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STATE & LOCAL TAX INSIGHTS

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Limiting a Taxpayer's Right to Recover Tax Costs Through Line Item Surcharges

By James P. Kratochvill[1]

Two recent federal Court of Appeals decisions, *BellSouth Telecommunications, Inc. v. Farris* ("*BellSouth*")[2] and *Peck v. Cingular Wireless, LLC* ("*Peck*"),[3] provide guidance regarding the restrictions imposed upon states to prevent or limit vendors from recovering their gross receipts tax costs through the use of line item surcharges on customer bills. Cumulatively, these decisions appear to signify that states cannot prohibit vendors from disclosing or recovering tax costs from their customers by line item charges, but that states do have leeway to prescribe when and how such line item customer charges can be applied.

In addition to examining the above-referenced decisions, this article summarizes the history and development of line item surcharges and addresses several of the legal and practical questions facing taxpayers and states regarding the implementation and enforcement of possible government limitations upon vendors seeking to recover their tax costs.

BACKGROUND

Public utilities, including telecommunications service providers ("TSPs"), have for decades borne the principal liability for state and local gross receipts taxes nationwide. Relying upon authority granted by the Federal Communications Commission ("FCC"), TSPs have included on their monthly billing statements a separate line item charge to recover these gross receipts taxes from customers located in the respective state or local jurisdictions imposing the applicable taxes or fees.[4] This line item charge serves two important purposes. First, because gross receipts taxes generally are imposed

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upon the vendor or service provider, vendors are not permitted to collect the tax directly from their customers (like a sales tax). Instead, providers who do not wish to simply increase the base price of the service (or TSPs that do not wish to raise their national rates) can recover their costs incurred for the tax from their customers by adding a separate surcharge for the tax recovery on customer invoices. Second, providers use line item surcharges to inform customers about the existence and degree of a state's gross receipts tax and to protect customers outside the taxing state from bearing the burden of an exported tax.

Employment of the surcharge by TSPs contributed to the reduced number of states imposing telecommunications gross receipts taxes, from almost thirty states in 1986 to only about ten states by 2004. But since then, several states have either expanded or enacted new gross receipts tax impositions on general businesses, as well as on TSPs and utilities.[5] These impositions have included the adoption of such taxes in Ohio,[6] Texas,[7] Michigan,[8] Pennsylvania,[9] and Kentucky.[10] Like TSPs, general business vendors naturally will seek to recover their tax expenses in some manner from their customers. However, a few of the states that have enacted such taxes have also sought to restrict or prohibit the recovery of such tax costs through the use of line item surcharges or similar entries on customer bills. *BellSouth* and *Peck* each arose out of litigation initiated to test the limits of a state's power to control whether or how vendor taxpayers can recover their tax costs from customers by using line item charges.

BELLSOUTH TELECOMMUNICATIONS, INC. V. FARRIS

In *BellSouth Telecommunications, Inc. v. Farris*, the United States Court of Appeals for the Sixth Circuit held that a Kentucky statutory provision that prohibited TSPs subject to a gross receipts tax from both collecting the tax directly from customers and stating the tax as a line item charge on customer bills violated the First Amendment of the United States Constitution.[11]

In 2005, Kentucky enacted a new gross revenues tax on communications and video service providers.[12] Included in the measure was a provision that sought to prohibit the service providers from stating the tax charge on customer bills, and effectively, to prohibit recovery of the tax from customers through the use of separate line item charges on customer invoices. The provision, Kentucky Revised Statues Annotated ("KRS") section 136.616(3) ("Section 3") stated:

> "The ***provider shall not*** collect the tax directly from the purchaser or ***separately state the tax on the bill to the purchaser***."[13]

The court first addressed the "not stating the tax" portion of the statute. Applying the constitutional test applicable to commercial speech, the court concluded that the statute regulates speech, not conduct, as it prohibits providers from stating the tax on the bill. While the court accepted that Kentucky has a substantial interest in avoiding potential consumer confusion about whether consumers, rather than providers, bear legal responsibility for the tax, the court concluded that the statute did not directly advance the Commonwealth's interest because the Commonwealth allowed providers to tell their customers anything about the tax, no matter how confusing, in all settings (e.g., in advertisements or on billing inserts) *except* on a customer invoice. Finally, the court concluded that the statutory prohibition was over-inclusive in that such a ban was more extensive than necessary to serve the Commonwealth's interest in preventing customer confusion over legal liability for the tax. The court stressed that regulating speech must be a last—not first—resort, and noted that Kentucky had a "full arsenal of options," short of restricting speech, to address such customer confusion. On this basis, the court held that the "not stating the tax" clause violated the First Amendment and must be struck.

The court then addressed the "no direct collection" clause. The court found that the terms of this clause referred to non-expressive conduct, not speech, and as a result lay beyond the protection of the First Amendment, and allowed it to survive. Arguably, this determination potentially diluted the effect of the court's First Amendment holding, as Kentucky could have taken the position that the surviving provision prevented not only the collection of the tax *as a tax* but also any collection of a tax reimbursement. Recognizing this potential result, the district court, on remand, issued a Modified Judgment confirming that the "no direct collection" clause of Section 3 did not violate the First Amendment, but that Kentucky was enjoined from enforcing Section 3 and from applying the related penalty to prohibit TSPs from using line items in customer bills to recover their costs for the gross revenues tax. As a condition, TSPs must not purport to shift the legal incidence of the tax by describing the line item as a direct tax on the customers themselves.[14]

The *BellSouth* decision would appear to prevent Kentucky, as well as other states imposing a gross receipts

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Upcoming 2009 Conferences

Following is a list of SALT conferences through June 2009, in which Morrison & Foerster attorneys will be participating.

