U.S. SUPREME COURT UPDATE

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U.S. Files Brief in N.H. v. MA, New York "Opioid Stewardship Payment" Tax Injunction Act Petition and Minnesota Due Process Challenge Petition, Plus Briefs Filed in Tribal Sovereign Immunity Case

As we go to press, the Acting Solicitor General filed a brief for the United States as amicus curiae in New Hampshire v. Massachusetts, recommending that the motion for leave to file a bill of complaint should be denied. We will cover the brief in the next issue of the Supreme Court Update.

A petition for writ of certiorari in *Healthcare Distribution Alliance v. James* (Docket No. 20 - 1611) asks whether the New York Opioid Stewardship Act's payment (the "Payment") is a "tax" within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341 (the "TIA"). The TIA forbids federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Second Circuit Court of Appeals determined that the annual Payment required of opioid manufacturers and distributors under New York's Opioid Stewardship Act ("OSA") is a "tax" within the meaning of the TIA, and therefore the United States District Court for the Southern District of New York lacked jurisdiction to invalidate or enjoin enforcement of the Payment. Two trade associations that represent manufacturers and distributors of pharmaceutical products, including opioids, Healthcare Distribution Alliance and Association for Accessible Medicines, and SpecGx, a developer, manufacturer and seller of opioids, filed the petition for a writ of certiorari with the U.S. Supreme Court.

In addition, in *Olson v. Minnesota Commissioner of Revenue* (Docket No. 20 - 1583), the Court is asked

whether issuance of the Minnesota Tax Commissioner's tax order by regular mail meets constitutional requirements of procedural due process under the Due Process Clause of the U.S. Constitution.

As reported in the last edition, in *Seneca County, New York v. Cayuga Indian Nation of New York* (Docket No. 20 - 1210), Seneca County, New York filed a petition for writ of certiorari challenging the Second Circuit's ruling that tribal sovereign immunity from suit bars the County from pursing tax enforcement foreclosure actions against a federally recognized tribe for the nonpayment of real property taxes on properties purchased in the open market. The federally recognized tribe, the Cayuga Indian Nation of New York, filed its Brief in Opposition, and Seneca County responded with its Reply Brief. Both briefs are covered in this edition of the Supreme Court Update.

We also currently await the Solicitor General's brief in *New Hampshire v. Commonwealth of Massachusetts* (Docket No. 220154) expressing the views of the United States with respect to Massachusetts' new telecommuting regulation as applied against New Hampshire residents, and the Special Master's reports in the MoneyGram cases: *Delaware v. Pennsylvania,* 220145 and *Arkansas et al. v. Delaware,* 220146.

Challenge to Ruling that New York Opioid Stewardship Payment is a "Tax" Under the Tax Injunction Act

The Second Circuit Court of Appeals concluded that "the primary purpose of the opioid stewardship payment is to raise revenue, not to punish or regulate the plaintiffs and other licensees who are required to make the payment." Accordingly, "the payment is a tax within the meaning of the TIA" and the "District Court therefore lacked jurisdiction to declare it invalid or to enjoin its enforcement."

New York's Opioid Stewardship Act.

In 2018, the New York State Legislature enacted the Opioid Stewardship Act ("OSA"), codified at N.Y. Pub. Heath Law § 3323 and N.Y. State Fin. Law § 97-aaaaa. As explained by the Second Circuit Court of Appeals, OSA was enacted to "address the substantial costs imposed by the national opioid public health crisis as it struck New York." OSA requires all licensed opioid manufacturers and distributors to pay a fixed annual "opioid stewardship payment" (the "Payment") of $100 million. (Each licensee is responsible for paying a portion of the $100 million Payment based on its market share of opioid sales in New York, based on reported opioid sales from the previous year.)

The Payment is required to be deposited into a special revenue fund established in the joint custody of the New York State Comptroller and the Commissioner of the New York State Department of Taxation and Finance and "must be used to support statewide programs that provide opioid treatment, recovery, prevention, and education services." Finally, under OSA, manufacturers and distributors of opioids are prohibited from passing the costs of the Payment through to their customers (referred to as the

"Pass-Through Prohibition"). Licensees that violate OSA's Pass-Through Prohibition are subject to a penalty of up to $1 million for each violation. Also, the New York Legislature added a severability clause, which provides that the invalidation of any part of OSA will not "affect, impair, or invalidate" the remainder of OSA.

District court opinion.

Two trade associations that represent manufacturers and distributors of pharmaceutical products, including opioids, Healthcare Distribution Alliance and Association for Accessible Medicines, and SpecGx, a developer, manufacturer and seller of opioids, filed separate actions challenging OSA and seeking declaratory (i.e. declaratory judgment that OSA is unconstitutional) and injunctive (i.e. permanent injunction against OSA's enforcement) relief against the New York Attorney General and the New York Commissioner of Health (collectively, "New York") in their official capacities. New York moved to dismiss the actions.

