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U.S. SUPREME COURT UPDATE

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Remembering the Late Justice Antonin Scalia

***41** Justice Antonin Scalia, Supreme Court Justice, died on February 13, 2016, at the age of 79. He was a member of the Supreme Court since 1986, when then President Ronald Reagan nominated him to the Supreme Court and he was confirmed by the Senate by a vote of 98 to 0.

'He was an extraordinary individual and jurist, admired and treasured by his colleagues,' Chief Justice John G. Roberts Jr. said in a statement confirming Justice Scalia's death. 'His passing is a great loss to the Court and the country he so loyally served.'

The Justices did not meet for their Friday, February 19 Conference because of a ceremony held in the Great Hall of the Supreme Court in his honor. Justice Scalia's widow, his children, the eight sitting Justices, President Barack Obama and Michelle Obama, and others, showed gestures of respect during the ceremony. In this issue of the JOURNAL, we share some of his last quips during oral argument, which will be well missed.

Supreme Court Hears Oral Argument Over Tribal Liquor Tax

In this issue of the JOURNAL, we discuss the recent oral argument in *Nebraska v. Parker* (Docket No. 14-1406), where the Court is now set to decide whether alcoholic beverage dealers operating in the Village of Pender, Nebraska, must comply with tribal liquor license and taxing regulations that impose a 10 percent sales tax on all liquor sales made on the Omaha Indian Reservation.

At issue before the Court is not whether the Omaha Tribal Council has the authority to impose such taxes generally, but rather whether the Omaha Indian Reservation itself encompasses the Village of Pender. Put differently, the alcoholic beverage dealers, who were joined by the Village of Pender and the State of Nebraska, ask the Court to consider whether an 1882 Act of Congress diminished the boundaries of the Omaha Indian Reservation, such that the tribe lacks jurisdiction to impose and enforce the liquor tax in Pender.

As we go to press, we also still await the Court's ruling in *Franchise Tax Board of the State of California v. Hyatt* (Docket No. 14-1175). As reported in the last edition of this column, the Court, on 12/7/15, heard oral arguments in this case and will now

decide whether the California Franchise Tax Board should receive full immunity from a civil suit brought by a Nevada taxpayer in Nevada state court. As part of its grant of certiorari, the Court agreed to review whether *Nevada v. Hall*, a prior decision by the Court, which permitted California to govern over a suit brought against Nevada without Nevada's consent, should be overruled.

**2 Finally, we note that at press time one of our previously reported petitions remains pending before the Court and two previously reported petitions have been denied.

High Court Asked to Rule on Indian Tribe's Right to Impose Liquor Tax in Disputed Territory

As mentioned above, on 1/20/16, the Court heard oral argument in *Nebraska v. Parker*, Docket No. 14-1406, ruling below as *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2014). In *Parker*, the Court must decide whether an 1882 Act of Congress (the '1882 Act') signaled Congress's intent to diminish the boundaries of the Omaha Tribal Reservation. Residents of the Village of Pender, Nebraska (who are now joined by the Village itself and by the State) (collectively 'Nebraska') first raised the diminishment question in the cases below in connection with a challenge to the tribe's right to impose a 10 percent sales tax on the purchase of alcoholic beverages within the Village.

The tax at issue applies to liquor sales to both Indian and non-Indian customers, but it applies only to sales on tribal land. In the rulings below, a Nebraska federal district court and the U.S. Court of Appeals for the Eight Circuit found that because the Omaha Indian Reservation was not diminished by the 1882 Act, the Village of Pender remains within the tribal boundaries and, thus, the tax at issue rightfully applies to all liquor sales in Pender.

*42 In its petition for certiorari, Nebraska argued that these lower courts failed to properly apply the three diminishment factors articulated in *Solem v. Bartlett,* 465 U.S. 463 (1984). In *Solem*, the Court reviewed another federal land surplus act and examined whether that act was intended to diminish the boundaries of a South Dakota reservation.

In reaching its decision, the Court examined three factors: (1) the language of the act in question; (2) the events surrounding the passage of the act; and (3) the treatment of the disputed territory after the act was passed. According to Nebraska, the courts below failed to properly weigh the third *Solem* factor, which Nebraska now argues clearly supports a finding by the Court that the boundaries of the Omaha Indian Reservation were diminished by the 1882 Act.