JANUARY 25–30
COST 2009 Basics School
Andres Vallejo

JANUARY 26–28
USC Gould School of Law 2009 Tax Institute
Thomas H. Steele

JANUARY 29–30
Ohio Tax Conference
Columbus, Ohio
Paul H. Frankel
Craig B. Fields

FEBRUARY 2
Cleveland Tax Club
Cleveland, Ohio
Craig B. Fields

FEBRUARY 5–6
Florida Tax Conference
Orlando, Florida
Paul H. Frankel
Craig B. Fields
Hollis L. Hyans

FEBRUARY 13
New Jersey TEI Conference
Morristown, New Jersey
Paul H. Frankel

FEBRUARY 25
COST Sales Tax Conference
Amelia Island, Florida
Paul H. Frankel

FEBRUARY 25
Tax Council Policy Institute
Washington, DC
Hollis L. Hyans

MARCH 4
ABA/IPT Sales Tax Conference
New Orleans, Louisiana
Paul H. Frankel
Craig B. Fields

MARCH 12
MoFo West
San Francisco, California
Paul H. Frankel
Thomas H. Steele
Andres Vallejo

MARCH 10
TEI State Legislative Update
Richmond, Virginia
Craig B. Fields

APRIL 2
MoFo East
New York, New York
Paul H. Frankel
Thomas H. Steele
Hollis L. Hyans
Craig B. Fields
Irwin M. Slomka
Andres Vallejo

APRIL 30
COST School
Atlanta, Georgia
Paul H. Frankel

MAY 15
Georgetown Tax Conference
Washington, DC
Paul H. Frankel
Hollis L. Hyans
Craig B. Fields
Roberta Moseley Nero

MAY 19
COST Spring Conference
Boston, Massachusetts
Paul H. Frankel

JUNE 18
Wisconsin Tax Conference
Milwaukee, Wisconsin
Paul H. Frankel
Craig B. Fields

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tax, from enacting or enforcing laws to prohibit its recovery by taxpayers through the use of line item surcharges on customer bills. It also affords a strong legal basis for all gross receipts taxpayers, not just telecommunications companies, to recover their tax costs in this manner. However, the *BellSouth* decision does not necessarily resolve the issue of whether states can legally limit how or when taxpayers may recover their tax costs through the use of these line item surcharges. To the contrary, the *BellSouth* decision strongly suggests that states have a legitimate interest in not misleading customers about their liability for gross receipts taxes imposed upon businesses. Thus, states arguably have the right to enact less-stringent measures that only protect consumers from misleading information and that limit the use of line item surcharges in ways that do not run afoul of the United States Constitution. Such a proper limitation of that use has been sanctioned in Washington regarding its B&O tax and confirmed by the Ninth Circuit Court of Appeals in the *Peck* decision.

PECK V. CINGULAR WIRELESS

In Washington State, Revised Code of Washington ("RCW") section 82.04.500 has been long considered a barrier to a direct recovery by vendors of the long-standing Washington business and occupation ("B&O") tax from their customers. This provision provides that:

> [i]t is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

In *Peck v. Cingular Wireless*, the Court of Appeals for the Ninth Circuit considered state law claims brought by wireless carrier customers alleging that the carriers had violated RCW § 82.04.500.[15]

The *Peck* court first addressed whether an FCC Order, which ruled that state laws prohibiting or restricting the use of line items to recover taxes constitute rate regulation preempted by the Federal Communications Act ("FCA"),[16] was entitled to deference. The Court of Appeals for the Eleventh Circuit previously had determined that the FCC Order was invalid in *National Ass'n of State Utility Consumer Advocates v. FCC* ("*NASUCA*"),[17] on the grounds that the FCC had exceeded its authority under Section 332(c)(3)(A) of the FCA when enacting the Order. The Ninth Circuit Court held that the district court was wrong not to follow the *NASUCA* decision, which the Ninth Circuit determined was binding both within and without the Eleventh Circuit.[18] In the absence of any valid FCC interpretation, the court agreed with the Eleventh Circuit's determination in *NASUCA* that the use of the term "rates" in FCA § 332(c)(3)(A) does not comprehend how line items are displayed or presented on wireless consumers' bills, but rather such practices constitute terms and conditions permitted by the FCA to be regulated by the states.

As to the Washington statute at issue, RCW § 82.04.500, the court concluded that, as interpreted by the Washington Supreme Court in *Nelson v. Appleway Chevrolet, Inc.*,[19] the statute simply structures the contract's negotiation and disclosure of the B&O tax recovery and therefore acts as a consumer protection statute. *Appleway* involved a situation where the customer and automobile dealer agreed to the price for a vehicle and entered into a written agreement that also listed several other fees and taxes, including a charge for the Washington B&O tax. The court held that the auto dealer's collection of the B&O tax from customers violated RCW § 82.04.500 because the charge for the tax was disclosed *after* the final price had been set. The court interpreted the statute to unambiguously state that the B&O tax is not imposed on customers and is a cost of doing business for the taxpayer vendor. Accordingly, as the B&O tax was an overhead cost, the statute required vendors to include the cost of the B&O tax as part of the price of the product sold, not as an additional charge on top of the price, as in the case of a governmentally imposed sales tax. The court determined that the dealer could disclose or itemize costs associated with the purchased item during the negotiation of or before setting the final purchase price, but it could not add a B&O tax to the final purchase price as one of several fees and taxes after agreement upon a final purchase price.[20]

The *Peck* court thus concluded that the FCA does not preempt state claims brought pursuant to RCW § 82.04.500 because the statute regulates the disclosure, and not the reasonableness or propriety, of the underlying rates.[21] The court then remanded the case back to the federal district court to determine whether the court still had subject matter jurisdiction over these customer claims.

LEGAL AND PRACTICAL ISSUES RAISED BY THE DECISIONS

A recurrent theme throughout the decisions discussed above appears to be that, short of actually prohibiting the use of line item charges to recover gross receipts taxes, states may enact or enforce state laws (such as consumer protection statutes) or employ federal rules or laws (such as the FCC's truth-in-billing rules) to limit the manner in which such line item charges are applied. The *BellSouth* court made it clear that Kentucky had several alternatives that it could have considered to regulate the use of such line item charges, and the *Peck* court endorsed the *Appleway* rationale in Washington to similarly limit how and when line item charges could be used to recover taxes.

