provides in relevant part that ‘no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person.‘ The Court determined that ‘[r]ead in light of the Federal Tax Code at the time the TIA was enacted (as well as today), these three ***41** terms refer to discrete phases of the taxation process that do **not** include informational notices or private reports of information relevant to tax liability.‘ (emphasis added). The Court stated that the Federal Tax Code ‘has long treated information gathering as a phase of tax administration procedure that occurs before assessment, levy, or collection.‘

****3** The Court further stated that the term “assessment' is the next step in the process and it refers to the official recording of a taxpayer's liability, which occurs after information relevant to the calculation of that liability is reported to the taxing authority.‘ The Court then reviewed the term ‘levy‘ and determined that it ‘refers to a specific mode of collection under which the [taxing authority] distrains and seizes a recalcitrant taxpayer's property. ‘ Finally, the Court found that the term ‘collection‘ is ‘the act of obtaining payment of taxes due,‘ which is also ‘a separate step in the taxation process from assessment and the reporting on which assessment is based.‘

The Court made clear that while ‘enforcement of the notice and reporting requirements may improve Colorado's ability to assess and ultimately collect its sales and use taxes from customers the TIA is not keyed to all activities that may improve a State's ability to assess and collect taxes. Such a rule would be inconsistent not only with the text of the statute, but also our rule favoring clear boundaries in the interpretation of jurisdictional statutes. ‘ The Court thus concluded that ‘the TIA is keyed to acts of assessment, levy and collection themselves, and enforcement of the notice and reporting requirements is none of these.‘

Court adopts narrow definition of term ‘restrain.‘

The Court further examined whether a suit to prevent Colorado from enforcing its law would 'suspend or restrain' assessment, levy or collection of tax. As stated by the Supreme Court, after concluding that enforcement of Colorado's law was not itself an act of 'assessment, levy or collection,' the Tenth Circuit adopted a broad definition of the term 'restrain' in its ruling and concluded that the TIA bars any suit that would 'limit, restrict, or hold back' the assessment, levy, or collection of taxes. The Supreme Court, however, rejected this broad reading of the TIA.

In its analysis, the Court acknowledged that, standing alone, 'restrain' may have several meanings—including the broad meaning given by the Court of Appeals or a narrower meaning, which 'captures only those orders that stop (or perhaps compel) acts of 'assessment, levy and collection.'' To resolve the ambiguity, however, the Court looked to the context in which the word 'restrain' is used.

First, the term appears next to the words 'enjoin' and 'suspend,' which, according to the Court, refer to different equitable remedies that restrict or stop official action. Additionally, as used in the TIA, 'restrain' acts on, what the Court refers to as, 'a carefully selected list of technical terms—'assessment, levy, collection'—not on an all-encompassing term, like 'taxation.'' Thus, Justice Clarence Thomas noted in the Court's opinion that to give 'restrain' the broad meaning selected by the circuit court would 'be to defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to 'hold back' 'collection.''

**4 And, Justice Thomas further stated that 'assigning the word 'restrain' its meaning in equity is also consistent with our recognition that the TIA 'has its roots in equity practice.' Under the comity doctrine that the TIA partially codifies, . . . courts of equity exercised their 'sound discretion' to withhold certain forms of extraordinary relief;' 'those courts did not refuse to hear every suit that would have a negative impact on State's revenues.'

Finally, the Court noted that 'adopting a narrower definition is consistent with the rule that '[j]urisdictional rules should be clear.'' The Court therefore adopted a strict definition of 'restrain,' noting that '[t]he question—at least for negative injunctions—is whether the relief to some degree stops 'assessment, levy or collection,' not whether it merely inhibits them.' Applying these definitions, the Court concluded that DMA's suit cannot be understood to 'restrain' the 'assessment, levy or collection of a state tax if it merely inhibits those activities.'

The comity doctrine—available to Colorado?

