

UPDATE WITH RESPECT TO LITIGATION CHALLENGING  
LICENSE TAXES LEVIED BY JEFFERSON COUNTY, ALABAMA  
JUNE 19, 2000

1, *Richards v. Jefferson County*. Since 1988, Jefferson County has levied and collected a special privilege or license tax (the "Special County License Tax") at the rate of 1/2 of 1% of the gross receipts of persons following a vocation, occupation, calling or profession within the County. On April 12, 1992, a class action was filed in Jefferson County Circuit Court by two sets of plaintiffs, one of which consists of federal employees who are subject to the Special County License Tax and the other of which consists of all employees who are subject to the Special County License Tax. The gravamen of the case, styled *Richards v. Jefferson County*, CV-92-3191 (the "*Richards* action"), is that the Special County License Tax levied pursuant to Ordinance No. 1120 violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution with respect to all plaintiffs because of certain exemptions required by the authorizing statute (Act No.406 adopted at the 1967 Regular Session of the Legislature of Alabama the "1967 Act") to be given to persons who engage in a regulated profession and who pay a license tax to the State of Alabama. In addition, the plaintiffs in the *Richards* case who are federal employees claim that the Special County License Tax violates their rights under that provision of the Public Salary Tax Act (4 U.S.C. § 111) which allows state and local taxation of compensation of federal officers and employees if such taxation does not discriminate against such federal officers and employees because of the source of compensation. The plaintiffs seek damages in the amount of the occupational taxes collected since January 1, 1988, plus costs, interest and attorneys' fees and an injunction prohibiting the collection of the Special County License Tax in its current form with respect to all taxpayers.

The County and the Birmingham-Jefferson Civic Center Authority (the "Authority") moved for summary judgment against plaintiffs on the grounds that (i) the plaintiffs' claims were barred by the doctrine of *res judicata* because of the 1988 holding of the Alabama Supreme Court; in prior litigation involving the Special County License Tax in *Bedingfield v. Jefferson County* and (ii) the exemptions from the tax did not violate the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. The Circuit Court denied the defendants' motion for summary judgment with respect to the federal constitutional claims, whereupon the principal questions decided adversely to the defendants were certified to the Alabama Supreme Court for interlocutory appeal. On March 31, 1995, the Alabama Supreme Court reversed the Circuit Court's denial of summary judgment, holding that the *Bedingfield* case barred further litigation of the federal constitutional claims. *Jefferson County v. Richards*, 662 So.2d 1127 (Ala. 1995). The plaintiffs obtained review by the United States Supreme Court, which on June 10, 1996, reversed the decision of the Alabama Supreme Court, holding that plaintiffs' federal constitutional claims were not barred by *res judicata* and remanding the case for further proceedings with respect to whether the license tax violated the equal protection guarantees of the Fourteenth Amendment. *Richards v. Jefferson County*, 517 U.S. 793, 116 S.Ct. 1761(1996). In connection with the appellate review of the *res judicata* issue, neither the United States Supreme Court nor the Alabama Supreme Court has as yet addressed the validity of the Special County License Tax under the equal protection or due process clauses of the United States Constitution. Notwithstanding the opposition of the defendants, including an unsuccessful petition for mandamus to the Alabama Supreme Court, the case was certified as a class action for each set of plaintiffs. The case was tried on October 21-23, 1997, before Judge John E. Rochester, Circuit Judge of Clay County, Alabama, sitting by special designation in this Jefferson County case.

Plaintiffs did not serve the Alabama Attorney General with the complaint as required by Alabama law for cases that challenge the constitutionality of a statute. On April 13, 1998, the County and the Authority filed a motion for dismissal of the case for lack of jurisdiction, contending that a failure to serve the

Attorney General is a jurisdictional defect that cannot be waived and may be raised with the court at any time, which the Circuit Court took under advisement pending its decision on the merits of the case. On March 17, 2000 the Alabama Supreme Court denied a petition for a writ of mandamus filed by Jefferson County requesting that the Supreme Court order the Circuit Court to dismiss the *Richards* case for lack of jurisdiction because of plaintiff's failure to serve the Attorney General before the trial on the merits.

On November 12, 1998, Judge Rochester denied the defendants' motion to dismiss the case for lack of jurisdiction and entered a judgment holding the Special County License Tax to be in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution. The governing body of the County was given two months in which (i) to develop a legislative bill providing for a replacement tax that would be free of the unconstitutional exemptions of the Special County License Tax and (ii) to develop legislative support for the enactment of this bill during the 1999 Regular Session of the Alabama Legislature.

A new tax statute, Act No.99-406, which eliminated the exemptions found in the Special County License Tax, was passed by the Alabama Legislature during its 1999 Regular Session and was signed into law by the Governor on June 9, 1999. This new act, however, appeared to suffer from numerous defects under the Constitution of Alabama in both its substantive provisions and in the procedure that had been followed in its passage. At a hearing on June 16, 1999, before Judge Rochester, the County explained its unwillingness to levy a new occupational tax under Act No.99-406 because of the risk of litigation that would likely be brought to challenge the validity of the tax and to seek a refund. Pursuant to the mutual agreement of both plaintiffs and defendants, Judge Rochester, on the following day, June 17, 1999, entered a new order which, among other things, restrains and enjoins the County "from collecting an occupational tax from current occupational taxpayers pursuant to Act 406 and Ordinance 1120 unless it also collects the tax from those wage earners who previously enjoyed an exemption pursuant to said Act and Ordinance." On June 30, 1999, the County filed an appeal of Judge Rochester's June 17, 1999, injunction. That appeal is now pending before the Alabama Supreme Court.

