The Alabama Municipal JOURNAL

May 2009 Volume 66, Number 11

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Cover Photo: *Municipal officials pose for a picture on the Capitol steps this past February following a Legislative workshop, Municipal Advocacy 101, held by the League in Montgomery.*

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A Message from the Editor

Clearly I enjoyed Easter this year ... note that Mr. Bunny and I have the same expression!

Many of you are probably reading this after returning from your first League convention – as you're still sorting through and making sense of the tremendous amount of information you brought back with you.

Since its inception in 1935, the Alabama League of Municipalities has been the leading legal, legislative and educational resource for cities and towns throughout the state. Next year marks the League's 75th Anniversary – a noteworthy accomplishment for an organization developed specifically to meet the needs of locally elected officials and the municipalities they serve. Throughout its distinguished history, the League has demonstrated repeatedly that the unified voices and collective actions of dedicated municipal officials, working through the League, are a compelling force in articulating the concerns, solving the problems and achieving the goals of its individual member municipalities.

Through the years, the League has become vastly more capable of meeting the ever-growing needs of municipal officials and personnel for legal and technical assistance and for information services during a period of revolutionary urban and economic change. Yet, the League has retained the same basic objectives that motivated its founding nearly 75 years ago:

• To maintain a staff capable of finding answers to legal and administrative questions asked by elected officials and personnel of member municipalities.

• To hold conferences and meetings at which views and experiences of municipal officials and personnel may be exchanged.

• To work to secure enactment of legislation, at both the state and federal levels, that will enable all cities and towns to perform their functions more efficiently and effectively.

• To conduct continuing studies of the legislative, administrative and operational needs, problems and functions of Alabama's municipal governments and to publish the results of these studies for the benefit of member cities and towns.

• To encourage in the people of Alabama a sympathetic appreciation of the duties, responsibilities and rights of both municipal government and its citizens.

The League's governing structure consists of the President, Vice President and the Executive Committee, which is composed of five elected municipal officials from each of the state's seven congressional districts, the active Past Presidents, and the Executive Director. League officers and members of the Executive Committee are elected by the voting delegates at the annual convention, (which was just held in Montgomery May 2-5). In addition, six standing committees are charged with the review and development of League policies and goals which encompass a broad spectrum of issues affecting municipal government. The Chairs and Vice Chairs of each standing committee are also elected annually at the convention. Committee members are selected by the respective committee chairs to provide representation from each congressional district and to ensure representation of cities and towns of all sizes on each committee.

I've been with the League for nearly 12 years and know first-hand the dedication of this organization to its members. We are a proactive association that anticipates and adapts in order to meet the needs of our municipalities. Our Certified Municipal Official (CMO) program has been providing educational training for Alabama's locally elected officials since 1994 and is one of the most respected programs in the country. Our website and printed materials are a prime resource for everything from national and League-sponsored programs, workshops and conferences to legal information, legislative updates and articles about topics relative to your communities. League-operated programs continue to flourish with 2009 marking the 20th Anniversary for the Alabama Municipal Insurance Corporation (AMIC), which was formed in 1989 by League members to provide liability and property insurance coverage for member municipalities.

I encourage *all* our members, particularly if you're newly elected, to visit our website (**www.alalm.org**) often; become active in our CMO training; sign up for a committee; attend conferences and workshops; participate in League-sponsored programs (such as the annual photo contest and Qualify of Life Awards); contact our attorneys with your questions; and explore the *many* resources offered through the League, particularly our insurance (MWCF and AMIC) and funding (AMFund) programs. Again, the website is: **www.alalm.org**!

Carrie

Report Assesses Regional Possibilities in Recovery Act

Melvin Duran
Mayor of Priceville

Note: This article by Bill Barnes appeared in the April 13 issue of *Nation's Cities Weekly.*

A new paper from the Brookings Metropolitan Policy Program finds that the American Recovery and Reinvestment Act (ARRA) is limited in its support for creative regional implementation, but that it delivers critical investments and holds out significant opportunity for regional and metropolitan empowerment and problem-solving.

To produce real prosperity, the paper argues, local leaders require ways to enhance the fundamental "drivers" of productive growth – innovation, infrastructure, human capital and quality places. But metropolitan actors also need the discretion and power to aggregate, link and coordinate those drivers to maximize their impact.

The paper finds that ARRA usefully directs billions of dollars towards significant investments in the four key drivers of prosperity. At the same time, the paper concludes that ARRA does very little to actively support efforts to bundle and align ARRA resources to foster local, regional and national recovery. The report finds that:

The need for fast action created a bias towards "business-as-usual" delivery systems in the crafting of ARRA. That orientation limits the extent to which the Recovery Act actively supports metropolitan-area implementation.

And yet, despite its flaws, ARRA delivers critical investments in what matters. In this respect, Brookings estimates that nearly 43 percent – roughly $335 billion – of the total stimulus appropriation supports the main drivers of prosperity: innovation, human capital, infrastructure and quality places. In addition, the report says that ARRA holds out significant opportunities for creative leaders to engage in coordinated, regional problem solving. The Recovery Act provides some important chances for linking resources and even for transformative governance. ARRA provides a number of avenues for coordinating its various funding streams at a metropolitan level, particularly in new competitive grant programs. A few of the relevant provisions include:

The Advanced Research Projects Agency-Energy (ARPA-E): A $400 million appropriation for cutting-edge energy research and development will require collaboration among private firms, universities, labs and research institutes that could seed the sort of cross-institutional partnerships that facilitate continued, regional innovation and economic growth.

Worker training in high-growth and emerging industries: A $750 million appropriation for connecting workforce development to competitive industry sectors could spur regional approaches to supporting high-value clusters, especially around energy efficiency and renewable energy.

Multimodal transportation: Some $1.5 billion will fund competitive grants to support nationally, regionally or metro-significant projects that may facilitate linking transportation, housing, energy and environmental concerns.

Energy Efficiency and Conservation Block Grants: ARRA provides $3.2 billion in tremendously flexible grants that could motivate metro-scale strategies for reducing fossil fuel emissions and promoting energy efficiency in transportation, building and other sectors.

The Neighborhood Stabilization Program: $2 billion is available to address the secondary community impacts of the foreclosure crisis and may lead to metro-wide partnerships between state and local governments, nonprofits and private entities

Some elements of ARRA, according to the report, truly do represent the sort of transformative policymaking that can strengthen all levels of governance and kindle true regional and metropolitan action. For example:

On energy retrofits: An effort by the Departments of Energy and Housing and Urban Development to leverage some $16 billion in ARRA funds could spark a major private retrofit market in U.S. regions. This effort will contribute to the emergence of an industry that could provide jobs and spark the economy in some of the oldest areas. Moreover, Brookings says, the initiative will strike a blow for integrated policymaking by stepping beyond the sort of silo-driven policy that so often frustrates innovation.

On education innovation: A $650 million Department of Education competitive grant program to local school districts, or partnerships between local districts and nonprofit organizations, could stimulate the expansion of high-performance charter management organizations and increase the local supply of highly effective teachers to staff those and other high-needs schools.

