



SCOTUS HEARS INTERNET SALES TAX CASE

By Josh Hicks

O N APRIL 17, 2018, THE UNITED STATES

Supreme Court (SCOTUS) will hear oral arguments in the case of *South Dakota v. Wayfair, Inc.* The case gives the Court the ability to revisit its seminal ruling in *Quill v. North Dakota*, where the Court held that a State can only impose a sales tax on a business when that business has a physical presence within the State.

When *Quill* was decided in 1992 the internet was a much different place. Amazon did not exist, only 2% of Americans had internet access, and the mail-order business was a \$180 billion per year industry. Today, e-commerce is a \$6 trillion per year industry and Americans

are accustomed to purchasing nearly anything they desire with nothing more than a few taps on their smartphones.

Although e-commerce has exploded, the *Quill* decision looms large a quarter century after its issuance. An absentee retailer taking a few precautions can still avoid collecting or remitting taxes on sales into a state. In-state retailers who must collect the sales tax suffer a competitive

disadvantage. And state and local governments who lose out on the tax revenue from absentee retailers look for other ways to generate revenue. Hearing of these issues in a variety of cases, the Supreme Court has recently indicated a willingness to re-examine the *Quill* decision.

States have come up with several approaches to address *Quill*. Some require an absentee retailer to report customer purchases in order to pursue those customers for the use tax. Other states, including Nevada, have adopted "click-through" nexus laws, which attempt to impose a sales tax obligation on an absentee retailer who directly or indirectly accepts

referrals from an in-state source.

South Dakota took a different approach. It passed a law purporting to create nexus with any absentee retailer who engages in either 200 transactions or \$100,000 worth of annual sales in the state. South Dakota's approach has been adopted by several other states.

The South Dakota approach seems to have

caught the attention of the Supreme Court as the appropriate vehicle to revisit *Quill*.

Several interesting issues will be considered in the *Wayfair* case. These include the competitive disparity between absentee retailers and in-stated retailers, the precedential value of cases decided before a market shift due to then-unforeseen technological advances, the burden on an absentee retailer to comply with various state sales tax laws, the possible impact of a retroactive application of nexus to an absentee retailer, whether states can improve on use tax collections, and whether

Congressional options such as the Marketplace Fairness Act are more appropriate ways to establish nexus on absentee retailers.

A decision from the Supreme Court is expected in mid-2018. If the Court overturns or significantly abrogates *Quill*, we can expect to see States, including Nevada, revisit their respective sales tax codes and utilize the South Dakota approach

as a template for establishing economic nexus. And as technology continues to outpace regulatory systems in many contexts, the manner in which the Supreme Court addresses the issues presented in *Wayfair* will impact more than just the sales and use tax arena.

Under *Quill*, an e-retailer without a physical presence in a state cannot be required to collect or remit sales tax on its sales into the state.

That doesn't mean tax is not due on those sales. States with a sales tax also have a use tax, which is imposed directly on the buyer in scenarios where the sales tax cannot be collected from the seller. However, enforcement

of use tax collections from millions of individual consumers is impractical, if

not impossible. The lack of enforcement has effectively given out of state e-retailers who don't charge sales tax an economic advantage over in-state retailers who must add sales tax to the purchase price.

States have therefore taken different approaches to capture tax revenue from e-commerce. Ten states require e-retailers to

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BOARD OF PHARMACY UPDATE

By Liz MacMenamin

THE BOARD OF PHARMACY MET ON MARCH 6TH

and 7th 2018, in Reno, Nevada. The Workshop and Public Hearing was held on the afternoon of March 6th. The following regulations were discussed under the forum of the workshop:

1. Amendment to NAC 639 that gives clarification to the new rules for prescribing or dispensing controlled substances for treatment of pain to enable prescribers to conform to the language in Assembly Bill 474 that passed during the 2017 legislative session.

The language **defines "acute pain"** as pain with an abrupt onset caused by injury but is not ongoing. The does not include chronic pain; pain being treated as part of cancer care; hospice, or other end-of-life care; or palliative care pain treatment.

The definition for **"course**

of treatment" is treatment and subsequent treatment initiated by any practitioner for a particular disease or symptom of the disease.

The definition of **"ongoing treatment"** means the same medication for the same diagnosis. The language does not prohibit the practitioner from prescribing a different medication, increasing the dosage of the same medication, or replacing lost, stolen or destroyed prescriptions.

The Nevada Medical Association brought language forward that would further clarify this regulation and the board agreed to include that language in the regulation. This will now be returned to the LCB (Legislative Council Bureau) for a rewrite to include changes and will be then posted for a public hearing. RAN will send out the new changes once they are posted.

2. The board then discussed an **amendment to NAC 453.510**. This language

adds newly identified synthetic drugs to the list of Schedule 1 controlled substances. The board works very closely with law enforcement to try to keep these controlled substances updated as new ones are being created. This language change passed unanimously and will be heard during public hearings at the next board meeting.

3. The following language was discussed during the public hearing:

LCB File R131-17— Prescription readers for the visually impaired. This language is a result of Senator Mo Denis' bill, SB 131, to require a pharmacy to assist or advise a visually impaired patient on obtaining a prescription reader. This language was continued and will be heard at the next board meeting.

Apparently there is a misunderstanding with the language and the board and RAN will work to help clarify statutory intent to be sure that the regulatory language reflects

the intent of the law.

LCB File R132-17— This regulation revises the amounts of controlled substances, poisons, dangerous drugs and devices that an advanced practice registered nurse is authorized to dispense to an amount that does not exceed the lesser of:

- (1) the amounts that the advanced practice registered nurse is authorized to prescribe;
- (2) a 365-day supply;
- or (3) such amounts as are authorized by his or her collaborating physician, if any.

This language passed unanimously and will now return to LCB to be submitted to the Legislation Commission for final approval before becoming law.

The next Board of Pharmacy meeting will be held in Las Vegas on April 11-12, 2018.

Please contact Liz MacMenamin at **775-720-2528** if you have any questions. ■

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taken different approaches to capture tax revenue from e-commerce. Ten states require e-retailers to report customer purchases. Vermont and Connecticut have sent letters to residents informing them of their use

tax obligations for online purchases. Nevada and 21 other States have adopted "click-through" nexus, in which nexus is extended to an out of state e-retailer who directly or indirectly accepts referrals from a person in the state.

South Dakota, and several other states, have passed laws establishing nexus based on a retailer's economic activity in the state, regardless of its physical presence. ■

Editor's Note: Josh Hicks is a partner



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