# POSSIBLE COMMERCE CLAUSE CLAIMS RELATED TO STATE TOLLING OF EXISTING INTERSTATES

INTRODUCTION

In addition to legal claims related to a state's authority to toll existing roads under federal law (*see* **"**LEGAL REQUIREMENTS RELATED TO STATE TOLL IMPOSITIONS"), there may be constitutional claims under the Commerce Clause against the state's proposal, depending upon how the tolling scheme is structured. In many proposals, the states actively seek to protect local citizens as much as possible from the impact of the tolls and impose a disproportionate share of the tolls on out-of-state interests engaged in interstate commerce. As discussed below, this manipulation of the toll to protect local interests may well violate the anti-discrimination protections of the Commerce Clause.

In addition, a toll plan that diverts significant toll revenues to projects that do not have a sufficient nexus to the tolled facilities may run afoul of the Commerce Clause's requirement that user fees must not be excessive compared to the benefit acquired for paying them, and must represent a fair approximation of the tollpayer's use. This "diversion of revenue" theory may provide an alternative basis for Commerce Clause challenges to some toll plans.

DISCRIMINATORY TOLL DESIGN

The principal method by which states seek to favor local interests in the collection of a toll is by manipulating the collection point so as to allow local, intrastate activity to escape tolling, while all interstate travel is sure to be tolled. For example, a number of proposals have provided for collection of the tolls at points as close to the state's borders as possible. In this way, travel between points in the state is toll free, while travel into or out of the state in interstate commerce, no matter how short the trip on the state's section of the interstate highway, is subject to the full toll. Another mechanism to provide a financial advantage to local interests may be use of a flat monthly or annual charge for the benefit of heavy road users, who inevitably would be in large part local users of the interstate. The local user is effectively given a substantial discount that is not available to infrequent, interstate users. As discussed below, a strong argument can be made that both of these tolling schemes discriminate against interstate commerce and therefore violate the Commerce Clause.

The United States Supreme Court has made clear that a state charge violates the Commerce Clause "if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corporation v. Director, Div. of Taxation*, 490 U.S. 66, 75 (1989). It can be argued that many state tolling schemes fail every element of that analysis.

First, the discriminatory intent of many tolling scheme proposals is manifest. With little camouflage, the proposed legislation takes every step possible to protect local interests from the impact of the tolls. As discussed above, it is often expressly directed that the tolls be collected as close to the borders as possible. The only reason for such positioning is to ensure that highway users involved in intrastate movements can, to the greatest degree possible, totally avoid paying the tolls, leaving the brunt of the charges to fall entirely on participants in interstate commerce. Moreover, the reason for allowing a flat annual option is also to ensure that local interests will be able to pay at a much lower effective rate than their out-of-state counterparts. The proposal's intent to protect local interests and to export the tax burden to out-of-state highway users is plainly discriminatory and strong argument can be made that it is therefore in violation of the Commerce Clause. *See, Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406-07 (1984) (holding that a tax credit that was "designed to have discriminatory economic effects" violated the Commerce Clause.) *Bacchus Imports, Ltd. v. Dias*, 466 U.S. 263, 270 (1984) (noting that a "finding that state legislation constitutes 'economic protectionism' may be made on the basis of [] discriminatory purpose.").

Second, if there is a manipulation of the collection point of the tolls, it can be argued that the toll charge is facially discriminatory. Interstate users of the state's interstate highways will be assessed the toll, while highway users involved in purely intrastate movements will escape the impact of the charge. This type of discrimination against out-of-state interests has for over a century been condemned under the Commerce Clause. *See, e.g., Welton v. Missouri*, 91 U.S. (10 Otto) 275, 280-81 (1876); *Bacchus* , 483 U.S. at 268 n.8 (reiterating that "discrimination between in-state and out-of-state taxpayers" is "offensive to the Commerce Clause."); *Chemical Waste Management v. Hunt*, 504 U.S. 334, 342 (1992) ("a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.") (citations omitted); *Oregon Waste Systems v. Dep't of Environmental Quality*, 511 U.S. 93, 99 (1994) (defining unlawful discrimination as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later" and noting that "[i]f a restriction on commerce is discriminatory, it is virtually *per se* invalid").

As the Court held in *Bacchus*, this form of facial discrimination does not have to result from an explicit difference in taxation of local and interstate taxpayers. Rather, a state cannot manipulate some aspect of its tax structure to advantage local interests. *Bacchus*, 483 U.S. at 271 (finding that a tax exemption that applied to only locally produced beverages was facially discriminatory); *Camps Newfound/Owatonna v. Town of Harrison*, 117 S. Ct. 1590, 1600-01 (1997) (holding that a tax exemption "f[e]ll by design in a predictably disproportionate way on out-of-staters" and thus facially discriminate[d] against interstate commerce."). Here too, by the manipulation of the toll collection point, the toll charge would fall in a predictably disproportionate way on out-of-staters and facially discriminates against interstate commerce.

Finally, if a flat annual fee option is used, a strong Commerce Clause claim can be made that the toll charge discriminates in its practical effect against out-of-state residents participating in interstate commerce. The U.S. Supreme Court has long held that a state cannot impose a charge that in its "practical operation work[s] a discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 456 (1940). And specifically in the context of highway taxation, the Court has expressly ruled that states may not discriminate against interstate commerce by imposing a charge that inherently costs local highway users less per highway use than it does out-of-state highway users. *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987) (finding unconstitutional a flat, annual highway tax because "in practical effect" it imposed a higher per-mile charge on out-of-state trucks than on local trucks).