The *Appleway* decision by the Washington Supreme Court represents the highest state court precedent to date regarding the limits placed on vendors passing through a gross receipts tax expense to customers. Can the example of the Washington statute and the *Appleway* decision and rationale be exported to other jurisdictions as a means to limit (without prohibiting) the recovery of other gross receipts taxes by a line item charge on customer bills? If so, the *Appleway* court appears to indicate that the point in time at which an "agreement on a final purchase price" is reached constitutes the point after which no surcharge can legitimately be added to the final price. However, the court does not provide much guidance as to when a "final price" is actually set, particularly in the case of TSPs. For example, the court noted that the vendor's written contract disclosed at four places, and the purchaser acknowledged, that the B&O tax was being passed through. But the court does not explain why the "final price" was reached (presumably orally) outside of that written contract.

The *Appleway* court offers even less guidance as to when a final price is set for businesses engaged in service transactions. In transactions such as the purchase of telecommunications service by consumers, where there is seemingly no "negotiation" regarding the price of the service, the point in time at which the final price is set appears more difficult to ascertain than in the sale of an article of tangible personal property. For example, in the case of most published contracts for telecommunications services, the general price of each service is listed along with the description of the corresponding service, while applicable additions to such prices are listed in a section of the contract usually labeled "Fees and Surcharges." Suppose that the price of the service (in the TSP's advertising and the terms and conditions section of its published contract) is identified as $29.95 per

Short of actually prohibiting the use of line item charges to recover gross receipts taxes, states may enact or enforce state laws...or employ federal rules or laws...to limit the manner in which such line item charges are applied.

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month, and the Fees and Surcharges section of the contract provides that there is an additional 6% surcharge of a tax expense. Under *Appleway*, is the "final price" $29.95 or $31.75 ($29.95 + 6%)? In other words, does the advertised price of $29.95 trump the contract language including the surcharge for purposes of determining the *Appleway* negotiated price?

The other major issue raised but left unanswered by the *Appleway* test concerns the manner of disclosing the tax surcharge. In the absence of judicial guidance, many questions abound. Would changing the advertising to note that "additional fees and surcharges" apply impact the determination of the *Appleway* negotiated price? Could a vendor eschew changing its advertising but make it clear (on its website?) before the customer actually signs up for the service that the price for the service includes a tax surcharge? Moreover, what level of specificity for the tax charge set forth in the advertising or published contract is sufficient for the change to become part of the final price? Must the actual amount of each tax surcharge be disclosed, or only the fact that some amount or percentage of a tax surcharge enters into the setting of the final price?

As can be seen, while states may have the legal right to limit when and how vendors can apply line item charges to recover taxes, states and taxpayers alike need to consider and address more carefully the many practical and business issues, such as those raised above, before proceeding in that direction. ■

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1 This is the author's abridged version of the full article that was published in the October 27, 2008 edition of State Tax Notes. 50 State Tax Notes 227 (Oct. 27, 2008).

2 542 F.3d 499, (6th Cir. 2008).

3 535 F.3d 1053 (9th Cir. 2008).

4 The FCC since 1986 has consistently sustained and sanctioned the practice by TSPs of recouping the costs of state gross receipts taxes imposed on their interstate receipts by adding line item charges to the bills of customers in the jurisdictions imposing the taxes. For many years, this practice was accomplished through tariffs filed with the FCC. The FCC's position was affirmed by the U.S. Court of Appeals for the Second Circuit, which concluded not only that allowing the surcharge was well within the FCC's broad authority, but also that the surcharge mechanism itself is a reasonable method of preventing states from singling out telecommunications for taxation in order to transfer a portion of their tax burden to non-residents via rates for interstate telephone service. *Conn. Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990). The FCC's sanction of the surcharge practice continues today, without tariffs, under the Telecommunications Act of 1996. *See, e.g.*, Policy and Rules Concerning the Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended, 11 F.C.C.R. 9564, 9571 at ¶ 12 (1996).

5 *See generally J. Mikesell, Gross Receipts Taxes in State Government Finances: A Review of Their History and Performance*, Council On State Taxation (Jan. 2007); L. Wheeler and E. Sennoga, *Alternative State Business Tax Systems: A Comparison of State Income and Gross Receipts Taxes*, State Tax Notes, Aug. 20, 2007, p. 487, Doc. 2007-16054, or 2007 STT 162-2.

6 Ohio Commercial Activity Tax ("CAT"), Ohio Rev. Code Ann. § 5751.01 *et seq.*

7 Texas Margins Tax, Tex. Tax Code Ann. § 171.0001 (2008) *et seq.*

8 Michigan Business Tax, Mich. Comp. Laws Serv. § 208.1101 (2008).

9 72 Pa. Stat. Ann. § 8101 (2008) *et seq.*

10 Ky. Rev. Stat. Ann. ("KRS") § 136.600 (2008) *et seq.*

11 *AT&T Corp. v. Rudolph*, Civil Action 06-16, 2007 WL 647564 (E.D. Ky. 2007); *BellSouth Telecommunications, Inc. v. Farris*, Civil Action 3:06-39, 2007 WL 647561 (E.D. Ky. 2007).

12 KRS § 136.600 et seq.; 2005 Ky. Acts 168.

13 The General Assembly then amended KRS § 136.990 to include the following provision: "Any provider who violates the provisions of KRS 136.616(3) shall be subject to a penalty of twenty-five dollars ($25) per purchaser offense, not to exceed ten thousand dollars ($10,000) per month." 2006 Ky. Acts 6, § 11.

14 *AT&T v. Rudolph*, Case 3:06-cv-00016-KKC (E.D. Ky. Oct. 22, 2008).

15 *Peck v. Cingular Wireless LLC*, No. C06-343Z, Case 2:06-cv-00343-TSZ (W.D. Wash. Oct. 24, 2006).

16 In 1993, Congress amended the FCA to create a new regulatory class called "commercial mobile radio service." 47 U.S.C. § 332(d)(1). That provision states that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. § 332(c)(3). On March 18, 2005, the FCC issued its Order that preempted the states from requiring or prohibiting the use of line items on monthly telephone bills by wireless service providers. *Nat'l Ass'n of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, In the Matter of Truth-in-Billing and Billing Format*, 20 F.C.C.R. 6448, 6449 at ¶ 1, 6461 at ¶ 27 (2005) (the "*FCC Wireless Order*").