Court questions the merits of de facto diminishment.

During oral argument, Nebraska continued its focus on the third *Solem* factor—*i.e.*, the treatment of the Omaha Tribal Reservation after the passage of the 1882 Act. And Nebraska's Solicitor General, James D. Smith, Esq., who appeared on the state's behalf, reiterated the fact that, for over 130 years, there has existed a lack of both tribal members (i.e., 'the non-Indian population has always been greater than 98 percent') and tribal authority in the area surrounding Pender. This, according to Mr. Smith, supports a finding of diminishment.

Although Mr. Smith originally framed his argument as in line with the Court's decision in *Solem*, the Justices were quick to ask whether Nebraska was arguing not for a fair application of the *Solem* factors, but, instead, for a standalone de facto diminishment test. Mr. Smith responded that he 'would not be opposed to the Court concluding and reaching [its] decision on the grounds of de facto diminishment,' but he also argued that, under *Solem*, the Court must examine the facts on the ground as they exist following a federal land surplus act. In other words, Mr. Smith argued that under both *Solem* and under a standalone de facto diminishment test, courts must apply a certain degree of hindsight in determining whether Congress intends to reduce the boundaries of a reservation.

**3 The Justices, however, struggled to accept the idea that facts subsequent to the enactment of a law could offer any insight into the legislative intent of the original lawmakers. Justice Scalia, for example, noted that it 'doesn't make any sense' to look

at the behaviors of a subsequent Congress when determining legislative intent. And Justice Kagan claimed that it was ‘a stretch to use subsequent legislative history or subsequent history generally when we're dealing with interpreting a statute.‘

Instead, Justice Kagan appeared more interested in the language of the 1882 Act itself, noting, ‘We do have pretty clear and settled law in this area with respect to diminishment . . . [and] the idea is that we're supposed to look to congressional intent . . . . And it seems as though the language here in—in the act in which we're concerned—it's—it's none of the language that would suggest that Congress diminished [the Omaha Indian Reservation with] this act. ‘ Accordingly, Justice Kagan asked Mr. Smith whether there was ‘anything in the language of this statute that suggests a diminishment?‘

Paul D. Clement, Esq., who appeared on behalf of the Omaha Tribal Council, further advanced this argument before the Court, when he stated: ‘Now the first, and probably most significant, factor is that the text of the statute uses the classic language this Court has justified for opening up a reservation for settlement without creating a diminishment. And, secondly, and I think very telling and specific to this statute, at the same time there is no language in the statute that supports a finding of diminishment.‘

Not having a direct answer to Justice Kagan's question, Mr. Smith responded only that *Solem* ‘specifically say[s] no particular form of words are required.‘

***43** Mr. Smith then went on to sidestep the question and return to his original point, noting that it is the *Solem* ruling itself that expressly asks courts to examine ‘the decades immediately after the Act.‘ And according to Mr. Smith, ‘in the decades immediately after this Act,‘ there has been a ‘total, one hundred percent consistent record‘ suggesting the diminishment of the Omaha Tribal Reservation.

Opposing the idea of de facto diminishment, both Mr. Clement, and Allon Kedem who appeared on behalf of the U.S. government, questioned the idea of relying on recent history to interpret a 130-year-old statute. First, Mr. Clement noted that the third *Solem* factor is not intended to be ‘a standalone alternative route to find diminishment.‘ And Mr. Kedem argued that Indian Reservations ‘retain [their] reservation status until Congress explicitly indicates otherwise.‘ Without any such indication, diminishment cannot occur, and according to Mr. Kedem, there is no ‘freestanding alternative path to change the boundaries of a reservation.‘

The Court's decision in *City of Sherrill v. Oneida Indian Reservation of New Y* ork, issued in 2005, was also addressed in support of de facto diminishment. The Court in *City of Sherrill* rejected long-delayed Indian land claims based on the equitable principle that a long history of state jurisdiction precluded the tribe from reasserting its authority. There was some discussion before the Court over whether Nebraska relied upon this precedent in the proceedings below. Chief Justice Roberts stated that ‘the other side says you did not raise a *City of Sherrill* argument. Do you agree with that?‘ Mr. Smith replied, ‘we have.‘ (See the discussion below of Mr. Smith's *City of Sherrill* ‘justifiable expectations‘ argument before the Court).