The Court took no position as to whether the DMA's suit might nevertheless be barred under the comity doctrine. As explained by the Court, the comity doctrine 'counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction.' And under this doctrine, 'federal courts refrain from 'interfer[ing] . . . with the fiscal operations of the state governments . . . in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.'' The Court stated that Colorado did not seek comity from either court below and, furthermore, that it did not understand the Court of Appeals footnote in its decision concerning comity to be a holding that comity compels dismissal. Thus, the Court left it to the Tenth Circuit to decide on remand whether any comity argument remains available to Colorado.

Surprise concurrence—need for Court to reconsider *Quill* physical presence nexus test.

Justice Anthony Kennedy offered his 'unqualified' assent to the Court's opinion, but nevertheless reserved a separate concurrence to address 'what may well be a serious, continuing injustice faced by Colorado and many other States.'

As regular readers of this column are well aware, under the Supreme Court's Commerce Clause jurisprudence, a vendor must have a physical presence in a state in order for that state to require the vendor to collect use taxes on its remote sales (*see National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992)). As described by Justice Kennedy, the Court reaffirmed the physical presence requirement (set forth in the Court's

Bellas Hess decision) in *Quill*, relying on *stare decisis.* 'This was despite the fact that under the more recent and refined test elaborated in *Complete Auto Transit, Inc. v. Brady* (citations omitted) contemporary Commerce Clause jurisprudence might not dictate the same result.' Or, as Justice Kennedy emphasized, 'the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided.' And now, such holding is 'inflicting harm and unfairness on the States.'

****5** Justice Kennedy argued that the Court should have used the opportunity it had in *Quill* to revaluate its earlier *Bellas Hess* decision, both in light of the Court's decision in *Complete Auto Transit, Inc. v. Brady* and 'in view of the dramatic technological and social changes that had taken place in our increasingly ***42** interconnected economy.' According to Justice Kennedy, '[a]lthough online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers,' and, '[a]s a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.' This argument, in his opinion, has only grown stronger.

Justice Kennedy acknowledged that he did not view DMA's suit as the appropriate vehicle to fully address these issues. Instead, he stated that the case provides 'the means to note the importance of reconsidering doubtful authority. ' And according to Justice Kennedy, '[t]he legal system should find an appropriate case for [the] Court to reexamine *Quill* and *Bellas Hess.* ' (For more on this case, including a detailed discussion of the Colorado notice and reporting requirements, see U.S. Supreme Court Update 24 JMT 40 (May 2014). For further analysis of Justice Kennedy's concurring opinion and its possible implications, see Hecht and Disque, '*Direct Marketing Association* and the Overture to Overturn *Quill,*' 25 JMT 6 (July 2015).)

The Saga of *CSX* Continues

On 3/4/15, the Court issued its opinion in *Alabama Department of Revenue v. CSX Transportation, Inc.*, Docket No. 13-553, cert. granted 7/1/14, ruling below as *CSX Transportation, Inc. v. Alabama Department of Revenue*, 720 F.3d 863 (11th Cir. 2013). In this case, Alabama asked the Court to review a decision by the U.S. Court of Appeals for the Eleventh Circuit, which held that Alabama's failure to provide rail carriers with a tax exemption from the state's sales and use taxes for their purchases of diesel fuel, while exempting both interstate motor carriers and water carriers, was discriminatory in violation of section (b)(4) of the federal Railroad Revitalization and Regulatory Reform Act of 1976 (the '4-R Act,' codified at 49 U.S.C. § 11501).

This is the second time that the case has reached the Supreme Court. In 2009, the Court rejected Alabama's argument that sales and use tax exemptions cannot 'discriminate' within the meaning of the 4-R Act, and remanded the case for further proceedings (*CSX Transportation, Inc. v. Alabama Department of Revenue*, 526 U.S. 277 ('*CSX* I')). As explained in more detail below, the Court has once again remanded the case to the Eleventh Circuit, setting the stage for a potential *CSX* III.

CSX's 'comparison-class' of competitors.

Section (b)(4) of the 4-R Act prohibits states from imposing taxes that 'discriminat[e] against a rail carrier.' Alabama imposes a 4 percent sales (or use) tax on rail carriers purchases (or uses) of diesel fuel, but exempts from the sales (or use) tax similar purchases (or uses) by motor carriers and water carriers. Motor carriers instead pay a 19-cent-per-gallon fuel excise tax on their purchases of diesel, whereas water carriers pay neither tax.