2. *Philip A. Triantos, M.D. v. Jefferson County.* On August 20, 1999, Philip A. Triantos filed a class action seeking a judgment enjoining and prohibiting the levy and collection of an occupational tax by Jefferson County from medical doctors and other professionals required by law to pay a license or privilege tax to the State of Alabama or to any county in Alabama. Plaintiff Triantos argued that Jefferson County lacks the authority to levy and impose an occupational tax from such doctors and other professionals. He also held that Act No.99-406, purportedly enacted by the Alabama Legislature at the 1999 Regular Session, is null and void because the 1999 Act did not comply with the requirements of Sections 70, 63, 73 and 44 of the Constitution of Alabama or with the requirements of Amendment No. 448 and Amendment No, 341 to the Constitution of Alabama. On January 12, 2000, Circuit Judge Thomas A. Woodall filed an opinion and orders granting plaintiff Triantos' November 29, 1999 motions for class certification and for summary judgment. In his opinion, Judge Woodall concluded that the plain language of the 1967 Act and of the Jefferson County Ordinance precludes Jefferson County from collecting the occupational tax from Dr. Triantos and similarly situated professionals. Accordingly, he entered an order permanently enjoining the County from levying and/or collecting from plaintiff Triantos and members of the class the occupational tax. Judge Woodall also declared that Act No. 99-406 had been enacted without complying with the requirements of the Alabama Constitution, as Amended, and accordingly declared that Act No. 99-406 is null, void, unenforceable and of no force and effect. On January 18, 2000, the County filed a motion to alter or amend the January 12, 2000 judgment which was orally argued on January 31, 2000 and was denied by Judge Woodall by order filed February 8, 2000.

By Order entered March 22, 2000, the Supreme Court stayed the January 12, 2000 Order entered by Judge Woodall in the *Triantos* case, and consolidated (for purposes of briefing and submissions) appeals taken in the *Richards* and *Triantos* cases. Accordingly, the County is continuing to collect the Special

County License Tax and is holding the proceeds pending a ruling by the Alabama Supreme Court on the pending appeals in *Richards* and *Triantos*

3. The *Parker* action. On June 23, 1999, another class action was filed by Carnesa T. Parker in Jefferson County Circuit Court seeking to have the Special County License Tax declared invalid under the Alabama Constitution on the ground that it constitutes an impermissible income tax imposed by a county. *Carnesa T. Parker v. Jefferson County, CV-99-3575* (Circuit Court, Jefferson County, Ala.) (the "*Parker* action"). The plaintiffs in the *Parker* action seek damages in the amount of all occupational taxes collected since January 1, 1988, plus costs, interest and attorneys' fees and an injunction against the collection of the Special County License Tax. The gravamen of the complaint in the *Parker* action is that the June 21, 1999, decision of the United States Supreme Court in *Jefferson County, Alabama v. Acker, WL 401256 (U.S.)*, holds that the Special County License Tax was an income tax prohibited by Alabama law. The ease of *Jefferson County, Alabama V. Acker* arose from proceedings commenced by the County to collect the Special County License Tax from two federal district judges who hold court in the County and who had refused to pay the tax from its inception. The judges argued that the Special County License Tax represented an unconstitutional attempt by the County to interfere with the federal judiciary by making it unlawful for federal judges to perform their official duties unless they paid a license tax. The United States Supreme Court rejected this argument and held that the Special County License Tax is, for purposes of federal law, a nondiscriminatory tax on earned income which could be levied on federal officials and employees by reason of the consent given by Congress in the Public Salary Tax Act. The *Parker* action appears to be based on two false premises, first, that the Special County License Tax must be deemed to be an income tax under Alabama law because of the U.S. Supreme Court's holding in *Acker*, and second, that a tax on earned income is disallowed by the Alabama Constitution. The County filed a motion to dismiss the *Parker* action for failure to state a claim upon which relief can be granted.

By Order filed January 24, 2000, Judge Rochester denied plaintiff Parker's motion for class certification, denied plaintiff Parker's motion for summary judgment, held that the defendant Jefferson County, Alabama was entitled to judgment as a matter of law and dismissed the *Parker* action. Plaintiff Parker has taken an appeal from the January 24, 2000 judgment to the Alabama Supreme Court. That appeal is currently being briefed. Plaintiff Parker has requested oral argument.

4 *Jefferson County Employees' Association v. Jefferson County.* By order entered March 8, 2000, Circuit Judge William A. Jackson has held invalid legislation purportedly enacted by the Alabama Legislature in the 1999 Special Session which purported to repeal the 1967 Act. The March 8 ruling is not likely to be appealed.

At this time, it is impossible to predict with certainty the final outcome of the litigation described above. If plaintiffs are ultimately successful in having the Special County License Tax declared unconstitutional, and if the Alabama Legislature fails to enact legislation which is deemed to cure the constitutional defects of the existing tax and which is not otherwise constitutionally defective itself, the County would suffer a significant decrease in revenues. Under the worst conceivable circumstances, it is possible that the County could suffer a monetary judgment equal to the amount of the Special County License Tax revenues collected since January 1, 1988 (over \$450 million), plus interest.