8-30-2010

The Judicial Instinct to Harmonize Statutes

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Judges like to reach results that harmonize statutory meanings, both meanings within given statutes and meanings among statutes. That inclination applies as fully in tax cases as in nontax cases, and in state and local tax cases as well as in federal tax cases. Effective advocates in state-local tax controversies recognize that judicial tropism and use it, whenever possible, in their clients' interests.

Part I discusses the harmonization instinct generally. Part II illustrates application of the harmonization approach in state and local cases. Part III notes some limitations on and unsettled questions regarding the harmonization.

I. The Judicial Harmonization Drive

"Related statutory provisions must be read together to achieve a consistent whole, and . . . where possible, courts must give full effect to all statutory provisions in harmony with one another."[1] That imperative is akin to the "supertext" and "consistent meaning" doctrines of interpretation, which we have previously explored in this column.[2] The approach usually is a judge-made rule, but it sometimes is commanded by statute.[3]

This principle is of ancient vintage, having been invoked by courts[4] and commentators[5] for centuries. The continued viability of the approach is demonstrated by *New Process Steel*, a recent decision by the U.S. Supreme Court in a nontax case. The case involved a scenario that one hopes will seldom be repeated. The National Labor Relations Board's enabling acts provide that the board has five members, that three constitute a quorum, and that the board makes its decisions by majority vote. Because of partisan wrangling in Congress, vacancies on the board were not filled for years, and the board's membership dropped to two. Foreseeing that problem, the board (when it had four members) delegated its power to a subgroup. Under that delegation, the board made hundreds of unanimous (that is, 2-0) decisions. The validity of the delegation (and thus the validity of numerous decisions) was challenged. In June 2010, in a 5-4 decision, the Supreme Court held that the board's powers cannot be vested in a subset of the board numbering fewer than three members.[6] The majority reached that result via several rationales. "First, and most fundamental" was the harmonization inclination: The result was seen as "the only way to harmonize and give meaningful effect to all of the [several statutory] provisions" bearing on the question.[7]

The judicial harmonization instinct is based on the respect of the courts for the legislature as a coordinate branch of government. It rests on two assumptions (or fictions) about the legislature and how it does its work. Courts "presume that, in passing a statute, the legislature not only did so

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[1]*Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 199 (Fla. 2007) (internal quotation marks omitted). For discussion of this principle of statutory interpretation, see 2B Norman J. Singer and J.D. Shambie Singer, *Sutherland Statutory Construction*, section 53.1 (7th ed. 2008).

[2]Steve R. Johnson, "Supertext and Consistent Meaning," *State Tax Notes*, May 25, 2009, p. 675, *Doc 2009-9545*, or *2009 STT 99-4*.

[3]*E.g.*, Haw. Rev. Stat. section 1-16.

[4]*E.g.*, *State ex rel. Newbury v. Patterson*, 20 A. 828, 829 (N.J. 1890); *Johnson v. Wing*, 3 Mich. 163, 1854 WL 1935, at *4 (1854); *Elmondorff v. Carmichael*, 13 Ky. 472, 1823 WL 1214, at *11 (1823).

[5]The principle was discussed by Judge Platt Potter in his American version of the English treatise on legislation by Dwarris. Fortunatus Dwarris, *A General Treatise on Statutes* (Platt Potter, ed. 1871).

[6]*New Process Steel, L.P. v. NLRB*, 2010 WL 2400089 (U.S. Sup. Ct. June 17, 2010).

[7]*Id.* at *4.

with the knowledge of the existing statutes but also that it did not intend to enact a conflicting statute."[8] Those assumptions hold in many instances, of course, particularly when legislative memories are long or legislative staff is of high quality. However, neither of those propositions is invariably correct. The haste with which some legislation is enacted may preclude fully researching prior enactments, and legislatures sometimes punt difficult issues — including reconciling enactments — to agencies and the courts.