"Metro Potential in ARRA: A Preliminary Assessment of the American Recovery and Reinvestment Act from a Metropolitan Perspective" – both the full report and an executive summary – is available on the Brookings Metro Studies website: ***www.brookings.edu/metro.aspx***. ■

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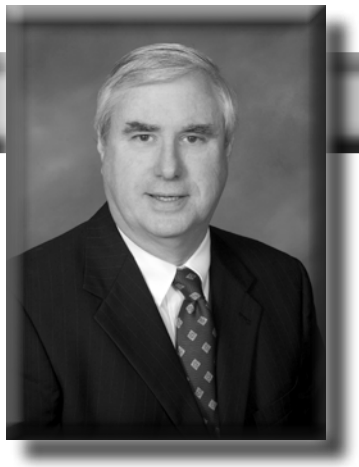

Perry C. Roquemore, Jr.
Executive Director

Spring Cleaning to Ensure Transparency: What Is Public Record?

This article was written by S. Ellis Hankins, Executive Director of the NC League of Municipalities, and modified by the Legal Department of the Alabama League of Municipalities to comply with Alabama law.

Have you Twittered yet? Do you have a Facebook page? Do you send text messages? Record podcasts? If you think email is the latest thing in communications, then you may be several "electronic" generations behind the times. These days, every other person seems to be talking on an iPhone, checking their Blackberry for emails or texting on their cell phone. These devices can be great conveniences, keeping you in touch with constituents and with your city or town operations. But if you are a public official, these are not just new ways to communicate, but new ways to generate public records. More ways to communicate equal more messages equal more public records.

Municipal officials believe in open government and access to public records, but also know that determining what to keep, what to provide and how to do so can be difficult. Regardless of whether you hand write notes, email or blog, the growing volume of communications creates some very real challenges for public officials who must comply with the public records laws.

Consider your email — a pretty standard form of communication these days. The emails you send and receive as a municipal official are public records, for the most part, if they deal with public business. And remember, if you get an email on your personal or business computer that is about public business, it is a public record and must be available and retained (some public officials forward all of those to an official email address). That means not only that anyone can ask to view your emails that deal with public business or get a copy of them, but also that you have to retain them under the same standards as any other public record.

Are all your emails public records? There is disagreement about that — with some media and some attorneys saying yes, the extreme position. Others maintain that emails not about public business are not public records nor are emails that are perhaps fleeting or ephemeral in nature (such as, "can you meet today at 3?").

If you decide to blog about being mayor, it probably is a public record and therefore needs to be kept like any other public record. If you use Facebook for city-related information this, too, is probably a public record. And, of course, your town's Internet site is a public record. But are you keeping electronic records of each version of communications about city business?

Then come the questions about how to store all these electronic records and make sure that the records can be accessed or read in future years. And we don't just mean emails and Internet documents, but also the vast computer records generated by the daily operations of municipal government. Remember floppy disks? When personal computers first came out, there were large "floppy disks," then smaller ones. How many cities and towns have public records stored on such disks? And can you still retrieve the information on those disks?

The sheer potential volume of public records can

continued on page 26

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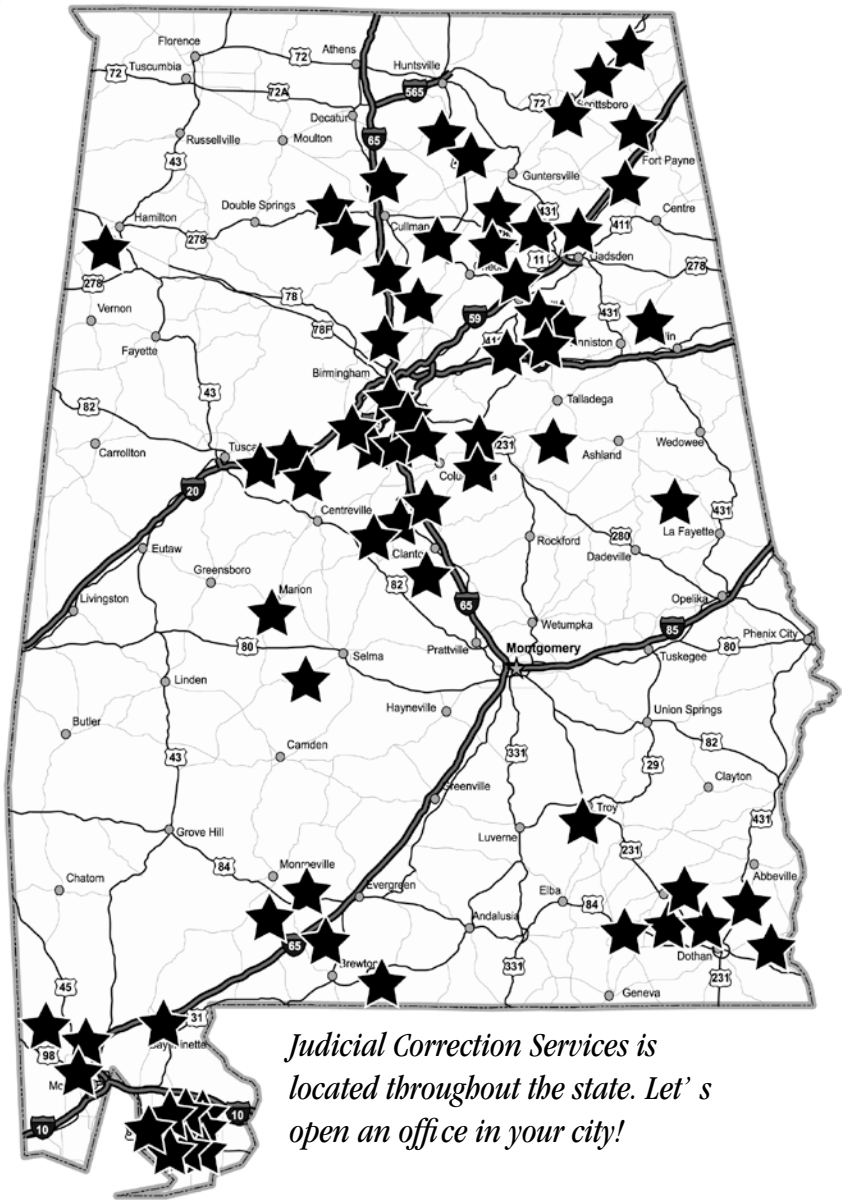

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The Legal Viewpoint

By Ken Smith
Deputy Directory/General Counsel

The Commerce Clause and Municipal Taxation

Article I of the United States Constitution provides that: "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Interstate commerce embodies any business which operates between two or more states. Individual states may not impede the flow of commerce from other states. The Commerce Clause prevents states from blocking channels of free trade, and, thus, impairing the national market. However, does state taxation of interstate commerce block free trade?

The U.S. Supreme Court has been asked to rule on this question several times, with various results. The Court has called its own decisions on state taxation of interstate commerce a "quagmire," and Justice Scalia has declared that in the years since the Commerce Clause was first applied in this area, the Court's applications of the doctrine have "made no sense."

This article explores the development of the Commerce Clause in the area of state taxation and explores future ramifications of recent court decisions on the tax revenues of local governments.