****6** The first issue before the Court was whether, in resolving CSX's claims of discrimination under the 4-R Act, courts should compare the tax treatment of CSX to its direct competitors (i.e., motor and water carriers) or to all general commercial and industrial taxpayers. In its petition to the Court, Alabama argued that the only appropriate comparison class for a claim under section (b)(4) of the 4-R Act is all general commercial and industrial taxpayers (the majority of which pay sales and use taxes on their purchases of diesel fuel).

The Court disagreed. In an opinion written by Justice Scalia (and joined by six other Justices), the Court concluded that '[w]hile all general and commercial taxpayers is *an* appropriate comparison class, it is not the only one.'

According to the Court, ‘[n]othing in the ordinary meaning of the word ‘discrimination’ suggests that it occurs only when the victim is singled out relative to the population at large.‘ And, moreover, the statutory construction of the 4-R Act confirms the conclusion that discrimination can occur vis-a-vis a rail carriers' competitors.

As stated by the Court, subsections (b)(1) to (b)(3) of the 4-R Act (dealing with property taxes) require a comparison of the taxation of railroads to the taxation of commercial and industrial taxpayers generally. But subsection (b)(4), the provision under which CSX brought its original lawsuit, ‘contains no such limitation, leaving the comparison class to be determined as it is normally determined with respect to discrimination claims.‘

Thus, according to Justice Scalia, ‘when a railroad alleges that a tax disadvantages it compared to its competitors in the transportation industry, the railroad's competitors in that jurisdiction are the comparison class. ‘ However, ‘[w]hat subsection (b)(4) requires, and subsections (b)(1)-(3) do not, is a showing of *discrimination*—of a failure to treat similarly situated persons alike.‘ Therefore, ‘[a] comparison class will thus support a discrimination claim only if it consists of individuals similarly situated to the claimant.‘ And, in the Court's view, the Eleventh Circuit properly concluded that a comparison class of competitors consisting of motor carriers and water carriers was appropriate, and differential treatment vis-a-vis this class would constitute discrimination.

In a dissenting opinion, which was joined by Justice Ruth Bader Ginsburg, Justice Clarence Thomas took issue with this reading of the 4-R Act. According to Justice Thomas, ‘[i]n order to violate [section (b)(4) of the 4-R Act], ‘a tax exemption scheme must target or single out railroads by comparison to general commercial and industrial taxpayers.’‘ Justice Thomas took this same stance in his dissent in *CSX* I.

Justice Thomas views section (b)(4) as a ‘residual clause, the meaning of which is best understood by reference to the provisions that precede it.‘ In other words, (b)(4) refers back to sections (b)(1)-(b)(3), which expressly identify ‘commercial and industrial property‘ as the proper comparison class for claims brought under those sections of the 4-R Act. Thus, Justice Thomas reasons, the same class must apply to claims brought under section (b)(4).

Court remands to Eleventh Circuit to engage in a ‘Sisyphean task.‘

****7 *44** As noted in previous issues of the JOURNAL, the Court requested that the parties address whether a court, in resolving a 4-R Act discrimination claim, should consider other aspects of the state's tax regime. The Eleventh Circuit refused to consider Alabama's alternate tax justifications for its treatment of rail carriers, referring to the prospect of reviewing the entirety of Alabama's tax scheme to determine whether Alabama imposes roughly comparable taxes on rail carriers' competitors as a ‘Sisyphean task.‘

Sisyphus, for those not familiar with Greek mythology, was punished by the gods for his various deceits and forced to endlessly roll a large boulder up a steep hill, only to watch it roll back down, over and over again. But according to the Court, if the task of determining whether Alabama imposes comparable taxes on motor carriers ‘is ‘Sisyphean,’ as the Eleventh Circuit called it, it is a Sisyphean task that the statute imposes.‘

According to the Court,‘[a] State's tax discriminates only where the State cannot sufficiently justify differences in treatment between similarly situated taxpayers.‘ Accordingly, if Alabama can justify its decision to exempt motor carriers from its sales and use tax through its decision to subject motor carriers to a fuel-excise tax, then no discrimination has occurred. The Court therefore remanded the case back to the Eleventh Circuit to consider ‘whether Alabama's fuel-excise tax is the rough equivalent of Alabama's sales tax as applied to diesel fuel, and therefore justifies the motor carrier sales-tax exemption.‘ Whether the Court has set the stage for *CSX* III remains to be seen.

