Continued Assaults on *Quill* in 2017 Will It Lead to Change in 2018?

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In 1967 the U.S. Supreme Court held the negative or dormant commerce clause and the due process clause prohibited Illinois from requiring a mail-order seller in Missouri to collect and remit use tax to Illinois on merchandise sold and shipped into Illinois. The seller in that case[26] had no physical presence in Illinois, and its only contacts with Illinois were by mail and common carrier. In terms of technology, the Court specifically noted the seller did not have a telephone listing and did not advertise by radio or television. Three justices dissented.

With the significant changes in the economy over the next 25 years, questions arose whether this holding in *National Bellas Hess Inc. v. Department of Revenue of Illinois*[27] should be reconsidered, and the Supreme Court ultimately addressed that question in *Quill Corp. v. North Dakota*[28]. The U.S. Supreme Court accepted review after the Supreme Court of North Dakota declined to follow *Bellas Hess* because "'the tremendous social, economic, commercial, and legal innovations' of the past quarter-century have rendered its holding 'obsole[te].'"[29]

On review, the Court first agreed that the due process clause does not bar enforcement of use tax collection. The Court noted that its "due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess.*"[30] However, after noting the Court's interpretation of the negative or dormant commerce clause has evolved substantially over the years, and "while contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today",[31] the Court referred to *Bellas Hess* as a "safe harbor for vendors 'whose only connection with customers in the [taxing] state is by common carrier or the United States mail.'"[32] Ultimately, the Court reaffirmed the holding in *Bellas Hess,* emphasizing the continuing value of a bright-line rule and the doctrine of *stare decisis*, and the underlying issue that Congress may be better qualified and ultimately has the power to resolve.[33] Consequently, the Court held a mail-order seller with no physical presence in North Dakota could not be required by North Dakota to collect and remit use tax on its sales into that state.

To encourage Congress to pass legislation allowing use tax collection, several states entered into a Streamlined Sales and Use Tax Agreement, which reflected an effort to create greater uniformity in state sales and use tax laws to address the concerns regarding compliance burdens.[34] Despite those efforts and the many bills that have been introduced, Congress has been unwilling to act.[35]

Colorado tried to address the situation by imposing an obligation on sellers to notify their customers of their use tax obligations. While that case progressed to the Court, it did so on the question of the federal court's jurisdiction under the Tax Injunction Act.[36] However, Justice Anthony Kennedy, in a concurring opinion, gave renewed hope to states questioning *Bellas Hess* and *Quill,* describing the "tenuous nature" of the holding in *Quill,* which is now "inflicting extreme harm and unfairness on the States,"[37] and "[g]iven these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A

[26] *National Bellas Hess Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967).

[27] *Id*.

[28] 504 U.S. 298 (1992).

[29] 3*Id*. at 301 (quoting 470 N.W.2d 203, 208 (1991)).

[30] *Id.* at 306-308.

[31] *Id.*at 311.

[32] *Id.*at 315.

[33] *Id.* at 317-318.

[34] Today, 24 states have adopted the agreement's simplification measures (23 full members and one associate member).

[35] *See e.g.,* Marketplace Fairness Act, S. 976.

[36] *Direct Marketing v. Brohl*, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015).

[37] *Id*. at 1134.

case questionable even when decided, *Quill* now harms states to a degree far greater than could have been anticipated earlier . . . The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[38]

In 2016 South Dakota passed S.B. 106, which required the collection and remittance of use tax if a specific level of sales were met. However, recognizing the reliance argument embodied by the doctrine of *stare decisis*, South Dakota effectively made its law prospective only. The state's strategy was to concede its law is unconstitutional under *Quill* to accelerate the case through the state court system to get it to the U.S. Supreme Court. It has succeeded in expediting an adverse decision from the South Dakota Supreme Court and now has a petition for writ of certiorari pending before the Court.[39] Was that the best approach?

The challenge is twofold. First, you must position your case to increase the likelihood that the Court will accept your cert. petition. Historically, the Court accepts somewhere around 2 percent of those petitions.[40] Typically, you need a conflict among federal circuits or states, or a conflict with Supreme Court precedent, as occurred in *Quill*.[41] By conceding the case at the state level, South Dakota offers no such conflict.

Once over that first hurdle, you'll need to convince the Court to deviate from its holding in *Quill*. Generally, you want to develop a robust record to give the Court objective factual data to support a contrary determination. While South Dakota did get some "post-*Quill*" information in the record, the question is whether it provided enough information to present the best case or at least an "appropriate case."

It remains to be seen if South Dakota's strategy will pay off. Whether its cert. petition is granted may be decided by the time this article is published.[42] If granted, we will anxiously wait to see if the record was adequate to support and justify a different outcome.

If the cert. petition is denied, that may only be a temporary setback, as it could set the stage for the next state dispute. *Quill* and *Bellas Hess* were both based on mail-order businesses. They did not address the multibillion-dollar e-commerce industry given its infancy at the time of *Quill* (and nonexistence at the time of *Bellas Hess*). Those cases did not address, among other things, the "virtual marketplace," internet, apps, worldwide connectivity on mobile devices, or the compliance software that has been developed. To put the stakes in context, the Marketplace Fairness Coalition recently released an analysis claiming states could lose out on $211 billion in online sales tax revenue over the next five years.[43]

If another state thoroughly develops a record and provides arguments that seek to distinguish *Quill* and *Bellas Hess*, and in doing so, convinces its highest court to distinguish e-commerce from mail-order sales, thereby creating a conflict with or at least divergence from South Dakota and *Quill*, that case might ultimately be a better candidate for Court review and give the Court a greater factual basis to justify change.

The stakes are high as we watch this play out.

[38] *Id.* at 1135.

[39] *South Dakota v. Wayfair Inc., et al.*, No. 17-494 (U.S. petition for cert. filed Oct. 3, 2017).

[40] U.S. Supreme Court, "About the Court"; and U.S. Courts, "Supreme Court Procedures."

[41] Ryan Stephenson, "Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis," 102 *Geo. L.J.* 271, 274–75 (2013).

[42] "Time Between Cert. Grant and Oral Argument," SCOTUSblog; "Time Between Oral Argument and Opinion," SCOTUSblog; and "United States Supreme Court FAQ," Counsel Press.

[43] Marketplace Fairness Coalition release dated September 21, 2017.