History

In interpreting state taxation of interstate trade, the U.S. Supreme Court has expressed concerns in two areas: the Commerce Clause which mandates that states not interfere with interstate commerce; and restrictions on personal jurisdiction imposed by the Due Process Clause.

The Court's decisions have tended to follow trade developments. In the early history of our country, only rare products were not produced locally. Markets were local and state regulations had little impact on commerce between the states.

In the 1800's, though, the market shifted. People began congregating in cities and towns. Transportation improved, and more goods were produced for a national market. The Court struck down many state regulations on Commerce Clause grounds to protect the fledgling economy and encourage growth. These rulings placed the power to regulate this national commerce solely in the hands of Congress. Justice Harlan Stone has said that the Court's interpretation of the Commerce Clause, more than perhaps any other single element, bound the states into a nation.

Commerce Clause opinions during the 19th century illustrate some of the central concerns that the justices had in trying to establish the proper role of the state and federal governments. The Court sought to preserve the territorial integrity of the states, while simultaneously acknowledging Congress' power under the Constitution to regulate interstate commerce. Industries challenged many state laws during this period and succeeded in establishing a federal right that only Congress can regulate interstate trade.

One of the results was a ban on local taxation of interstate businesses. In the early 1800's, the Court felt that states should not tax interstate commerce. The late 1800's, though, witnessed a shift.

The Court continued to prohibit direct taxation but allowed indirect taxation. The Court held that each sovereign is supreme within its sphere of influence. A state can exercise its police power, leaving Congress to regulate the commercial aspects of interstate commerce. If a state law, operated extraterritorially or unreasonably, burdened the introduction of non-domestic products into a state, the court treated the law as a direct regulation of interstate commerce and a violation of the commerce clause. When the state's exercise of police power was not aimed at interstate commerce but the means of regulation merely affected interstate commerce, the state was free to regulate unless preempted by Congress.

Sales and Use Taxes

Sales and use taxes comprise a large portion of most state and local revenues. Most economists feel these taxes will increase as states are forced to assume responsibility for more federal programs. Budget shortfalls have made state and local governments increasingly aggressive in enforcement of these taxes.

State laws require retailers to collect sales and use taxes from consumers and remit these amounts to the government. Retailers remain liable for any uncollected taxes. State collection requirements have resulted in challenges based on the interstate Commerce Clause. Courts have focused on the nature of contacts the retailer has with the state. Clearly, physical presence is enough to enable the state to require collection of the taxes. Closer questions arise where the contact is more limited.

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Forty years ago, in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), the United States Supreme Court held that states may not impose collection duties on absent mail-order retailers. The Court held that this violated both the Due Process and Commerce Clauses of the U.S. Constitution.

Bellas Hess

In *Bellas Hess*, Bellas Hess, a mail-order company incorporated in Delaware and headquartered in Missouri, was required by the state of Illinois to collect and remit use taxes. The company had no stores, agents, property or telephone numbers in Illinois. Its contacts with Illinois residents consisted of mailing two catalogues each year to past and potential customers, supplemented by occasional flyers. Bellas Hess accepted orders by mail and shipped goods by mail or common carrier. Bellas Hess challenged the use tax requirement on both Commerce Clause and Due Process grounds.

The Court stated that state taxation on interstate businesses is justified only where the tax is necessary to make the commerce bear its fair share of the cost of the government whose protection it enjoys. The Court said that due process requires that the state demonstrate that it has given benefits to the business which justify the tax. The Court found that retailers with stores, solicitors or property within a state received protection and services from the state, while retailers relying solely on mail-order business did not. The Court felt that if the use tax was upheld, every other state would impose similar requirements on mail-order businesses, which would unjustifiably entangle mail-order businesses in an administrative nightmare.

In this case, the Court ignored the nature and depth of the retailer's contacts with the taxing state. Instead, the Court conditioned nexus upon a finding that the retailer was physically present in the state. This bright-line rule, first articulated in this case, continues as the rule today.

Post *Bellas-Hess* Cases

In *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), California sought to impose use tax collection duties on the National Geographic Society. The society sold items to California residents from its offices in Washington, D.C. It had no retail outlets in California. However, the society maintained two offices in California to solicit advertising for its magazine. The Court held that these offices constituted a physical presence in the state which justified imposing the use tax on the mail order business. This decision means that a retailer's physical presence does not have to relate to the portion of business which the state seeks to tax.

In 1977, the Court issued its ruling in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In this case, a transportation services dealer sued over a Mississippi requirement that he collect taxes from his customers. The Court overturned its previous decisions and allowed the state tax to stand. The Court established a four-part test to determine when a state tax is permissible. A state tax will be sustained if:

(a) the tax is applied to an activity with a substantial nexus with the taxing state;

(b) the tax is fairly apportioned;

(c) the tax does not discriminate against interstate commerce; and

(d) the tax is fairly related to some service the state provides.

This test is followed today. The court has said that interstate commerce must pay a fair share of local taxes. However, taxes and licenses applied to interstate businesses must not constitute a burden. In determining whether a tax meets this test, it is important to understand each of these four elements.

***Complete Auto* Element One: What is Nexus?**

Webster defines "nexus" as a connection, a tie or a link. For taxation purposes, legally speaking, nexus is some activity, relationship or connection which is necessary to subject a person, business or corporation to a jurisdiction's taxing powers. In other words, there must be a sufficient connection between the business involved and the taxing jurisdiction for a tax to be applied. Physical presence is generally necessary to satisfy nexus requirements under the Interstate Commerce Clause.[1] Case law and legislative efforts to statutorily define nexus have made this a frequent topic of discussion among local revenue administrators.

Interstate commerce cases generally arise from two types of taxes: true sales and use taxes and license taxes.

The true sales and use tax is a consumer tax; that is, although the seller collects this tax, he or she serves only as an agent for the taxing jurisdiction. The purchaser is the ultimate taxpayer. The use tax is on tangible personal property which was purchased outside the jurisdiction for use or consumption within the jurisdiction. Interstate Commerce Clause cases frequently challenge whether a jurisdiction can require an out-of-state seller to collect a use tax.

In the sales and use tax context, pursuant to state law, whether a sales tax is due on a transaction depends upon the passing of title between the buyer and seller. *Hamm v. Continental Gin Co.*, 276 Ala. 611, 165 So.2d 392 (Ala. 1964). Section 40-23-1(5) states that "a transaction shall not be closed or a sale completed until the time and place when and where title is transferred by the seller or seller's agent to the purchaser or purchaser's agent."

Delivery is a pivotal issue for determining where title transfers, but it is not conclusive. The determining factor is the intent of the parties, in whatever means it is revealed.

Section 11-51-90 authorizes all municipalities to collect license taxes on business that is transacted within the municipality and police jurisdiction. These fees are collected from the business itself for the privilege of doing business within the municipality. License fees are generally based on either a flat rate or on the gross receipts of the company. In Alabama, licenses may be assessed on businesses which operate in interstate commerce only to the extent of the business which

is transacted within the limits of the state and where the business has an office or transacts business in the city or town imposing the license.

