

Revenue at Risk:

Pending Court Cases that Threaten County Taxes and Fees

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Sources of Revenue Currently Under Attack

1. Solid Waste Fees
2. The Ad Valorem Tax Levy
3. Railway Use Taxes on Diesel Fuel Consumption

Revenue Risk #1:

Challenges to Solid Waste Fees

- Authorization for County Commissions to Establish & Operate Garbage Collection & Disposal Programs:
 - “The county commission ... may, and is hereby authorized to, make available to the general public collection and disposal facilities for solid wastes in a manner acceptable to the department. The county commission ... may provide such collection or disposal services by contract with private or other controlling agencies...”

Ala. Code § 22-27-3(a)(1).

Revenue Risk #1:

Challenges to Solid Waste Fees

- Authorization for County Commissions to Establish Garbage Collection Programs and Assess Operational Fees:
 - **The county commission** or municipality undertaking the responsibility for providing services to the public under this article **may establish fees, charges and rates** and may collect and disburse funds within cooperating areas or districts, inside or outside the corporate limits of municipalities or inside or outside of county boundaries, **for the specific purpose of administering this article and providing and operating a solid waste program.**

Ala. Code § 22-27-5.

Revenue Risk #1:

Challenges to Solid Waste Fees

- Several Alabama Counties are either currently facing or will face class action lawsuits challenging their assessment and use of solid waste fees established under Ala. Code § 22-27-5.
 - The challenges focus on the portion of § 22-27-5 which states that established fees must be used “**for the specific purpose of administering this article and providing and operating a solid waste program.**”
 - The lawsuits claim that the fees assessed and collected exceed the amount necessary to operate the garbage program and are used to raise the general revenue of the county.
- The current challenges to solid waste fees are based on Town of Eclectic v. Mays, 574 So. 2d 96 (Ala. 1989).

Challenges to Solid Waste Fees

Example of Potential Liability

- Town of Eclectic v. Mays, 574 So. 2d 96 (Ala. 1989).
 - Town's water customers claimed that Eclectic was using the garbage service fees to raise the Town's general revenue, in violation of Alabama law.
 - Specifically, the Plaintiffs contended that the Town was assessing and collecting fees which exceeded the amount necessary to operate its garbage disposal service.
 - As a result, the Plaintiffs claimed that Eclectic was violating the provisions of Ala. Code § 22-27-5 that authorized the Town to assess a fee *"for the specific purpose of administering this article and providing and operating a solid waste program."*

Example of Potential Liability

Town of Eclectic v. Mays, 574 So. 2d 96 (Ala. 1989).
continued.

- In Mays, the Alabama Supreme Court held that any fees assessed under Ala. Code § 22-27-5 must only be imposed to cover the cost of providing the Town's garbage service.
- In its opinion, the Court also stated that "before imposing the garbage service fees, Eclectic should have related the fee to the cost of providing the service."
- Additionally, the Court held that the Town improperly spent revenue generated by the garbage service in departments other than the solid waste department.

Alabama Attorney General's Opinions Discussing Proper Use of Solid Waste Fees

Can the proceeds from tipping fees at the Fayette County Solid Waste landfill be deposited into the general fund account either directly from the source or by the transfer from the Health Tax Fund?

- Yes. HOWEVER, the restrictive language found in Ala. Code § 22-27-5 requiring that any garbage only be assessed for "the specific purpose of administering this article and providing and operating a solid waste disposal program" obligates any such funds collected to be DIRECTLY related to the expenses of implementing the solid waste statutes and CANNOT subsidize the general fund.
- Therefore, the Opinion noted that **if the County deposits tipping fees into the general fund** rather than a special fund, **these proceeds must be earmarked** for use related to the operation of the county's solid waste program.

Hon. Jerry Lacey, Ala. Op. Atty. Gen. No. 98-00005 (Oct. 6, 1997).

Alabama Attorney General's Opinions Discussing Proper Use of Solid Waste Fees

Can county sanitation funds be transferred to the county road department to repair roads damages by county garbage trucks?