II. Examples in State and Local Tax Cases

Harmonization questions sometimes arise regarding different provisions within the same statute. For example, a Mississippi case considered whether a manufacturer qualified for a jobs tax credit under a statute enacted to provide incentives for businesses to locate in the state. The manufacturer relied on a portion of the statute that provided: "Only those permanent businesses that increase employment by twenty (20) or more in developed areas are eligible for the credit."[9] Over the years, the manufacturer had increased employment to that degree.

Nonetheless, the Mississippi Supreme Court rejected the claimed credit, saying that "focusing on only this sentence [relied on by the manufacturer] skews the true meaning of the statute."[10] Instead, the court adverted the other provisions of the statute, from which, "reading the statute as a whole," the court concluded that eligibility for the credit depended on increasing employment by 20 or more *within a single year*, which the manufacturer had not done.[11]

Other cases involve the interrelation of different statutes, as illustrated by two cases nearly a century apart. A 1911 North Dakota case involved the respective authority of cities on the one hand and boards of county commissioners on the other regarding property tax assessments. On request by taxpayers, the county board, acting as a board of review, reduced assessments that had been made by the city. Two statutes — North Dakota Revised Code sections 1553 and 2722 — were in apparent conflict. Section 1553, found in the code's chapter on revenue and taxation, on its face permitted county boards to abate taxes erroneously assessed. Section 2722, found in the code's chapter relating to cities, prohibited county boards from changing individual assessments made by incorporated cities.

The North Dakota Supreme Court said: "In accordance with elementary law, . . . it is the duty of this court to harmonize conflicting statutory provisions as far as possible, so as to give effect to the legislative intent."[12] The court held that section 1553 operated freely in the case of county reassessments in unincorporated areas but limited the section's application to exceptional situations as to reassessments in incorporated cities — a holding that preserved space for operation of both section 1553 and section 2722. The court noted that allowing county boards always to overturn city assessments would mean that "taxation would be a matter of uncertainty."[13] In contrast:

> if, on the contrary, the Legislature has provided a complete system, and the provisions referred to only furnish methods applicable to exceptional cases, as where one or another of the boards has failed to perform its function, then our construction of these sections is in harmony with such system, and the rights of all concerned are subject to protection as nearly as may be in any such revenue system.[14]

Ninety-eight years later, an Alabama case involved an action brought by a county tax assessor seeking an injunction against a county to prevent reduction of the assessor's budget by diversion of commissions on collected taxes. The assessor relied on a statute (section 40-4-2 of the Alabama Code), the plain language of which, the assessor argued, stated the commissions that were due the assessor. However, this would have created conflict with three other provisions of the Alabama Code (sections 40-6A-6, 40-4-3, and 1-3-6), which provided that salaried assessors were to be paid no commissions.

The Alabama Supreme Court held that it was required to harmonize the apparently conflicting statutes "as much as practical."[15] That imperative, it concluded, compelled it to hold "that the commission schedule set forth in section 40-4-2 still has a field of operation insofar as there may be counties whose tax assessors are not paid on a salary basis; however, it has no application in those counties in which tax assessors receive a salary."[16] Accordingly, the

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[8]*Perille v. Ray-bestos-Manhattan-Europe, Inc.*, 196 Conn. 529, 541 (1985); *see also State v. Snyder*, 63 S.E. 385, 388-389 (W. Va. 1908), *superseded by statute as stated in Peters v. Rivers Edge Min., Inc.*, 680 S.E.2d 791, 807 (W. Va. 2009); *Lockshin v. Semsker*, 987 A.2d 18, 28-29 (Md. 2010).

[9]Miss. Code Ann. section 57-73-21(4).

[10]*Manufab, Inc. v. State Tax Comm.*, 808 So. 2d 947, 949 (Miss. 2002).

[11]*Id.*

[12]*City of Minot v. Amundson*, 133 N.W. 551, 552 (N.D. 1911).

[13]*Id.* at 553.

