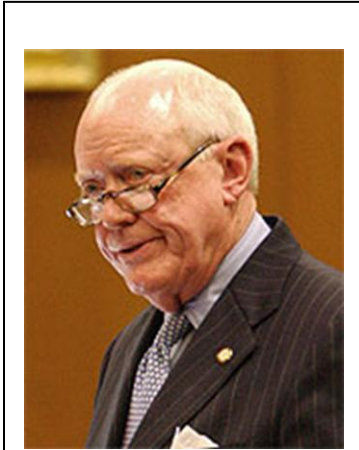


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Report: Expedia dodged taxes owed to state and local governments across the country

Lawyers for company say information in documents unsealed by Columbus judge is inaccurate, 'highly prejudicial'

By R. Robin McDonald, Staff Reporter



(Zachary D. Porter/Daily Report)

"My report to the judge speaks for itself," said Marion Pope, special master in the suit. "I never would have put anything in writing if I didn't believe what I said and what I found."

Expedia, one of the nation's largest online travel reservation companies, has demonstrated "a conscious and deliberate effort ... in violation of state and local law" to avoid paying taxes it owes to state and local governments across the country for its online hotel and motel bookings, according to a report unsealed by a judge in Columbus.

The company, which owns Hotels.com, has engaged in "sham transactions" and pursued "a calculated, deliberate plan to conceal its true liability for the occupancy taxes," the report states. The report is being reviewed by attorneys representing local governments pressing similar litigation against online travel companies, including counsel in a class action on behalf of more than 250 Georgia counties and municipalities in federal court in Rome.

A Jones Day attorney in Atlanta who represents Expedia called the report "inaccurate and highly prejudicial."

The report, and more than 12,000 Expedia documents on which it was based, has been under seal for nearly two years. It was authored by Marion T. Pope Jr., a former chief judge of the Georgia Court of Appeals who served for 20 years on the appellate bench before his 2002 retirement. Pope currently practices law with his sons at Hasty Pope in Canton. Muscogee County Superior Court Judge Douglas C. Pullen appointed Pope as special master in a long-running tax suit against Expedia by the city of Columbus, which has claimed that Expedia routinely shorted the city on hotel-motel occupancy taxes it

collected.

After Pope issued his report in 2009, Expedia sent an estimated \$110,000 to \$115,000 to the city, claiming the funds were payment for the back occupancy taxes the city said it was owed, according to Michael L. McGlamry, one of the city's attorneys in the case. The case remains in litigation as the city seeks to recoup its legal fees for five years of litigation with Expedia.

Pullen, over the objections of Expedia's attorneys, released the report—but not the 12,000 documents Pope reviewed—last week at the request of attorneys at the Columbus firm Pope, McGlamry, Kilpatrick, Morrison & Norwood who represent the city of Columbus. The firm's name partner, C. Neal Pope, is not related to Marion Pope.

"Court business is public business," Pullen said during a hearing in Columbus on May 20. "The general rule is that we deal in the light of day."

At the all-day hearing, Expedia attorney E. Kendrick Smith of Jones Day in Atlanta objected to having the report and accompanying documents made public, calling it "factually and legally inaccurate and highly prejudicial."

"It needs to be corrected and reviewed before it is released to the public," Smith said. The attorney unsuccessfully sought permission from Pullen to appeal the ruling.

In September 2009, three days after Pullen adopted the report's findings and recommendations, Expedia lawyers filed a motion under seal that accused Pope of "a predisposed bias against Expedia," and sought his replacement as special master so that what they described as the report's "numerous factual, legal, procedural and substantive errors may be properly addressed and corrected. ..."

"The report contains numerous unsupported and, in some cases, outrageous statements of fact, recites erroneous conclusions of law while refusing to adhere to established Georgia law, demonstrates a general contempt for Expedia and its exercise of First Amendment rights, applies an inappropriately narrow and wrong reading of the attorney-client privilege in Georgia along with a wildly-expansive application of the crime-fraud exception, and it inexplicably fails to apply or even recognize the statutory accountant client privilege," the recusal motion stated.

Expedia attorneys also filed under seal a separate 131-page document that challenged Pope's findings of fact and law as "unsupported and contrary to record evidence."

Pope's findings, according to a copy of the pleading obtained by the Daily Report, "consist of taking snippets of documents out of context, speculating as to what authors 'must have' felt, known or intended, adding pejorative verbs, adjectives and adverbs, and then weaving the whole thing together to cast events in the most sinister light possible."

Pope was not aware of Expedia's attempts in 2009 to remove him as special master or Expedia's allegations of bias before a call from the Daily Report last week. "My report to the judge speaks for itself," Pope said. "I never would have put anything in writing if I didn't believe what I said and what I found."

Pope said that he bolstered the report's conclusions with excerpts from Expedia documents "that I thought were smoking guns."

"I know they vehemently denied that they owed taxes, and I thought they did," he said. "I thought they were hiding and refusing to divulge the fact that they were collecting tax money. ... I would say they would be very defensive because they got found out."

"There's an old saying," he continued, "If you don't have the facts, beat on the table. ... The evidence I found was convincing to me. ... I'm sorry they want to make it a personal fight."