In a consolidated decision, the United States District Court for the Southern District of New York determined that OSA's Pass-Through Prohibition violated the dormant Commerce Clause of the U.S. Constitution, and since that provision was not severable from the rest of OSA, the District Court invalidated the OSA in its entirety.

As explained by the Court of Appeals, the New York Legislature amended the OSA to expire December 2018, and then enacted a new law that excluded a pass-through prohibition. Based on the new law, New York elected not to seek reversal of the District Court's invalidation of the Pass-Through Prohibition. Rather, New York limited its appeal to the Second Circuit Court of Appeals solely to the reversal of the District Court's invalidation of the remainder of the OSA, including the Payment.

The Tax Injunction Act.

The Tax Injunction Act, 28 U.S.C. § 1341 (the "TIA") forbids federal district courts from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." As explained by the Second Circuit Court of Appeals, the TIA "prohibits declaratory as well as injunctive relief." **1** Per the Court of Appeals, "[t]wo conditions must be satisfied to invoke the protection of the TIA: first, the surcharges must constitute 'taxes,' and second, the state remedies available to plaintiffs must be 'plain, speedy and efficient.'" Since the parties did not dispute the second condition, the decision focused on the first condition, whether the Payment is a "tax."

Application of the three-factor *San Juan test*.

The Second Circuit Court of Appeals explained that "[a]though there is no bright line between assessments that are taxes and those that are not, most courts agree that [a]ssessments which are imposed primarily for revenue-raising purposes are 'taxes,' while levies assessed for regulatory or punitive purposes, even though they may also raise revenues, are generally not 'taxes.'" Furthermore the Court of Appeals, noted its approval of a three-factor test devised by the First Circuit, in *San Juan Cellular Telephone Co. v. Public Service Commission*, **2** which factors are: (1) the nature of the entity imposing the assessment, (2) the population subject to the assessment, and (3) the ultimate allocation or use of the revenues generated by the assessment. However, it also noted that in *Entergy Nuclear Vt. Yankee, LLC v. Shumlin,* **3** the Court of Appeals focused on the third *San Juan* factor finding it unnecessary to adopt the other two factors at that time.

Consequently, per the Court of Appeals, "'[t]he principal identifying characteristic of a tax, as opposed to some other form of state-imposed financial obligation . . . is whether the imposition serve[s] general revenue-raising purposes,' which 'in turn depends on the disposition of the funds raised.'" Or stated differently, "if the funds are allocated to 'provide[] more narrow benefits to regulated companies or defray[] [an] agency's cost of regulation,' the assessment is more likely to be seen as a regulatory fee that does not implicate the TIA.'" Here, the Court of Appeals opined that "New York's allocation of revenues from the Payment . . . strongly suggests that the [ ] Payment requirement serves general revenue raising purposes without a regulatory or punitive aim." It also noted that the funds from the Payment are statutorily directed to support programs that are operated or authorized to provide opioid treatment, recovery and prevention and education services and to support the State's prescription monitoring program registry. Per the Court of Appeals, these "programs and the registry reflect broad public health initiatives that undoubtedly provide a 'general benefit' to New York residents 'of a sort often financed by a general tax.'" Moreover, OSA "effectively bars using any revenue generated from the stewardship payment to deliver 'narrow benefits' to opioid manufacturers and distributors."

The Court of Appeals also found that the two other *San Juan* factors "reinforces the view that the opioid stewardship payment is a tax." First, examining the nature of the entity of the assessment, the Court of Appeals noted that the Payment was "clearly imposed by the Legislature, which wields the taxing power, and not by a 'limited-purpose' agency."

Second, examining the population subject to the assessment, the Court of Appeals rejected the argument that the Payment falls on a narrow set of only 97 companies, finding such argument "too simplistic." Instead, the Court of Appeals found that it was its "task to consider whether '[t]he category of persons or entities subject to [a] tax[ ] is defined by general and open ended criteria, even if only a few entities, or one entity alone, are subject to the tax.'"

Accordingly, the Court of Appeals concluded "when viewed properly in that light, the population subject to the stewardship payment consists of '[a]ll manufacturers and distributors . . . that sell or distribute opioids in the state of New York,'" and "[s]o defined, the category is broad and general enough to qualify the payment at issue in this appeal as a tax."

Question presented.

"Whether the New York Opioid Stewardship Act's surcharge is a 'tax' within the meaning of the Tax Injunction Act, despite having features that other circuits repeatedly have held indicative of a punitive fee."