[14]*Id.*

[15]*Jefferson Cty v. Weinrib*, 2009 WL 3415295, at *4 (Ala. 2009) (quoting *Peebles v. Mooresville Town Council*, 985 So. 2d 388, 394 n.5 (Ala. 2007)).

[16]2009 WL at *4.

court concluded that its "interpretation gives effect to all the relevant statutes."[17]

The harmonization principle does not prevail in all cases, of course. For example, a recent Vermont case involved the state's property transfer tax. The dissent would have held for the revenue authority, in part because the authority's construction harmonized a tax exemption statute and the state's limited liability company statutes.[18] However, the majority of the Vermont Supreme Court held for the taxpayer, concluding that a bright line used by the revenue department was inadequately grounded in the statute and its purposes.[19]

Other times, courts say they are harmonizing statutes but may in fact be engaged in other enterprises. A recent Florida case involved a challenge to the validity of a tax deed sale of property containing a condominium's swimming pool (though not the condominium itself). The tax-sale buyers relied on section 65.081 of the Florida statutes, which provided that tax deeds could be attacked only on the ground that the tax had been paid. The condominium association relied on section 718.107(3), providing that common elements appurtenant to condominium units may not be divided or partitioned from the units.

The appellate court identified its responsibility as "to read the Florida Statutes *in pari materia* and to harmonize the statutes with each other whenever possible."[20] It then held: "Reading section 718.107 and 65.081 together, we find no indication that subsection 65.081(3) overcomes the ban on separate sale of common elements contained in subsection 718.107."[21] That is subordination of one statute to another, not harmonization, and subordination with precious little explanation at that.

III. Limitations on Harmonization

There are unsettled points regarding the harmonization doctrine, and the courts of the various states often describe the contours of the doctrine differently. This section discusses two such areas of difference. One concerns when the approach should be applied, that is, which types of statutes implicate the judicial responsibility to harmonize. The other concerns the degree to which a court may go in rewriting statutes to harmonize them.

When the Doctrine Applies

In some states, a court's obligation to harmonize statutes applies even for statutes "enacted at different times and contain[ing] no reference one to the other." Moreover, it "is immaterial to the endeavor that the statutes are found in different titles."[22]

> ***If the harmonization duty is held inapplicable — or when harmonization is impossible — the court will resolve the conflict on other grounds.***

In other jurisdictions, the duty is less broad, applying only if — or particularly if — the statutes are *in pari materia*,[23] they "relate to the same subject matter,"[24] they were enacted at the same time,[25] or "the legislation itself recognizes that multiple statutes may govern."[26] If the harmonization duty is held inapplicable — or when harmonization is impossible — the court will resolve the conflict on other grounds, such as the precept that the more specific statute will control over the more general statute.[27]

What Judicial 'Surgery' the Doctrine Authorizes

In cases of genuine conflict, harmonization typically can be effected only by doing some violence to one or another of the statutes. How much? Is there some point beyond which the courts may not go in resculpting the statutes so that they fit together?

This matter has not been definitely resolved, and the approaches of various states appear to conflict.

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[17] *Id.*

[18] *Polly's Properties, LLC v. Department of Taxes*, 2010 WL 2015273, para. 18 (Vt. May 21, 2010) (Johnson, J., dissenting).

[19] *Id.* at para. 7.

[20] *Village of Doral Place Ass'n, Inc. v. RU4 Real, Inc.*, 22 So. 3d 627, 631 (Fla. App. 2009).

[21] *Id.* To reinforce its holding, the court also invoked the maxim "that statutes will not be construed so as to reach an absurd result." *Id.* For discussion of this maxim, see Steve R. Johnson, "The 'Absurd Results' Doctrine in State and Local Tax Cases," *State Tax Notes*, Oct. 19, 2009, p. 195, *Doc 2009-21703*, or 2009 STT 199-4.

[22] *Hounshell v. White*, 199 P.3d 636, 640 (Ariz. 2008) (citations omitted) (quoted by *State v. Far West Water & Sewer Inc.*, 228 P.3d 909, 920 (Ariz. App. 2010)).

