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U.S. Supreme Court Update

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U.S. SUPREME COURT UPDATE

DEBRA S. HERMAN is a partner and K. CRAIG REILLY is an associate in the New York City office of the law firm Hodgson Russ LLP.

Court Continues to Receive Petitions in Multistate Tax Compact Disputes

***38** As we reported in last month's column, on 10/11/16, the U.S. Supreme Court denied the petition for certiorari filed by Gillette, along with several other corporate taxpayers, in *Gillette v. California Franchise Tax Board* (Docket No. 15-1442).In *Gillette*, the petitioners asked the Court to review a decision by the California Supreme Court, in which the lower court held that the Multistate Tax Compact does not qualify as a reciprocal agreement that is binding on the states that haveenacted its provisions. (The Multistate Tax Compact is an interstate tax agreement that provides taxpayers with an election to apportion their income using an equally weighted, three-factor apportionment formula based upon sales, property and payroll.)

If, however, the Justices of the Supreme Court thought that their denial of certiorari in *Gillette* had resolved the open questions surrounding the Multistate Tax Compact, recent activity at the Court clearly suggests otherwise. Less than 10days after denying Gillette's petition, for example, the Court, on 10/20/16, received a petition from Kimberly-Clark Corporation (‘Kimberly-Clark‘) in *Kimberly-Clark Corp. v. Minnesota Comm'r of Revenue* (Docket No. 16-565).

In its petition, Kimberly-Clark asks the U.S. Supreme Court to review Minnesota's unilateral repeal of the Multistate Tax Compact's three-factor apportionment formula and the state court's application of the ‘unmistakability doctrine.‘ Counsel forKimberly-Clark focuses on the broader implications of the Minnesota court's decision, which turned on the ‘meaning of the unmistakability doctrine, a principle that applies in a wide range of contexts . . . .‘ We detail Kimberly-Clark's petition below.

But Kimberly-Clark is not the only taxpayer seeking the Court's review of issues involving the Multistate Tax Compact. On 11/21/16, five separate petitions for certiorari were filed by five separate groups of petitioners:

• Docket No. 16-699: *Goodyear Tire Rubber Co. v. Michigan Dep't of Revenue*, including Goodyear Tire & Rubber Co.; Deluxe Financial Services LLC; and Monster Beverage Corp.

• Docket No. 16-697: *Gillette Commercial Operations N. Am. v. Michigan Dep't of Revenue*, including Gillette Commercial Operations North American and Subsidiaries and Coventry Health Care, Inc.

****2** • Docket No. 16-687: *Sonoco Products Co. et. al. v. Dep't of Treasury*, including Sonoco Products and Co.; Ingram Micro, Inc. and Subsidiaries; AK Steel Holdings Corp.; Big Lot Stores, Inc.; Nintendo of America, Inc.; Advance/Newhouse

Partnership;Fluor Corp. and Subsidiaries; T-Mobile USA Inc. and Subsidiaries; Intuitive Surgical, Inc.; and General Aluminum Mfg. Company and Affiliates.

• Docket No. 16-698: *International Business Machines Co. v. Michigan Dep't of Revenue.*

• Docket No. 16-688: *Skadden, Arps, Slate, Meagher & Flom LLP v. Michigan Dep't of Treasury.*

These petitions for certiorari involve Michigan's retroactive repeal of its statute enacting the Multistate Tax Compact and its three-factor apportionment election. We look forward to covering these petitions for certiorari in greater detail in the nextissue of the JOURNAL.

As discussed above, in this issue of the JOURNAL, we discuss Kimberly-Clark's petition in its Multistate Tax Compact challenge and briefly outline four other recent petitions for certiorari. We also note that two previously reported petitionsremain pending before the Court.

