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U.S. SUPREME COURT UPDATE

DEBRA S. HERMAN is a partner in the New York City office of the law firm Hodgson Russ LLP. She thanks K. Craig Reilly for his contributions to this column.

Court Upholds Obamacare

***39** As reported in our last column, on 6/25/15, the U.S. Supreme Court issued its opinion in *King v. Burwell* (Docket No. 14-114, cert. granted 11/7/14). The King challengers argued that the Patient Protection and Affordable Care Act (‘Obamacare‘or ‘ACA‘) authorized the Internal Revenue Service to issue tax credits solely ‘through an Exchange established by the State,‘ and not through exchanges established by the federal government. Thus, the Court was asked to interpret the meaningof the phrase ‘Exchange established by the State‘ under the ACA.

In a 6 to 3 decision, the Court held that ACA's tax credits for health insurance are available in states that have a federal exchange. Although a majority of the Justices acknowledged that ‘the meaning of the phrase ‘an Exchange established bythe State . . .’ may seem plain ‘when viewed in isolation,’ such a reading [which would have disallowed credits for insurance purchased through federally operated Exchanges] turns out to be ‘untenable in light of [the statute]

as a whole.'‘ Thus, the ‘context and structure of the Act‘ compelled the Court to depart from what would ‘otherwise be the most natural reading of the pertinent statutory phrase.‘

In addition to our *King* commentary, we note that the Court has granted certiorari in two previously reported petitions. First, in *Hickenlooper v. Kerr* (Docket No. 14-460, cert. granted 6/30/15) the Court granted certiorari onlyto vacate the judgment below and remand the case back to the U.S. Court of Appeals for the Tenth Circuit for further consideration in light of the High Court's recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,2015 U.S. Lexis 4253 (2015). Second, in *Franchise Tax Board of the State of California v. Hyatt* (Docket No. 14-1175, cert. granted 6/30/15) the Supreme Court will now consider whether Nevada courts may refuse to extend to the California FranchiseTax Board (FTB) the same immunities that Nevada state agencies enjoy in those courts. In the case below, the Supreme Court of Nevada ruled on a taxpayer's lawsuit against the FTB. And although the damages imposedagainst the FTB were significantly reduced by the Nevada court, the California taxing authority was unable to escape all liability based on state sovereignty principles.

****2** We also review two new petitions for certiorari filed by DIRECTV and DISH Network. The new petitions, which the satellite providers have asked the Court to consider jointly, seek clarification for determining what makes taxpayers ‘similarly situated‘under the dormant Commerce Clause. The satellite companies claim that Massachusetts's and Tennessee's disparate tax treatment of satellite providers, as compared to cable providers, violates the dormant Commerce Clause because the two businesses are similarlysituated and yet taxed unequally in these states.

Finally, we note that three previously reported petitions remain pending.

Court Approves ACA Tax Credits for Health Insurance on Federal Exchanges

As restated by the Court, Obamacare adopted ‘a series of interlocking reforms designed to expand coverage in the individual health insurance market.‘ These reforms included (1) barring insurers from taking a person's health into account when decidingwhether to sell health insurance or how much to charge (‘the guaranteed issue and community rating requirement‘); (2) requiring individuals to maintain insurance coverage or make a payment to the Internal Revenue Service (IRS) (the ‘individualmandate‘); and (3) providing tax credits to make insurance more affordable. At issue before the Court was the ACA's third component: tax credits. More specifically, the Court was asked to address the availability of such credits for individuals purchasinghealth insurance on federally operated ‘Exchanges,‘ also known as marketplaces.

Federally operated Exchanges currently exist in the 34 states that have not established their own marketplaces. These Exchanges exist because the ACA requires the creation of an ‘Exchange‘ in each state where people can shop for health insurance,but Exchanges may be created in one of two ways: (1) by the individual states or (2) if a state chooses not to establish its own Exchange, the ACA provides that the Secretary of Health and Human Services (the ‘Secretary‘) ‘shall . . . establishand operate such Exchange within the State.‘

Tax credits— Section 36B.