Water carriers.

The Court also remanded the case to the Eleventh Circuit to consider Alabama's taxation of water carriers. As stated by the Court, water carriers in Alabama pay neither sales and use tax on diesel fuel purchases nor the state's fuel-excise tax. Alabama, however, offered other justifications for the water carrier exemption in the cases below—e.g., that such an exemption is compelled by federal law. According to the Court, however, '[t]he Eleventh Circuit failed to examine these justifications,' and thus the Court left this question for the circuit court to decide on remand.

Lack of Immunity for CA's FTB in NV Intentional Tort and Bad Faith Conduct Suit

In *Franchise Tax Board of the State of California v. Hyatt*, Docket No. 14-1175, petition for cert. filed 3/23/15, ruling below at 335 P.3d 125 (Nev. 2014), the Supreme Court of Nevada largely reversed a jury award of $139 million in tort damages and $250 million in punitive damages in favor of inventor Gilbert P. Hyatt ('Hyatt') in his lawsuit against the Franchise Tax Board of the State of California (FTB). However, despite FTB's claims that all of Hyatt's causes of action were barred under principles of discretionary-function immunity and comity, the Nevada high court affirmed the district court's findings that FTB committed fraud and intentional infliction of emotional distress in its personal income tax residency audit of Hyatt.

****8** Accordingly—although the damages imposed against FTB were significantly reduced—FTB was unable to escape all liability and now petitions the U.S. Supreme Court for review. In its petition for certiorari, FTB asks the Court to review the sovereign immunity principles allegedly disregarded by the Nevada Supreme Court in its ruling below.

The audit and resulting litigation.

As explained by the Nevada Supreme Court, in the early 1990s, Hyatt received large sums of money from a 'lucrative computer chip patent.' After reading a newspaper article regarding this income, FTB decided to review Hyatt's 1991 California state personal income tax return. The return revealed that Hyatt did not include his licensing payments as taxable income on his 1991 return. Hyatt excluded the income on the grounds that he moved from California to Nevada in September 1991, prior to receiving the payments, and was no longer a resident of the state when the payments were received.

FTB initiated what can best be described as a lengthy and contentious audit, sending over 100 letters and demands for information to third parties—many containing Hyatt's personal information—and interviewing numerous witnesses and family members. Eventually, FTB determined that Hyatt's move from California to Nevada did not occur until April 1992 and that Hyatt had 'staged an earlier move' in a deliberate effort to shield his patent earnings from state taxation. Accordingly, FTB determined that Hyatt owed the state of California over $10 million in additional state income taxes, penalties, and interest for tax years 1991 and 1992.

Hyatt challenged the audit findings both through protests with the FTB and also, relevant to the current petition before the Supreme Court, in Nevada state courts. Hyatt's claims in Nevada court included charges of negligence and seven intentional tort causes of action that were allegedly committed by FTB during its audit. The intentional tort causes of action included invasion of privacy (intrusion upon seclusion); invasion of privacy (publicity of private facts); invasion of privacy (false light); intentional infliction of emotional distress; fraud; breach of confidential relationship; and abuse of process.

In an unpublished 2000 order, the Nevada Supreme Court dismissed the negligence claim on the basis of comity. Although FTB sought immunity from the entire Nevada state lawsuit—arguing that it 'was entitled to the complete immunity that it enjoyed under California law based on either sovereign immunity, the Full Faith and Credit Clause, or comity'—the Nevada Supreme Court concluded that FTB was not entitled to full immunity under any of these principles.

