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3 Things To Know About Supreme Court's Hotels.com Case

By **Katie Buehler**

Law360 (January 11, 2021, 7:39 PM EST) -- The U.S. Supreme Court has agreed to hear San Antonio's challenge to Fifth Circuit precedent that district courts have no discretion in assigning appeals bond costs, an opinion the city argues places the Fifth Circuit on the wrong side of a "lopsided" circuit split.

The justices agreed Friday to review argument from San Antonio and more than 170 other Texas municipalities that the Fifth Circuit was wrong in approving a Texas federal judge's award of $2.2 million in appeal bond costs in favor of Hotels.com LP and about a dozen other online travel companies.

The Fifth Circuit in May affirmed the district court's ruling that it was "obligated" under the Federal Rules of Appellate Procedure to tax the costs associated with a $68 million appeal bond, also known as a supersedeas bond, against the municipalities after the companies successfully overturned an $84 million award against them.

But San Antonio argues holdings by the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh and Federal circuits contradict the Fifth Circuit.

"The Fifth Circuit's outlier position is wrong, and it now stands alone on the wrong side of a lopsided split," San Antonio wrote in its September petition for writ of certiorari. "The circuit conflict is both open and entrenched, and it should be resolved by this court."

Here, Law360 breaks down three things you need to know about the case.

How It Started

San Antonio and the other municipalities brought a proposed class action against Hotels.com, Hotwire Inc., Expedia Inc. and other online travel companies in 2006, alleging the companies failed to remit the full amount of hotel occupancy taxes owed to the cities under local ordinances.

The class comprised 173 municipalities "whose ordinances contain language that requires every person owning, operating, managing or controlling any hotel to collect and remit hotel occupancy taxes," according to court documents.

In April 2016, U.S. District Judge Orlando L. Garcia entered judgment in the cities' favor, awarding them the unpaid taxes, which would eventually total $84 million.

The online travel companies launched their successful appeal of the award in November 2016, and, one year later, the Fifth Circuit wiped out the $84 million award, finding services fees charged by online travel companies weren't subject to Texas hotel occupancy tax ordinances.

When the companies appealed the judgment in favor of the cities, they posted $68 million in appeal bonds, which at the time was enough to cover the judgment and 18 months' worth of interest and penalties, according to court documents.

Once the case was back in front of Judge Garcia, the online travel companies moved for final judgment that would include the $2.2 million premiums paid for the appeal bonds.

San Antonio appealed Judge Garcia's judgment, which the Fifth Circuit affirmed in May. The city unsuccessfully petitioned the court for an en banc rehearing in June, which the court denied in a 10-6 vote.

What's at Issue

San Antonio has asked the U.S. Supreme Court to review the Fifth Circuit's May decision that affirmed the $2.2 million award for premiums in favor of the online travel companies, arguing the circuit court wrongly relied on a two-judge 1991 unpublished opinion by the court as precedent.

In the 1991 opinion, the Fifth Circuit held that Federal Appellate Rule 39(e) provides district courts with no discretion "whether, when, to what extent, or to which party to award costs," which San Antonio argued in its September petition made a full award of costs "mandatory."

San Antonio argues the 1991 opinion is based on an outdated version of Rule 39(e), which has been amended three separate times since then.

The old version of Rule 39(e) stated appellate costs "shall be taxed" in the district court, but the current version reads certain appellate costs "are taxable" in the district court. The list of costs include the preparation and transmission of the record, the reporter's transcript, premiums paid for a bond or other security to preserve rights pending appeal and the fee for filing the notice of appeal.

The online travel companies, however, argue San Antonio and its fellow municipalities are exaggerating the amendments to Rule 39(e), saying the changes were purely stylistic in nature.

"The Rules Committee knew how to confer discretion and could have added language to Rule 39(e) allowing district courts to modify the appellate court's award of costs if that was the intent. The committee did not do so," the companies said in a brief filed with the court in December.

The companies added that San Antonio's failure to act at the appropriate time and raise arguments for cost reduction to the appellate court — and not the district court — is not the online travel companies' fault and they shouldn't have to bear the costs.

"So no great act of prophesy was needed for the city to see, at nearly every turn, that its hyper-aggressive litigation tactics … would lead the Fifth Circuit to award appellate costs to respondents, including their supersedeas bond premium expenses," the companies said.

The Circuit Split

While San Antonio argued in its petition to the court that a "lopsided" split establishes a "square conflict" among the courts, the online travel companies argued in their December brief that the split is another exaggeration on San Antonio's part.

"If this issue did recur as frequently as San Antonio contends, then surely, given how long the purported circuit split has existed, the court would have been presented an opportunity to consider it long before now," the companies said. "Instead, the Seventh and Fifth circuits' precedents have remained and survived for nearly thirty years in total — and for twenty years since the 1999 amendment."

San Antonio attacked the companies' characterization of the split in a response brief filed with the court in December. In the brief, the city accused the companies of attempting to "minimize the obvious conflict" by describing the split as stale.

In its September petition, the city explained the split as "both open and entrenched" and pointed to a 1978 Seventh Circuit decision that found district courts are in the better position to determine costs because they often deal with the true facts of cases and how to evaluate them.

The Eleventh Circuit in 2006 rejected an argument similar to the online travel companies' in this case, which proffered that district courts lack the discretion to decline to tax the bond premiums. In that decision, the Eleventh Circuit ruled that Rule 39(e)'s language is permissive, not mandatory, according to court documents.

San Antonio mentioned that the First, Second, Fourth, Sixth, Eighth, Ninth and Federal circuits agree with the Eleventh Circuit on that point.

The city urged the justices to remedy the split so that the "availability of costs under the Federal Rules" would "not turn on geography.

"The court below would have exercised discretion had these proceedings occurred in Illinois, Florida, California, Virginia, Ohio, Massachusetts, Minnesota, or New York, but it instead declared the award mandatory because this case arose in Texas," San Antonio said.

San Antonio is represented by Gary Cruciani and Steven D. Wolen of McKool Smith PC and Daniel L. Geyser of Alexander Dubose & Jefferson LLP.

The online travel companies are represented by Thomas M. Petterson of Morgan Lewis & Brockius LLP, Anne Marie Seibel and Michael Bentley of Bradley Arant Boult Cummings LLP and David Keltner of Kelly Hart & Hallman LLP.

The case is City of San Antonio v. Hotels.com LP et al., case number 20-334, in the Supreme Court of the United States.

--Additional reporting by Joyce Hanson and Michelle Casady. Editing by Orlando Lorenzo.