In the interstate commerce area, "the 'substantial–nexus' requirement ... limit[s] the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce." *See*, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). Nexus can only be determined by examining all possible connections the taxpayer has with the taxing jurisdiction. This can only be determined on a case-by-case basis because these factors vary in each individual situation. However, generally speaking for interstate commerce purposes, only a minimal contact is necessary.

Factors Indicating Nexus

Cases have indicated a number of factors relevant to the issue of nexus. For instance, maintaining a legal domicile or principle place of business generally subjects the business to tax liability. Other factors include making deliveries into the jurisdiction, advertising, employing local individuals, maintaining or using a facility, rendering services, taking advantage of the economic benefits of locating near the jurisdiction, and soliciting orders. However, in the case of soliciting orders, 15 U.S.C. Section 381 et seq., prohibits a state or local government from assessing any net income-based tax on an interstate business if the only contact between the business and the taxing jurisdiction is the employment of a representative to solicit orders which are filled and shipped from a point outside the state. Even in this situation, though, every decision about accepting or rejecting the order must be made outside the state in order to defeat a finding of nexus.

An example might help clarify the issue of nexus. In *Tyler Pipe Industries , Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), the State of Washington imposed a business and occupational tax on businesses which operated within the state. The measure of this tax, a wholesale tax, was based upon the gross proceeds of the company's sales within Washington. The U.S. Supreme Court found that sufficient nexus existed to justify imposing the tax against Tyler Pipe, even though the only connection between Tyler Pipe and Washington was hiring an independent contractor to solicit orders within the state. Tyler Pipe maintained no offices in Washington, owned no property, and had no employees within the state, even though it sold large amounts of cast iron and other products within the state. The Court pointed out that the sales representative Tyler Pipe hired acted daily on behalf of the company, calling on customers and soliciting orders. In addition to the goodwill established by the representative, he also kept the company informed on all aspects of their business within Washington, and kept Tyler Pipe up-to-date about the market for its products within the state. Because of the substantial activities of the representative, the Court found sufficient nexus to uphold imposing the tax.

In attempting to define nexus legislatively, in 2003 the Alabama legislature adopted Section 40-23-190, Code of

Alabama 1975. The purpose of this legislation is to establish the conditions under which an affiliation between an out-of-state business and an in-state business creates remote entity nexus with Alabama to require the business to collect and remit state and local use tax. Remote entity nexus is established and an out-of-state business to collect and remit state and local use tax if:

The out-of-state business and the in-state business maintaining one or more locations within Alabama are related parties; and one or more of the following conditions is met:

• The out-of-state business and the in-state business use an identical or substantially similar name, trade name, trademark, or goodwill, to develop, promote, or maintain sales, or

• The out-of-state business and the in-state business pay for each other's services in whole or in part contingent upon the volume or value of sales, or

• The out-of-state business and the in-state business share a common business plan or substantially coordinate their business plans, or

• The in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting, or maintaining the in-state market.

An out-of-state business and an in-state business are related parties if one of the entities meets at least one of the following tests with respect to the other entity:

• One or both entities is a corporation, and one entity and any party related to that entity in a manner that would require an attribution of stock from the corporation under the attribution rules of Section 318 of the IRC owns directly, indirectly, beneficially, or constructively at least 50 percent of the value of the corporation's outstanding stock; or

• One or both entities is a limited liability company, partnership, estate, or trust and any member, partner or beneficiary, and the limited liability company, partnership, estate, or trust and its members, partners or beneficiaries own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the profits, or capital, or stock, or value of the other entity or both entities; or

• An individual stockholder and the members of the stockholder's family, as defined in Section 318 of the IRC, owns directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of both entities' outstanding stock.

***Complete Auto* Element Two: Fair Apportionment**

The apportionment element of the *Complete Auto* test is concerned with the avoidance of applying multiple taxes to a single interstate transaction. State and local governments cannot exact from interstate commerce more than a fair share of the tax associated with the transaction. This part of the test looks to the structure of the tax to see whether its identical application by every State would place interstate commerce at a disadvantage as compared with intrastate commerce.

M & Associates v. City of Irondale, 723 So.2d 592 (Ala.

Historical Records Advisory Board Announces Grant Awards to Local Communities

The Alabama Historical Records Advisory Board (HRAB) awarded $49,999.68 in grant funds to 22 local government agencies or historical repositories for records preservation projects during its March 25, 2009, meeting. Funding for the awards was provided by the National Historical Publications and Records Commission (NHPRC) under its State and National Archival Partnership (SNAP) Grant Program.

After its grant program was announced in mid-November, the HRAB received a total of 30 grant applications from localities across Alabama. With $50,000 available from the Board and a cap of $3,000 on individual awards, 73 percent of the grant applicants received full or partial funding. Of the 22 successful applicants, five were municipalities:

City of Aliceville: $1,000 to inventory and organize city records, apply records disposition schedules and prepare historical city council minutes (1978-2008) for scanning and easier access for citizens.

City of Heflin: $2,000 to inventory and re-house city records and prepare historical city council minutes (1890s - 1980s) to be scanned for easier access by the public.

Town of Killen: $1,156 to purchase archival shelving for the historical city records and improve lighting and file arrangement in records storage areas.

City of Leeds: $3,000 to sort, re-house, and improve storage for council minutes and other historical city records (1887-2009). Related records from two city cemeteries dating back to Alabama's statehood will also be included in project activities.

Town of Locust Fork: $683.22 to inventory, reorganize and improve storage conditions for historical town records. The town will install new shelving and create an index for easy records retrieval.

The Alabama Historical Records Advisory Board (HRAB), created by law in 2006, is responsible for providing leadership and guidance to identify, preserve and provide access to Alabama's historical records. The Board also works to strengthen public awareness of the uses and value of these records. Staff members from the Alabama Department of Archives and History, Government Records Division serve as staff for the board.

For more information on the Alabama Historical Records Advisory Board's grant program, contact Tracey Berezansky, HRAB Deputy Coordinator, or Tom Turley, ADAH Local Government Records Archivist, at (334) 242-4452 or records@archives.alabama.gov. Grant information is also available on the web page: **www.archives.alabama.gov/hrb/hrbmainpage.pdf.**

1998), provides an Alabama example of the application of the "fairly apportioned" standard. In this case, M & Associates was an Alabama corporation, headquartered in Irondale. The company sold electrical supplies from its Irondale facility as well as from facilities in Mobile, Georgia, Tennessee, Mississippi and Louisiana. The company used a central billing system in Irondale; all gross receipts were transmitted to its headquarters in Irondale. The city sought to assess a gross receipts license against M & Associates' entire interstate business; that is, the city based the business's gross receipts upon its total sales, even where those sales had no connection to Alabama other than the bookkeeping.

The Alabama Supreme Court evaluated this taxing scheme using the four part test set out by the U.S. Supreme Court in *Complete Auto Transit, Inc. v. Brady*, discussed above.

In *M & Associates*, the court was particularly concerned with whether the local tax was fairly apportioned. The court quoted the U.S. Supreme Court, stating that:

> "[W]e are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction. But 'we have long held that the Constitution imposes no single [apportionment] formula on the States,' and therefore have declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.' Instead, we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. . . .To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg v. Sweet*, 488 U.S. 252 (1989). (Citations omitted.)