Finally, as reported in last month's column, on 10/3/16, the U.S. Supreme Court agreed to review a dispute between Delaware and several other states as to which states have priority rights for claiming MoneyGram's uncashed ‘official checks.‘ TheCourt originally received two separate filings in this case—*Delaware v. Pennsylvania and Wisconsin* (motion for leave to file a bill of complaint filed 5/26/16) and *Arkansas et. al. v. Delaware* (motion for leave to file a billof complaint filed 6/9/16). The Court has now consolidated the two filings as *Arkansas v. Delaware* (220146 ORG) and has agreed to let multiple states file a complaint asking the Court to address the proper priority rules applicable to MoneyGram's‘official checks.‘ (For more background on this case, including a detailed discussion of MoneyGram's ‘official checks‘ and the general priority rules for unclaimed intangible personal property, see U.S.Supreme Court Update, 26 JMT 42 (September 2016).)

Kimberly-Clark Argues Minn. Prohibited from Repealing Compact's Apportionment Formula

In *Kimberly-Clark Corp. v. Minnesota Comm'r of Revenue*, Docket No. 16-565, ruling below at 880 N.W.2d 844 (Minn. 2016), the Supreme Court of Minnesota ruled that Minnesota was not contractually prohibited from repealing the Multistate Tax ***39** Compact'sthree-factor apportionment election from the state's tax laws without also entirely withdrawing from the Multistate Tax Compact. Accordingly, the state high court upheld the state's refusal to allow Kimberly-Clark to use the Multistate Tax Compact's equallyweighted, three-factor apportionment formula during the years at issue.

In response to the Minnesota Supreme Court's ruling, Kimberly-Clark joins a growing list of taxpayers that have petitioned the U.S. Supreme Court to review the state-by-state exodus from the Multistate Tax Compact's apportionment regime. Specifically, Kimberly-Clarkasks the Court to review the Minnesota court's reliance on the so-called ‘unmistakability doctrine‘ of contract law, and asks whether, under that doctrine, ‘States are bound by contractual promises embodied in multistate compacts only if the contractingStates make a separate and express ‘second promise’ to abide by their initial contractual promise.‘

Minn. adopts and repeals the Compact's three-factor apportionment formula.

****3** As regular readers of this column are well aware, multistate businesses are generally free to apportion their income among the various states in which they operate. The goal of apportionment is to avoid the same income being taxed simultaneously by differentjurisdictions. The formula used to apportion income has an obvious impact on how much (or how little) of a taxpayer's income ends up being taxed by each state.

One such apportionment formula is the Multistate Tax Compact's equally weighted, three-factor apportionment formula. This formula utilizes three factors—(1) a property factor; (2) a payroll factor; and (3) a sales factor—and allows taxpayersto determine

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their in-state taxable income by dividing their in-state property, payroll, and sales by the worldwide property, payroll, and sales of the business. These three factors are then added and divided by three. The resulting percentage is multipliedby the business's worldwide income to determine what amount of a taxpayer's income is subject to tax in a particular state.

As explained by the court below, in 1984, Minnesota joined the Multistate Tax Compact, and the state's Legislature adopted (among other provisions) the Compact's three-factor formula by statute as an available method of apportionment for taxpayers with Minnesotabusiness operations (Minn. Stat. § 290.171, Art. IV (1984)). In 1987, however, Minnesota reversed course and repealed the specific provisions within its tax laws that allowed for equally weighted, three-factor apportionment. This left only two expressapportionment methods on the state's books: (1) a weighted sales formula, in which the sales factor is weighted more heavily than the property and payroll factors, or (2) a discretionary, alternative apportionment method, available to those taxpayers who petitionthe Commissioner of Revenue for a discretionary adjustment. (Minn. Stat. §§ 290.191(2), 290.20(1).)

Despite Minnesota's repeal of the Multistate Tax Compact's apportionment formula in 1987, the state did not formally withdraw from the Compact until 2013. Kimberly-Clark therefore argued in the case below that Minnesota was obligated to continue to allowtaxpayers to use the Multistate Tax Compact's equally weighted, three-factor apportionment formula up and until the state 'fully withdrew from the Compact.' In other words, Kimberly-Clark argues that the Multistate Tax Compact is an all-or-nothingagreement.

Minn. Sup. Ct. applies 'unmistakability doctrine' and determines Compact did not impose binding obligations.