17 457 F.3d 1238 (11th Cir. 2006), *cert. denied*, *Sprint Nextel Corp. v. NASUCA*, 128 S. Ct. 1119 (2008).

18 The court explained that when federal agency rules are challenged in more than one court of appeals, as was the case in *NASUCA*, 28 U.S.C. § 2112 requires that the petitions be consolidated and assigned to a single Circuit, which thereby becomes and remains the sole forum for addressing the validity of such rules. In this instance, the challenges were consolidated and assigned to the Eleventh Circuit, which held that the FCC's Order was invalid.

19 *Nelson v. Appleway Chevrolet, Inc.*, 157 P.3d 847 (Wash. 2007).

20 *Id.* at 851. The court rejected the auto dealer's claim that its First Amendment right to free speech was violated because neither its decision nor the statute prevented disclosure or itemization of the B&O tax recovery. The statute was silent about disclosure, and the dealer was free to disclose and itemize any tax or cost prior to setting a final price. Accordingly, because the Washington statute, unlike the Kentucky statute, did not prohibit but only limited the use of line item surcharges, the *Appleway* decision is not inconsistent with the *BellSouth* decision. The last section of this article discusses the practical and legal questions raised by the requirements for recovering the B&O tax set forth in the *Appleway* decision.

21 *Id.*

The Manifest Justice of the Manifest Injustice Doctrine: The Time Has Come to Invoke the *Ex Post Facto* Clause to Bar Retroactive Tax Increases[1]

By Paul H. Frankel & Amy F. Nogid[2]

In *Oberhand*,[3] the New Jersey Supreme Court infused new vitality into the manifest injustice doctrine. The question remains, however, as to whether manifest injustice is a separate doctrine, as the plurality decision held or, rather, as Justice Barry Albin contends in his concurring decision, a proxy for a violation of constitutional rights to due process. In either case, however, there was an attempt by the New Jersey Supreme Court to do justice, which is, one hopes, the fundamental goal of all courts. As Alexander Hamilton said: "Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit."[4]

Oberhand addresses whether New Jersey's enactment of retroactive legislation, which decoupled certain New Jersey estate tax provisions from federal provisions increasing the amount of taxable estates, was manifestly unjust. On June 7, 2001, Congress increased the threshold of estate taxability from $675,000 to $1 million for decedents dying in 2002 and 2003. Although the New Jersey Legislature had six months prior to the time the federal provisions would have become effective to pass a decoupling provision, it failed to pass legislation until July 1, 2002. The legislation was made retroactive to January 1, 2002.

The decedents of the two estates involved in the case, those of Cynthia Oberhand and Eugene Seidner, died during the six-month retroactivity period of the legislation. Each of the estates contributed in excess of the $675,000 old federal and State taxability threshold, but less than the new $1 million federal threshold, to the family credit-shelter trust. The Division of Taxation assessed each estate for estate tax based on the excess amount transferred to the credit-shelter trust.

The estates had argued that, by the plain language of the legislation, the only estates impacted by the legislation were those that would have had to pay an estate tax if the date of the decedents' death were December 31, 2001 or earlier. Each of the courts that heard the case rejected that statutory argument, although the New Jersey Supreme Court agreed that the estates' argument was "plausible," but would yield an "absurd result."

In their appeal to the Appellate Division, the estates abandoned their argument that the retroactivity of the statute was unconstitutional, instead arguing only that it would be manifestly unjust to apply the statute retroactively, since the decedents could not revise their wills to address the legislation that had been passed after their deaths.

Citing *Gibbons*,[5] the plurality decision of Justice John Wallace Jr., which was joined by Justices Jaynee LaVecchia and Roberto Rivera-Soto, set out the "fundamental principle of jurisprudence" that prospective legislation is favored over retroactive legislation.[6] The plurality then recognized that if the intent of the Legislature were clearly to enact a retroactive statute, then it should be given that effect unless retroactive application would: (1) be unconstitutional; or (2) result in manifest injustice. Manifest injustice, according to the plurality, focuses on "'unfairness and inequity,'" but does "'not necessarily violate any constitutional provision.'"[7]

Justice Albin, however, agreed that retroactive application of the statute was improper, but on the basis that such retroactive application violated the New Jersey Constitution: "The source of a court's powers to declare a law invalid rests on the higher law of our constitutions, not on judicially-crafted equitable principles."[8] Manifest injustice, in Justice Albin's

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Manifest Justice

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view, constitutes a violation of the "guarantees [of] fundamental fairness and due process of law" of Article 1, Paragraph 1 of the New Jersey Constitution, which although it does not guarantee "due process of the laws," as does the Fourteenth Amendment to the U.S. Constitution, has been interpreted to provide the same "fundamental guarantees."[9]

Justices Virginia Long and Helen Hoens dissented and would have restricted use of the manifest injustice doctrine as an interpretive tool for use in cases where the legislation was ambiguous. The dissent held that the "'essential integrity' of the legislative process" had been compromised by the plurality and that the manifest injustice doctrine should be repudiated.[10]

The plurality opinions, however, appropriately address the concerns of the framers of the U.S. Constitution as embodied in the *Ex Post Facto* Clause. Unfortunately, the *Ex Post Facto* Clause was improperly restricted to retroactive criminal legislation by an "early and foolish"[11] decision by the U.S. Supreme Court, an issue which should be reevaluated in light of the proliferation of retroactive civil legislation, particularly in the state tax area. The recent willingness of the Court to strictly construe the Constitution could provide a result that reestablishes the correct application of the Clause to civil cases and eliminates the need for courts to resort to the Due Process Clause or other equitable concepts that are the underpinning of sound justice.

