

3-2020

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Davis Lackey

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Recommended Citation

Lackey, Davis (2020) "Bellsouth v. Cobb County and the 9-1-1 Act: Taxation Without a Right of Action," *Mercer Law Review*: Vol. 71 : No. 2 , Article 9.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol71/iss2/9

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Bellsouth v. Cobb County* and the 9-1-1 Act: Taxation Without a Right of Action

I. INTRODUCTION

The State of Georgia has long recognized the importance of providing emergency services for its citizens. The on-call availability of medical services in our communities is a vital resource for those in need. The Georgia Legislature enacted the Emergency Telephone Number “911” Service Act of 1977 (9-1-1 Act or Act),¹ which streamlined the emergency services phone number into a single, three-digit emergency number that would effectively reduce response time.² Specifically, the Georgia General Assembly was concerned with the existence of too many phone numbers for emergency services throughout the state.³ In 2005, the Georgia General Assembly amended the Act that generated a comprehensive plan that funds counties’ and local governments’ emergency services.⁴ The new, uniform, state-wide system placed a duty on service providers to bill, collect, and remit funds to local municipalities in order to provide reliable emergency services to

*I would first like to thank my faculty advisor, Professor Monica Roudil, for assisting me throughout the drafting stages and providing valuable comments and critiques. It was Professor Roudil’s Income Tax course that inspired me to research an area of law that was foreign to me at the time. However, as I learned of its complexity, I grew to appreciate it all the more. I also want to thank my family and my fiancé, Abby Crouch, for their constant support and encouragement.

1. Ga. S. Bill 134, Reg. Sess., 1977 Ga. Laws 1040.

2. *Id.* § 2.

3. The language of Section 2 displays the legislative intent: “There currently exist numerous different emergency phone numbers throughout the State. Provision for a single, primary three-digit emergency number through which emergency services can be quickly and efficiently obtained would provide a significant contribution to law enforcement and other public service efforts”

4. Ga. H.R. Bill 470, Reg. Sess., 2005 Ga. Laws 660 (codified as amended at O.C.G.A. § 46-5-120 to -138 (2005)). O.C.G.A. § 46-5-121(b) states, “It is also in the public interest that users of wireless telephones should bear some of the cost of providing this life-saving service, as users of landline telephones currently do.”

Georgia citizens.⁵ Essentially, the service providers would charge one's account on a monthly basis under the statute.⁶ Upon collection of the funds, the service providers would remit the money to the local governments to offset their costs of providing emergency services.⁷ Until recently, there has been no litigation concerning the Act.

In 2010, The Georgia Court of Appeals in *Fulton County v. T-Mobile South, LLC*⁸ first addressed the 9-1-1 charge under the Act.⁹ The court wrangled in Georgia case law as well as other persuasive authority to precisely attack the issue. Dissecting the main factors discussed in the case, the court ultimately concluded that the charge under the Act was a tax.¹⁰ The *T-Mobile* opinion is a raw depiction of the court scuffling with the case of first impression. As a result, the *T-Mobile* decision built a platform for other courts, including the Georgia Supreme Court, to stand on when faced with the challenging issues of taxation and statutory schemes.

On February 18, 2019, *Bellsouth Telecommunications, LLC v. Cobb County*¹¹ was decided by the Georgia Supreme Court.¹² The court reversed the court of appeals and the trial court, holding that the charge under the act is a tax and that Gwinnett and Cobb Counties (the Counties) did not have a right of action against the service providers.¹³ Because the charge was ruled a tax, the Counties were barred from pursuing any common law remedies for negligence, fraud, or breach of

5. O.C.G.A. § 46-5-134(a)–(b) describes the billing and collection process.

6. Specifically, under O.C.G.A. § 46-5-122(17) a telephone subscriber is “a person or entity to whom local exchange telephone service or wireless service, either residential or commercial, is provided and in return for which the person or entity is billed on a monthly basis.” Further, O.C.G.A. § 46-5-122(11) defines “911 charge” as,

a contribution to the local government for the 9-1-1 service start-up equipment costs, subscriber notification costs, addressing costs, billing costs, nonrecurring and recurring installation, maintenance, service, and network charges of a service supplier providing 9-1-1 service pursuant to this part, and costs associated with the hiring, training, and compensating of dispatchers employed by the local governments to operate said 9-1-1 system at the public safety answering points.