Based on its belief that the Multistate Tax Compact constitutes a binding contract, Kimberly-Clark argued in the case below that Minnesota's unilateral modification of the terms of the Multistate Tax Compact (i.e., the elimination of the equally weighted,three-factor apportionment formula) violated the Contract Clauses of the U.S. and Minnesota Constitutions. (U.S. Const. art. 1, § 10, cl. 1; Minn. Const. art. 1, § 11.) The Minnesota Supreme Court declined, however, to address Kimberly-Clark's constitutionalarguments, ruling instead that Minnesota did not undertake any binding contractual obligations when it enacted the Multistate Tax Compact's three-factor apportionment formula. Put differently, the court ruled that there was no binding contract for the stateto violate.

****4** In reaching its decision, the Minnesota Supreme Court applied the 'unmistakability doctrine,' which, according to the court, is a 'rule of contract construction that provides the sovereign powers of a state cannot be contracted away except in'unmistakable' terms.' This doctrine was addressed in the U.S. Supreme Court's ruling in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), in which the Court announced that the doctrine was developed in order to 'protect stateregulatory powers.'

Kimberly-Clark argued in the case below that, by enacting the Multistate Tax Compact's apportionment formula in connection with its adoption of the broader Compact provisions, Minnesota 'unmistakably . . . promised to be bound by the Compact's termsuntil it withdraws from the Compact or [until] the member States collectively agree to amend the Compact.'

***40** But the Minnesota Supreme Court found 'no unmistakable or express promise surrendering the State's legislative authority' to amendits tax laws. Although the court recognized that Minnesota did declare in its original statute that the Multistate Tax Compact was 'enacted into law,' the court below declared that, despite this language, 'nothing in the statute dictated the 'allor nothing' position advanced by Kimberly Clark.'

The Minnesota Supreme Court also noted that '[e]ven assuming that the State undertook a contractual obligation to Kimberly Clark when it enacted [the Multistate Tax Compact's apportionment provision], the obligation was and is invalid.'As restated by the court, the Minnesota Constitution states that '[t]he power of taxation shall never be surrendered, suspended or contracted away.' (Minn. Const. art. X, § 1.) Thus, according to the court below, 'regardless of thelanguage of Minn. Stat. § 290.171, the State is constitutionally barred from surrendering, suspending, or contracting away its authority to amend or repeal tax provisions.'

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New Petitions for Certiorari

In addition to the Multistate Tax Compact related petitions discussed above, the Court has also received new petitions for certiorari in the following cases.

High Court Asked to Review Michigan Insurance Tax Dispute

On 10/31/2016, the Self-Insurance Institute of America, Inc., filed a petition for certiorari in *Self-Insurance Inst. of America v. Snyder*, Docket No. 16-593, ruling below at 827 F.3d 549 (6th Cir. 2016). The lower court, the U.S. Court of Appealsfor the Sixth Circuit, held (for a second time) that the Michigan Health Insurance Claims Assessment Act (Mich. Comp. Laws §§ 550.1731–1741 (the 'Michigan Act'))—which imposes a 1 percent tax, along with various reporting andrecord-keeping requirements, on all paid claims by carriers and third party administrators to health care providers for services rendered in Michigan for Michigan residents—is not prohibited by the preemption provisions of the Employee Retirement IncomeSecurity Act of 1974 ('ERISA') (29 U.S.C. § 1144(a)).

****5** As previously reported in this column, this marks the Sixth Circuit's second review of the Self-Insurance Institute's challenge to the Michigan Act. Previously, the Sixth Circuit issued a similar ruling in *Self-Insurance Inst. of America v.Snyder*, 761 F.3d 631 (6th Cir. 2014), *cert. granted, judgement vacated*, 136 S. Ct. 1355 (2016) (mem). On 3/7/16, the U.S. Supreme Court vacated the Sixth Circuit's original decision and remanded the case back to the lower court for furtherconsideration in light of *Gobeille v. Liberty Mutual Insurance Co.*, 577 U.S. ____ (2016).