EX POST FACTO LAWS[12]

The considerable angst of courts dealing with retroactive legislation would have been avoided had not the U.S. Supreme Court, in *Calder v. Bull*,[13] improperly restricted to criminal matters the state *Ex Post Facto* Clause of the U.S. Constitution, article I, section 10, which provides, " no State shall . . . pass any . . . *ex post facto* Law."[14]

Calder addressed the long-standing practice of the Connecticut Legislature, acting as a judicial tribunal, to grant to courts the ability to rehear time-barred cases. The Legislature's ability to grant the rehearing was not time barred. On March 21, 1793, the probate court invalidated a will by which property would have been granted to Mr. Bull and his wife. With the will invalidated, Mr. Calder and his wife could claim the property. On May 2, 1795, the Connecticut Legislature passed a law setting aside the decree in favor or the Calders, allowing Mr. Bull and his wife to benefit under the will.

Of the four sitting justices, three, Justices Samuel Chase, William Paterson and James Iredell, agreed that the Ex Post Facto Clause applied only in the realm of criminal legislation. The fourth justice, Justice William Cushing, did not believe the *Ex Post Facto* Clause was implicated, as the "law" was really a judicial act, a possibility also recognized by Justice Iredell. Justice Chase, the only U.S. Supreme Court justice ever to be impeached, stated that "[t]here is a great and apparent difference between making an unlawful act lawful; and the making of an innocent action criminal, and punishing it as a crime."[15] Justice Chase, however, recognized that even if a law is not retrospective, "[e]very law that takes away or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon."[16] Justice Paterson agreed with Justice Chase, holding that the "words *ex post facto*, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, and penalties."[17] Justice Paterson admitted, however, that literally, *ex post facto* was not so limited.

To support their conclusion that the *Ex Post Facto* Clause was limited to criminal laws, the justices cited Sir William Blackstone, Mr. Wooddeson [Blackstone's successor], the Federalist, and the definitions of *ex post facto* laws given by Massachusetts, Delaware, Maryland and North Carolina in their constitutions. Those sources are, however, not supportive of the *Calder* court's exclusion of civil legislation from the *Ex Post Facto* Clause. Additionally, and perhaps most significantly, as a judicial action by the Connecticut Legislature, the *Ex Post Facto* Clause was not implicated, and should not have been addressed.

Justice William Johnson, who sat on the Court from 1804 through 1834, stated in an 1829 memorandum, which addressed his investigation and his conclusion that the *Ex Post Facto* Clause was improperly limited by the *Calder* Court: "This court has had more than once to toil up hill in order to bring within the restriction on the States to pass laws violating the obligation of contracts, the most obvious cases to which the constitution was intended to extend its protection; a difficulty which it is obvious might often be avoided by giving the phrase *ex post facto* its original and natural application."[18] Justice Johnson agreed with Justice Cushing's opinion in *Calder* and persuasively argued that there was no need for the *Calder* Court to have addressed the *Ex Post Facto* Clause and that, therefore, it was an "extrajudicial opinion," which is not precedent.[19]

Based upon extensive and comprehensive research, Professor William Winslow Crosskey, a renowned professor at the University of Chicago Law School, presented a compelling argument that, at the time of the Constitution's formation, *ex post facto* laws

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CALIFORNIA'S NEW 20% UNDERPAYMENT PENALTY

On October 1, 2008, California enacted SBX1 28, which imposes a new penalty of 20% on understatements of corporate taxes in excess of $1 million for tax years beginning on or after January 1, 2003 that remain open under the statute of limitations. The new penalty is imposed in addition to all existing penalties. California taxpayers seeking to avoid the new penalty have until May 31, 2009 to file amended returns for tax years beginning before January 1, 2008. The basics of the new penalty are outlined here.[1]

- An "understatement of tax" is defined as the amount by which the tax imposed by Part 11 exceeds the amount of tax shown on an original return or on an amended return filed on or before the due date of the return for the taxable year
    - Amended returns filed by May 31, 2009, for tax years beginning before January 1, 2008, will be treated as reflecting amounts of tax shown on an original return for this purpose
- The $1 million threshold applies to the aggregate amount of tax liability for all taxpayers required or authorized to be included in a combined report
- Relief from the new penalty is available only if:
    - The Franchise Tax Board failed to properly compute the penalty
    - The understatement of tax is attributable to a change in law that is enacted, promulgated, issued or becomes final after the earlier of the date the taxpayer files the return or the extended due date of the return for the year in which the change is operative
        - A "change in law" is defined as a statutory change or an interpretation of law or rule of law by regulation, legal ruling of counsel issued pursuant to Government Code § 11340.9, or published federal or California court decision
        - The Franchise Tax Board is instructed to implement this provision in a reasonable manner
    - The taxpayer reasonably relied upon a written chief counsel ruling issued pursuant to Revenue and Taxation Code § 21012(a)(1)
- The Franchise Tax Board does not have authority to waive the penalty based upon traditional grounds such as reasonable cause, substantial authority or adequate disclosure
- Taxpayers wishing to avoid the new penalty for tax years beginning on or after January 1, 2003 and before January 1, 2008 should amend their current returns and pay any additional tax due by May 31, 2009 and thereafter submit a timely claim for refund
- Taxpayers wishing to avoid the new penalty for tax years beginning after January 1, 2008 should err on the side of overpayment by filing a conservative original return and paying the tax, followed by an amended return claiming a timely refund

[1] For more information regarding the new penalty and other major income tax provisions of the 2008 budget bills, please see "The Income Tax Provisions of California's Fiscal 2009 Budget Act," by Eric J. Coffill and David A. Ziring, which was published in the October 28, 2008 edition of State Tax Notes. 2008 STT 209-12 (Oct. 28, 2008).

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unquestionably included both criminal and civil laws: "*ex post facto* Laws . . . were thoroughly disproved by the framers of our government and were intended by them to be completely impossible under our system."[20] Professor Crosskey argued that the *Calder* decision was "needlessly made upon such flimsy grounds."[21]

Justice Johnson and Professor Crosskey agreed that the *Calder* Court's reliance upon Blackstone and Wooddeson and on the constitutions of Massachusetts, Delaware, Maryland and North Carolina was erroneous. Blackstone's discussion of *ex post facto* laws can be found in the section "Of the Nature of Laws in General":

> [Law] is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. . . . . Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectively to ensnare the people.
>
> There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards be converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement, which is implied in the term "*prescribed*."