As stated above, one of the principal goals of Obamacare was to offer affordable insurance coverage. Accordingly, Section 36B of the Internal Revenue Code (‘ Section36B‘) provides refundable tax credits to individuals with household incomes between 100 and 400 percent of the federal poverty line. But in order to receive such a credit, the individual must enroll in an insurance plan purchased from ‘anExchange *established by the State* under [42 U.S.C. § 18031]‘ (emphasis added). The Court therefore needed to determine whether the federally operatedExchanges (discussed above) were ‘established by the State‘ as that phrase was to be interpreted under the ACA.

Giving rise to the underlying petition for certiorari was the IRS's interpretation of the ACA via promulgation of a rule ***40** (77 Fed. Reg. 30378 (2012); the ‘IRS Rule‘) that made the tax credits available on both state and federal Exchanges. Accordingto the Petitioners (four Virginia taxpayers), however, federally operated marketplaces (like the one established in Virginia) are not Exchanges ‘established by the State.‘ And therefore, the Petitioners argued, tax credits are not available to individualswho purchase insurance from federal Exchanges. (The IRS Rule would require the *King* Petitioners to either buy health insurance they did not want and receive tax credits to reduce the costs of buying such insurance, or make a payment to the IRS).

***Chevron* deference does not apply.**

****3** Chief Justice Roberts, who delivered the majority opinion for the Court, first noted that the Court would not apply the familiar two-step test announced in *Chevron U.S.A., Inc. v. Natural Resource Defense Counsel, Inc.* in reviewing the IRS'sinterpretation of Section 36B. The *Chevron* test, which is often used to determine whether a court should defer to an agency's interpretation of a statute, asks two general questions:(1) whether the statute is ambiguous, and (2) if so, whether the agency's interpretation of that statute is reasonable.

In the present case, if the Court had applied the *Chevron* test, it would have first asked whether the phrase ‘established by the State‘ was ambiguous and, if the answer was yes, then decided whether the IRS's interpretation of the languagewas reasonable. But according to Justice Roberts, the *Chevron* test is inapplicable in ‘extraordinary cases,‘ and given the importance of tax credits under the ACA, the Court found that it was extremely unlikely Congress meant to delegatean interpretation of Section 36B to the IRS. Thus, instead of analyzing the reasonableness of the IRS Rule interpreting Section36B, the Court sought to determine itself the correct reading of the statute.

The language of Section 36B is ambiguous.

The Court began its analysis with a review of the text of Section 36B—which, as stated above, allows an individual to receive tax credits if the individual enrolls in an insuranceplan through ‘an Exchange established by the State under [42 U.S.C. § 18031].‘ Although the ACA expressly defines the term ‘State‘ to mean ‘eachof the 50 States and the District of Columbia‘—a definition that, even Justice Roberts admits, does not include the federal government—the Court noted that many conflicting provisions in the ACA nevertheless render the phrase ‘establishedby the State‘ ambiguous.

For example, the majority noted that despite statutory language suggesting state and federal Exchanges are to operate in the same manner, the Exchanges would ‘differ in a fundamental way if tax credits were available only on State Exchanges.‘ Morespecifically, ‘one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not.‘

The Court also found that the ‘conclusion that Section 36B is ambiguous is further supported by several provisions that assume tax credits will be available on both State and FederalExchanges.‘ For example, all Exchanges are instructed to report information about the number of credits they grant, and all Exchanges must assist taxpayers in determining their eligibility for tax credits. According to the Court, ‘[i]f taxcredits were not available on Federal Exchanges, these provisions would make little sense.‘

Thus, given the ACA's numerous examples of ‘inartful drafting,‘ the Court found the text of Section 36B to be ambiguous, and thus turned to the broader structure of the ACA todetermine the meaning of the phrase ‘established by the State.‘

Limiting tax credits would cause ‘death spirals.‘

****4** According to Chief Justice Roberts, ambiguous statutory provisions are ‘often clarified by the remainder of the statutory scheme.‘ And in the present case, the overall statutory scheme compelled the Chief Justice to reject the Petitioners' interpretationof Section 36B because it would ‘destabilize the individual insurance market in any State with a Federal Exchange, and likely create the very ‘death spirals' that Congress designedthe Act to avoid.‘

As stated above, the three major reforms of Obamacare—guaranteed coverage and community rating, the individual mandate, and tax credits—were meant to work in tandem and to collectively ‘minimize . . . adverse selection and broaden the healthinsurance risk pool to include healthy individuals, which will lower health insurance premiums.‘ But these reforms cannot exist independently.

