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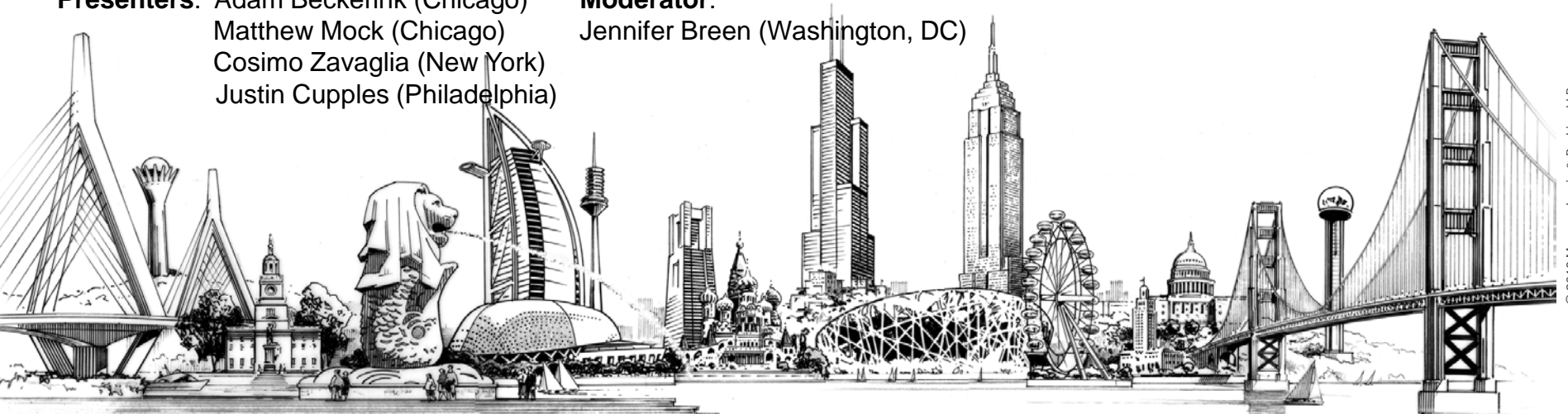
A CLOSER LOOK: STATE TAX & PRACTICAL IMPLICATIONS OF THE US SUPREME COURT'S DECISION IN *SOUTH DAKOTA V. WAYFAIR*

Part I: Overview of Decision and State Tax Implications

June 26, 2018

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AGENDA

- Background & Wayfair decision
- State of the states
- Issues and implications
- Immediate to-do list

BACKGROUND & WAYFAIR DECISION

Background & Wayfair decision

- The *Quill & Bellas Hess* Precedents – via *DMA v. Brohl*
- The *Wayfair* Decision
 - Divided court
 - Majority: Kennedy, Thomas (concurring), Ginsburg, Alito, and Gorsuch (concurring)
 - Dissent: Roberts, Breyer, Sotomayor, and Kagan
 - None defended the original physical presence ruling
 - Physical presence is not necessary for nexus
 - No logical connection between physical presence and jurisdiction to tax
 - Has the seller availed itself of the opportunities and protections provided by the state?
 - The physical presence standard distorts markets
 - Small retailers with a slight physical presence must collect tax
 - Large retailers that plan around a physical presence do not have to collect tax

Background & Wayfair decision (cont'd)

- Physical presence rule is not simple or easy to administer
 - Click-through nexus
 - Notice and reporting
 - Cookie nexus
- South Dakota's rule is reasonable
 - Sales threshold
 - No retroactivity
 - Adopted Streamlined Sales and Use Tax Agreement (SSUTA)
 - Free compliance software and audit immunity

STATE OF THE STATES

State of the states – Current SUT Economic Nexus

- Alabama (1/1/16) \$250k
- Connecticut (1/1/18) \$250k/200 sales
- Indiana (1/1/17) \$100k/200 sales
- Louisiana (6/21/18) \$100k/200 sales
- Maine (11/1/17) \$100k/200 sales
- Minnesota (?) \$100k/100 sales
- Mississippi (12/1/17) \$250K
- North Dakota (6/21/18) \$100k/200 sales
- Ohio (6/30/17) \$500k
- Oklahoma (4/10/18) \$10k or N&R
- Pennsylvania (10/30/17) \$10k or N&R
- Rhode Island (8/17/17) \$100k/200 sales or N&R
- South Dakota (6/21/18) \$100k/200 sales
- Washington (1/1/18) \$10K/\$267k Ref
- Wyoming (7/1/17) \$100k/200 sales

State of the states – Pending SUT Economic Nexus

- Connecticut (12/1/18) \$250k/200 sales
- Georgia (1/1/19) \$250k/200 sales
- Hawaii (7/1/18) \$100k/200 sales
- Illinois (10/1/18) \$100k/200 sales
- Iowa (1/1/19) \$100k/200 sales
- Kentucky (7/1/18) \$100k/200 sales
- Massachusetts (10/1/18) \$500k
- Minnesota (?) \$100k/100 sales
- Tennessee (?) \$500k
- Vermont (7/1/18) \$100k/200 sales

ISSUES AND IMPLICATIONS

Issues and Implications

- Are all South Dakota safeguards necessary?
 - Thresholds
 - Prohibition against retroactivity
 - SSUTA / Uniformity
 - Free compliance software, with audit immunity
- Threshold controversies?
 - Most match or exceed South Dakota
 - Those that are lower alternatively require notice and reporting
- Notice and Reporting States?
- Home Rule Jurisdictions?