- No. Based on the restrictive language found in § 22-27-5, the County may not use funds collected for the purpose of administering a waste program for any purpose.
 - Use of sanitation funds for the purpose of repairing roads damaged by the County's garbage trucks would be in conflict with the stipulated uses of waste disposal funds as prescribed by Alabama law.

Hon. Hobson Manasco, Jr., Ala. Op. Atty. Gen. No. 2011-068 (2011).

Challenges to Solid Waste Fees

Legislative Responses

- After the 1998 Attorney General's Opinion involving solid waste fees was issued, the legislature passed Ala. Code § 22-27-5.1 which states as follows:
 - Notwithstanding any other provision of law, any county having a population of 25,000 inhabitants or less, according to the 1990 federal decennial census, which voluntarily operates a landfill as defined in Section 22-27-2(12), may charge a tipping fee for use of the county landfill. The county may deposit any or all of the tipping fee in the county general fund to be used for county general purposes. This section shall not be construed to grant any solid waste disposal authority or unit of local government the authority to impose a tipping fee on the processing, treatment, or disposal of solid waste at a privately-owned or privately-operated solid waste facility.

Challenges to Solid Waste Fees

Legislative Responses

- Although Ala. Code § 22-27-5.1 does attempt to allow for a more comprehensive use of solid waste fees the statute has limited applicability.
 - As a result of the size restriction found in the first sentence, the statute only applies to very few counties (e.g., Fayette County).
 - Additionally, at least two local constitutional amendments have been passed to get around the size limitation imposed in § 22-27-5.1.

Solid Waste Fees

Current Challenges Faced by Alabama Counties

As previously mentioned, several Alabama Counties are currently facing class action lawsuits challenging their assessment and use of solid waste fees established under Ala. Code § 22-27-5.

- The class members are claiming as follows:
 - The solid waste fees charged by the County under § 22-27-5 bear no relation to the cost of operating the disposal services
 - The solid waste fees exceed the reasonable cost of providing the disposal service to county residents
 - As a result, the class members argue that the solid waste fees are an invalid tax.

Solid Waste Fees

Current Challenges Faced by Alabama Counties

- Plaintiff's Class Definition:
 - All individuals or entities that had paid or reimbursed Defendants for solid waste disposal fees collected by the County.
- Possible Theories of Liability:
 - Declaratory Judgment that the fee bears no relation to cost of operation
 - Claim for Money Had and Received
 - Unjust Enrichment
 - Negligence
 - Injunctive Relief

Current Challenges Faced by Alabama Counties

Possible Defenses to be Asserted by the County:

1. Use of the Notice of Claim Provision in Ala. Code § 11-12-8 which provides as follows:
 - “[a]ll claims against counties must be presented for allowance within 12 months after the time they accrue or become payable or the same are barred”
 - First line of defense for limitation of any refund sought would be to argue that the class members are only entitled to damages that were incurred during the 12 months prior to the filing of the notice of claim.
 - Is this defense applicable?

Current Challenges Faced by Alabama Counties

Possible Defenses to be Asserted by the County:

2. Applicable Statute of Limitations:

- County will need to argue that the 2 year statute of limitations applies which would only allow the class members to assert claims and recover damages for up to two years prior to the time the Complaint was filed.
- Possible Dangers:
 - It could be argued that the money had and received claim has a 6 year statute of limitations.
 - Additionally, if an unjust enrichment claim is based on contact theory it too can carry a 6 year statute of limitations.

Current Challenges Faced by Alabama Counties

Possible Defenses to be Asserted by the County:

3. Lack of Standing and Adequacy of Class Representative:

- It is unlikely that one Class Representative can adequately represent class members that are uniquely situated.
- For example, can a residential customer adequately represent a business owner or a municipal government?

Example of Other Challenged Fees

Densmore v. Jefferson County et al., 813 So. 2d 844 (Ala. 2001).

- Landowners brought an action against County Commission to challenge the constitutionality of a storm-water fee imposed by a county ordinance.
 - The storm-water fee at issue was enacted pursuant to the Storm Water Act.
 - The Storm Water Act allowed local entities to assess and collect a fee in order to operate their storm water programs.
- The Plaintiffs argued that:
 - The storm-water fee is an illegal, unconstitutional tax because the primary purpose of the fee is to raise revenue.
 - There was no relationship between the fee at issue and the benefit each property owner receives from the Storm Water program.

