

South Dakota v. Wayfair

- *Wayfair in Context:*
 - *Nature of Sales Tax:* Generally, a tax on the consumer. But states can obligate the retailer to serve as a deputy/trustee/agent for collecting.
 - *Nature of “Nexus”:* In order for states to impose that obligation (or to tax the retailer directly), there must be a constitutionally sufficient connection with the state. Implicates the Commerce Clause
 - *Complete Auto test:* First of four requirements for constitutionality is that a tax is applied to an activity with a “substantial nexus” to the taxing state.

South Dakota v. Wayfair

- For more than 50 years, U.S. Supreme Court recognized a physical presence standard for sales and use tax purposes. *Wayfair* upended that.
- *National Bellas Hess, Inc. v. Illinois* (1967): Sales to in-state customers by delivery via the USPS or common carrier was not sufficient to create nexus.
- *Quill v. Corp. v. North Dakota* (1992): Economic presence may be sufficient for *due process*, but not under the Commerce Clause. Some form of physical presence is required to satisfy “substantial nexus.”

South Dakota v. Wayfair

Pre-Wayfair

- “Main Street Fairness Act and other measures proposed in Congress
- *Direct Marketing Ass'n v. Brohl* (2015): Justice Kennedy concurring opinion suggests it's time to revisit *Quill*.
- In 2016, South Dakota enacts S.B. 106: a seller “who does not have a physical presence in the State” has nexus for sales and use tax purposes if the seller meets either of the following thresholds in the previous or current calendar year:
 - Seller had gross revenue from delivery of products or services into SD exceeding \$100,000; or
 - Seller sold such goods for delivery into SD in 200 or more separate transactions.

South Dakota v. Wayfair

- **HELD IN WAYFAIR:** Because *Quill*'s physical presence rule is unsound and incorrect, the Supreme Court **overruled** *Quill Corp. v. North Dakota* and *National Bellas Hess Inc. v. Department of Revenue of Ill.*

South Dakota v. Wayfair

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Alabama	10/1/2018	\$250,000 in-state sales and seller conducts one of the listed activities
Arizona	TBD	\$100,000 in-state sales or 200 transactions
Arkansas	TBD	\$100,000 in-state sales or 200 transactions
California	4/1/2019	\$100,000 in-state sales or 200 transactions
Colorado	12/1/2018	\$100,000 in-state sales or 200 transactions
Connecticut	12/1/2018	\$250,000 in-state sales and 200 transactions
District of Columbia	1/1/2019	\$100,000 in-state sales or 200 transactions
Georgia	1/1/2019	\$250,000 in-state sales or 200 transactions
Hawaii	7/1/2018	\$100,000 in-state sales or 200 transactions
Idaho	7/1/2018	\$10,000 in-state sales (result of referrals)
Illinois	10/1/2018	\$100,000 in-state sales or 200 transactions
Indiana	10/1/2018	\$100,000 in-state sales or 200 transactions
Iowa	1/1/2019	\$100,000 in-state sales or 200 transactions
Kentucky	10/1/2018	\$100,000 in-state sales or 200 transactions
Louisiana	1/1/2019	\$100,000 in-state sales or 200 transactions
Maine	7/1/2018	\$100,000 in-state sales or 200 transactions
Maryland	10/1/2018	\$100,000 in-state sales or 200 transactions
Massachusetts	10/1/2017	\$500,000 in-state sales and 100 transactions
Michigan	10/1/2018	\$100,000 in-state sales or 200 transactions
Minnesota	10/1/2018	10 or more retail sales totaling more than \$100,000 or 100 transactions
Mississippi	9/1/2018	\$250,000 in-state sales
Missouri	TBD	\$100,000 in-state sales or 200 transactions
Nebraska	1/1/2019	\$100,000 in-state sales or 200 transactions

South Dakota v. Wayfair

<u>State</u>	<u>Effective Date</u>	<u>Threshold</u>
Nevada	10/1/2018	\$100,000 in-state sales or 200 transactions
New Hampshire	TBD	Proposed anti-Wayfair bill
New Jersey	11/1/2018	\$100,000 in-state sales or 200 transactions
New York	?	\$300,000 in state and 100 transactions
North Carolina	11/1/2018	\$100,000 in-state sales or 200 transactions
North Dakota	10/1/2018	\$100,000 in-state sales or 200 transactions
Ohio	1/1/2018	\$500,000 in-state sales and uses in-state software to promote sales, or \$500,000 in-state sales and enters into an agreement to provide content distribution to accelerate or enhance delivery
Oklahoma	7/1/2018	\$10,000 in-state sales (register or report)
Pennsylvania	3/1/2018	\$10,000 in-state sales (register or report)
Rhode Island	8/17/2017	\$100,000 in-state sales or 200 transactions (register or report)
South Carolina	11/1/2018	\$100,000 in-state sales
South Dakota	11/1/2018	\$100,000 in-state sales or 200 transactions
Tennessee	TBD	\$500,000 in-state sales
Texas	10/1/2019	\$500,000 in-state sales
Utah	1/1/2019	\$100,000 in-state sales or 200 transactions
Vermont	7/1/2018	\$100,000 in-state sales or 200 transactions
Virginia	TBD	\$100,000 in-state sales or 200 transactions
Washington	10/1/2018	\$100,000 in-state sales or 200 transactions
West Virginia	1/1/2019	\$100,000 in-state sales or 200 transactions
Wisconsin	10/1/2018	\$100,000 in-state sales or 200 transactions
Wyoming	2/1/2019	\$100,000 in-state sales or 200 transactions

South Dakota v. Wayfair

- Sales Tax “Sourcing” Rules

- Generally based where *delivery of possession* occurs.
- Not dictated by title passage or contractual terms.
- For shipping, generally relinquishment to an interstate carrier for out-of-state shipping means an out-of-state sale/destination for sales tax purposes.
- Who pays for shipping isn’t necessarily determinative.

South Dakota v. Wayfair

- Sales Tax “Sourcing”: Where is the “Sale”?
 - Generally, the place where the *delivery of possession* occurs controls where the transaction is taxed.
 - Where title passes and the terms of the contract generally *do not* control.
 - When shipping is involved, relinquishing property to an interstate carrier for out of state shipment is generally deemed a delivery out-of-state for sales tax purposes. This is generally applies regardless of who pays for shipping.

South Dakota v. Wayfair

- Example: New York Regulations
 - The sales tax is a “**transaction tax**”, with liability for the tax arising at the time of a transaction. “[A]n act resulting in the receipt of consideration for the transfer of title to or possession of (or both) tangible personal property.”
 - The sales tax is also a “**destination tax**”, meaning that “the point of delivery or point at which possession is transferred by the vendor to the purchaser or the purchaser’s designee controls both the incidence and the tax rate.”
 - Rulings on Shipping: If the *vendor* arranges and pays for shipping out of state via interstate carrier (“contract” or “common”), delivery is out of state. **BUT**, if the *customer* arranges for shipping, the place of delivery depends on whether the customer hired a “common” or “contract” carrier. If a “contract” carrier, delivery is deemed to occur in “NY” – to the customer’s “agent or designee.”

South Dakota v. Wayfair

- COMPARE: California's rule
 - Exempt out-of-state sale includes “sale of tangible personal property which, pursuant to the contract of sale, is required to be shipped and is shipped to a point outside this state by the retailer by means of: (a) facilities operated by the retailer, or (b) delivery by the retailer to a carrier, customs broker or forwarding agent, whether hired by the purchaser or not, for shipment to such out-of-state point.”
 - “Carrier” includes common and contract carriers.