Without tax credits, fewer healthy individuals would purchase insurance; and without healthy individuals purchasing insurance, the costs to cover those with preexisting health issues would rise; and with rising costs, more and more healthy people would leavethe insurance market until a proverbial ‘death spiral‘ of fleeing customers and rising costs would eventually destroy the market. And according to Chief Justice Roberts, ‘[i]t is implausible that Congress meant the Act to operate in thismanner.‘

Moreover, it was clear to the Court that ‘Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation.‘ And because ‘those requirements only work when combined with the coverage requirement andthe tax credits . . . [,] it stands to reason that Congress meant for those provisions to apply in every State as well.‘

The Chief Justice's ruling was not without caveat, however. Understanding that reliance on context and structure in statutory interpretation calls for ‘great wariness lest what professes to be mere rendering becomes creation and attempted interpretationof legislation becomes legislation itself,‘ the Chief Justice nonetheless found that such reliance was appropriate in this case.

According to Justice Roberts, ‘Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.‘ And because a limitation on tax credits for insurance purchased through federally operated Exchanges would risk triggeringan insurance ‘death spiral,‘ the majority found that Congress had not intended to limit tax credits to only state Exchanges.

Justice Scalia attacks majority's attempts to save ‘SCOTUScare.‘

In a strongly worded dissent, Justice Scalia, joined by Justices Thomas and Alito, attacked what he viewed as the majority's attempt to ‘rewrite‘ the Act, labeling it ‘interpretive jiggery-pokery‘ and ‘[p]ure applesauce.‘According to Justice Scalia, ‘[t]he Court holds that when the Patient Protection and Affordable Care Act says ‘Exchange established by the State’ it means ‘Exchange established by the State or the Federal Government.’ That is of coursequite absurd, and the Court's 21 pages of explanation make it no less so.‘

****5** Specifically, Justice Scalia took issue with the majority's reliance on context and structure when, in his eyes, the language of Section 36B plainly restricts the availability of tax creditsto only individuals who enroll in state Exchanges. As restated by Justice Scalia, ‘[t]he Secretary ***41** of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State—whichmeans people who buy health insurance through such an Exchange get no money under §36B.‘ Or, put differently, ‘[w]ords no longer have meaning if an Exchange that is *not* established by a State is ‘established by theState.’‘

Justice Scalia notes that ‘[s]tatutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision,‘ and he doubts whether anyone could ‘maintain with a straight face that §36B is unclear. ‘Justice Scalia therefore strongly questions whether Section 36B is truly ambiguous and challenges the Court's reliance on ‘extrinsic circumstances‘ to interpret an otherwise clearprovision. And while Justice Scalia acknowledges the majority's concern that a lack of tax credits could destabilize the individual insurance market, he reasons that such a result ‘would show only that the statutory scheme contains a flaw; [it]

would not show that the statute means the opposite of what it says.‘

But more than taking issue with the majority's current reliance on context to defeat the otherwise plain meaning of the statute, Justice Scalia notes that ‘today's opinion changes the usual rules of statutory interpretation for the sake of the AffordableCare Act. That, alas is not a novelty.‘ Revisiting *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), Scalia reminds readers that the Court previously saved the individual mandate by reclassifying a ‘mandate-cum-penaltyas a tax.‘ And, as Justice Scalia states earlier in his dissent, ‘normal rules of interpretation seem to always yield to the overriding principle of the present Court: The Affordable Care Act [or, as Justice Scalia relabels the law, ‘SCOTUScare’]

must be saved.‘

Satellite Providers' Dormant Commerce Clause Challenges

In *DIRECTV, LLC v. Massachusetts Department of Revenue*, Docket No. 14-1499, petition for cert. filed 6/18/15, ruling below at 25 N.E.3d 258 (Mass. 2015) and *DIRECTV, Inc. v. Roberts*, Docket No. 14-1524,petition for cert. filed 6/23/15, ruling below at No. M2013-0167-COA-R3-CV (Tenn. Ct. App. 2015), DIRECTV and DISH Network, two providers of direct broadcast satellite services (the ‘satellite providers‘), petition the Supreme Court to review the questionof whether businesses are 'similarly situated' for Commerce Clause purposes if they directly compete in a relevant market. In the rulings below, both the Massachusetts Supreme Judicial Court and the Tennessee Court of Appeals found that the satelliteproviders were not similarly situated to cable providers and that, therefore, the satellite providers could not show that the states' tax schemes discriminated against satellite providers in violation of the dormantCommerce Clause.