Issues and Implications (cont'd)

- Impact on other taxes?
 - States with business activity tax economic nexus
 - AL (2015) \$500k sales / \$50k Prop / \$50k Payroll
 - CA (2011) \$500k+ sales / \$50k+ Prop / \$50k+ Payroll
 - CO (2010) \$500k+ sales / \$50k+ Prop / \$50k+ Payroll
 - CT (2010) \$500k+ sales / \$50k+ Prop / \$50k+ Payroll
 - MI (2015) \$350k+ sales
 - NY (2015) \$1M sales
 - OH (2005) \$500k sales / \$50k Prop / \$50k Payroll
 - TN (2016) \$500k sales / \$50k Prop / \$50k Payroll
 - WA (2010/2015) \$250k+ sales / \$50k+ Prop / \$50k+ Payroll

Issues and Implications (cont'd)

- State law must still support economic nexus
 - *See, e.g., United Parcel Service, Inc. v. Indiana Dept. of State Revenue*
- What about localities that impose gross receipts (GRT) or income taxes?
- Difference between GRT and income tax for these purposes?
 - In cases like *Crutchfield*, the court had to distinguish tax types... Now?
- Any impact on PL 86-272 protection?
- Retroactivity?
 - Existing Laws / Administrative Action
 - New Legislation

Issues and Implications (cont'd)

- Commerce Clause new frontier?
 - Opinion implies little space between Commerce and Due Process Clauses
- International Issues
 - The gulf between nexus and PE is greater than ever
- Emboldened Legislatures and Revenue Authorities
- Congressional Action?!?!
- Third-Party Sellers (Marketplace Sellers)

IMMEDIATE TO-DO LIST

Immediate To-Do List

- Survey your sales numbers in each state
- Understand the state of play in each state
 - Remote seller requirements
 - Exemptions or exclusions
 - Ongoing audits or assessments
- Ascertain your compliance capabilities – Jurisdictions and Rates
 - Software
 - Staff
 - Advisors
- Communicate sales tax collection requirements to customers
- Registering to collect... and do business?
- **Register for Part II of this webinar: [Practical Implications for Retailers](#)**
 - *[This Thursday, June 28 @2PM ET](#): We will survey the existing state laws regarding sales tax collection on remote sales, review pending legislative initiatives, and assess how states and Congress may react to the decision. We will also discuss the path forward for retailers in a post-Quill world.*

STATE & LOCAL TAX ISSUES

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Biography



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Adam P. Beckerink is a partner in the Tax Practice. He represents clients, including multinational corporations and high net-worth individuals, in tax disputes, controversies, and litigation with revenue authorities throughout the United States. Adam's practice spans all aspects of the tax planning and dispute resolution process, including audit, litigation, and appeals in matters including state False Claims Act tax defense, state tax refund class action defense, individual residency, telecommunications excise tax, and sales and income tax.



Biography



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Matthew S. Mock is a partner in the Tax practice. He advises clients on state and local tax litigation and planning, regularly representing them in all stages of state and local tax controversies, including sales tax, income tax, and unclaimed property disputes. Matt is often called on to counsel on audits, protests before state administrative agencies, and appeals to state courts. He also advises multinational companies on the state and local tax aspects of corporate restructurings and transactions.



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Cosimo A. Zavaglia is a partner-elect in the Tax practice. With a focus on state and local tax issues involving corporations, partnerships, and individuals, Cosimo advises clients on a range of multistate tax issues, including controversy, planning, and compliance. He handles matters related to state and local income and franchise taxes, gross receipts taxes, entity-level taxes, sales and use taxes, telecommunications taxes, and real estate transfer taxes. Cosimo also develops state tax planning strategies for corporate restructurings, mergers, acquisitions, and dispositions.



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Justin D. Cupples is of counsel in the Tax practice. He focuses his practice on providing the highest quality State and Local Tax (SALT) counsel and advocacy to Fortune 500 companies and large multistate organizations. Justin obtains significant state tax savings for his clients by developing and implementing state tax return positions, defending state tax audits, and advocacy through administrative appeals and litigation.



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Jennifer Breen is a partner in the Tax practice. She concentrates her practice on tax controversy and planning matters, with an emphasis on audits and controversies and Internal Revenue Service (IRS) administrative proceedings. Jennifer routinely handles matters involving US federal income tax, foreign tax, state and local corporate and business tax, and sales and use tax. She has experience representing major corporations, partnerships, S corporations, and individuals in resolving domestic and international compliance and controversy issues before the IRS.



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