[23] *E.g.*, *Lexin v. Superior Ct.*, 222 P.3d 214, 241 (Cal. 2010). "Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object." *Walker v. Superior Ct.*, 47 Cal. 3d 112, 124 n.4 (1988) (quoting 2A Sutherland, *Statutory Construction* (Sands, 4th ed. 1984)).

[24] *E.g.*, *Defina v. Town of Greenwich*, 2009 WL 4068612, at *5 (Conn. Super. Oct. 22, 2009) (unpublished op.).

[25] *Sempre Limited Partnership v. Maricopa Cty.*, 2010 WL 2499411, at *3 (Ariz. App. June 22, 2010).

[26] *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 229 P.3d 871, 876 (Wash. App. 2010).

[27] *Id.*; *see also In re Estate of Kerr*, 134 Wash. 2d 328, 343 (1998). For discussion of this precept, see Steve R. Johnson, "When General Statutes and Specific Statutes Conflict," *State Tax Notes*, July 12, 2010, p. 113, *Doc 2010-11554*, or *2010 STT 132-3*.

Here are some examples. Under the banner of harmonization, some judges have interpreted the statutory term "shall" to mean "may" in its permissive sense,[28] interpreted "or" to mean "and,"[29] and excised words from the statute.[30] Other judges have not been similarly emboldened.[31]

An advocate inclined to push the harmonization principle to similar lengths should perhaps proceed with caution. As revealed by the footnotes herein, some of the above cases are old. Their precedential or influential status may be in some question,[32] especially if, as some perceive, statutory text receives greater weight these days[33] than in eras when judges felt free to behave "in the grand manner."[34] Moreover, advocates often shy away from expansive assertions lest judges view them as signs of desperation or lack of confidence in one's other arguments. Yet one's willingness to take risks grows when alternatives are few. The harmonization principle may sometimes get the advocate to a result that would be difficult to sustain on other grounds. ☆

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[28]*Turner v. School Dist. of Clayton*, 2010 WL 2812864, at *6 (Mo. July 16, 2010) (per curiam) (criticizing the dissent for taking this tack). The converse (that is, reading "may" as "shall") is less startling because "may" has both mandatory and permissive connotations. *E.g.*, *Frye v. South Phoenix Volunteer Fire Co.*, 224 P.2d 651, 654 (Ariz. 1950).

[29]*State v. Brandt*, 41 Iowa 593, 1875 WL 496, at *13 (Iowa Dec. 10, 1875).

[30]*Bingham v. Birmingham*, 15 S.W. 533, 535 (Mo. 1891). This case justified this excision on "purpose controls over text" and "absurd results" grounds. *Id.*

[31]*E.g.*, *Turner*, *supra*, at *6 ("there is no need to refer to other similar statutes where a statute's own language is clear").

[32]However, more modern cases also sometimes have gone far in considering judicial surgery. *E.g.*, *OfficeMax, Inc. v. United States*, 428 F.3d 583, 588-592 (6th Cir. 2006) (taking seriously, although ultimately rejecting, an argument that the statutory term "and" should be read as "or"); *Sosa v. Chase Manhattan Mortgage Corp.*, 348 F.3d 979, 981, 983 (11th Cir. 2003) (reading "and" as "or" to avoid an absurd result).

[33]*See, e.g.*, Jasper L. Cummings, Jr., *The Supreme Court's Federal Tax Jurisprudence: An Analysis of Fact Finding Methods and Statutory Interpretation from the Court's Tax Opinions, 1801-Present* 12 (2010); Peter L. Strauss, *Legislation: Understanding and Using Statutes* 259 (2006) (saying that there had been a "vigorous revival of textualism" since the mid-1970s).

[34]*See, e.g.*, Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed," 3 *Vand. L. Rev.* 395, 396 (1950) (contrasting the "Grand Style" and the "Formal Style" of statutory construction; courts operating in the Grand Style feel more free to achieve results they think to be wise).