Instead the court determined that, ‘under comity, FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive.‘ Thus, the Nevada Supreme Court held that FTB was immune from Hyatt's negligence cause of action only, since Nevada did not provide immunity to its own government agencies for intentional torts or bad-faith conduct. The Nevada Supreme Court's ruling on the immunity issues was affirmed by the U.S. Supreme Court in *Franchise Tax Board of the State of California v. Hyatt*, 538 U.S. 488 (2003).

****9** Hyatt's intentional tort claims were subsequently considered by a Nevada jury, which awarded Hyatt $139 million in tort damages and $250 million in punitive damages.

Discretionary-function immunity does not apply to intentional torts and bad-faith conduct.

FTB appealed the jury's verdict to the Nevada Supreme Court, alleging that, as a government agency, Hyatt's causes of action against it were barred by discretionary-function immunity and that, in the alternative, each of Hyatt's claims failed as a matter of law. ***46** As a threshold matter, the Nevada Supreme Court addressed the issue of discretionary-function immunity and whether Hyatt's causes of action against the FTB were barred by this immunity, or whether there was an exception to the immunity for intentional torts and bad-faith conduct. As discussed below, the Nevada Supreme Court determined that FTB was not immune from suit under discretionary-function immunity.

Under Nevada law, discretionary-function immunity provides that no action can be brought against the state or its employee ‘based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State . . . or of any . . . employee. . ., whether or not the discretion involved is abused.‘ (Nev. Rev. Stat. § 41.032(2).) But Nevada has historically recognized an exception to discretionary-function immunity for intentional torts and bad-faith conduct. And although, as addressed in the ruling below, Nevada has also adopted the federal *Berkovitz-Gaubert* two-part test for determining the applicability of discretionary-function immunity (see *Berkovitz v. United States*, 486 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991)), according to the Nevada Supreme Court, that test has not altered the exception for intentional torts or acts in bad faith.

Under the *Berkovitz-Gaubert* two-part test, discretionary-function immunity will apply if the government actions at issue ‘(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic, or political policy.‘ However, according to the Nevada Supreme Court, intentional torts and acts in bad faith cannot satisfy this test, as these acts ‘by definition cannot be within the actor's discretion.‘ Accordingly, Nevada's exception to discretionary-function immunity for intentional torts and bad-faith conduct applies.

Based on this conclusion, the Nevada Supreme Court also determined that FTB was not entitled to immunity under principles of comity. Comity, as explained by the Nevada Supreme Court, ‘is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state.‘

In California, FTB would have enjoyed full immunity from tort actions arising in the context of an audit. (Cal. Gov't Code § 860.2 (2012).) Accordingly, FTB argued in the case below that it should receive this same protection in Nevada. But the Nevada Supreme Court disagreed.

****10** Because discretionary-function immunity under Nev. Rev. Stat. § 41.032 does not include intentional torts and bad-faith conduct, the court reasoned that a Nevada government agency would not receive immunity under these circumstances and, thus, the court refused to extend such immunity to FTB under comity principles, since to do so would be contrary to the policy of Nevada. Accordingly, Hyatt's causes of action were properly considered by the lower court.

Hyatt's intentional tort causes of action.

The Nevada Supreme Court considered FTB's various arguments contesting Hyatt's specific causes of action—i.e., his three invasion of privacy claims (intrusion upon seclusion, publicity of private facts, and false light) and his additional causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress. The court reversed the district court's judgment based on the jury's verdict with respect to each of these causes of action except for those based on fraud and intentional infliction of emotional distress (‘IIED‘).

With regard to Hyatt's fraud claims, the Nevada high court found that ‘[t]he record before us shows that a reasonable mind could conclude that FTB made specific representations to Hyatt that it intended for Hyatt to rely on, but which it did not intend to fully meet.‘ Specifically, ‘FTB represented to Hyatt that it would protect his confidential information and treat him courteously. ‘ But at trial, Hyatt presented evidence that FTB (and its employees) unnecessarily disclosed his social security number and home address to numerous people and entities, took 11 years to resolve his protests of the two audits, made disparaging comments about Hyatt and his religion, and that FTB ‘promoted a culture in which tax assessments were the end goal whenever an audit was undertaken.‘

The court therefore concluded that substantial evidence supported each of the fraud elements and that FTB was not entitled to judgment as a matter of law on this cause of action. Moreover, the court held that FTB was not entitled to a statutory cap on the amount of damages recoverable under this claim. Accordingly, Hyatt was entitled to receive the special damages he was awarded in the approximate amount of $1.1 million.