‘Justifiable expectations.‘

****4** In his time before the Court, Mr. Smith emphasized that the Court's ruling will impact more than just the tribal liquor tax at issue. Specifically, Mr. Smith noted that this case involves the ‘justifiable expectations of those who live in the disputed area.‘ In other words, Nebraska expressed its concern that a new sovereign—the Omaha Tribal Council—had suddenly entered a region upon which it had not previously exercised any sovereign authority. And this, according to Mr. Smith, constitutes ‘a huge disruption of expectations.‘ (The Justices did, however, bring out during oral argument that the tribe had to get approval for taxation from the federal government.)

What's more, Mr. Smith argued, was that in connection with this new sovereign in their lives, the citizens of Pender lacked adequate recourse if they disagree or are wronged by one of the tribe's laws. If, for example, the Court allows Nebraska's laws and regulations to be replaced or augmented with tribal regulations, Mr. Smith warned that Pender citizens who ‘call the state of

Nebraska' to voice their concerns will be met with the unhelpful response of 'I'm sorry you've called the wrong number.' In other words, Mr. Smith argued that liquor taxes are only the beginning of Pender's problems if the tribe's taxing authority is upheld.

Not surprisingly, Mr. Clement disagreed that there existed any significant risk of jurisdictional conflict, but he faced several questions on this point. Justice Ginsburg, for example, wanted to know what else the Omaha Tribal Council could do if the Court were to uphold the tribe's right to impose these liquor taxes. And although Mr. Clement tried to downplay the likelihood of any additional tribal involvement with or control over non-Indian citizens of Nebraska, Chief Justice Roberts raised concerns about the inherent conflicts of 'overlapping jurisdiction.'

Similarly, Mr. Kedem, appearing on behalf of the U.S. government, faced questions about the consequences of allowing the tribe to impose jurisdiction over the non-Indian residents of Pender. Justice Kennedy in particular dismissed Mr. Clement's claim that, practically speaking, there was little to be concerned about in this case.

According to Justice Kennedy, the Court's questioning was meant to uncover the consequences of a ruling in favor of the tribe, and the response of 'oh; it's a practical matter . . . [d]on't worry,' failed, in Justice Kennedy's mind, to answer the question. The Justices therefore continued to question both Mr. Clement and Mr. Kedem about the inherent conflicts of allowing multiple sovereigns to tax, police, regulate, and govern the citizens of Pender.

While the immediate effect of the Court's ruling may be limited to taxes, it is clear from the parties' arguments that this case is likely to have a broad and lasting impact on both Indian and non-Indian residents in disputed tribal areas. And while Nebraska framed the larger issue as one of 'justifiable expectations,' Mr. Kedem argued that 'the single most unsettling thing that this Court could do would be to suggest that the borders of reservations depends [*sic*] not on what Congress said about them, but on shifting demographic patterns or who provides what services where.' (For more background on this case, including a discussion of the original petition for certiorari, see U.S. Supreme Court Update, 25 JMT 43 (January 2016).)

Court Set to Decide State Sovereignty Case

****5 *44** As noted in our last column, the Court, on 12/7/15, heard oral argument in *Franchise Tax Board of the State of California v. Hyatt*, Docket No. 14-1175, ruling below at 335 P.3d 125 (Nev. 2014). The Court is therefore now set to rule on the scope of sovereign immunity as between states. More specifically, the Court is considering whether the California Franchise Tax Board (the 'FTB') is immune from a civil suit brought by a Nevada taxpayer in Nevada state court. Although the Court previously addressed a similar issue in *Nevada v. Hall*, 440 U.S. 410 (1979), finding that sovereign immunity is not absolute when it comes to states vis-a-vis other states, California has asked the Court to revisit that holding and to find that Nevada has overstepped its jurisdiction.

In the case below, the Supreme Court of Nevada largely reversed a jury award of $139 million in tort damages and $250 million in punitive damages awarded in favor of inventor Gilbert P. Hyatt in his lawsuit against the FTB. The decision of the lower court, however, was not a complete victory for the FTB. Specifically, the Nevada court found that not all of Hyatt's causes of action were barred under principles of discretionary-function immunity and comity.

Instead, the Nevada high court affirmed the lower court's findings that the FTB committed fraud and intentional infliction of emotional distress in its audit of Hyatt. And although the damages imposed against the FTB were significantly reduced, the Nevada Supreme Court ruled that the FTB was not immune from suit in Nevada state court and was therefore unable to escape all liability.