To be externally consistent, the local government must demonstrate that it has taxed only that portion of the revenues from the interstate activity which reasonably reflects the local component of the activity that is being taxed. *Goldberg v. Sweet*, 488 U.S. 252 (1989).

The court also cited *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939), where the U.S. Supreme Court struck down a Washington state statute that assessed a gross receipts privilege tax against a business which marketed fruit shipped from Washington to different places around the country and the world. The State of Washington included in gross receipts even transactions where the fruit was shipped to a location outside Washington, then sold outside the state. The U.S. Supreme Court held that imposition of the state tax violated the federal commerce clause.

Similarly, the Alabama Supreme Court held that the ordinance in *M & Associates* was not internally consistent. The court stated that "if local governments in other states in which M & Associates does business . . . were to impose license taxes based on gross receipts from sales made within their respective jurisdictions, then multiple state taxation of interstate commerce would result. . . .[I]f M & Associates were to sell a certain piece of electrical equipment from its facility in Marietta, Georgia, that one sale would be subject to taxation in both Georgia and Alabama." Thus, the court held that the ordinance was not fairly apportioned because a single transaction could result in two taxes by separate jurisdictions. It is irrelevant whether other jurisdictions actually apply a tax—the only question is whether the transaction may be reasonably subject to application of a gross receipts tax by another jurisdiction.

The court did, however, specifically uphold its decision in *City of Tuscaloosa v. Tuscaloosa Vending Co*., 545 So.2d 13 (Ala. 1989), where the court stated that a city can impose on businesses located inside the corporate limits or police jurisdiction a gross receipts fee that includes transactions from that facility, whether the sale was inside the corporate limits or beyond. Thus, it would be permissible for a municipality to include in the license fee of a business located in the municipality or police jurisdiction any intrastate sales from that location.[2] The question remains, though, can a municipality include the gross receipts from interstate sales by businesses located in the police jurisdiction or corporate limits? In the League's opinion, the answer is a qualified yes.

Once the court determined that municipalities have the right to include in the license fee the gross receipts of transactions which occur beyond the municipal corporate limits, the issue returns to the court's earlier analysis; that is, does the imposition of the tax satisfy the four-prong test of *Complete Auto*? Simply stating that the sale occurs in interstate commerce isn't enough to exempt the sale from municipal gross receipts taxation. Remember that a tax is not fairly apportioned only if another state could impose the same type tax on the same transaction. In many cases, this can't happen because the other state cannot obtain sufficient nexus to assess the gross receipts tax.

Perhaps an example would help illustrate this point. Look again at the situation in *Tuscaloosa Vending*: a business physically located within a municipality's taxing jurisdiction ships goods throughout the country. It receives orders at the Tuscaloosa site and ships from that location. In this situation, it is clear that Tuscaloosa is the only jurisdiction so closely aligned with the transaction that it can levy a license tax. If the goods are shipped to Atlanta, Georgia, Atlanta's only connection to the transaction is the delivery. It would not have sufficient nexus with the business to assess a gross receipts tax against it.

M & Associates is frequently cited for the proposition that it requires municipalities to exclude gross receipts of interstate transactions from the computation of a local business's license fee. In the League's opinion, this is not the case. Only where the gross receipts of the same transaction can be taxed both by an Alabama municipality and a municipality in another state does *M & Associates* prohibit including the gross receipts of interstate sales. In other words, each jurisdiction may only tax the taxable portion of the transaction that occurs in its jurisdiction.

Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995), is another case that involved the internal/external consistency prong of the *Complete Auto* test. Jefferson Lines, Inc., a common carrier, did not collect or remit to Oklahoma the state sales tax on bus tickets sold in Oklahoma for interstate

travel originating there, although it did so for tickets sold for intrastate travel. The Court found no failure of consistency in this case, because if every state imposed a tax identical to Oklahoma's—that is, a tax on ticket sales within the state for travel originating there—no sale would be subject to more than one state's tax. Additionally, since Jefferson offered no convincing reasons why the tax failed the external consistency test, the Court found that Oklahoma's sales tax on full price of ticket for bus travel from Oklahoma to another state did not violate dormant commerce clause.

In *Goldberg v. Sweet*, 488 U.S. 252 (1989), Illinois passed an Telecommunications Excise Tax Act which imposed a 5% tax on the gross charges of interstate telecommunications originated or terminated in the State and charged to an Illinois service address, regardless of where the call was billed or paid. The Act also provided a credit to any taxpayer upon proof that another State has taxed the same call and required telecommunications retailers to collect the tax from consumers.

The U.S. Supreme Court found that this tax was fairly apportioned. The Court stated that the tax was internally consistent, since it was structured so that if every state imposed an identical tax on only those interstate phone calls which are charged to an in-state service address, only one State would tax each call. Thus, no multiple taxation would result.

The Court also found that the tax was externally consistent even though the tax was assessed on the gross charges of an interstate activity, since the tax was reasonably limited to the in-state business activity which triggered the taxable event in light of its practical or economic effects on interstate activity. Because it was assessed on the individual consumer, collected by the retailer, and accompanied the retail purchase of an interstate call, the tax's economic effect was like that of a sales tax, and reasonably reflected the way consumers purchased interstate calls, even though the retail purchase simultaneously triggered activity in several States, and was not a purely local event.

Further, the Court found that the risk of multiple taxation was low, since only two types of States—a State like Illinois which taxed interstate calls billed to an in-state address and a State which taxed calls billed or paid in state-have a substantial enough nexus to tax an interstate call. Even though this opened the door to possible multiple taxation, actual multiple taxation was precluded by the Act's credit provision.

And, in *American Trucking Associations, Inc. v. Michigan Public Service Com'n*, 545 U.S. 429 (2005), the U.S. Supreme Court refused to invalidate on Commerce Clause grounds Michigan's flat $100 annual fee imposed on trucks engaged in intrastate commercial hauling.[3] The Court held that the law applied even-handedly to all carriers engaged in intrastate transactions, not just those involved in interstate commerce. Further, the Court seems to have been influenced by the fact that Michigan used this fee to regulate commerce to protect the public, rather than to raise revenue. The Court noted that although this tax did apply to carriers engaged in hauling interstate commerce, and could be subject to numerous taxes by several states, it would be subject to the tax only if it picked up local goods and hauled them within the state, the same as intrastate carriers.

***Complete Auto* Element Three: Discrimination**

The third element of the Complete Auto test is that the tax must not discriminate against interstate commerce. This test is designed to prevent taxes which are imposed which provide a commercial advantage to intrastate business. The Court has described the rule as follows:

> "[N]o State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . .by providing a direct commercial advantage to a local business." This antidiscrimination principle "follows inexorably from the basic purpose of the Clause" to prohibit the multiplication of preferential trade areas destructive of the free commerce anticipated by the Constitution. *Maryland v. Louisiana*, 451 U.S. 725 (1981)."

For example, a state excise tax on wholesale liquor sales, which exempted sales of specified local products, was held to violate the Commerce Clause in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). And, a state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the State was found discriminatory in *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).