Regarding the special damages, FTB argued that because it was immune from liability under California law, and because Nevada provides a statutory cap on liability damages imposed against ‘a present or former officer or employee of the State or any political subdivision,‘ it too was entitled to the statutory cap on its liability. According to the court, however, FTB was not entitled to the statutory cap under comity because extending comity in this instance would violate the state's public policy of providing adequate redress to Nevada citizens.

Finally, with regard to Hyatt's IIED claims, the court found that based on the ‘extreme treatment‘ that Hyatt received from FTB during its audit, there was sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emotional distress. The court therefore affirmed the lower court's ruling in favor of Hyatt but reversed the award of damages on the IIED claim and remanded the case for a new trial as to damages on that claim.

Punitive damages.

****11** The Nevada Supreme Court also addressed the issue of whether Hyatt could recover punitive damages from the FTB. The district court allowed the issue of punitive damages to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million. In its petition for review, FTB alleges that these damages ‘demonstrate[] the dangers of allowing a sovereign State to be hauled into another State's court system against its will.‘ ***48** On appeal, however, the Nevada Supreme Court reversed the lower's court judgment with regard to the award of the punitive damages. Because neither Nevada nor California law authorize punitive damages against a government entity, the Nevada Supreme Court invoked the comity doctrine and afforded FTB the protections of California's immunity from punitive damages.

Questions for review.

FTB now asks the U.S. Supreme Court to review this matter for a second time in order to address what it views as the important sovereign immunity issues at stake. Specifically, FTB presents the following questions for review:

1 Whether the federal discretionary-function immunity rule, 28 U.S.C. § 2680(a), is categorically inapplicable to intentional torts and bad-faith conduct.

2 Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities [i.e., statutory damage caps] Nevada enjoys in those courts.

3 Whether *Nevada v. Hall*, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.

'In short,' according to the FTB, 'this case presents a perfect vehicle for this Court to correct two cert worthy errors made by the court below or one of its own.'

Petitions Still Pending

The following two petitions remained pending at the time of this writing.

Colorado legislators challenge state's Taxpayer Bill of Rights.

In *Hickenlooper v. Kerr*, Docket No. 14-460, petition for cert. filed 10/17/14, ruling below as *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), petition for rehearing en banc denied, 759 F.3d 1186, the Court of Appeals for the Tenth Circuit affirmed a district court's ruling that a group of Colorado citizens, including current and former legislators, had standing to challenge Colorado's Taxpayer's Bill of Rights ('TABOR') and that the legislators' challenge was not barred by the political question doctrine.

The plaintiffs seek injunctive and declaratory relief, claiming that TABOR's requirement that new taxes be subject to voter approval 'undermines the fundamental nature of the state's Republican Form of Government' in violation of the Guarantee Clause of the U.S. Constitution. Under TABOR, Colorado, with certain limited exceptions, 'must have voter approval in advance for . . . any new tax, tax rate increase . . ., or a tax policy change directly causing a net tax revenue gain to any district.' (Colo. Const. art. X, § 20, cl. 4(a).)

****12** The legislators named Colorado Governor John Hickenlooper as defendant in their suit, and Governor Hickenlooper moved to dismiss the complaint, arguing that the plaintiffs lacked standing and that the political question doctrine required dismissal of all of the legislators' claims. But, according to the circuit court, the plaintiffs provided adequate proof that TABOR, by requiring a voter referendum on most tax issues, caused them injury. Thus, the plaintiffs had standing to challenge TABOR.