According to the Sixth Circuit's most recent decision, *Gobeille* involved a Vermont law that 'require[d] health insurers, health care providers, health care facilities, and governmental agencies to report any information relatingto health care costs, prices, quality, utilization, or resources required by the state agency, including data relating to health insurance claims and enrollment.' Based on these facts, the U.S. Supreme Court in *Gobeille* held that the Vermontlaw was preempted because 'Vermont's reporting regime, which compels plans to report detailed information about claims and plan members, both intrudes upon 'a central matter of plan administration' and 'interferes with nationally uniform planadministration.''

Contrasting this law with the Michigan Act, the Sixth Circuit held that the Michigan Act 'does not directly regulate any integral aspects of ERISA. ' Instead, according to the court, the Michigan Act 'is, at its core, an Act to generate the revenuenecessary to fund Michigan's obligations under Medicaid. ' Though the court conceded that the Act 'does touch upon reporting and record-keeping,' the Sixth Circuit concluded that the 'thrust of the Act is to collect taxes—not to amassdata.' Accordingly, the court ruled that the Michigan Act is an example of state law that involves merely 'incidental reporting and record-keeping and thus [is] not preempted.'

The Self-Insurance Institute of America now petitions the U.S. Supreme Court to, once again, review the Sixth Circuit's ruling and asks the following questions for review: (1) 'Whether the Sixth Circuit's determination that the Michigan tax, includingits reporting and recordkeeping obligations, does not 'relate to' employee benefit plans and is not preempted by ERISA § 514(a) conflicts with *Gobielle* andother decisions of this court;' and (2) 'Whether the Sixth Circuit's constricted reading of *Gobielle* and the increasing tendency of States to impose onerous new financial and administrative requirements on ERISA plans requires this Courtto further elaborate *Gobeille'*s teaching.'

Florist Challenges Florida's Tax on Out-of-State Flower Sales

***42** On 10/24/16, the U.S. Supreme Court received a petition for certiorari in *American Business USA Corp. v. Florida Dep't of Revenue*, Docket No. 16-567, ruling below as *Florida Dep't of Revenue v. American Business USA Corp*, 191 So.3d 906 (Fla. 2016). In the case below, the Florida Supreme Court reversed a Florida Court of Appeals decision, in which the lower court held

that Florida's tax on flower sales by in-state florists that are delivered to out-of-state customers violated the dormantCommerce Clause of the U.S. Constitution.

****6** The law at issue in the case below was section 212.05(1)(l) of the Florida Statutes, which provides that ‘Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items are to be delivered.‘Although the Florida Court of Appeals ruled that ‘the imposition of taxes on sales to out-of-state customers for out-of-state flower and gift deliveries violates the dormant Commerce Clause,‘ the Florida Supreme Court reversed the lower court and heldthat Florida's tax law was constitutional as applied to the activities of America Business USA Corp. (‘American Business‘), a Florida-based flower retailer.

Applying the four-prong test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the Florida Supreme Court noted that the tax satisfied all four requirements. First, America Business—as a Florida-based retailer that ‘acceptsinternet orders and arranges for delivery of out-of-state flowers‘ from its Florida location—had a ‘substantial nexus‘ with the state.

Second, the court held that Florida's tax satisfied the ‘internal consistency test‘ and was therefore ‘fairly apportioned‘ to ensure that Florida only taxed its fair share of interstate transactions. More specifically, in applying the internalconsistency test, the court noted that ‘if all states taxed only the entity initially receiving the order for flowers, and not the florist to whom the flower order and delivery is referred, then no florist would be taxed twice.‘ Thus, Florida's lawsatisfied the internal consistency test and the second prong of the *Complete Auto* test.

Third, the court noted that Florida's law ‘contains no provision that affords preferential treatment or any commercial advantage to a Florida business over an out-of-state business.‘ Accordingly, the court held that the tax did not discriminate againstinterstate commerce in violation of the third prong of the *Complete Auto* test.

Finally, the Florida Supreme Court held that ‘the tax in this case is fairly related to the services provided by the State because American Business, like other Florida residents or businesses, benefits from the state's resources and services,‘thus satisfying the final prong of the *Complete Auto* test.