The Columbus suit against Expedia is one of dozens of suits across the country—including five in Georgia—that accuse online travel companies of willfully failing to pay millions of dollars in hotel-motel occupancy taxes. The city of Columbus also sued Hotels.com and Orbitz. After several years of litigation, Orbitz settled the case for \$450,000 last year. The city had claimed that Orbitz owed it less than \$75,000, said McGlamry, whose firm also represented the city in the Orbitz tax case. Pope McGlamry also is co-counsel for the city of Atlanta in identical litigation against the online travel companies in Fulton County Superior Court.

The tax suits in Georgia and across the nation revolve around claims that online travel companies, which sell hotel rooms at discounted prices, routinely have shorted state and local governments of hotel taxes that they have billed and collected from their online customers. Expedia and other online travel companies have long argued that they should pay occupancy taxes for blocks of rooms they lease at a discount for resale online only on the discounted rates they pay to hotels and motels, not on the rates they bill their online customers.

Attorneys representing local taxing authorities have countered that not only do the online companies owe them taxes on the retail prices, but that the travel companies bill for and collect taxes on the retail room rates and then keep them, instead of remitting them to the local jurisdictions.

Online travel companies named as defendants include some of the most well-known names in the online reservation business, including Expedia, Hotels.com, Travelocity, Orbitz, priceline.com and Hotwire Inc.

In Georgia, the hotel occupancy excise tax dollars generally are used by local governments to fund their convention and visitors bureaus, enhance local tourism and bolster their general funds.

Attorneys for the online travel companies largely have been successful in sealing documents and pleadings in cases across the country, explaining it was necessary to protect proprietary information contained in room lease contracts between the online companies and thousands of hotels and motels across the nation.

The release of such information, the travel companies have said, could cause them "irreparable harm."

In August 2009, after reviewing more than 12,000 documents that Expedia had resisted turning over to the city in the litigation, claiming they were privileged internal communications shielded as trade secrets or by attorney-client privilege, Pope determined that Expedia's refusal to pay taxes on the room rates it charged its online customers violated the law and ordered the documents he had reviewed be turned over to the city.

Citing internal company emails, Pope noted that Expedia does not separate taxes and other fees that it attaches to its online customers' reservation bills "because it would lose millions of dollars in revenue if it had to pay taxes on its margin." The company's claim "that it disagrees with Georgia law, or that it has tried to change Georgia law, does not excuse its obligation to follow Georgia law," he wrote.

Pope rejected claims by Expedia that the documents he reviewed were shielded by attorney-client privilege, finding that Expedia had "improperly withheld documents ... to obstruct discovery and to deliberately protract and delay" the litigation.

Pope rejected Expedia's "blanket assertions of privilege" in the Columbus case and in an identical pending case against online travel companies brought by the city of Atlanta, in part, because attorney-client privilege does not attach if an adequate showing has been made that an attorney's services have been utilized in the furtherance of a fraud or other crime.

"It is abundantly clear that [Expedia] has interposed claims of privilege where none legitimately exist," Pope wrote. "It is further evidence that [Expedia] has engaged in deliberate efforts to conceal its true liability for occupancy taxes, to refuse disclosure, and to hold onto a 'position' which is untenable under Georgia law."

In a 2009 pleading, Expedia called Pope's findings "factually and legally meritless" but "entirely consistent with Expedia's stated concern that the Special Master had predetermined the outcome."

"The record establishes that Expedia did everything within its power to explain its business models to the relevant taxing authorities and obtain guidance as to how to comply with the applicable tax laws," the pleading states. "Disclosing its business models and requesting guidance from the taxing authorities is what responsible corporate taxpayers do when they want to comply with the law—it is neither a crime nor a fraud."

Pullen unconditionally adopted Pope's report and recommendation less than a month after he filed it with the court. The city was given a copy of Pope's report, but not the underlying documents he reviewed. In March, after the state Court of Appeals determined that it lacked jurisdiction, and the state Supreme Court refused to hear an appeal, Pullen released more than 12,000 documents on which the special master's report was based to the city's lawyers, although they remained under seal.

In May, several of the sealed documents became public when they were distributed to members of the Florida Legislature and the Florida media shortly before a vote on a bill sponsored by the online travel companies that would have allowed them to pay occupancy taxes only on the wholesale room rates they contracted to pay to hotels and motels, not on what they charged their online customers.

The leaked documents suggested that as early as 2003, at least one online travel company was advised that companies in the industry were obligated to pay taxes on the rates their online customers paid for hotel rooms, not on the substantially lower rates they negotiated to reserve those rooms. A separate internal Expedia document suggested "that the stakes are high enough that we should resist, delay and make it as difficult as possible for any state to require us to collect occupancy tax."

Expedia attorneys accused Pope McGlamry of leaking the documents and sought a contempt finding that they had violated a long-standing protective order in the case. Pope McGlamry denied giving any documents either to members of the Florida Legislature or to the media and countered with motions to unseal the special master's report and the entire court record.

At the May 20 hearing, attorneys C. Neal Pope and McGlamry defended the firm, arguing that Expedia was concerned about the release of the documents and Pope's report only because the online travel companies "don't want anybody else litigating to know the truth about what they're doing."

At the conclusion of the May 20 hearing, Pullen rejected Expedia's motion for contempt, granted Pope McGlamry's motion to release the special master's report and took the firm's request to open the entire court record under advisement. "We decided that enough time has passed without the public knowing these things," Neal Pope told the Daily Report. "We just thought it was time the public knew what Judge Pope had found."

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