(Footnotes omitted.)

The statement in Wooddeson's treatise that purported to stand for the conclusion that the *Ex Post Facto* Clause related solely to criminal statutes stated only: "'justice wears her sternest aspect' in the case of '*penal statutes passed ex post facto*.'"[22] Wooddeson's statement does not, however, establish "that none other can be affected with that character; and certainly [Wooddeson's] commentator, Mr. Christian, in his note upon . . . '*ex post facto*' seems to have no idea of this restrictive application of it."[23]

Likewise, the *Calder* Court's reliance on the Federalist is not borne out. The Federalist Number 44, authored by James Madison, and Numbers 78 and 84, both authored by Alexander Hamilton, address *ex post facto* laws. Justice Chase did not state to which author he was referring. James Madison considered together "bills of attainder, *ex post facto* laws and laws impairing the obligation of contracts," and made no suggestion that he viewed the *ex post facto* laws in a restrictive sense:

> Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares

> to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society.

Although Justice Johnson believed it was to this paper that Justice Chase was referring,[24] it is possible that Justice Chase was referring to Alexander Hamilton's statement in Number 84, which, in addition to addressing *ex post facto* laws, dealt with the establishment of the writ of *habeas corpus*, and, therefore, the discussion was framed in the context of criminal laws:

> It may well be a question, whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of *habeas corpus*, the prohibition of *ex post facto* laws, and of TITLES OF NOBILITY, *TO WHICH WE HAVE NO CORRESPONDING PROVISION IN OUR CONSTITUTION*, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life, [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore A MORE DANGEROUS ENGINE of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas-corpus* act, which in one place he calls "the BULWARK of the British Constitution."

(Footnote omitted.) However, in Number 78, Mr. Hamilton did not suggest any limitation of the term:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.

Regardless of whether "the author of the Federalist" to which Justice Chase referred was Mr. Madison or Mr. Hamilton, the suggestion that a limitation of *"ex post facto* Law" was clearly expressed in the Federalist papers is not borne out.

Additionally, as Justice Johnson points out, of the four state constitutions to which the *Calder* court referred, two, Massachusetts and Delaware did not even contain the phrase "*ex post facto.*" While Justice Johnson acknowledged that the other two constitutions, those of Maryland and North Carolina, "would seem to have applied the phrase in the restricted sense," he correctly queried, "why should the erroneous use of language in two instances only, control the meaning of it everywhere?"[25]

Various newspaper articles published around the time of the Constitutional Convention substantiate the general and widespread animus towards *ex post facto* laws and that both civil and criminal enactments were equally intolerable. One article offered the opinion that "'*ex post facto* laws are poison to free constitutions, and pregnant with calamity to the community,'" and "'[t]o suffer a continuation of this shameful abuse of power, would be to hold our patrimony and liberty as tenants at will – an onerous tenure! Distrust, the canker-worm of prosperity and happiness,

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must haunt that government which tolerates the abuse; and gnaw deep into every measure, public or private, in its nature.'"[26] New Jersey publications, including *The [Elizabeth Town] Political Intelligencer* and *New-Jersey Advertiser*, referred to *ex post facto* laws as "engines of oppression."[27]

Justice Johnson's view was shared by Justice James Kent of the New York Supreme Court of Judicature, who had opined in 1811 that there is "no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right, soon ceases to regard the other."[28]

Professor Crosskey posits that the impetus for the *Calder* Court's restrictive interpretation of the Clause was to allow for the passage of retroactive bankruptcy legislation, legislation that was of great concern to the Court and its friends. At the time of the *Calder* decision, Robert Morris, one of the signors of the Declaration of Independence and a member of the Federal Constitutional Convention, was incarcerated in debtor's prison, and Justice James Wilson, a member of the Court, was on the run (purportedly with the help of other members of the Court) to avoid debtor's prison.[29] Although the pre-*Calder* drafts of the bankruptcy legislation had restricted its application to preexisting debts, such provision was removed from the version that was enacted in 1800.[30]

Neither the language of the Constitution, nor the authorities cited by the *Calder* Court to justify its holding, support the Court's restriction of the *Ex Post Facto* Clause to criminal laws. Further, the Court's motivation for the limitation is highly suspect. Despite attempts to repudiate the narrow and baseless interpretation of the *Ex Post Facto* Clause, such efforts have – at least to date – been unsuccessful.[31]

It is, therefore, not surprising that, with the intended Constitutional protection foreclosed, other provisions of the Constitution, and even "extra-Constitutional"[32] limitations, have been used to attack retroactive civil legislation.

EXTRA-CONSTITUTIONAL LIMITATIONS ON RETROACTIVITY

The vested rights of parties have been said to "rest not merely upon the [C]onstitution, but upon the great principles of Eternal Justice, which lie at the foundation of all free governments."[33] Other extra-constitutional arguments for rejecting

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retroactive legislation are that by promulgating laws that would require modification of past conduct "'would be to legislate an absurdity; to grant what would be an utter impossibility,'"[34] and that by acting upon the past, the laws would be judicial and not legislative, and beyond legislative authority.

It has been suggested that the extra-constitutional limitations on retroactivity "gradually retreated to cover under the due process clauses of the 14th [A]mendment and of the state constitutions."[35] However, given the increasing willingness of courts to narrowly construe due process provisions and countenance all manner of retroactive legislation, perhaps these basic "immutable principles" need to be resurrected and pursued. In addition, as Justice Joseph

Story recognized long ago, and after explicitly recognizing the restriction to the *Ex Post Facto* Clause by *Calder*, "[r]etrospective laws are, indeed generally unjust; and, as has been forcibly said, neither accord with sound legislation, nor with the fundamental principals of the social compact."[36] Legislatures should respect the rights of the people they purport to represent; retroactive legislation undermines the basic trust citizens should have in the government. Legislatures should keep in mind that prospective legislation is "better suited to an even-handed and impartial justice."[37]

DUE PROCESS

Even though the Due Process Clauses of the Fifth ("No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation") and Fourteenth Amendments ("nor shall any state deprive any person of life, liberty, or property, without due process of law") do not expressly prohibit retroactive enactments *per se*, courts have relied on those provisions in holding retroactive laws to be invalid. "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through the centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess."[38]