Placing a ceiling on a state resident's total, annual toll cost would mean that highway users from that state would inevitably pay less per-use than out-of-state users. For example, if the toll was set at $1 toll and an annual fee at $25, an in-state user would pay a flat $25 for 50 trips or (50 cents per-trip) and an interstate highway user would pay $50 for the same 50 trips. The discrimination would be exacerbated as use by local residents increases – at 100 annual trips, an in-state resident would pay only 25 cents per-trip or ¼ of the per-trip cost of a non-resident. This type of practical effect discrimination in highway taxation has been expressly condemned by the United States Supreme Court and by state supreme courts around the country. *See, e.g. American Trucking Associations, Inc. v. Gray*, 746 S.W.2d 377, 378 (Ark. 1988) (holding that per-mile highway tax, capped at $175 per-year, "effectively costs other truckers more per-mile than it costs those based in Arkansas"); *American Trucking Associations, Inc. v. Secretary of Administration*, 613 N.E.2d 95, 103 (Mass. 1993) (finding that flat, annual fee "discriminate[s] against out-of-state truckers by subjecting them to a higher charge per mile traveled in Massachusetts"). A state tolling proposal that includes a cap will inevitably discriminate against out-of-state highway users by subjecting them to a higher charge per use compared to local users; a clear Commerce Clause violation.

In summary, many state proposed tolling schemes, to mitigate local opposition, will be structured to favor local interests and to export as much of tolling state's highway tax burden to out-of-state interests as is possible. A strong argument can be made that the discriminatory purpose and effect of such schemes condemn them under the Commerce Clause.

<u>DIVERSION OF TOLL REVENUE</u>

To the extent that a state uses revenue from a tolled highway to fund projects or facilities unconnected to that highway, the toll arrangement may also run afoul of the dormant Commerce Clause doctrine. The Supreme Court has explained on multiple occasions that state-imposed fees for the use of interstate commerce facilities must not be "excessive in comparison with the governmental benefit conferred," and must be "based on some fair approximation of use or privilege for use" of the tolled facility. *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972); *see also Northwest Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 367, 369 (1994). Thus, even a toll that does not discriminate against out-of-state economic interests may be vulnerable to a Commerce Clause challenge if toll revenues are diverted to unrelated purposes.

This theory is rather novel, and to ATA's knowledge has not yet been successfully applied in the highway toll context. But the Second Circuit has invalidated fees assessed on ferry passengers in an instructive case. In *Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79 (2d Cir. 2009), the Port Authority was funded almost solely from fees it collected from passengers. Its budget, however, encompassed not just the maintenance and servicing of the port facilities themselves, but a variety of additional projects (including economic development projects and operation of a free trade zone; developing plans to reduce traffic on I-95; and operating dredging and pleasure-boat pump-out services in the harbor). The Second Circuit applied the *Evansville* analysis and concluded that the fees were excessive because they supported projects that did not benefit ferry passengers as fee-payers (even if those passengers derived the same incidental benefits that all community members enjoyed), and were an unfair approximation of use because the beneficiaries of some funded services paid nothing for them at all. The Second Circuit has since made clear that this same analysis applies to dormant Commerce Clause challenges to highway tolls. *See Selevan v. New York Thruway Authority*, 584 F.3d 82, 97 98 (2d Cir. 2009).

Note that such a challenge would likely not succeed if the additional projects bore a sufficient "functional relationship" to the tolled facility. For example, in *Automobile Club of New York v. Port Authority*, 887 F.2d 417 (2d Cir. 1989), the court had held that expenses for the PATH train were properly included in evaluating the reasonableness of bridge and tunnel tolls from which it was funded, because the train was part of an integrated system that reduced load on the bridges and tunnels, thereby directly benefiting the tollpayers. Strictly speaking, *Automobile Club* involved a whether the tolls were "just and reasonable" under the Highway Act rather than an excessive/fair approximation analysis under the dormant Commerce Clause doctrine; but a number of courts have recognized that the two analyses are similar and have applied "functional relationship" considerations apply in both contexts.

Currently, ATA is aware of one pending toll challenge on a diversion theory, in which the AAA contends that the NY/NJ bridge and tunnel tolls are excessive and unfair because the Port Authority planned to use revenue from an increase to fund reconstruction of the World Trade Center. Although the litigation remains in relatively early stages, the district court implicitly confirmed that the challenged tolls must be subject to the *Evansville* analysis when it denied the Port Authority's motion to dismiss. *See Auto. Club of N.Y., Inc. v. The Port Auth. of N.Y. and N.J.*, 842 F. Supp. 2d 62 (S.D.N.Y. 2012). And last year, the Massachusetts Supreme Judicial Court rejected a challenge brought against the tolling practices of the Mass Turnpike—which used revenue from tolled highways to support the untolled "Big Dig" and other projects—that was premised largely on state tax law, but secondarily on a dormant Commerce Clause "diversion" theory. The court focused on the state tax law claims, devoting little analysis to the Commerce Clause claim and suggesting—inconsistently with *Bridgeport* and *Evansville*—that so long as the state legislature considered the diversion to be reasonable, Commerce Clause concerns were not implicated.