

# **Bond Case Briefs**

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## **Wayfair: The Sequel - Baker McKenzie**

A new lawsuit filed by Wayfair, LLC in Jefferson County Court (Colorado) seeks to address a question left open by the U.S. Supreme Court's landmark 2018 *Wayfair* decision that permits states to impose a sales or use tax collection obligation based on an economic nexus threshold: Does this decision apply to locally-administered sales or use taxes? While many localities have asserted that the same economic nexus standards should apply at the state and local levels, the devil is in the details as there are thousands of local taxing jurisdictions, many of which do not have uniform laws or centralized administration.

To briefly recap the *Wayfair* landscape, the U.S. Supreme Court blessed the brightline economic nexus standard used by South Dakota, stating that a tax "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In concluding that South Dakota's law did not impose an undue burden on interstate commerce, the Court cited to three key features of the South Dakota tax system: (1) the economic nexus standard at issue included a safe harbor that required considerable business in the state; (2) the economic nexus standard was not applied retroactively; and (3) most notably, South Dakota had adopted the Streamlined Sales and Use Tax Agreement ("SSUTA"), which requires a single point of state-level administration for all state and local sales and use taxes along with other simplification measures. In this most recent *Wayfair* filing, Wayfair asks the court whether the City of Lakewood's locally administered sales tax should be invalidated because of its excessive burdens.

The taxpayer alleges that the City of Lakewood improperly assessed it roughly \$600,000 in sales tax for the period May 2018 through June 2021, along with penalties and interest. As discussed in an earlier [SALT Savvy blog post](#), Colorado state law provides for the local administration of local sales taxes in over 70 home-rule counties and municipalities. Further exacerbating the issue, the state has done little to require the simplification of these local taxes. While the state offers a centralized single remittance portal that home-rule localities may use, the portal is optional and the City of Lakewood is not yet part of the program, though they have taken the preliminary step of signing the agreement to join the program. Due to this inaction, Wayfair's lawsuit also includes an affirmative claim against the Executive Director of the Colorado Department of Revenue alleging that the state failed to provide adequate safeguards and support to mitigate the burdens of Colorado's local tax system on out-of-state businesses.

Some within Colorado's state and local governments appear to recognize the compliance burdens and the concomitant litigation risk that could arise from them. For example, the Colorado Municipal League ("CML"), a non-profit, nonpartisan organization representing the cities and towns of Colorado [stated](#) that "part of the reason South Dakota did not overburden interstate commerce was due to an easy way for businesses to remit to all taxing jurisdictions." In response, the CML developed a [Model Ordinance on Economic Nexus and Marketplace Facilitators](#) ("Model Ordinance") with standardized definitions "as part of a sales tax simplification effort," because the CML [acknowledged](#) that "various home rule municipalities giving the same term different meanings is a source of complexity in our tax system for businesses that operate in multiple municipalities."

However this standardized statutory language has not been adopted by all home rule jurisdictions in the state. As of the writing of this publication, [270 cities and towns](#) of Colorado are members of the CML, out of a total of 272, indicating widespread local support for the organization's purpose. But as of 2021, only about [43 out of the 70](#) home rule jurisdictions had adopted the Model Ordinance.

As noted above, Colorado itself also established an optional single point of remittance portal with a uniform remittance form for use by home rule localities. Additionally, in April the state enacted a law that prohibits localities from imposing local license fees on retailers without a physical presence or with only an incidental physical presence within the locality as long as the retailer has a standard state retail license. Moreover, the bill summary states, "[t]he department is required to consult with local taxing jurisdictions when determining what information to collect and how to make the information collected available to local taxing jurisdictions and making and testing modifications. The department is also required to consult with retailers and address any reasonable concerns they may have." It remains to be seen if this positive step in the right direction will lead to changes sufficient to overcome the serious Commerce Clause concerns with respect to the administration and collection of local taxes in Colorado.

The situation in Colorado is analogous to the situation in Louisiana. In a November 2021 suit filed by Halstead Bead Inc. in the Eastern District of Louisiana, the taxpayer likewise alleged that Louisiana's decentralized sales tax system violates the Commerce Clause of the U.S. Constitution. However, that case was dismissed on procedural grounds.

As illustrated in prior U.S. Supreme Court precedent, *Pike v. Bruce Church*, and reaffirmed by the Court in *Wayfair*, navigating such complex, overlapping, and competing obligations between and amongst local jurisdictions can create an undue burden on and discriminates against interstate commerce, thereby violating the Commerce Clause of the U.S. Constitution. *Pike v. Bruce Church*, 90 S. Ct. 844 (1970). The Colorado complaint alleges that neither Lakewood, nor the Colorado Department of Revenue, took reasonable steps to mitigate such burdens and that therefore requiring Wayfair to collect and remit the local tax is unconstitutional.

The problems of decentralized tax collection are not unique to Colorado and Louisiana. Other states have recently placed themselves in similar situations through their economic nexus and/or marketplace facilitator laws that apply to general sales and use taxes or other locally administered taxes (e.g., hotel occupancy taxes). For example, North Carolina, West Virginia, and Wisconsin require marketplace facilitators to individually register with each locality in the state for certain tax types once that marketplace facilitator has met or exceeded the state-level economic nexus threshold. These requirements are subject to the same balancing test that will be reviewed in Colorado.

We will continue to monitor this lawsuit and further developments on this issue.

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August 16 2022

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