This shows who is liable (telephone subscribers) and what the costs are funding under the statute. *Id.*

7. O.C.G.A. § 46-5-134(f)(1)–(8) lists the specific items in which the local municipalities are authorized to use the money received from the Emergency Telephone System Fund.

8. 305 Ga. App. 466 (2010).

9. *Id.*

10. *Id.*

11. 305 Ga. 144 (2019).

12. *Id.*

13. *Id.*

fiduciary duty.¹⁴ Interestingly, the Georgia Supreme Court relied on many of the cases cited in the *T-Mobile* decision,¹⁵ continuing to construct a stronger framework regarding the taxation issue under the Act.

II. FACTUAL BACKGROUND

Gwinnett and Cobb Counties brought their suit against Bellsouth Telecommunications, LLC and Earthlink, Inc., Earthlink, LLC, Deltacom, LLC, and Business Telecomm, LLC (“the telephone companies”).¹⁶ The Counties alleged that the telephone companies did not bill, and therefore not collect, enough 9-1-1 charges under the statute.¹⁷ Specifically, the Counties alleged that the defendants did not charge two classes of customers, estimating damages of more than \$38.9 million.¹⁸ Further, the Counties alleged in their complaints that they should have been able to recover the funds through common law theories of recovery (breach of fiduciary duty, fraud, and negligence) even though the Act did not explicitly state a recovery action directly against the service providers.¹⁹ The telephone companies argue that the 9-1-1 charge under the act is a tax and that the Counties are precluded from collecting the money.²⁰

At trial, the telephone companies moved to dismiss the complaints for two reasons. First, the companies argued that the Counties did not have a right to enforce a collection action against the service providers because it was not expressly stated in the statute. Secondly, the companies argued that the charge under the 9-1-1 Act is a tax, distinguished from a fee, and thus, the Counties were barred from pursuing any claim under common law remedies. The trial court denied the motion and concluded that the charge is a fee, not a tax. Further, the trial court found that the Counties had an implied right of action when the statute was read in conjunction with O.C.G.A. § 51-1-6²¹ and O.C.G.A. § 51-1-8,²² meaning the Counties could pursue their claim.²³

14. *Id.* at 155.

15. *Id.* at 146–50.

16. *Id.* at 145.

17. *Id.* More precisely, the Counties allege that the telephone companies failed to bill two categories of people: (1) customers that purchased plans capable of “carrying multiple simultaneous calls over a single physical line” and (2) “Voice Over Internet Protocol” customers. *Id.* at 145 n. 5.

18. *Id.* at 145.

19. *Id.*

20. *Id.* at 144.

21. O.C.G.A. § 51-1-6 (2019) provides, “When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another,

Upon interlocutory review, the Georgia Court of Appeals ruled that the trial court erred by finding that the Act furnished an implied right of action for violating the statute.²⁴ However, the court of appeals ruled that the Counties were still allowed to pursue their claim against the service providers under O.C.G.A. § 51-1-6 and O.C.G.A. § 51-1-8 for violating the 9-1-1 Act.²⁵ The court of appeals vacated the trial court's ruling regarding the charge not being defined as a tax, and remanded for further consideration on the issue.²⁶

The Georgia Supreme Court granted certiorari to decide whether the charge under the Act was a fee or a tax, and whether the Counties could pursue common law remedies or an implied right of action, depending on the court's answer to the former issue.²⁷ The court concluded that the charge was in fact a tax.²⁸ Moreover, the court concluded that the 9-1-1 Act did not give the Counties a right of action to pursue a collection action against the telephone companies.²⁹

III. LEGAL BACKGROUND

A. Brief History of the 9-1-1 Act Litigation and T-Mobile: Case of First Impression

In 1977, the General Assembly passed the Emergency Telephone Number 9-1-1 Service Act, which established “a cohesive state-wide emergency telephone number 9-1-1 system that [] provide[d] citizens with rapid, direct access to public safety agencies by dialing telephone number 9-1-1.”³⁰ This Act allows local governments to offset the costs of the 9-1-1 services it provides by “impos[ing] a monthly 9-1-1 charge upon each telephone service.”³¹ The 9-1-1 Act defines “telephone

although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damages thereby.”