Dormant Commerce Clause.

****6** The Commerce Clause of the U.S. Constitution provides that 'Congress shall have Power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.' (Art. I, § 8, cl. 3) But, as stated by the Massachusettscourt below, the 'United States Supreme Court has 'long interpreted the commerce clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute.'' This 'implicit restraint' is known as the 'dormant'Commerce Clause. And ***42** under the test announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a state tax is permissible under the dormant Commerce Clause only if it '[1] is applied to an activity with a substantialnexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by theState.'

In order, however, for a taxpayer to show that a tax discriminates against interstate commerce in violation of the third-prong of the test listed above, both the Massachusetts and Tennessee courts noted that interstate taxpayers must first show that theyare 'similarly situated' to an in-state rival receiving alleged beneficial treatment. As restated by the Tennessee Court of Appeals, '[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are,for the relevant purposes, similarly situated. ' And in the cases below, neither court found that the satellite providers had met this threshold.

Interstate satellite providers vs. in-state cable providers.

Both the Massachusetts and Tennessee courts accepted the satellite providers' characterization of their business models as involving more of an interstate component than that of cable companies. In other words, both courts agreed that a discriminatory taximposed against satellite providers could run afoul of the dormant Commerce Clause if the entities were similarly situated.

The inter- versus in-state nature of the two businesses results from the different levels of investment each provider makes in the local economies in which it operates. While cable companies typically have dozens of local facilities in each state, knownas 'headends,' satellite providers collect, process, and package their programming at national 'uplink centers,' which, in the case of DIRECTV and DISH, are located outside of Massachusetts and Tennessee. Thus, satellite providers, as comparedto cable providers, typically invest substantially less money and create far fewer jobs in local economies outside of those surrounding their uplink centers.

Because of these differences, the courts recognized that Massachusetts and Tennessee may have improper motives for treating cable companies more favorably. As stated by the Tennessee Court of Appeals, '[w]here operational differences and geographyare linked, the negative Commerce Clause does not permit favoritism to local interests at the expense of out-of-state interests, even where the challenged tax scheme discriminates only by reference to operational differences.' Similarly, the Massachusettscourt 'assume[d] for purposes of [its] analysis, that the cable companies and the satellite companies represent in-State and out-of-State interests respectively.'

The allegedly discriminatory tax provisions.

****7** Both Massachusetts and Tennessee apply different taxes to satellite providers than to cable providers. First, Massachusetts imposes a 5 percent excise tax on video programming delivered by direct satellite broadcast. Cable companies, however, do not paythe excise tax. Instead, cable companies pay 'franchise fees' to local governments, which, as restated by the court below, are 'typically [3] to [5] per cent of gross revenue,' along with 'additional fee[s]

. . . at an average rate of 1.09 [percent] of gross revenue, dedicated to supporting public, educational, and government programming.‘ Finally, cable companies also pay a personal property tax on poles, underground conduits, wires, and othertypes of property that satellite companies do not use (and therefore are not taxed upon).

In Tennessee, the state imposes a sales tax on subscription fees charged by both satellite and cable providers. The state, however, exempts the first $15.00 of fees charged by cable companies, without offering any like exemption for satellite providers.

In the cases below, DIRECTV and DISH contended that both of these tax schemes unconstitutionally discriminate against satellite providers. The courts, however, held that because satellite providers and cable providers are not substantially similar entitiesfor purposes of the Commerce Clause, no actionable discrimination occurred.

Massachusetts court focuses on divergent regulatory regimes.