In *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987), two Pennsylvania statutes which impose lump-sum annual taxes on the operation of trucks on Pennsylvania's highways were challenged. One statute required that an identification marker be affixed to every truck over a specified weight, and imposed an annual flat fee ($25) for the marker. The statute exempted trucks registered in Pennsylvania by providing that the marker fee was part of the vehicle registration fee. The second statute imposed an $36 annual axle tax on all trucks over a specified weight using Pennsylvania highways. Again, Pennsylvania vehicles registration fees were reduced to offset the axle tax.

The U.S. Supreme Court found that these taxes violated the Commerce Clause. The Court noted that the Clause prohibits a State from imposing a tax that places a much heavier burden on out-of-state businesses that compete in an interstate market than it imposed on its own residents who also engaged in interstate commerce. The challenged taxes do not pass the "internal consistency" test under which a state tax must be of a kind that, if applied by every jurisdiction, there would be no impermissible interference with free trade because the challenged taxes' inevitable effect is to threaten the free movement of commerce by placing a financial barrier around Pennsylvania. The Court noted that "though 'interstate business must pay its way,' a State consistently with the Commerce Clause cannot put a barrier around its borders to bar out trade from other States and thus bring to naught the great constitutional purpose of the fathers

in giving to Congress the power 'To regulate Commerce with foreign Nations, and among the several States ... [.]' Nor may the prohibition be accomplished in the guise of taxation which produces the excluding or discriminatory effect."

A similar Alabama tax was found to violate the Commerce Clause in *Sizemore v. Owner-Operator Independent Drivers Ass'n, Inc*., 671 So.2d 674 (Ala. Civ. App. 1995).

A September, 2002, report of the Research Department of the Minnesota House of Representatives notes several important aspects of the discrimination part of the *Complete Auto* test:

"Discrimination is determined by economic effect. It is not necessary that the state or the legislature intend to discriminate, if the provision has the economic effect of discriminating. However, showing intent to discriminate is relevant; a legislative intent to discriminate is nearly conclusive of the tax's unconstitutionality."

"The tax will be invalidated, even if discrimination is minor or seemingly inconsequential. The Court has rejected arguments that the effect of the discrimination is so minor or *de minimus* that it is not of constitutional stature."

"Incentives to encourage local investment or activity may be invalid. Tax incentives for in-state activity (e.g., investment or exporting) may be invalid, if the net effect is to raise the underlying tax on out-of-state businesses."

See, *Constitutional Restrictions on State Taxation The Prohibition on Discriminating Against Interstate Commerce*, Joel Michael, www.house.leg.state.mn.us/hrd/issinfo/clssintc.pdf)

***Complete Auto* Element Four: Relation to State Services**

Finally, in order to be valid under the Commerce Clause, a tax must be "fairly related to some service the state provides." This element seems to be fairly easily satisfied, provided that there is sufficient nexus to uphold the tax. The test appears to be whether the business has the requisite nexus with the State or local government. If so, the tax probably meets the fourth element simply because the business has enjoyed the opportunities and protections that the government has provided.

Changes in Direct Marketing Since 1967

In the 40 years since *Bellas Hess*, retailers have developed the ability to target customers by lifestyles, life-events, demographics and geographic and previous purchasing characteristics. Orders are no longer taken just through the mail. Retailers now use telemarketers, toll-free numbers, computers, the Internet, FAX machines, interactive television, electronic bulletin boards and e-mail.

Revenues have grown as well. In 1967, mail order sales totaled $2.4 billion annually. Now mail order sales amount to $130.4 billion annually and constitute 15 to 25 percent of all retail sales. Taxes on these sales are lost. In 1991, governmental

entities lost an estimated $3.08 billion in uncollected use taxes.

Quill

Twenty-five years after *Bellas Hess*, the Court had the opportunity to reexamine the physical presence requirement in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

In this case, North Dakota required its residents to pay a use tax on personal property brought into the state for storage, use or consumption. All retailers maintaining a place of business in North Dakota were required to collect the tax when the property was sold. For purposes of the North Dakota statutes, distribution of catalogues or advertisement in the state on a regular or systematic basis constituted maintaining a place of business. Regular or systematic solicitation was defined as three or more separate transmissions of any ad during a twelve-month period.

In 1989, North Dakotas' tax commissioner filed suit in North Dakota district court requesting that the Quill Corporation be ordered to pay use taxes, interest and penalties on all sales in North Dakota since July 1, 1987. Quill, a Delaware corporation with property in Illinois, California, and Georgia, sold office supplies and equipment to North Dakota residents. Quill mailed catalogues and flyers into the state 62 times a year and supplemented these efforts with telephone solicitation. At the time of the lawsuit, Quill was the sixth largest retailer of office supplies in North Dakota. However, its presence in the state was almost purely economic. It owned no real property and very little personal property. It had no representatives, facilities, in-state telephone numbers or bank accounts in North Dakota.

The district court, relying on *Bellas Hess*, rejected the commissioner's request. On appeal, the North Dakota Supreme Court reversed, holding that changes in the mass marketing business and in the legal landscape had reduced *Bellas Hess* to an "obsolescent precedent."

The state supreme court stated that the test applied in personal jurisdiction cases should apply in mail-order taxation cases as well. That is, out-of-state retailers are subject to use tax collection duties if they purposefully direct their activities at a state's residents. The court held that a seller's nexus with a taxing state should be evaluated by analyzing the economic realities present in each case. Thus, the court found a substantial nexus in Quill's intentional solicitation and exploitation of North Dakota residents. The court determined that the company's economic presence was substantial, given its market share, level of advertising and annual gross revenues in North Dakota. The court noted that North Dakota regulated

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LEGAL CLEARINGHOUSE

NOTE: Legal summaries are provided within this column; however, additional background and/or pertinent information will be added to some of the decisions, thus calling your attention to the summaries we think are particularly significant. We caution you *not* to rely solely on a summary, or any other legal information, found in this column. You should read each case in its entirety for a better understanding.

ALABAMA COURT DECISIONS

Ad Valorem Taxes: Residential property, in order to be classified as Class III single-family owner-occupied residential property, must be being used by the owner as their dwelling at the time taxes are assessed. A taxpayers' single family residence did not qualify as "residential property," and, thus, was not eligible for classification as Class III single-family owner-occupied residential property for taxation purposes, as their residence was still under construction and was not occupied by or being used by taxpayers as a single-family dwelling on the applicable assessment date. *Weinrib v. Wolter*, 1 So.3d 1032 (Ala.Civ.App.2008)

Contracts: Although a school board was a local agency of the state with constitutional immunity from suit, the board was legislatively granted authority to contract and to sue and be sued on such contract, and, thus, the board was not immune from a former attorney's breach of contract suit for unpaid legal fees. Mandamus is an appropriate remedy to compel payment of a valid judgment against a public entity or official. *Bessemer Bd. of Educ. v. Tucker*, 999 So.2d 957 (Ala.Civ.App.2008)

Courts: It is the duty of the trial court to take some affirmative action, either by a statement recorded in the record or by written order, to state its reasons for revoking probation, with appropriate reference to the evidence supporting those reasons. The trial court's failure to set forth in the record its reasons for revoking probation will warrant remand. *Gerstenschlager v. State*, 999 So.2d 590 (Ala.Crim.App.2008)