Example of Other Challenged Fees

Densmore v. Jefferson County et al., 813 So. 2d 844 (Ala. 2001),
continued.

- In Densmore, the Alabama Supreme Court held that the storm-water fee at issue was valid.
 - Jefferson County was not required to demonstrate a direct benefit to each person assessed the storm water fee, a valid fee may be sustained based on a indirect benefit or a public benefit to the persons assessed the fee

Example of Other Challenged Fees

St. Clair County Home Builders Association et al. v. City of Pell City et al., 61 So. 3d 992 (Ala. 2010).

- Home builders brought an action against the City and multiple officers challenging an ordinance through which the City imposed various service fees.
 - The fees at issue were imposed in order to:
 - make necessary improvements to the municipal sewer and water systems; and
 - defray costs of providing additional services to new developments within the municipal service area.
- The Plaintiff home builders argued, in part, that there was no relationship between the fees charged and the benefits realized by the home builders.

Example of Other Challenged Fees

St. Clair County Home Builders Association et al. v. City of Pell City et al., 61 So. 3d 992 (Ala. 2010).

- Relying on Densmore, the Alabama Supreme Court held that:
 - “Alabama law does not require that fees precisely comport with the benefits provided to property owners.”
- Further, the Court stated that the City did not act arbitrarily in assessing the amount of the service fees, and the home builders certainly received a benefit, even if it was not direct in nature.
 - In reaching its decision, the Court noted that the City conducted numerous studies to determine the cost of correcting the City’s problems with its water and sewer systems and the cost of expanding its water and sewer systems to allow for further and future development.

Example of Other Challenged Fees

Ex parte City of Mobile, 37 So. 3d 150 (Ala. 2009).

- A Class action complaint was filed against the City of Mobile which sought to recover damages on behalf of approximately 200 businesses operating in the City's police jurisdiction whose members had paid both an annual business-license tax and a monthly gross-receipts privilege tax.
 - The City had imposed the taxes at issue pursuant to Ala. Code § 11-51-91 which authorizes a municipality to collect license fees or taxes from businesses within its police jurisdiction in order to defray the costs of providing municipal services within the police jurisdiction.

Example of Other Challenged Fees

Ex parte City of Mobile, 37 So. 3d 150 (Ala. 2009).

- In its opinion, the Alabama Supreme Court first noted that in order for a § 11-51-91 tax to be considered valid, the amount collected:
 - must reflect reasonable compensation to the municipality for the expense of providing municipal services in the police jurisdiction and
 - cannot be used for the purpose of raising the City's general revenue.

Example of Other Challenged Fees

Ex parte City of Mobile, 37 So. 3d 150 (Ala. 2009).

- Ultimately, the Alabama Supreme Court held that the City's reliance on an audit conducted six years prior to its enactment of the ordinance imposing the tax at issue was sufficient to satisfy the requirements of Ala. Code § 11-51-91.
- Further, the Court stated that the City was not required to do a more extensive analysis to determine that it spent more on municipal services than it collected on the license taxes at issue.

Solid Waste Fees

LESSONS LEARNED

- Do not use the Solid Waste Fee for any other purpose than the operation of the county's solid waste program!
- Do not take loans from the Solid Waste Fee Account in order to temporarily support the county's general fund.
- Do not co-mingle the county's Solid Waste Fee Funds with any other source of revenue.

Solid Waste Fees

An Issue Yet to be Resolved

- It is clear that revenue generated from solid waste fees must be used for the specific purpose of operating the county's garbage collection and disposal programs.
- It is unclear, however, as to whether the fees can be used to cover the cost of the solid waste department's percentage of the county's overall overhead expenses.