Moreover, under the *Baker v. Carr* test (*see* 369 U.S. 186, 7 L. Ed 2d 663 (1962)), the legislators' suit was not barred by the political question doctrine, as there were judicially discoverable and manageable standards for the litigation, and resolving the case would not require the court to improperly make a policy determination. The circuit court's decision was strictly jurisdictional, however. The court stated that 'merits of the case are not before us' and 'stress[ed] that [its] decision on plaintiffs' Guarantee Clause claim is quite limited, leaving all issues other than standing, prudential standing, and the political question doctrine to the district court.'

In his petition for certiorari, the governor challenges the circuit court's rulings on both the political question doctrine and standing. (For more background on this case, including the circuit court's decision, see U.S. Supreme Court Update, 24 JMT 39 (February 2015).)

ERISA preemption provision challenge to Michigan health insurance tax.

In *Self-Insurance Institute of America, Inc. v. Snyder*, Docket No. 14-741, petition for cert. filed 12/18/14, ruling below at 761 F.3d 631 (6th Cir. 2014), the U.S. Court of Appeals for the Sixth Circuit affirmed a district court's ruling that the Michigan Health Insurance Claims Assessment Act (Mich. Comp. Laws §§ 550.1731-1734; the 'Michigan Act')—which imposes a 1 percent tax, along with various reporting and record-keeping requirements, on all paid claims by carriers and third party administrators to healthcare providers for services rendered in Michigan for Michigan residents—is not prohibited by ERISA's preemption provision (29 U.S.C. § 1144(a)).

In its petition for review, the Self-Insurance Institute of America ('SIIA ') argues (as it did in the proceedings below) that the Supremacy Clause of the U.S. Constitution (art. VI, Sec. 2) and ERISA's preemption provision, prohibit the application of the Michigan Act to ERISA-covered entities (i.e., ERISA plan administrators).

As explained by the Sixth Circuit in its decision upholding the Michigan Act, one of the purposes of ERISA is 'to provide a uniform regulatory regime over employee benefit plans.' Accordingly, 'ERISA contains a broad preemption provision that 'supersede[s] any and all State laws insofar as they . . . *relate* to any employee benefit plan' that falls under the regulation of ERISA. (29 U.S.C. § 1144(a)).' (emphasis added). The Sixth Circuit interpreted this standard to mean that '[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'

****13** In the proceedings below, SIIA argued that the Michigan Act has an impermissible connection with employee benefit plans inasmuch as the Michigan Act: '(1) interferes with the administration of the plans; (2) imposes administrative burdens in addition to those prescribed by ERISA; and (3) interferes with the relationships between ERISA-covered entities.' The Sixth Circuit disagreed with all three of SIIA's contentions, however.

In its petition for review, SIIA contends that '[t]he circuit court invoked a strong presumption against the preemption of state taxing powers to read [ERISA's preemption provisions] narrowly despite Congress's deliberate choice of preemptive language whose breadth has been repeatedly emphasized by this Court, and Congress's express recognition that ERISA can and does preempt state tax laws.' (For more background on this case, including a detailed discussion of the circuit court's response to SIIA's specific claims, see U.S. Supreme Court Update, 25 JMT 45 (May 2015).)

The Supreme Court unanimously determined that the Tax Injunction Act does not preclude the Direct Marketing Association from bringing suit in federal court to enjoin enforcement of Colorado's law.

The Court left it to the Tenth Circuit to decide on remand whether any comity argument remains available to Colorado.

According to Justice Kennedy, '[t]he legal system should find an appropriate case for [the] Court to reexamine *Quill* and *Bellas Hess*.'

In the Court's view, the Eleventh Circuit properly concluded that a comparison class of competitors consisting of motor carriers and water carriers was appropriate.

If the task of determining whether Alabama imposes comparable taxes on motor carriers 'is 'Sisyphean,' as the Eleventh Circuit called it, it is a Sisyphean task that the statute imposes.'

FTB asks the Court to review the sovereign immunity principles allegedly disregarded by the Nevada Supreme Court in its ruling below.

The Nevada Supreme Court determined that FTB was not immune from suit under discretionary-function immunity.

FTB was not entitled to the statutory cap under comity because extending comity in this instance would violate the state's public policy of providing adequate redress to Nevada citizens.

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