22. O.C.G.A. § 51-1-8 (2019) provides, “Private duties may arise from statute or from relations created by contract, express or implied. The violation of a private duty, accompanied by damage, shall give a right of action.”

23. *Bellsouth*, 305 Ga. at 145.

24. *Id.* at 146 (citing *Bellsouth Telecomms.*, 342 Ga. App. 323, 326–28).

25. *Id.* at 146 (citing *Bellsouth Telecomms.*, 342 Ga. App. 323, 328–31).

26. *Id.* at 146 (citing *Bellsouth Telecomms.*, 342 Ga. App. 323, 330–33).

27. *Id.* at 146.

28. *Id.*

29. *Id.*

30. *Bellsouth Telecomms., LLC*, 342 Ga. App. at 324; see O.C.G.A. § 46-5-121(a) (2019).

31. *Bellsouth Telecomms., LLC*, 342 Ga. App. at 324; see O.C.G.A. § 46-5-133(a) (2019).

service” as “any method by which a 9-1-1 emergency call is delivered to a public safety answering point.”³²

The 9-1-1 Act requires telephone users to pay a monthly charge to the companies (acting as the intermediary in the statutory scheme) in which the telephone companies remit the charges to local governments that operate 9-1-1 centers and dispatch services.³³ At the time this suit was filed, customers could be billed for the 9-1-1 charge at a maximum of \$1.50 for each subscription per telephone service provided.³⁴ Specifically, the Act states:

Each service supplier shall, on behalf of the local government, collect the 9-1-1 charge from those telephone subscribers to whom it provides telephone service in the area served by the emergency 9-1-1 system. As part of its normal billing process, the service supplier shall collect the 9-1-1 charge for each month a telephone service is in service, and it shall list the 9-1-1 charge as a separate entry on each bill.³⁵

Even though the 9-1-1 Act was enacted in 1977, very few cases have addressed issues distinguishing taxes and fees during the legislation’s tenure. However, the case of first impression, *Fulton County v. T-Mobile South, LLC*,³⁶ laid out the court of appeals’s rationale and set up a foundation for future cases involving the 9-1-1 Act.

In *T-Mobile*, the same statutory scheme was in play involving three parties: telephone subscribers, service providers, and the local government.³⁷ The Act defined “telephone subscriber” as “a person or entity to whom local exchange telephone service or wireless service . . . is provided and in return for which the person or entity is billed on a monthly basis.”³⁸ The “service supplier” collects the 9-1-1 charge and remits the money to the local government.³⁹ In this case, however, T-Mobile did not bill those who purchase the “prepaid” wireless service monthly, because those individuals pay for all their minutes upfront.⁴⁰

32. *Bellsouth Telecomms., LLC*, 342 Ga. App. at 324; see O.C.G.A. § 46-5-122(16.1) (2019).

33. *Bellsouth Telecomms., LLC*, 342 Ga. App. at 323; see O.C.G.A. § 46-5-134(a), (b) (2019).

34. *Bellsouth Telecomms., LLC*, 342 Ga. App. at 324; see O.C.G.A. § 46-5-134(a)(1)(A) (2019).

35. O.C.G.A. § 46-5-134(a)(1)(B) (2019).

36. 305 Ga. App. 466 (2010).

37. *Id.* at 466–67.

38. O.C.G.A. § 46-5-122(10) (1999).

39. *T-Mobile*, 305 Ga. App. at 467.

40. *Id.*

Therefore, T-Mobile did not need to distribute the 9-1-1 charges for the “prepaid” customers. T-Mobile paid \$101,618.66 on behalf of the prepaid customers during the refund period out of their own pocket. Consequently, T-Mobile filed a claim for a refund arguing that the 9-1-1 charges were taxes.⁴¹ The pivotal issue in the case was whether the charges under the 9-1-1 Act are classified as a tax under Georgia law.⁴²