However, while due process concerns should generally apply equally to retroactive enactments regardless of type of legislation, the U.S. Supreme Court appears to have adopted a bifurcated approach to retroactive legislation, with a low level of judicial scrutiny and high degree of judicial deference being applied to economic legislation and, in particular, tax legislation.[39] Such position is in stark contrast to the position of the founding fathers, who were acutely concerned with retroactivity in the sphere of commerce, particularly with respect to issues of legal tender and debt.[40] It should not matter that the retroactive legislation is tax-related if the fundamental requirements of fair notice and settled expectations are not respected. One commentator has posited that "it would have been more in accord with the spirit of the Constitution to declare freedom from retroactivity a 'fundamental right,' and require that the statute's defenders show a compelling state interest before infringing that right."[41]

However, in *United States v. Carlton*,[42] the U.S. Supreme Court adopted a restrictive view of the Due Process Clause and a broad view of legislative powers. *Carlton* involved Congress' enactment of "clarifying" tax legislation with a 14-month retroactive effect. The IRS had, however, shortly after the original legislation, had issued both a statement and a notice advising the public of its position, which was consistent with the "clarifying" legislation.[43] In *Carlton*, Justice Harry Blackmun, writing for the majority of the Court, held that the retroactive legislation did not violate due process, since Congress had promptly enacted legislation that was neither illegitimate nor arbitrary. In her concurring opinion, Justice Sandra Day O'Connor suggested that there was "an element of arbitrariness" to retroactive changes in tax rate or deduction, but concluded that a modest look back, *i.e.*, less than "the year preceding the legislative session in which the law was enacted,"[44] would not violate due process. The third opinion, written by Justice Antonin Scalia and joined by Justice Clarence Thomas, concurred in judgment, on the basis that "the Due Process Clause guarantees *no* substantive rights, but only (as it says) process."[45] Justice Scalia, noted, however, that if "'substantive due process' were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation."[46] While, arguably, the *Carlton* decision can be justified due to the "curative" nature of the legislation due to the unintended financial

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benefit of the original legislation, the relatively short period between the original and the clarifying legislation and the prompt notice to taxpayers that the IRS would interpret the original legislation in the manner provided in the clarifying language, enactment of tax imposition provisions that are made retroactive because a legislature could not reach a timely consensus – as in *Oberhand* – cannot be justified.

In *Johnson Controls*,[47] the Kentucky Court of Appeals, relying on *Carlton*, struck down legislation passed by the Kentucky General Assembly in 2000 (H.B. 541) that extinguished tax refund claims filed by corporate taxpayers more than five years earlier on the grounds that "the retroactivity period created by H.B. 541 exceeds the constitutional limits and violates [taxpayers'] due process rights." The refunds had been filed after the Kentucky Supreme Court had determined that the Kentucky Revenue Cabinet's shift in position from allowing combined reporting to requiring separate reporting was contrary to the law.[48] Instead of doing the right thing by paying the claimed refunds and passing prospective revenue enhancement legislation (if needed), the Legislature tried to erase the court's decision. In addition to due process and separation of powers issues engendered by such action, by thumbing its nose at the court the Legislature evidences disrespect for the laws it expects the citizenry to respect.

It is submitted that a legislature's enactment of a retroactive tax provision due to its own inability to pass legislation on a timely basis, or to address the negative financial impact of an adverse decision, cannot be countenanced and is not sustainable under the Due Process Clauses of the Constitution.

CONCLUSIONS

With increasing frequency legislatures are enacting all manner of retroactive legislation. While retroactive curative legislation may not be problematic, the now routine practice of enacting laws with pre-enactment effective dates and retroactive "clarifying" legislation to change past laws due *inter alia* to adverse litigation or court decision, is contrary to the goals of the Constitution and the "great principles of eternal justice."

Reliance on and respect for the law are prerequisites for an orderly society. Legislators should have the same respect for the law as they expect from their constituents. Changing the rules of the game after the game has been played is wrong. Here, in particular, the New Jersey Legislature had ample opportunity to change the law prospectively, yet afford individuals the opportunity to restructure their affairs. The estate tax amendments were proposed in Congress more than a year before legislation was introduced in New Jersey, and the federal legislation was passed on June 7, 2001. While no one questions the New Jersey Legislature's authority to decouple, doing so after the decedents' game was over was an abuse of process.[49]

While the "wisdom, good sense, policy or prudence (or otherwise) of a statute are matters within the province of the Legislature and not the Court,"[50] by taking a very circumscribed view of the *Ex Post Facto* Clause and the due process protections afforded by the U.S. and state constitutions, courts have failed to protect the populace against improper legislative action. It is improper for courts to second guess the wisdom of a legislative enactment, but it should not be improper for courts to ensure that, in achieving the legislative purpose, fundamental rights of the populace are not trammeled. The long-standing animus towards retroactive or retrospective legislation is grounded in the significant potential for due process violation. Stated differently, the protection afforded under due process clauses is the protection against manifest injustice. The *Oberhand* decision offers a welcome respite from courts' *laissez faire* approach to retroactive legislation. Justice Albin got it right: "Manifest injustice and the denial of fundamental fairness are two ways of expressing the same concept."[51] ■

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[3] *Oberhand v. Director, Div. of Taxation*, 193 N.J. 558 (2008).

[4] *The Federalist,* No. 51 (Alexander Hamilton).

[5] *Gibbons v. Gibbons*, 86 N.J. 515, 521 (1981).

[6] For an historical perspective regarding retroactive impositions, *see* Paul H. Frankel, Michael A. Pearl & Amy F. Nogid, *Johnson Controls: Reaching the Right Result Regarding Retroactive Legislation*, 40 State Tax Notes 1003 (June 26, 2006).

[7] 193 N.J. at 572 (citations omitted).

[8] *Id.* at 574.

[9] *Id.* at 575.

[10] *Id.* at 582.

[11] Paul Craig Roberts, *How the Law Was Lost*, 20 Cardozo L. Rev. 853, 855 (1998-99).