Due Process Challenge to Minnesota's Notice of Tax Order Mailing Procedures

In *Olson v. Commissioner of Revenue*, **4** the Minnesota Supreme Court issued its opinion affirming the decision of the Tax Court, that the Department of Revenue's notice of tax order sent to the taxpayer by regular, non-certified, mail, provides sufficient notice to a taxpayer under the U.S. and Minnesota Constitutions' Due Process Clauses.

Background.

The Minnesota Department of Revenue sent Jeffrey Olson a tax order assessing sales and use taxes by regular, non-certified mail. Olson had 60 days from the date of the tax order to pursue an appeal of the tax order. Olson maintains that he either did not receive this order or he overlooked it and only learned about the order once the Minnesota Commissioner of Revenue levied his bank account. Olson appealed the tax order to the Minnesota Tax Court (after the 60-day appeal period lapsed), where he argued that regular mail provided insufficient notice and thus violated procedural due process.

The Commissioner of the Minnesota Department of Revenue filed a motion to dismiss for lack of subject matter jurisdiction, asserting that Olson's appeal was untimely. The Minnesota Tax Court allowed Olson to file an amended notice of appeal to raise his constitutional arguments. However, the Tax Court granted the Commissioner of Revenue's motion to dismiss, concluding that Olson's claim was untimely. Olson appealed to the Minnesota Supreme Court.

Ruling.

Olson argues that regular, non-certified mail service provides insufficient notice of a tax liability and therefore violates due process under the U.S. Constitution and Minnesota Constitution. The Commissioner of the Minnesota Department of Revenue argues that regular mail, which is authorized by statute, provides sufficient notice to satisfy due process.

The Minnesota Supreme Court citing to the Due Process Clauses of the U.S. Constitution and Minnesota Constitution, explains that "the government cannot deprive a person of 'life, liberty, or

property without due process of law'. . . But [d]ue process does not require that a property owner receive *actual* notice before the government may take [their] property." The Court further explains that "notice is constitutionally sufficient if it is 'reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"

Furthermore, the court notes that regular mailing alone would normally satisfy the requirements of due process, and it is only if the State "has actual knowledge that its initial notice to the taxpayer has failed to reach the taxpayer, due process requires that the State take additional reasonable steps to attempt to provide notice if it is practicable to do so." **5**

Here, the court highlights that "Olson admits he may have 'overlooked' the tax order, but maintains that his inability to dispute the underlying tax assessment - because he did not contest the tax order in 60 days - requires more effective notice of the tax order." The Commissioner argues based on U.S. Supreme Court precedence, *Mullane v. Cent. Hanover Bank & Tr. Co.*, **6** that regular mail is sufficient notice.

The Minnesota Supreme Court found on the facts before it, that notice by regular mail was constitutionally sufficient. First, the court found that Olson's arguments appear focused "on why certified mail is a better policy choice, not why regular mail is a constitutionally deficient choice." Second, the court found that there was no evidence to suggest that the Commissioner knew that Olson had not received notice of his tax liability and "no evidence that regular mail is not 'reasonably calculated' to reach the address and person to which it is sent."

Question presented.

"Whether the issuance of the Commissioner's order by ordinary mail meets constitutional requirements of procedural due process."

Cayuga Indian Nation's Brief in Opposition

The Cayuga Indian Nation of New York (the "Nation" or "Cayuga Indian Nation") filed its Brief in Opposition to the petition for writ of certiorari filed by Seneca County, New York. The Nation disagrees with Seneca County that it owes money for unpaid taxes on properties the Nation owns within its reservation that was purchased on the open market. The Nation's argument is simple: state law exempts its properties from the tax. Also, since "[s]overeign immunity would obviously bar a collection suit against the Nation . . . the County tried to circumvent that immunity by foreclosing on the Nation's properties." However, the Second Circuit Court of Appeals found in favor of the Cayuga Indian Nation, refusing to "'carv[e] out exceptions from the Nation's immunity" and per the Nation, such "conclusion was correct, implicates no division of authority, and does not warrant review."

The Cayuga Indian Nation argues that the U.S. Supreme Court should not grant certiorari to address the

County's *City of Sherrill v. Oneida Indian Nation of New York* argument. Per the Nation, the "County argues that because *Sherrill* authorizes it to *tax* the Nation's properties, it must be able to *collect* taxes via foreclosure. However, the Cayuga Indian Nation argues that the "[t]h[e] [Supreme] Court has repeatedly rejected that argument." The Cayuga Nation also argues that the County's argument based on *Sherrill* implicates no split and the lower court's conclusion was correct. In addition, the Cayuga Indian Nation argues that the County's arguments with respect to the immovable property exception fare no better to limit tribal sovereign immunity. Finally, the Cayuga Nation maintains that the case is a poor vehicle and the county's parade of horribles is imaginary.