B. Analyzing Georgia Supreme Court Case Law

Understanding that this issue was a question of first impression, the Georgia Court of Appeals relied on Georgia Supreme Court precedent and analyzed primary mandatory authority.⁴³ The court first analyzed *Gunby v. Yates*,⁴⁴ which involved the allocation of charges on marriage licenses.⁴⁵ In *Gunby*, the Ordinary of Catoosa County, Harold Yates, allegedly sold 2,760 marriage licenses and failed to remit the \$1.00 charge for each marriage license sold as required by the statute at issue.⁴⁶ The court in *Gunby* defined a “tax” as “an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered.”⁴⁷ Contrastingly, a “fee” was defined as “a charge fixed by law as compensation” for services rendered.⁴⁸ The court in *Gunby* held that, “the collection of this [money] was not for the purpose of compensating . . . for a service rendered, but was for the purpose of raising revenue for the expenses of operating the retirement board and paying benefits . . . , and it is therefore a tax and not a fee.”⁴⁹

The court in *T-Mobile* next analyzed *Luke v. Department of Natural Resources*,⁵⁰ which considered whether the charges for participation in the Underground Storage Tank Trust Fund (Fund)⁵¹ constituted a tax.⁵² The court in *Luke*, relying on *Gunby*, concluded that—because the owner or operator may participate in the fund (meaning participation is

41. *Id.*

42. *Id.* at 469.

43. *Id.* at 469–73.

44. 214 Ga. 17 (1958).

45. *Id.* at 18.

46. *Id.*

47. *Id.* at 19.

48. *T-Mobile*, 305 Ga. App. at 469.

49. *Gunby*, 214 Ga. at 20.

50. 270 Ga. 647 (1999).

51. O.C.G.A. § § 12-13-2(c) (1999).

52. *Luke*, 270 Ga. at 648.

voluntary)—the charge under the statute is a fee and not a tax.⁵³ The court reasoned by stating, “A tax is not dependent on the will or assent of the person taxed,”⁵⁴ rather it is an “enforced contribution, exacted pursuant to legislative authority.”⁵⁵

*Levetan v. Lanier Worldwide*⁵⁶ was the third case the *T-Mobile* court examined.⁵⁷ In *Levetan*, the court had to consider whether sanitation assessments for garbage collection constituted a tax or a fee charged for services provided.⁵⁸ The court in *Levetan* relied on *City of Covington v. Newton County*,⁵⁹ establishing that “counties that choose to provide services for garbage collection and disposal may fix reasonable charges and fees for the service.”⁶⁰ Furthermore, the sanitation assessments at issue were found to not be taxes within the meaning of the Georgia Constitution, but rather charges for services rendered by the municipality.⁶¹

Finally, *McCleod v. Columbia County*⁶² was analyzed by the court in *T-Mobile*.⁶³ *McLeod* involved a monthly stormwater utility charge.⁶⁴ Four owners of like property brought a suit against the county arguing that the utility charge was unconstitutional.⁶⁵ The plaintiffs’ argument was that the utility charge was a tax, thus it must be applied uniformly and proportionally under the Georgia Constitution.⁶⁶ The court acknowledged, “Although it is often important to decide whether a particular charge is a tax or a fee, it is frequently difficult to discern whether a given enactment provides for a regulatory fee or authorizes simply a tax.”⁶⁷ The court ultimately relied on the reasoning in *Gunby* and *Luke* and highlighted key factors that led to the court’s conclusion: the voluntariness of the charge; whether the properties charged received a special benefit; and the fact that the charge was not imposed

53. *Id.* at 648.

54. *Id.* (citing 71 AM. JUR. 2d *State and Local Taxation* § 2, p. 344 (2019)).

55. *Id.* (quoting 84 C.J.S. *Taxation* §1, p.32 (2019)).

56. 265 Ga. 323 (1995).

57. *T-Mobile*, 305 Ga. App. at 470.

58. *Id.*

59. 243 Ga. 476 (1979).

60. *Levetan*, 265 Ga. at 324.

61. *Id.*

62. 278 Ga. 242 (2004).

63. *T-Mobile*, 305 Ga. App. at 470.

64. *Id.*

65. *McLeod*, 278 Ga. at 242.

66. *Id.* at 243; see GA. CONST. art. VII, § I, para. 3.