[12] An *ex post facto* law is "simply a law that is retrospective; that is, a law made after the doing of the thing to which it relates, and retroacting upon it." William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. Chi. L. Rev. 539, 539 (1947) ("Crosskey").

[13] 3 U.S. 386 (3 Dall.) (1798).

[14] The Congressional *ex post-facto* provision is found in article I, section 9 of the U.S. Constitution.

[15] 3 U.S. at 391.

[16] *Id.*

[17] *Id.* at 396.

[18] William Johnson, Note to *Satterlee v. Matthewson*, 2 Pet. 380, 416n (1829).

[19] *Id.*

[20] Crosskey at 539. *See also* William Winslow Crosskey, *The Ex Post Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. Chi. L. Rev. 248 (1967-68). *Cf.* Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 Idaho L. Rev. 489 (2002-03) ("Natelson") (disagreeing with Crosskey's firm conclusion that the *Ex Post Facto Clause* was intended by the framers to be limited to criminal laws, but acknowledging that it was unclear).

[21] Crosskey at 560.

[22] Crosskey at 546.

[23] Note to *Satterlee v. Matthewson*, 2 Pet. 380, 416n (1829)

[24] *Id.*

[25] *Id.*

[26] Crosskey, at 541 (citations omitted).

[27] Crosskey at 542.

[28] *Dash v. Van Kleek*, 7 Johns 477, 506 (1811).

[29] Crosskey at 563. Crosskey states that the other justices arranged that Justice Wilson ride circuit in North Carolina, to avoid debtor's prison, and he stayed at Justice Iredell's home.

[30] *Id.* at 563-64.

[31] However, at least one sitting Justice, Justice Thomas, has indicated a willingness to reconsider the *Calder* decision. In *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539 (1998), he stated in his concurrence: "In an appropriate case, therefore, I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the *Ex Post Facto* Clause."

[32] Bryant Smith, *Retroactive Laws and Vested Rights,"* 5 Tex. L. Rev. 231, 235 (1926-27) ("Smith").

[33] *Benson v. Mayor*, 10 Barb. 223 (Sup. Ct. N.Y County 1850).

[34] Smith at 236 (citation omitted).

[35] Smith at 237.

[36] 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1392, at 266 (1833).

[37] Bryant Smith, *Retroactive Laws and Vested Rights II*, 6 Tex. L. Rev. 409, 417 (1927-28).

[38] *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (J. Frankfurter, concurring).

[39] *Welch v. Henry*, 305 U.S. 134 (1938).

[40] Natelson at 492, 504-05.

[41] *Id.* at 529.

[42] 512 U.S. 26 (1994).

[43] The IRS issued a statement on January 5, 1987 and Notice 87-13 (1987-1 C.B. 432) in January 1987.

[44] 512 U.S. at 38.

[45] *Id.* at 40.

[46] *Id.* at 39.

[47] *Johnson Controls, Inc. v. Rudolph*, No. 2004-CA-001566-MR (Ky. Ct. App. May 5, 2006), *review granted*, 2006-SC-0416-DG (Ky. Oct. 24, 2007). Paul H. Frankel and Michael A. Pearl of Morrison & Foerster LLP, along with Bruce F. Clark, Margaret R. Grant and Erica L. Horn of the Kentucky firm of Stites & Harbison, PLLC, are representing Johnson Controls in this case.

[48] *GTE v. Revenue Cabinet,* 889 S.W.2d 788 (Ky. 1994). Paul H. Frankel and Bruce F. Clark represented GTE in that case.

[49] In *McGinley v. Madigan*, 366 Ill. App. 3d 974, *appeal denied*, 222 Ill. 2d 575 (2006), the Illinois Appellate Court reached a contrary result with respect to similar retroactive legislation related to decoupling from the federal estate tax. Although the Circuit Court had ruled in favor of the taxpayers and had concluded that the substantive amendment should only be applied prospectively, the Appellate Court concluded that the taxpayers' Illinois due process rights were not violated, relying in large part on the Illinois Supreme Court's decision in *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27 (2001). *Commonwealth Edison* held that: "A retroactive tax measure does not necessarily violate the due process provisions of either the Illinois or the Federal constitution (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, sec. 2). A court must consider the nature of a tax measure and the circumstances leading to its adoption before the court may determine 'that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.' In determining whether a retroactive tax measure is "'so harsh and oppressive as to transgress the constitutional limitation,'" courts have considered such factors as the legislative purpose in enacting the amendment, the length of the period of retroactivity, whether the taxpayer reasonably and detrimentally relied on the prior law, and whether the taxpayer had adequate notice of the change in the law." 196 Ill. 2d at 43-44 (citation omitted). Applying *Commonwealth Edison*, the court found that "the legislature was pursuing the legitimate purpose of avoiding a loss of revenue," there was only a short retroactivity period, that taxpayers had "'ample advance notice'" since several bills proposing decoupling had been presented to the Legislature, and that the ability of taxpayers to change their estates prior to death was "purely speculative." *McGinley*, 366Ill. App. 3d at 987, 988. However, by their very nature tax laws raise revenue, and the Legislature had more than adequate time to enact a law so that the decoupling provision would not need to be retroactive. Suggesting that "ample advance notice" is provided by proposed legislation is an unrealistic and very troubling standard due to the myriad bills that are introduced and never passed. Additionally, in relying on *United States v. Darusmont*, 449 U.S. 292 (1981), to support its "ample advance notice" conclusion, the court fails to appreciate the distinction between an increase in tax (*Darusmont* involved an increase to the minimum tax rate and a reduction to the amount of the allowable exemption) from a provision the effect of which could be avoided by restructuring the estate. While both instances of retroactivity are objectionable and evidence a fundamental lack of respect to the populace represented by the enacting bodies, there is a difference between a tax increase and subjecting an estate to tax where that estate had been structured to take advantage of a credit provision eliminating the tax and then only after the decedent is dead.

[50] *White v. North Bergen*, 77 N.J. 538,543 (1977).

[51] *Oberhand*, 193 N.J. at 579.

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