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# FOR THE RECORD

BY CRAIG M. SANDBERG

## Illinois Municipalities May Not Require Electronic Intermediaries to Collect and Remit Amusement Taxes on Resold Tickets

On October 7th, on certification from the United States Court of Appeals for the Seventh Circuit (ILL. S. CT. R. 20), Justice Mary Jane Theis, writing on behalf of a unanimous Illinois Supreme Court, concluded that Illinois municipalities may not require electronic intermediaries to collect and remit amusement taxes on resold tickets. (*City of Chicago v. Stubhub, Inc.*; No. 111127).

In 1923, the Illinois General Assembly passed the Ticket Scalping Act, which prohibited owners of public entertainment venues from selling admission tickets anywhere other than the venues' box offices. In 1935, the legislature broadened that statute beyond venue owners, and outlawed the sale of tickets for more than face value. This statute remained unchanged until 1991, when the legislature rewrote it to provide an exception for ticket brokers, who could avoid penalties for selling tickets above the box office price by meeting several requirements, including registering with the Secretary of State and paying all applicable state and local taxes.

The legislature amended, and expanded on, these requirements in 1995 and 2002. As tickets to entertainment events began to appear on web sites, the legislature replaced the Ticket Scalping Act with the Ticket Sale and Resale Act (Act) (720 ILCS 375/0.01 *et seq.*). This statute still prohibited the sale of tickets for more than face value, but contained more exceptions, including one for internet auction listing services, which featured extensive and detailed consumer protection measures.

StubHub, Inc., registered as an internet auction listing service in compliance with the Act. StubHub describes itself as "the world's largest online ticket marketplace" and operates a web site or "platform" where users can buy and sell tickets to various

events around the country.

In 2006, the City amended its amusement tax ordinance again to require not only "resellers," but also "reseller's agents" to collect and remit the amusement tax.

In 2007, the City sent a letter to StubHub stating that it might be deemed a reseller's agent under the ordinance, and might be required to collect and remit the amusement tax on behalf of its users. The letter requested information and documents with respect to StubHub's "facilitation" of ticket resales to entertainment events located in Chicago since January 1, 2000. StubHub declined to provide any of the information, and in 2008, the City filed a four-count complaint against StubHub. The City alleged that StubHub was a reseller's agent under the ordinance because it "resold and/or facilitated the resale" of tickets. Accordingly, the City claimed, StubHub had a joint and several duty to collect and remit the amusement tax on thousands of ticket resales from 2000 to the present. The City sought a declaration that StubHub was required to do so; a writ of mandamus ordering StubHub to produce records and submit to an audit; fines for StubHub's violation of the ordinance in refusing to comply with the City's request to produce records; and a monetary judgment in the amount of the tax revenues plus interest and penalties.

StubHub removed the case to federal court on diversity grounds, and filed a motion to dismiss. The federal district court granted that motion. *City of Chicago v. StubHub, Inc.*, 622 F. Supp. 2d 699, 704 (N.D. Ill. 2009). The federal district court stated that the City's power to impose an obligation on StubHub to collect and remit the amusement tax depended on the nature of the tax and held that the City lacked the authority to require StubHub to collect and remit the amusement tax incurred by its sellers. *StubHub*, 622 F. Supp. 2d at 703-04.

The City appealed. The federal circuit

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court first examined, then rejected, StubHub's argument that federal law prohibited the City from imposing a tax on internet sites. *City of Chicago v. StubHub, Inc.*, 624 F.3d 363, 367 (7th Cir. 2010). The U.S. Court of Appeals for the Seventh Circuit certified a question to the Illinois Supreme Court.

Before reaching its decision that the City overstepped its home rule authority, the Illinois Supreme Court looked to the statutory scheme and the debates which produced the Act, which it concluded evinced an intent by the legislature to allow internet auction listing services to opt out of any obligation regarding local tax collection. "That is a policy decision this court is ill-advised to ignore. The City's ordinance—specifically the imposition of a joint and several duty on internet auction listing services to collect and remit its amusement tax (Chicago

Municipal Code § 4-156-020(A)) and the requirement that internet auction listing services are primarily responsible for collecting and remitting this tax (Chicago Municipal Code § 4-156-030(F))—does not pertain to its own government and affairs."

### Seventh Circuit Allows the Metropolitan Pier and Exposition Authority Opportunity to Defend Constitutionality of Policy for Public Expression

On October 4th, Circuit Judge Williams J. Bauer, writing on behalf of the U.S. Court of Appeals for the Seventh Circuit (*Michael Marcavage v. City of Chicago*; Docket Nos. 09-3335 & 09-4079), affirmed in part and reversed in part the district court's rulings. The court of appeals affirmed the dismissal of the plaintiff's constitutional claims involving Soldier Field and Wrigley Field. Additionally, the court of appeals held that regulations dealing with expressive activity on Navy Pier were constitutional. But, the case was remanded for the MPEA to defend its Policy for Public Expression at Navy Pier and the Headlands. The court noted that it was left with the impression that the imposition of burdensome restrictions for small groups at Gateway Park might be overreaching".

The appeal arises from events held in connection with the seventh annual Gay Games (the "Games"), a series of athletic and cultural gatherings with the stated mission "to foster and augment the self-respect

of gay men and women throughout the world and to engender respect and understanding from the non-gay world." Plaintiffs were volunteers with Repent America, a ministry of Christians whose self-described goal is "to proclaim the Gospel of Jesus Christ in the public square." In an effort to foster their mission, the plaintiffs traveled to Chicago and appeared at the Games to share their message with attendees and supporters of the Games. At three different locations during the Games, Chicago police officers ordered the plaintiffs to change the location of their outreach activities. Failure to comply resulted in the arrests of plaintiffs James Deferio and Michael Marcavage.

The plaintiffs alleged (1) denial of their First Amendment rights to free speech and exercise of religion; (2) denial of their 14<sup>th</sup> Amendment right to equal protection; and (3) denial of their rights under the Illinois Religious Freedom Restoration Act (the "IRFRA"). They later amended their complaint to add claims against the City for (1) denial of equal protection; (2) denial of their Fourth Amendment rights; (3) state-law conversion; and (4) spoliation.

Cross motions for summary judgment were filed by the City Defendants and the plaintiffs. The district court denied the plaintiffs' motion and granted the City Defendants', finding that (1) the orders issued by the police during the events at the Games were content-neutral regulations narrowly tailored to serve the legitimate purpose of maintaining an orderly and effective flow of traffic and therefore did not violate the First Amendment; (2) the plaintiffs' Equal Protection claim failed because they could not identify any similarly-situated individuals at the Games who received more favorable treatment from the officers than they did; and (3) the plaintiffs' Fourth Amendment claims failed because their arrests were supported by probable cause. The court refused to exercise supplemental jurisdiction over the state-law claims and later granted a motion for judgment on the pleadings in favor of the MPEA, finding that the issues raised in the MPEA claims were precluded by the grant of summary judgment in favor of the City Defendants. ■

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