67. *Id.* at 244 (quoting *Hadley v. City of Atlanta*, 232 Ga. App. 871, 872 (1998)).

on those who owned undeveloped property.⁶⁸ The court held that the utility charge was a fee and not a tax.⁶⁹

C. Persuasive Authority Examined in *T-Mobile*

In order to gain a better understanding of the 9-1-1 Act's implications, the court in *T-Mobile* looked to a few cases in other states with more relevant facts than those presented in the Georgia cases. *Kessler v. Hevesi*⁷⁰ was the first source of persuasive authority for the court.⁷¹ Specifically, the court in *T-Mobile* was interested in how the court in *Kessler* analyzed the "public benefit" factor to the facts presented. In *Kessler*, the court was faced with deciding whether a monthly surcharge on wireless phones for enhanced 9-1-1 services is a tax or a fee.⁷² The court concluded that "the surcharge . . . pays for services received by, and for the benefit of, the general public. The benefits flow to the general public because everyone—not just wireless telephone users—benefits from the enhancement to 911 service."⁷³

Comparably, a California court wrestled with a 9-1-1 charge similar to that of the Act addressed in *T-Mobile* and *Bellsouth*.⁷⁴ In *Bay Area Cellular Telephone Co. v. City of Union City*,⁷⁵ the court reasoned that the charge implemented "is not charged for the use of the 911 system, but for access to the system, whether or not a resident ever places an emergency call."⁷⁶ The reasoning from *Kessler* and *Bay Area* show that the public at large is benefitted from the tax, regardless if one is being assisted by emergency services regularly or calling 9-1-1 on a regular basis. Because the charge is uniformly applied to everyone who subscribes to a service provider, it is a tax. If the charge only applied to those who called 9-1-1, then the charge would simply be a fee for services rendered.

D. Main Takeaways from *T-Mobile*

After the legal framework was laid out, the court then applied the factors and rationale from the above decisions to come to a conclusion:

68. *T-Mobile*, 305 Ga. App. at 470.

69. *McLeod*, 278 Ga. at 244–45.

70. 846 N.Y.S.2d 56 (N.Y. App. Div. 2007)

71. *T-Mobile*, 305 Ga. App. at 472 n. 37.

72. *Hevesi*, 846 N.Y.S.2d at 57.

73. *Id.*

74. *T-Mobile*, 305 Ga. App. at 472.

75. 162 Cal. App. 4th 686 (Cal. Ct. App. 2008).

76. *Id.* at 696.

the 9-1-1 charge is a tax.⁷⁷ Quoting *Gunby*, the court emphasized and reiterated the definition of a tax: “an enforced contribution exacted pursuant to legislative authority.”⁷⁸ Here, the charge under the Act was not voluntary and it was “exacted” in accordance with the statute.⁷⁹

Next, the court considered whether the revenue raised under the Act was used for the general public benefit, rather than payment for a service rendered.⁸⁰ The purpose of the Act clearly offered evidence showing that its purpose was to raise revenue for public or governmental purposes.⁸¹ The General Assembly’s intent was:

to establish and implement a cohesive state-wide emergency telephone number 9-1-1 system which will provide citizens with rapid, direct access to public safety agencies by dialing telephone number 9-1-1 with the objective of reducing the response time to situations requiring law enforcement, fire, medical, rescue, and other emergency services.⁸²

Interestingly, the charges under the Act are defined as “contributions to the local government” that help offset the costs of running, maintaining, and providing an effective emergency system.⁸³ The court viewed this as evidence of funding the government to assist emergency systems rather than compensation for services rendered.⁸⁴

Furthermore, the court considered whether those who are charged under the Act received a benefit not received by others.⁸⁵ Distinguishing the facts and holdings presented in *McLeod* and *Levetan*, the court concluded that the individuals in *McLeod* and *Levetan* received benefits that others did not receive.⁸⁶ Here, the people who pay the charge under the act receive no benefit because all members of the general public can access the 9-1-1 system.⁸⁷

Finally, to conclude the court’s analysis on whether the charge under the 9-1-1 Act was a tax, the court looked at the United States

77. *T-Mobile*, 305 Ga. App. at 470.

78. *Id.* (quoting *Gunby*, 214 Ga. at 19).

79. *Id.*

80. *Id.* at 470–71.

81. *Id.* at 471.

82. *Id.* (quoting O.C.G.A. § 46-5-121(a) (2019)).