Courts: The court exceeded its discretion by allowing a physician to testify by telephone in a court proceeding. Alabama had not adopted the federal rule that allowed contemporaneous transmission of a witness's testimony from a different location, and there were no cases in Alabama that indicated that testimony by telephone was permissible under the rule of civil procedure that stated witness testimony was to be taken in open court. *Greener v. Killough*, 1 So.3d 93 (Ala.Civ.App.2008)

Courts: A domestic violence victim's statement to a physician, that her injury was caused as a result of an altercation with the defendant, her husband, while they were driving, was admissible in a domestic violence trial under the hearsay exception for statements made for purposes of medical diagnosis or treatment. The identity of the perpetrator was related to the treatment of the emotional and psychological injuries suffered by the victim. *Moore v. City of Leeds*, 1 So.3d 145 (Ala.Crim.App.2008)

HIPAA: When a request is made pursuant to an order from a court or administrative tribunal, a covered entity under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy rule may disclose the information requested without additional process. *Ex parte John Alden Life Ins. Co.*, 999 So.2d 476 (Ala.2008)

Tort Liability: A personnel director's failure to recommend termination of a teacher accused of sexual misconduct did not support a § 1983 supervisor liability claim. Determination of whether a local entity is an arm of the state in carrying out a particular function, as would trigger Eleventh Amendment immunity from § 1983 suit, involves analysis of four factors: (1) state law's definition of the entity; (2) degree of control the state maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity. *Ex parte Madison County Bd. of Education*, 1 So.3d 980 (Ala.2008)

Zoning: Municipalities have the authority to regulate the use of structures and improvements in certain zones or districts and can use their zoning power to regulate aesthetics in maintaining property values. So far as an ordinance restricts the absolute dominion of the owner over its property, however, it should furnish a uniform rule of action, and its application cannot be left to the arbitrary will of the governing authorities. *Ex parte Duncan*, 1 So.3d 15 (Ala.2008)

ATTORNEY GENERAL'S OPINIONS

Ad Valorem Taxes: A vacant parsonage loses its tax-exempt status if there is no good-faith intent that it is to be used for a future tax-exempt purpose. A minister's family member may live in the parsonage without the parsonage losing its otherwise tax-exempt status. Pursuant to section 40-9-1 of the Code of Alabama, real or personal property owned by any educational, religious, or charitable institution, society, or corporation let for rent or hire or for use for business purposes shall not be exempt from taxation notwithstanding that the income from such property shall be used exclusively for educational, religious, or charitable purposes. AGO 2009-053

Ad Valorem Taxes: Excess proceeds arising from a tax sale are properly payable to the owner of the property or a representative or agent of the owner. The original owner can contract with a third party to receive the excess funds. AGO 2009-058

City Attorney: Where a municipality has created, *by ordinance*, the office of city attorney and the ordinance fails to designate the appointing authority, the Mayor is the appointing

authority for the city attorney. AGO 2009-054 **NOTE:** Where a municipality contracts with an attorney to provide legal services for the municipality, the council must approve the contract and its terms.

Employees: The Alabaster Water Board ("Water Board") and its employees are not subject to the Alabaster Civil Service System established by Act 93-493. The Water Board may adopt the system for its employees, but the personnel board is not authorized to contract with the Water Board to administer the system. AGO 2009-047 **NOTE:** Act 93-493 applies to the City of Alabaster only.

Employees: A City Council has the authority, without specific enabling legislation, to pass an ordinance or resolution that gives hiring and promotion preferences to honorably discharged veterans of the United States Armed Forces where the city has neither a personnel board or a point system in place as to hiring or for promotions. AGO 2009-051

Juveniles: The Department of Human Resources ("DHR") has jurisdiction to investigate child abuse and neglect report allegations involving children in DHR legal custody for incidents that allegedly occur out of state allegedly committed by DHR foster parents and others authorized to care for the children. Alabama law applies to DHR child and neglect investigations in such cases. AGO 2009-055

Licenses and Business Regulations: A city may deliver the renewal reminder notice required under the provisions of the Alabama Municipal Business License Reform Act of 2006 by means other than via the U.S. mail. Should the required renewal reminder notice be transmitted other than by use of the U.S. mail, the city would be precluded from assessing any fines or penalties otherwise due for late payment until proof of actual delivery has been achieved, and the city would not be entitled to the statutory presumption of compliance with delivery where the U.S. mail is not utilized. AGO 2009-045

Licenses and Business Regulations: Under section 34-14-1, *et seq.,* of the Code of Alabama and the Administrative Code for the Alabama Board of Hearing Instrument Dealers, a hearing instrument dealer cannot perform services in a temporary location such as a mobile unit or hotel room. AGO 2009-046

Office of Profit: A deputy sheriff does not hold an office of profit because a deputy does not exercise some portion of the sovereign power of the state. A person may be employed as a deputy sheriff and serve as a mayor of a town. AGO 2009-048

Police – Coroners: Unless otherwise provided by local law, the coroner in each county is responsible for the cost of transportation of bodies for the purpose of forensic examination. These costs should be paid from the expenses allocated to the coroner or by the use of a county automobile used by the coroner for that purpose. If funds are insufficient to meet the costs, the coroner and the county commission should work together to determine the best method for providing transportation of the bodies. AGO 2009-050

Utilities: Pursuant to Act 95-573, the Russell County Planning Commission has regulatory authority over sewer systems installed in subdivisions and gives the Commission the same powers of a municipal planning commission as set forth in chapter 52 of title 11 of the Code of Alabama. The County Sewer Authority ("Authority") incorporated pursuant to section 11-88-1, *et seq.,* may not require a developer to dedicate a system to the Authority, but may set specifications for the system that must be met before the Authority will accept a dedication. The Authority may not require residents to connect to its sewer system. The Authority's jurisdiction is not exclusive. A person or entity may install a sewer system of a particular design as permitted by statute or other applicable authority. AGO 2009-049 **NOTE:** Act 95-573 applies to Russell County only.

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financial institutions Quill utilized to verify customer credit. The state also supplied Quill with a benefit the court deemed extremely important: disposal of Quill's advertising. The court reasoned that Quill profited from advertising and benefited from the annual disposal of an estimated 24 tons of discarded advertisements.

The U.S. Supreme Court reversed, holding that *Bellas Hess* was still good law for the proposition that a retailer must have a physical presence in a state in order to establish a substantial nexus under the Commerce Clause. However, the Court removed one barrier to future taxation of direct marketers: The Court held that a physical presence is not necessary to establish nexus under the Due Process Clause. Under a due process analysis, the Court held that a retailer satisfies the nexus requirement when its connections with a state provide fair warning that it may be subject to the state's jurisdiction.

The Court pointed out that the central concern of due process is the fundamental fairness of governmental activity. The Court stated that developments in the law of due process since *Bellas Hess* had rendered the physical presence requirement unnecessary. Thus, as long as an out-of-state retailer purposefully directs its solicitation toward residents of a taxing state, it doesn't matter whether the solicitation is by catalogue or retail stores.