(For more background on this case, including a detailed discussion of the underlying audit of Mr. Hyatt, see U.S. Supreme Court Update, 25 JMT 40 (July 2015).

Petition Still Pending

The following petition remained pending as the JOURNAL went to press.

ERISA preemption provision challenge to MI 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, 59 EBC 1406 (6th Cir. 2014), the U.S. Court of Appeals for the Sixth Circuit affirmed a federal 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)).

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.'

****6** In the proceedings below, the Self-Insurance Institute of America, Inc. ('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.

***46** In its petition for review, SIIA argues 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.' Accordingly, SIIA argues (as it did in the proceedings below) that the Supremacy Clause of the U.S. Constitution (art. VI, § 2) and ERISA's preemption provision, prohibit the application of the Michigan Act to ERISA-covered entities. (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).)

Petitions Denied

On 2/29/2016, the Court denied review in ***Kentucky Department of Revenue v. Bulk Petroleum Corp.***, Docket No. 15-569, petition for cert. filed 10/29/15, ruling below as *Bulk Petroleum Corp. v. Kentucky Department of Revenue*, 796 F.3d 667 (7th Cir. 2015) in which the U.S. Court of Appeals for the Seventh Circuit had held that Bulk Petroleum Corporation ('Bulk') was entitled to a refund of Kentucky gasoline or special fuel taxes ('Fuel Tax') paid on fuels delivered outside the state.

In its petition for review, the Kentucky Department of Revenue ('KDOR') had argued that Kentucky's Fuel Tax did not place the legal incidence of the tax on Bulk—who, during the relevant times, was an unlicensed dealer—but, instead, on Bulk's suppliers. Accordingly, Kentucky argued that Bulk was not a 'taxpayer' for purposes of Kentucky's Fuel Tax, and, therefore, Bulk was not entitled to a refund under the state's tax statutes.

More specifically, the KDOR asked the Court to consider 'whether the court below failed to apply this Court's precedent for determining the incidence of a state fuel tax developed in such cases as *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965), *Gurley v. Rhoden*, 421 U.S. 200 (1975) and *Wagnon v. Prairie Potawatomi Nation*, 546 U.S. 95 (2005), with respect to the State of Kentucky's gasoline and special fuels tax of KRS 138.220(1) and instead effectively resurrected the discarded rule of *Panhandle Oil Co. v. State of Mississippi ex. Rel. Knox*, 277 U.S. 218 (1928), and its progeny to the incorrect result.' (For more background

on this case, including a discussion of Kentucky's Fuel Tax regime, see U.S. Supreme Court Update, 25 JMT 42 (February 2016).)

7 Also on 2/29/2016, the Court denied review in ***Taylor v. Yee*, Docket No. 15-169, petition for cert. filed 8/5/15, ruling below at 780 F.3d 928 (9th Cir. 2015), in which a group of California taxpayers had asked the Court to review the constitutionality of California's Unclaimed Property Law (Cal. Civ. Proc. §§ 1300, et seq.; 'UPL') on an as-applied basis. The U.S. Court of Appeals for the Ninth Circuit had held that the California Controller did not violate the Due Process Clause in administering the UPL. Specifically, it found that the taxpayers failed to sufficiently state an as-applied claim to support their argument that the Controller failed to provide constitutionally adequate notice for the transfer of property under the UPL on a pre-escheat basis by failing to obtain information from all available state databases.

In their petition for certiorari, the taxpayers cited to the Supreme Court's recent decision in *Horne v. Department of Agriculture*, in which the Court held that the U.S. Government had violated a group of raisin growers' constitutional rights under the Takings Clause of the Fifth Amendment by requiring growers to set aside a certain portion of their raisins for government use without offering just compensation.

The taxpayers had asked the Court whether, in light of that decision, the Ninth Circuit's ruling should be remanded for further proceedings. Alternatively, the taxpayers had asked the Court to consider whether the UPL violates the Due Process Clause because it allegedly 'deprives owners of their property without affording constitutionally adequate notice.' (For more background on this case, including a discussion of the current notice requirements under California's UPL, see U.S. Supreme Court Update, 25 JMT 41 (November/December 2015).)

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