In deciding whether satellite providers and cable providers are similarly situated for purposes of the dormant Commerce Clause, the Massachusetts Supreme Judicial Court spent considerable energy noting the possible justifications Massachusetts might havefor taxing satellite providers differently than cable providers. According to the satellite providers, the court's analysis therefore avoided directly addressing the ‘similarly situated‘ inquiry, and in their petition for certiorari to the SupremeCourt, they take specific exception with this mixed analysis, noting that, in their opinion, the Massachusetts court wrongly ‘merged the ‘similarly situated’ inquiry with the distinct inquiry into whether the discrimination has been adequately justified.‘

Specifically, the Massachusetts court's analysis centered on a discussion of the extensive federal regulations facing cable providers, including those governing signal quality, rates, programming, mandatory emergency reporting, and censorship. The courtthen compared this regime to the relatively ‘flexible regulatory approach‘ governing satellite providers, which, according to the court, allows satellite operators to experiment with beneficial service offerings and methods of financing.

And, according to the court, ‘[t]he rate of the excise tax permissibly may allow for the fact that satellite companies do not bear the additional regulatory burdens imposed on cable companies.‘ This, the Massachusetts court found, supportedthe conclusion that the state's excise tax is not discriminatory because the cable and satellite companies are not similarly situated.

Tennessee court finds satellite providers and cable providers are not substantially similar.

****8** In its analysis of what the court described as a ‘threshold question‘ under the dormant Commerce Clause, the Tennessee Court of Appeals also focused on the regulations each business faces. The court admitted that many consumers may ‘view satelliteand cable as similar substitutes‘ and that the two industries are ‘ardent competitors for customers.‘ But the court went on to note that competition alone was not sufficient for taxpayers to qualify as substantially similar under the dormant CommerceClause.

Instead, the Tennessee court highlighted that ‘[d]espite being competitors, satellite and cable providers do have an important distinction. Cable providers are heavily regulated by the federal government, while satellite providers are ‘minimally'regulated.‘ Focusing on many of the same regulations discussed by the Massachusetts court in DIRECTV and DISH's parallel litigation in that state, the Tennessee court found that ‘[t]he difference in regulatory treatment between satelliteand cable and the resulting benefits inuring to cable customers mean that satellite providers and cable providers are not substantially similar entities for ***43** purposes of the Commerce Clause . . . . Therefore, the disparate tax treatment of satellite providersand cable providers does not constitute discrimination.‘

Questions presented.

In their petitions for certiorari to the Supreme Court, the satellite providers present the following questions for review.

In *DIRECTV v. Massachusetts Department of Revenue*, the companies ask, 'Does the threshold requirement that two businesses be 'similarly situated' for Commerce Clause purposes depend on whether they directly compete in the relevantmarket (which is how three circuits and three state supreme courts analyze the issue), or does it instead encompass a wide-ranging inquiry into the justifications for the law and operational differences (as four circuits and, now, one state supreme courthave held)?'

Similarly, in *DIRECTV v. Roberts*, the satellite providers ask, 'Does the threshold requirement that two businesses be 'similarly situated' for Commerce Clause purposes depend on whether they directly compete in the relevant market(which is how three circuits and three state supreme courts analyze the issue), or does it instead require a court to attempt to assess whether the businesses are regulated differently, how the businesses operate, and how the state justifies the law (as fourcircuits and one state supreme court have held)?'

Petitions Granted

The Supreme Court has now granted requests for certiorari in two previously reported petitions.

Court remands Colorado legislators' challenge to state's Taxpayer Bill of Rights.

On 6/30/15, the Supreme Court granted the petition for certiorari in *Hickenlooper v. Kerr*, Docket No. 14-460, ruling below as *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), petition for rehearing en banc denied, 759 F.3d1186. In granting the petition, however, the Court merely vacated the judgment below and remanded the case back to the U.S. Court of Appeals for the Tenth Circuit for further consideration in light of its recent decision in *Arizona State Legislaturev. Arizona Independent Redistricting Commission*, 2015 U.S. Lexis 4253 (2015)—a recent Supreme Court case involving the Arizona Legislature's challenge to Proposition 106, which was a state ballot initiative that amended Arizona's Constitution andremoved redistricting authority from the Arizona Legislature and vested it in an independent commission.

****9** In *Kerr*, 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') andthat 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 Clauseof 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).)