Revenue Risk #2:

The Ad Valorem Tax Levy

- Regarding the process by which ad valorem taxes are to be levied, Alabama Code § 40-7-42, prior to April 10, 2014, stated as follows:
 - The County Commission, at the first regular meeting in February in each year, shall levy the amount of general taxes required for the expense of the county for the current year ... at the same time levying the amount of special taxes required for the county for the current year

Revenue Risk #2:

The Ad Valorem Tax Levy

- Several counties in Alabama are currently facing challenges to the way in which they went about levying ad valorem taxes.
- These lawsuits focus on the phrase “at the first regular meeting in February in each year” found in Alabama Code § 40-7-42.
- In each current lawsuit, the Plaintiffs point out that the county commission did not levy the taxes at its first meeting in February, but instead at some later date.
- As a result, the Plaintiffs claim that the levy is invalid and therefore the taxes were improperly assessed.

Revenue Risk #2: *The Ad Valorem Tax Levy*

- It is important to note that in most of the current lawsuits, the ad valorem taxes at issue were levied one to three months after the date prescribed by the statute. One county levied the taxes after they were assessed.

Revenue Risk #2: The Ad Valorem Tax Levy *Legislative Response*

- In April 2014, the Legislature amended § 40-7-42 to read, in pertinent part, as follows:
 - Any general or special taxes levied by the county commission prior to April 10, 2014, are hereby ratified and confirmed irrespective of whether the general or special taxes were levied during the first county commission meeting held in February of any year.
- This amendment is now being challenged on constitutional grounds.

Revenue Risk #2: The Ad Valorem Tax Levy

Defenses Available to Counties

- In response to the current challenges to the ad valorem tax levies, the April 2014 amendment to § 40-7-42 will be the counties' first line of defense.
- Additional Arguments Available to Counties:
 - § 40-7-42 imposes a mandatory, ministerial duty on the County Commission and the ONLY remedy available to the Plaintiffs is petition for a writ of mandamus, compelling the Commission to levy the tax.
 - The purpose of the Act is ensure that the Revenue Commissioner is notified of the amount of taxes to be assessed.
 - If the challenge is to a tax levied in 2012, the 12 month notice of claim statute is an additional defense.

Revenue Risk #3:

Railway Diesel Fuel Use Tax

- Background:
 - The Railroad Revitalization and Regulatory Reform Act ("4-R Act") was enacted, in part, to ensure that railway carriers were not being unfairly treated as compared to motor carriers and water carriers with regard to state tax structures.

Revenue Risk #3:

Railway Diesel Fuel Use Tax

- Several Alabama counties are currently facing a challenge by Railway Companies (e.g. CSX Transportation, Norfolk Southern, Alabama Southern Railway) claiming that counties are violating the 4-R Act by imposing a use tax on the railway company's consumption of diesel fuel while exempting motor carriers.
 - It is important to note that motor carriers are subject to an excise tax, rather than a use tax.
 - Although water carriers do not appear to be subject to any use taxes or excises taxes, there is a special state tax on the repair of watercraft.

Revenue Risk #3:

Railway Diesel Fuel Use Tax

- The cases currently pending against Alabama counties are supported, in large part, by the decision of the Eleventh Circuit in:
 - CSX Transportation, Inc. v. Alabama Department of Revenue, No. 14-611 (11th Cir. July 1, 2013).
 - In this case, CSX Transportation, an interstate rail carrier, brought an action against the Ala. Dept. of Revenue, alleging that Alabama's tax scheme discriminated against railroads in violation of the 4-R Act.
 - CSX contends that interstate motor and water carriers are unfairly exempted from the State's diesel fuel use tax.

Revenue Risk #3:

Railway Diesel Fuel Use Tax

- In CSX, the 11th Circuit reversed the district court's finding in favor of the State and held that "the State's sales tax [on diesel fuel] violates the 4-R Act [§ 11501], and remand to the district court with instructions to enter declaratory and injunctive relief in favor of CSX consistent with this opinion."
- The Alabama Department of Revenue filed its Petition for Writ of Certiorari on October 30, 2013.

Revenue Risk #3:

Railway Diesel Fuel Use Tax

- When the Petition for Writ of Certiorari was granted on July 1, 2014, the United State Supreme Court directed the parties to brief and argue, in addition to the issue presented in the petition, the following question:
 - Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. § 11501(b)(4), a court should consider other aspects of the State's tax scheme rather than focusing solely on the challenged tax provision.
- How the Supreme Court rules in the CSX case will determine, to a large extent, the outcome of the cases against counties and cities that are sued.

Questions???