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# What does "Wayfair" mean for NAA members?

Quill was overturned in June, which affects goods sold via the Internet. That includes auction companies.

**Question:** What was the decision of the United States Supreme Court in *South Dakota v. Wayfair, Inc.*? What will this mean for NAA members?

**Answer:** *South Dakota v. Wayfair, Inc.* is a case that was decided by the Supreme Court of the United States on June 21, 2018. It relates to the collection of sales tax for sales made over the internet. South Dakota requested the Supreme Court abrogate its 1992 decision of *Quill Corp. v. North Dakota*. In *Quill*, the Supreme Court decided that under the "dormant commerce clause" states may not collect sales tax from businesses conducting sales online unless those businesses have a physical presence within their state.

The Supreme Court ruled in favor of South Dakota and overruled *Quill*. In the majority decision, the Court noted that the *Quill* decision caused the states to lose between \$8 and \$33 billion every year. It noted how there has been significant changes in ecommerce since *Quill* was decided in 1992. The Court explained: "Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause."

The Supreme Court said that States and the United States Congress have the power to regulate commerce concurrently. The Court explained "that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units. ... But it is not to purpose of the Commerce Clause to relieve those engaged in interstate commerce

from their just share of state tax burden." The Court said that a state may tax interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause. It explained that "[t]he Court will sustain a tax so long as it (1) applies to an activity with substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides."

How will this change the things sold via the internet? This case allows states to adopt legislation that will require remote sellers to collect and remit the tax without some additional connection to the State. There is some uncertainty about what will now constitute a "substantial nexus" and to what extent a state's law may place burdens on interstate commerce.

In the *Wayfair* case, the Supreme Court reasoned: "the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more \$100,000 of goods or

services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis.” It continued that “respondents are large, national companies that undoubtedly maintain an extensive virtual presence.” Therefore, the Court concluded that there was a substantial nexus to require the collection of sales tax.

The United States Supreme Court remanded the case to the Supreme Court of South Dakota to address any remaining issues. Several states have already adopted legislation requiring remote sellers to collect and remit sales tax. Other states are now considering legislation to do the same. Until the scope of when a state can require remote sellers to collect and remit sales tax is more clearly established, there is likely to be more litigation.

A related question is whether a remote business will be subject to an audit by a state or local government far away to determine whether the proper amount of sales tax was collected and paid. For example, will a small business based in Indiana that sells goods online be subject to audits in Maine, New Jersey,

California, Washington, or all states that have a sales tax?

The law will continue to change and develop in this area. Auctioneers who sell goods and/or services online must closely watch these issues and comply with applicable sales tax laws. ♦



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