The legislators named Colorado Governor 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 thelegislators' 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 court below held that the legislators' suit was not barred by the political question doctrine, as there were judicially discoverable and manageable standardsfor 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 the '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.'

The circuit court will now have the opportunity to revisit its holdings to ensure that they satisfy new precedent from the High Court. (For more background on ***44** this case, including the circuit court's decision, see U.S. Supreme Court Update, 24JMT 39 (February 2015).)

Court to address immunity for CA's FTB in NV intentional tort and bad-faith conduct suit.

On 6/30/15, the Court partially granted the petition in *Franchise Tax Board of the State of California v. Hyatt*, Docket No. 14-1175, ruling below at 335 P.3d 125 (Nev. 2014). In its petition for review, the California Franchise Tax Board (FTB)presented three questions for review: '[1] Whether the federal discretionary-function immunity rule, 28 U.S.C. § 2680(a), is categorically inapplicable tointentional torts and bad-faith conduct; [2] Whether Nevada may refuse to extend to sister States haled into Nevada courts the same immunities Nevada enjoys in those courts; [and 3] Whether *Nevada v. Hall*, 440 U.S. 410 (1979),which permits a sovereign State to be hauled into the courts of another State without its consent, should be overruled.' The Supreme Court has agreed to review the second and third questions above.

****10** 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 in favor of inventor Gilbert P. Hyatt in his lawsuit against the FTB. However, despite the FTB's claims thatall 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 auditof Hyatt. Accordingly—although the damages imposed against the FTB were significantly reduced by the Nevada court—the FTB was unable to escape all liability. (For more background on this case, including a detailed discussion of the underlying audit,see U.S. Supreme Court Update, 25 JMT 40 (July 2015).)

Petitions Still Pending

The following three previously reported petitions remained pending as the JOURNAL went to press.

Due Process Clause challenge to WA's retroactive application of estate tax laws.

In *Hambleton v. Washington*, Docket No. 14-1436, petition for cert. filed 6/5/15, ruling below at 335 P.3d 398 (Wash. 2014), the Supreme Court of Washington denied two estates' challenges to Washington's retroactive application of a 2013 amendmentto the state's estate tax laws. The amendment granted Washington greater authority to tax qualified terminable interest property (QTIP) trust assets, but the estates claimed that the state's eight-year retroactive application of the amendment violated theirDue Process rights.

The Washington Supreme Court rejected this argument, finding that the amendment (and the period of retroactivity) satisfied a rational basis review. The estates now petition the Court to revisit that holding and to define the Due Process rights associatedwith retroactive tax laws. (For more background on this case, including a discussion of Washington's Estate Tax laws, see U.S. Supreme Court Update, 25 JMT 38 (September 2015).)

Student loan lenders challenge MA's apportionment of income under the state's financial institution excise tax.

In *First Marblehead Corp. v. Massachusetts Commissioner of Revenue*, Docket No. 14-1422, petition for cert. filed 5/29/15, ruling below at 23 N.E.3d 892 (Mass. 2015), the Supreme Judicial Court of Massachusetts upheld a decisionof the Appellate Tax Board (the 'Board'), which determined that all of a financial institution's property—consisting exclusively of securitized student loans—was properly assigned to Massachusetts for purposes of the state's financial institutionexcise tax (FIET). The financial institution now challenges the Massachusetts ruling and, by invoking arguments from the U.S. Supreme Court's recent decision in *Comptroller of the Treasury v. Wynne*, claims that Massachusetts's apportionment schemeviolates the Commerce Clause of the U.S. Constitution by failing both the internal and external consistency tests. (For more background on this case, including a detail discussion of the Massachusetts's ruling,see U.S. Supreme Court Update, 25 JMT 38 (September 2015).)

ERISA Preemption Provision challenge to MI health insurance tax.

****11** 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 district court'sruling 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 carriersand 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)). ‘ (emphasisadded). 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.‘

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 theplans; (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 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 preemptivelanguage 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, seeU.S. Supreme Court Update, 25 JMT 45 (May 2015).)

Given the ACA's numerous examples of ‘inartful drafting,‘ the Court found the text of Section 36B to be ambiguous.

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