

Panelists: SCOTUS Should Review North Carolina's *Quad Graphics* Decision

Posted on Mar. 17, 2023

By Christopher Jardine

A group of practitioners slammed the North Carolina Supreme Court's reasoning in a sales tax suit and called for the U.S. Supreme Court to take up the case.

The practitioners took part in a March 14 panel discussion at the 2023 American Bar Association/Institute for Professionals in Taxation Advanced State Income Tax Seminar in New Orleans. Panelists denounced the North Carolina high court's decision in [Quad Graphics Inc. v. Department of Revenue](#) to "anticipatorily overrule" the U.S. Supreme Court in *McLeod v. J.E. Dilworth Co.* (1944) by upholding a sales tax assessment on a Wisconsin printer's sales to North Carolina customers.

Cheryl Upham of Cozen O'Connor said that "based on *Dilworth*, to me, *Quad Graphics* should be a simple case to answer. The facts in *Quad Graphics* are pretty much the same as *Dilworth*. . . . There could have been a use tax imposed, because there's no question that Quad Graphics had nexus, entity and personal, with North Carolina." But the case comes down to whether Quad Graphics' sales had transactional nexus, Upham continued, adding, "If *Dilworth* is still good law, the answer is no."

Upham noted that on appeal, the trial court said *Dilworth* is [still precedential](#) but that the North Carolina Supreme Court [disagreed](#), finding in a 6-1 decision that the U.S. Supreme Court superseded *Dilworth* in [Complete Auto](#) and [Wayfair](#). "Although the U.S. Supreme Court never explicitly overruled *Dilworth*, they implicitly overruled *Dilworth* through a series of cases including *Complete Auto* and *Wayfair*, and that goes to whether or not [the North Carolina justices] are engaging in anticipatory overruling, which is clearly illegal and improper. North Carolina cannot overturn Supreme Court decisions, only the Supreme Court can," she said.

Noting that the state supreme court argued that it is not anticipatorily overruling *Dilworth* because the Supreme Court already did so implicitly, Upham said, "I don't think the U.S. Supreme Court implicitly overruled anything." The rest of the panelists indicated their agreement with her statement. Upham also noted that the *Complete Auto* test was not incompatible with *Dilworth* and that *Wayfair* "had nothing to do with the concepts discussed in *Dilworth*. *Dilworth* goes to transactional nexus . . . all *Wayfair* went to was personal nexus."

Charles J. Moll III of McDermott Will & Emery said: "This was not really an anticipatory overruling, this was a mistake — was it an excuse, a mistake, who knows? — but *Complete Auto* didn't involve these facts and as we all know from law school, if it's not the issue in the case, it's dicta. So even if they said they were overruling, which they didn't say, it wouldn't be something you would follow." He noted that less than a month after issuing the *Complete Auto* decision, the Supreme Court addressed

Dilworth in [National Geographic Society v. California Board of Equalization](#), which he said it would not have done if *Complete Auto* overruled *Dilworth*.

Moll also noted that the state could have imposed a use tax on Quad Graphics' transactions rather than a sales tax, which would not have been controversial. But, he added, if the state had imposed a use tax it would have needed to grant a use tax credit, which the state avoided by calling the tax a sales tax.

Quad Graphics filed a petition for certiorari March 14, [urging the Court](#) to review or summarily reverse the state court's decision.

Upham said that the Court "needs to take the case and tell us whether *Dilworth* is still good law."

Whitney Compton of Barnwell Consulting LLC warned that "if *Quad Graphics* goes through and is decided by the Court for North Carolina's position, or if the Supreme Court doesn't take the case, it could lead to participation agreements on steroids," which he said would lead to confusion and fighting among the states to become tax shelters.

"What happens if the sky does fall? What happens if the Supreme Court takes *Quad Graphics* and finds in favor on North Carolina?" Compton asked. "At best, and at worst much of our knowledge is obsolete . . . It's always the income tax guy that comes out on top — if that happens the rules will become like the income tax rules, because that's the only thing that could possibly work. Otherwise the states will steal from each other."

Upham pointed out that if North Carolina succeeds in anticipatorily overruling Supreme Court precedent, there could be "wide-ranging reach, because it's not just a tax issue, it has regulatory implications and everything else."