83. *Id.* (quoting O.C.G.A. § 46-5-122(11) (2019)).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

Comptroller General's ruling regarding the 9-1-1 charge under the Act.⁸⁸ The opinion stated:

[t]he monthly charge is adopted by a resolution of the local government and applies to every billed telephone subscriber, without regard to level of service. The [9-1-1] charge raises money that is spent to provide rapid, direct access to public safety agencies for the benefit of the entire community.⁸⁹

It is important to understand the legal backdrop that Georgia courts have faced regarding the 9-1-1 Act. The same factors and rationale are applied in the *Bellsouth* case. There has not been another case with the same facts involving the 9-1-1 Act between the *T-Mobile* and *Bellsouth* decisions. For the first time, the Supreme Court of Georgia got to weigh in on the 9-1-1 Act since it was passed in 1977.

IV. COURT'S RATIONALE

A. Defining "Tax" and Distinguishing "Fee"

The court in *Bellsouth* started its analysis quoting *Gunby*, by providing the definition of a tax: "A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for special privilege or a service rendered."⁹⁰ The court explained that there are typically four criteria to consider when deciding whether a charge is a tax:

(1) a means for the government to raise general revenue based on the payer's ability to pay without regard to direct benefits that may inure to the payer or to the property taxed; (2) mandatory; (3) not related to the payer's contribution to the burden on government; and (4) not resulting in a "special benefit" to the payer from those to whom the charge does not apply.⁹¹

Contrastingly, a fee is "a charge for a particular service provided based on the payer's contribution to the problem."⁹² The court, applying

88. *Id.* at 472.

89. *Id.* (quoting Natl. Weather Sys. Ga. 911 Charge. B-301126, 2003 U.S. Comp. Gen. LEXIS 231, 2003 WL 22416497 (Comp. Gen. 2003)).

90. *Bellsouth*, 305 Ga. at 146 (quoting *Gunby*, 214 Ga. at 19).

91. *Id.* at 146–47; see *McLeod*, 278 Ga. at 244–45; see also *Homewood Village, LLC v. Unified Gov't of Athens–Clarke County*, 292 Ga. 514, 515 (2013).

92. *Id.* at 147 (citing *McLeod*, 278 Ga. at 244).

the four factors above, concluded that the charge under the 9-1-1 is a tax as a matter of law.⁹³

1. Government Raising General Revenue

The Counties on appeal argued that the 9-1-1 Act restricted the funds to specific communications costs listed in the statute rather than generally fund the government to provide emergency services.⁹⁴ The statute provides,

“9-1-1 charge” means a contribution to the local government for the 9-1-1 service start-up equipment costs, subscriber notification costs, addressing costs, billing costs, nonrecurring and recurring installation, maintenance, service, and network charges of a service supplier providing 9-1-1 service pursuant to this part, and costs associated with the hiring, training, and compensating of dispatchers employed by the local government to operate said 9-1-1 system at the public safety answering points.⁹⁵

From this perspective, the Counties argued that the charges were fees for specific services rendered. The court responded by saying, “[A]lthough the 911 charge raises funds for a dedicated purpose, it is assessed based on the extent to which a person or business subscribes to telephone service, not the extent to which a person can or in fact does summon emergency services.”⁹⁶ Furthermore, the court reasoned by stating, “requiring a governmental charge to be deposited in a special purpose fund does not make it a tax.”⁹⁷ Extending the counterargument further, the court noted that a multitude of charges labeled as taxes are limited to a particular purpose.⁹⁸ Specifically, the Georgia Constitution lays out exceptions to the rule that “no appropriation shall allocate to any object the proceeds of any particular tax or fund or fund or a part or percentage thereof.”⁹⁹ Within the enumerated limitations listed, local school taxes are presented as one of the funds for which the taxes are deposited in a specific fund for a particular purpose.¹⁰⁰

93. *Id.*

94. *Id.* See O.C.G.A. § 46-5-122(11) (2019); O.C.G.A. § 46-5-134(f); O.C.G.A. § 46-5-134.2(j)(4); see also O.C.G.A. § 46-5-134.2(j)(5) (2019).

95. O.C.G.A. § 46-5-122 (11).

96. *Id.*

97. *Id.* (citing *Gunby*, 214 Ga. at 20).

98. *Id.*

99. *Id.* (quoting GA. CONST. art. III, § 9, para. 6).