However, the Court held that the Commerce Clause still requires that a retailer have a physical presence in a state before he or she can be required to collect a state tax. The Commerce Clause is primarily concerned with issues of national unity, the Court said, and only a physical presence can satisfy problems of state regulation on the national economy. This requirement, according to the Court, sets boundaries on the states' authority to impose collection duties, reduces litigation over such imposition and encourages settled expectations and promotes business investment based on those expectations.

In the direct marketing context, though, the Court's decision to remove the due process barrier was important because it opens the door to regulation of the direct marketing business by Congress. The Commerce Clause says that only Congress can regulate interstate commerce. Therefore, Congress has the power to pass a law that less than physical presence will satisfy the Commerce Clause.

What is a "Burden?"

As noted above, a tax on an interstate business cannot amount to a **"burden on interstate commerce."** Again, each individual situation must be examined to determine if a tax or license on any particular business constitutes such a burden. And, as discussed above, each situation must be looked at in light of recent legislative action. Some cities have most of their license fees set on a gross receipts basis while others charge flat amounts for their license each year. Some cases indicate that flat-rate license taxes run the risk of burdening interstate commerce. *See*, i.e, *West Point Wholesale Grocery Co. v. City of Opelika, Ala.,* 354 U.S. 390 (1957).

For instance, representatives of door-to-door firms regularly solicit business within municipalities and then deliver the products. These companies sometimes refuse to buy a license claiming immunity from the license because they are engaged in interstate commerce. Can a municipality levy and collect a license on this type of activity?

If this city has based its license on a percentage of the gross business, then case law seems to hold that the company would be liable for the license. In *Armstrong v. Tampa*, 118 So.2d 195 (Fla. 1960), a representative of the Avon Company refused to pay the license tax. The court upheld the graduated license on the representative but held that the flat sum license would be invalid as applied to this interstate business activity.

Note that nexus for "intrastate" transactions (those that occur completely in Alabama) is treated differently. This concept is discussed further in the article on sales and use taxation in the *Selected Readings for the Municipal Official*.

Footnotes:

[1] Note that nexus for "intrastate" transactions (those that occur completely in Alabama) is treated differently. This concept is discussed further in the article on sales and use taxation in the Selected Readings for the Municipal Official.

[2] The court declined to address whether Irondale could include the receipts from M & Associates' Mobile location when computing the company's license fee.

[3] *But see*, for comparison purposes, *Boyd Bros. Transp., Inc. v. State Dept. of Revenue,* 976 So.2d 471 (Ala. Civ. App. 2007), where the Alabama Court of Civil Appeals held that a flat-rate two percent use tax on truck tractors that were originally purchased outside Alabama, but later used in Alabama, was not properly apportioned since the tax was not "based upon actual miles traveled in the performance of a contract in Alabama." ■

ION Interactive Video Technologies

The listing for ION Interactive Video Technologies was printed incorrectly in the 2009 Directory. Please refer to the company information below to contact ION Interactive about their products and services.

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What Is Public Record? continued from page 7

be daunting to consider. In the "good old days" of typewriters and carbon paper, perhaps fewer records were generated and, therefore, there were fewer concerns about keeping track of the records. These days, the number of municipal staff members and elected officials with personal computers is huge, and each has the capacity to create public records that must be available for public inspection and retained according to standards set by state statute.

The municipal clerk is charged with safekeeping of public records, and no doubt the clerk in your city or town does a fine job retaining the most vital documents of your municipality — minutes, ordinances, petitions, contracts and other important records. But who is managing all the records in all the other municipal departments? Does each department know what documents should be kept and for how long? Or could some efficient new employee decide to do some office cleaning and throw out public records that should be maintained? (Hint: That happens often.)

Twenty-first century communication tools allow us to generate many more documents, both paper and electronic. If you are not certain about how your municipality's records are being kept, ask questions and get help.

Talk to your information technology staff about how your records are stored. They may tell you it's time to move some of your electronic data from one medium to another. [Sort of like converting 8mm home movies to videotape, then videotape to cds, then cds to digital.] They may tell you that you have to do some data conversion on a regular basis to keep up with technology changes.

The Alabama Archives Department has a local records retention committee that has developed a schedule for retaining records. You should consult this schedule before disposing of any public record.

Consult with your municipal attorney or call the League office and talk with one of our attorneys. Remember, however, that there have not yet been many court cases about emails and other forms of electronic communications and public records. There are still many unanswered questions.

Open Meetings

There are fewer unanswered questions about open meetings. The Alabama Open Meetings Act states that meetings of public bodies are open to the public unless the meeting can be closed for one or more of a few specific reasons. There are statutory definitions and provisions and case law about what constitutes a "public body," the permissible reasons for a closed session and the proper procedures for calling and holding a closed session.

The Alabama Attorney General's Office has developed a manual explaining the Open Meetings Act. Even with all the rules and standards, problems can occur. In a closed session, elected officials are only supposed to talk about the issues listed as the reasons for calling the session — discussing a matter of litigation with your attorney, for example. But it is easy for the conversation to drift into topics that should be aired in open session. Or it is easy to fail to give the proper notice for a special or emergency meeting.

Take the time to review the Open Meetings Act requirements and procedures. An annual review of the laws and your municipality's compliance procedures might be a good routine. Think of it like Spring Cleaning — cleaning the windows of your local government to ensure transparency and full compliance with the law. ▪

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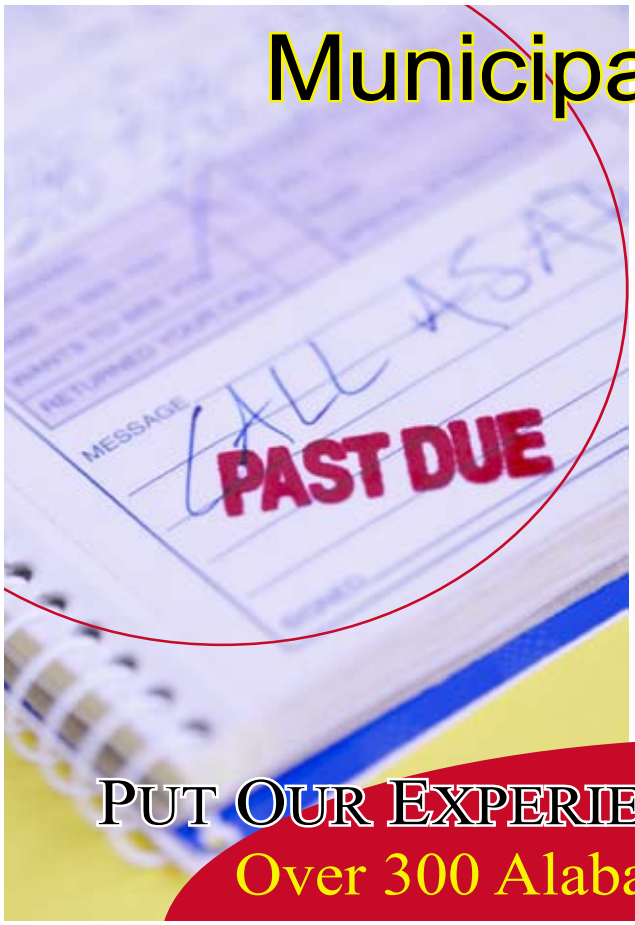

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