The limited role of privacy concerns in Direct Marketing Association v. Brohl

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Charlotte Federal & International Taxation Counsel Julie Bradlow and Federal & International Taxation Member Rachel Coyne co-authored an article that was published in *Westlaw Journal Computer & Internet*, volume 32, issue 14, on December 18. Their piece discusses the limited role of privacy concerns in *Direct Marketing Association v. Brohl* and can be seen in its entirety below.

The limited role of privacy concerns in *Direct Marketing Association v. Brohl*

On Dec. 8 the U.S. Supreme Court heard oral argument in *Direct Marketing Association v. Brohl*, No. 13-1032. The court granted *certiorari* to consider the reach of the Tax Injunction Act, which limits when federal courts may hear challenges to state tax laws and generally says state courts should hear these disputes.[1]

The petition concerns the Direct Marketing Association's federal lawsuit challenging a 2010 Colorado law imposing notification and reporting requirements on out-of-state retailers, including those that operate online.

The DMA represents a group of businesses and organizations that market products via catalogs, advertisements, broadcast media and the Internet.

The Colorado law requires out-of-state retailers to remind Colorado residents about their "use tax"[2] responsibilities at the time of purchase and in an annual notice, and also to report a list of all Colorado purchases to the state's revenue department.

Under U.S. Supreme Court precedent, however, states are prohibited from enacting laws that impose a duty on out-of-state retailers to collect sales and use taxes.[3]

Colorado says it enacted the notification and reporting law as a way to recoup use taxes after more residents began shopping online and the state faced diminishing sales tax revenues.

A Colorado federal judge enjoined the law, ruling it violated the Commerce Clause of the U.S. Constitution, but the 10th U.S. Circuit Court of Appeals reversed that decision, saying the TIA prevents federal courts from considering a challenge to a law related to Colorado's sales and use taxes.[4]

Because the 10th Circuit's decision resulted in a split between the federal circuits over the scope of the TIA, the Direct Marketing Association petitioned the Supreme Court to step in and resolve it.

Christopher Oswald, the DMA's vice president for state affairs, said the group filed the case to protect private sales transaction information.

"Private sales transaction information, including the items a customer ordered and how much they paid for them, should remain private. We know that both businesses and consumers would agree, which is why DMA and its members remain committed to challenging this law," he said.[5]

This issue, however, is not before the high court.

COLORADO'S LAW

The original challenge in the case arose in response to Colorado House Bill 10-1193, which Gov. John Hickenlooper, D, signed into law in 2010.

The Democrat-sponsored bill imposed three separate and distinct reporting requirements on out-of-state retailers that make sales into the state:

- These retailers must inform purchasers at the time of the sale that a use tax may be due and that Colorado requires them to file sales and use tax returns and pay use taxes directly to the state.
- By Jan. 31 of each year, these retailers must provide each Colorado purchaser with a reminder of the use tax and provide the dates, amounts and categories of each purchase, if available.
- These retailers must file annual reports with the Colorado Department of Revenue by March 1 that includes, on a purchaser-by-purchaser basis, the total amount paid for Colorado purchases in the prior year.

DMA'S CHALLENGE

On June 30, 2010, just four months after Colorado enacted the reporting bill, the DMA sued the state's Department of Revenue and its executive director in the U.S. District Court for the District of Colorado.[6]

In the suit, the DMA sought, among other things, an injunction to prevent the Department of Revenue from enforcing the reporting law against out-of-state retailers and a ruling that the new law:

- Violated the dormant Commerce Clause by imposing an undue burden on sellers in interstate commerce without a physical presence in the state.[7]
- Chilled the exercise of free speech.
- Violated certain privacy protections.

In its motion for a preliminary injunction, the DMA argued:

> Consumers have a reasonable expectation of privacy in their purchasing information, even without disclosure of the items they purchased. … The reality is that the entity from whom a person makes purchases (as well as to whom such purchases are sent) reflects personal details about that individual, such as his or her health, politics, religion, sexual orientation and financial circumstances, among other

things.[8]

The DMA's complaint alleged violations of numerous aspects of the U.S. and Colorado constitutions, including consumers' right to privacy, but its motion for a preliminary injunction only focused on two issues:

- The likelihood of success of its Commerce Clause claims, to the exclusion of the other alleged constitutional violations.
- The irreparable harm that would result from forced disclosure of the private purchasing information of their members' Colorado customers to the state Department of Revenue.

In early 2011 the District Court granted the DMA's motion for a preliminary injunction against enforcement of the law and held that:

- The DMA had a substantial likelihood of succeeding on the merits of its claims.
- Irreparable harm would be done to sellers if they were required to file the reports.[9]

By granting the preliminary injunction, the District Court prevented the Department of Revenue from enforcing H.B. 10-1193 until it entered a final decision in the case.

In May 2011 the parties filed cross-motions for summary judgment. These motions focused exclusively on Commerce Clause issues as well and did not address privacy issues.

In March 2012 the District Court granted the DMA's motion and denied the Department of Revenue's motion, entering a permanent injunction forbidding the agency from enforcing the law.[10]

In its order granting a preliminary injunction, the court acknowledged that H.B. 10-1193 did not require out-of-state retailer to collect sales and use taxes. The law's burdens on out-of-state retailers, however, "are inextricably related in kind and purpose" to those the Supreme Court already condemned. The court again echoed this concept in its order granting summary judgment.

In discussing the likelihood of irreparable harm, moreover, the court noted in both its orders that 10th Circuit precedent indicated that violation of Commerce Clause rights by itself constitutes irreparable injury. It did not address any injuries that might occur to consumers from violations of their privacy rights.

The Department of Revenue subsequently appealed the grant of a permanent injunction by the federal court to the 10th Circuit. The appellate court ruled in August 2013 that the Tax Injunction Act barred the DMA from seeking a ruling on constitutionality of the use-tax reporting requirements in federal court.

The DMA sued the Department of Revenue in Colorado state court that November, asserting claims for relief nearly identical to those that it brought in federal court.

The state court entered a preliminary injunction Feb. 18 barring enforcement of the law.[11] The state proceedings are continuing independently of the federal court litigation.

In July the DMA petitioned the U.S. Supreme Court to review the 10th Circuit's ruling regarding the issue of the scope of the Tax Injunction Act and resolve a split among the circuits in that regard.

The 1st, 2nd and 6th circuits all have ruled that the TIA does not enjoin suits against state taxing authorities regarding schemes that only indirectly aid in the collection of tax.

None of these cases involve a use tax, but all of those courts read the TIA more narrowly than does the 10th Circuit.[12]

The DMA's Supreme Court petition does not address privacy concerns, nor does the Department of Revenue's response.

If the Supreme Court sides with the three circuits that ruled that the TIA does not bar a suit seeking to invalidate a state taxing statute that does not directly involve the collection of tax, it will not be necessary to address the privacy issues raised elsewhere in the complaint.

Thus, it is unlikely that this will be the case where the Supreme Court addresses the DMA's privacy concerns.

It will likely be necessary for a case involving a use-tax statutory scheme that does not present dormant Commerce Clause issues — placing an undue burden on interstate commerce — to reach the justices in order for that to happen.