100. GA. CONST. art. VIII, § 6, para. 1(b).

2. Mandatory Requirement

The Counties argued “the 911 charge is not mandatory because people may opt to receive telephone service and avoid the charge.”¹⁰¹ However, the court noted that under the Counties’ interpretation of avoiding the mandatory requirement, “income and sales taxes would not be mandatory . . . [because] they could be avoided by not earning income or making purchases.”¹⁰² The court elaborated by saying, “[W]e have considered not whether someone may theoretically continue to live a lawful existence without using a particular service at all, but whether someone may obtain that service by way of an alternate route that avoids paying the charge.”¹⁰³ The court stressed this difference by recalling the *McLeod* and *Luke* cases.¹⁰⁴ In *McLeod*, because the property owners could create and maintain their own private stormwater management systems, the utility charge was not a tax.¹⁰⁵ Likewise, in *Luke*, the storage tank owner could have provided evidence showing financial responsibility (as required by the statute) other than participating in the underground storage tank trust fund.¹⁰⁶ Here, individuals who own telephones cannot opt out of emergency services even if they subscribe to an alternative phone service.¹⁰⁷ Thus, the charge under the Act is mandatory.¹⁰⁸

3. Relationship Between the Payer’s Contribution and Burden on Government

The court next insisted on illuminating the relationship between the taxpayers’ obligation to pay the charge and the burden each telephone user places on the emergency system.¹⁰⁹ If a relationship existed between the taxpayer and the government to provide emergency services for that individual, then nothing more would exist other than compensation for services rendered—in other words, a fee. However, because the emergency services were uniformly applied to all citizens in the state, it was a tax. To extend this reasoning a little bit further, the court, relying on the *T-Mobile* decision, noted that visitors who came to the state could easily dial 9-1-1 and request emergency services on a

101. *Bellsouth*, 305 Ga. at 148.

102. *Id.* at 148 n.10.

103. *Id.* at 148.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 149.

phone, even though that individual was not subject to the charge under the Act.¹¹⁰ Moreover, individuals who have phones could pay the charge for years on end and never once summon emergency services, while other people may need to call emergency services on a regular basis.¹¹¹ Because no relationship exists between the taxpayers and the government regarding an obligation to provide services, the charge was a tax.¹¹²

4. No Special Benefit to the Payer

The Counties argued on appeal that emergency services vary from county to county.¹¹³ Primarily, the Counties argued that individuals who don't possess a cell phone or landline within one of the counties are unable to take advantage of the so-called "enhanced" services, like a dispatcher knowing the exact location of the caller immediately.¹¹⁴ In essence, the Counties provided that visitors or individuals that do not reside in one of the Counties' service areas are at a disadvantage because they do not receive the same benefit as those who pay the 9-1-1 charge.¹¹⁵ To counter, the Georgia Supreme Court stated that the court of appeals incorrectly framed the issue.¹¹⁶ The court explained that at the time that litigation ensued, the maximum amount that any telephone user in the state would pay was \$1.50, regardless of the quality of service provided in a given county.¹¹⁷ Furthermore, the Act provides that the charge "must be uniform" and "may not vary according to the type of telephone service used."¹¹⁸ In conclusion, the court relied on *Bay Area*, because in that case even though the local government elected to provide "enhanced" emergency services (automatic location identification), the 9-1-1 charge was still considered a tax.¹¹⁹ Ultimately, the supreme court reversed the court of appeals on this issue and held that there was no special benefit received by those who paid the 9-1-1 charge.¹²⁰

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 150.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* (citing O.C.G.A. § 46-5-134(a)(1)(A)).

118. *Id.* (citing O.C.G.A. § 46-5-133(a)).

119. *Id.* (citing *Bay Area*, 162 Cal. App. 4th 686, 691, 699).