Seneca County's Reply Brief

Seneca County (or "County") filed its Reply Brief where it urges the Court to grant certiorari to resolve the question it left unanswered in *Madison County v. Oneida Indian Nation of NY.* **7** As explained in the County's brief, in "*Madison County,* this Court granted certiorari to decide 'whether tribal sovereign immunity . . . bars taxing authorities from foreclosing to collect lawfully imposed property taxes." - i.e., to decide whether *Sherrill* would have any practical effect.

However, due to the Oneidas' post-grant of certiorari waiver of immunity, the Court vacated the Second Circuit's decision, leaving that question unresolved." Per the County, "[t]his case presents the exact same issue; indeed, the decision below expressly reinstated the reasoning of the Second Circuit's decision in *Madison County*, effectively unvacating what this Court vacated."

Seneca County also contends "a conflict with - or evisceration of - th[e] [Supreme] Court's precedents is an independent basis for satisfying Rule 10," in what appears to be a counter to the argument that there is a no-circuit split in this case. In addition, the County explains that "[w]hile the Cayugas claim they consider the properties at issue 'reservation land,' that is part of the problem, as they also concede that they are all 'fee-owned lands' 'subject to *Sherrill'.* They thus do not dispute that they are claiming immunity from the collection of the very taxes from which *Sherrill* held they lack immunity." Therefore, Seneca County argues that the doctrines *Sherrill* invoked are fatal to the immunity the Cayugas assert in this case.

In addition, the County argues that the Second Circuit's refusal to apply an immovable-property exception to tribal sovereign immunity "reinforces the need for review." Per the County, the immovable property exception provided a "ready alternative path for permitting the County's foreclosure actions and giving *Sherrill* practical effect." Finally, Seneca County maintains that this case is an ideal vehicle to address the important question presented - whether tribal sovereign immunity bars local tax authorities from collecting lawfully imposed property taxes by foreclosing on real property that a tribe has acquired on the open market.

As explained in the brief, because the Cayugas concede that the properties are "'fee owned lands' subject to *Sherrill,* the Second Circuit resolved the case on the undisputed premise that the Cayugas do

not enjoy the kind of 'sovereign dominion' over them that matters under *Sherrill* or the immovable property exception. That makes this an ideal vehicle to resolve once and for all whether tribes may really flout with impunity the very same property taxes from which *Sherrill* held they lack immunity."

Pending Petitions

Solicitor General filed brief in the matter of *New Hampshire v. Massachusetts* concerning the extraterritorial taxation of telecommuters.

As noted above, as we went to press the Acting Solicitor General filed a brief with the Court in *New Hampshire v. Commonwealth of Massachusetts* (Docket No. 220154) in which the State of New Hampshire brought an action before the Court against the Commonwealth of Massachusetts seeking to enjoin Massachusetts from enforcing its new telecommuting regulation against New Hampshire residents. We will cover the brief in detail in the next issue of the Supreme Court Update.

Special Master's Reports in cases concerning priority to abandoned property still pending.

We await the issuance of the Special Master's Reports in the MoneyGram cases: *Delaware v. Pennsylvania,* 22O145 and *Arkansas et al. v. Delaware,* 22O146 which involve a dispute between Delaware and several other states concerning which states have priority rights to claim abandoned, uncashed MoneyGram official checks.

Denied Petitions

Vermont National Telephone Company v. Vermont Department of Taxes (Docket No. 20 - 1159), cert. den. May 17, 2021, ruling below at *Vermont National Telephone Company v. Vermont Department of Taxes*, **8** where the Supreme Court of Vermont affirmed the Vermont Department of Taxation's imposition of corporate income tax on capital gains generated from the sale of two Federal Communications Commission telecommunications licenses allowing Petitioner the exclusive right to broadcast in upstate New York.

1 *California v. Grace Brethren Church,* 457 U.S. 393 411 (1982).

2 *San Juan Cellular Telephone Co. v. Public Service Commission,* 967 F.2d 63 685 .

3 *Entergy Nuclear Vt. Yankee, LLC v. Shumlin,* 737 F.3d 228 232-33 (2d Cir. 2013).

4 *Olson v. Commissioner of Revenue*, 955 N.W.2d 605 (Minn 2020).

5 Jones, 547 U.S. at 227-31 .

6 *Mullane v. Cent. Hanover Bank & Tr. Co.,* 339 U.S. 306 314 (1950).

7 *Madison County v. Oneida Indian Nation of NY,* 562 U.S. 42 (2011).

8 *Vermont National Telephone Company v. Vermont Department of Taxes*, 2020 VT 83 .