120. *Id.*

B. Absent Express Language in the Statute, the Counties Cannot Recover

The Counties argued on appeal that “even if the 911 charge is considered a tax, the Counties do not need express statutory authorization to recover the charge in a tort action.”¹²¹ Further, the Counties stated that they could enforce Bellsouth’s duty to collect the funds because they were not trying to “levy taxes” on the service subscribers.¹²² The court held that the Counties were wrong.¹²³

The court began its analysis with the influential case of *McCulloch v. Maryland*¹²⁴ by saying, “The power to tax is the power to destroy.”¹²⁵ Appropriately, the court noted the power, which rests with the government to collect and levy taxes, is so great that statutes that are enacted by the legislature can only appropriately permit this power.¹²⁶ The structure of the separation of powers “preserves liberty because legislators are accountable to the people more directly than bureaucrats and judges.”¹²⁷ In light of the rationale before the court, it concluded, “Taxes cannot be collected through a court action absent some specific legislative provision authorizing such an action.”¹²⁸

Here, the 9-1-1 Act never provides any express authorization for the Counties to recover from Bellsouth or any service provider directly.¹²⁹ When these lawsuits were originally filed, the Act provided:

“[a] collection action may be initiated by the local government that imposed” the 911 charges, but described only the “telephone subscriber” as “liable” for the charge and provided that “[a] service supplier shall have no obligation to take any legal action to enforce the collection of the” charge.¹³⁰

This means that the Counties could not directly force Bellsouth or other service providers to collect the funds that they allegedly failed to collect under the Act. Thus, the court concluded that if the charge under the 9-1-1 Act is in fact a tax (which it held) then the Counties “must have express statutory authorization to collect it through this action.”¹³¹

121. *Id.* at 152.

122. *Id.*

123. *Id.*

124. 17 U.S. (4 Wheat.) 316 (1819).

125. *Bellsouth*, 305 Ga. at 151.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 153.

130. *Id.* at 153–54.

131. *Id.* at 153.

However, as the court showed, there was no express statutory authorization and the court would not provide a remedy that contradicted the legislature.

V. IMPLICATIONS

In light of the court's decision, a number of various points need to be addressed going forward considering the relationship between the counties and service providers. Specifically, the 9-1-1 Act does not penalize the service providers for failing to remit funds to the counties. Counties and municipalities need a game plan, in light of this decision, to ensure the service providers are distributing all of the funds.

One avenue counties could pursue is to negotiate a private contract with the service providers that expressly states that the service providers will be liable to the counties directly for the funds the service provider fails to collect. Counties need a way to guarantee their money and a right of action so the counties can pursue a claim against the companies if they fail to remit the funds. By entering into a private contract, counties could substitute a right of action against the service providers that the Act fails to implement. This way, counties could guarantee their money that is owed to them. However, after this decision, it seems highly unlikely that any attorney would enter into a private contract that will put the company they represent on the hook for funds it fails to collect.

As mentioned above by the Georgia Supreme Court, the statute provides that the service subscribers alone are liable to the counties and the service providers cannot enforce a collection action against them—the counties are responsible. Because the statute does not provide express statutory authorization for counties or local governments to pursue an action against the service providers for tort or common law remedies such as fraud and negligence, lower courts will be hesitant to provide equitable remedies where the statute does not expressly give one. This decision means that Cobb and Gwinnett Counties are roughly \$38 million dollars out of pocket. As a result, Cobb and Gwinnett Counties must find space in their budget to allocate funds to maintain effective emergency services for their citizens.

What is more troubling about the setup of the 9-1-1 Act is that counties are paying the service providers a small fee to bill, collect, and remit the funds. However, as in this case, the Counties are alleging that the service providers failed to collect the charges from the individual service subscribers. In essence, why should the Counties pay the service providers if the service providers are negligent in their billing and collecting of funds? One would think that the General Assembly would include a right of action against the service providers in the event that

they fail to bill and collect correctly. The legislature precisely did not include any sort of action or procedure by which counties and local governments could pursue a collection action against the service providers. In the approaching months and years, we will hopefully see revisions to the 9-1-1 Act regarding a specific collection action against service providers. Legislation along these lines would be appropriate and would allow the counties to directly access more money, given that the service providers are the ones in charge of collecting the funds from the people.

Too many lives are on the line requiring medical emergency assistance each and every day. Governments need adequate resources, numerous staff, and reliable equipment to carry out their duties to meet the needs of the citizens. If counties and local governments cannot get the necessary funding, due to the negligence of collecting funds from service providers under the Act, then people could lose their jobs and others, possibly their lives. The *Bellsouth* decision has huge ramifications that play a role in all of our lives beyond the legal profession.

Davis Lackey