The Florida Supreme Court also determined that, as a result of American Business's ‘substantial nexus to Florida . . . , the minimum connection required to satisfy due process [was] also met.‘ Accordingly, the court held that Florida'sstatute did not violate either due process or the dormant Commerce Clause and reversed the lower court.

American Business now challenges the Florida Supreme Court's ruling and asks the U.S. Supreme Court to consider whether ‘a State [can] collect sales tax on out-of-state property ordered over the internet for out-of-state delivery, by relyingon this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and the State's connection to the corporation that accepts the order and arranges the sale, or does such a tax violate both the Due Process Clause and dormant CommerceClause of the United States Constitution by imposing a sales tax on the out-of-state transfer of tangible personal property?‘

Heirs to Subsurface Property Rights Claim Pennsylvania Tax Sale Violates Due Process

****7** In *Keller v. Herder Springs Hunting Club*, Docket No. 16-556, rulings below at *Herder Springs Hunting Club v. Keller*, 143 A.3d 358 (Pa. 2016) and *Bailey v. Elder*, 134 A.3d 484 (Pa. 2016), the heirs of thehistoric owners of subsurface rights beneath two unimproved Pennsylvania properties ask the U.S. Supreme Court to review Pennsylvania's alleged ‘unconstitutional taking of private property in violation of the Due Process Clause of the Fifth and FourteenthAmendments.‘ In the cases below, the petitioners were the heirs of various individuals who sold their surface interests in the properties at issue but reserved ownership over the subsurface interests. Following these partial sales, however, the new surfaceowners accrued various tax delinquencies, and the properties were eventually sold at a tax sale.

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In reviewing the heirs' claims to the subsurface rights, the Pennsylvania Supreme Court held that because the surface and subsurface rights were rejoined by this tax sale, the sale therefore involved the entire property, such that the heirs no ***44** longer possessedany subsurface rights in the property. Moreover, the Pennsylvania Supreme Court specifically noted in its decisions that the published notices regarding the tax sales satisfied due process. The petitioners now challenge that ruling.

Specifically, the petitioners ask the U.S. Supreme Court to consider: (1) ‘Whether Pennsylvania's unseated land tax statues as recently interpreted by its highest court and under which the tax sales were made and title is claimed violate the Due ProcessClause of the Fifth and Fourteenth Amendments as applied to owners of recorded nonproducing oil, gas and other subsurface interests? ‘ and (2) ‘Whether notices of *in rem* tax sales by publication issued by the taxing authorities under Pennsylvania'sunseated land tax statutes violate the due process standards identified in [*Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 315 (1950)] and [*Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983)]

for owners of recorded nonproducing oil, gas and other subsurface interests?‘

Vermont Property Owner Challenges Fair Market Value Tax Assessment

In *Cornish. v. Town of Brookline*, Docket No. 16-448, ruling below at Docket No. 2016-031 (July 13, 2016), the Vermont Supreme Court issued an order affirming a state property tax hearing officer's fair market value assessment of a Vermont property.In the case below, the ‘two principal arguments on appeal [were]: (1) the Town's manipulation of quality level input data to increase the fair market value of [the taxpayer's] property violated the proportional contribution clauseset forth in Chapter 1, Article 9 of the Vermont Constitution; and (2) the Town's violations rendered every stage of the proceedings constitutionally infirm . . . .‘ After multiple remands to the hearing officer, however, the Vermont Supreme Court eventuallyfound no error in the assessment.

****8** The property owner asks the U.S. Supreme Court to review the Vermont court's decision, alleging that the assessment of his property, which he claims served as a ‘non-profit, faith based, independent [home] school,‘ violates prior SupremeCourt case law, as well as the Equal Protection and Establishment Clauses of the U.S. Constitution.

Petitions Still Pending

The following two petitions remained pending as the JOURNAL went to press.

DMA alleges Colo.'s notice and reporting requirements unconstitutionally discriminate against and unduly burden interstate commerce. In *Direct Marketing Association v. Brohl*, Docket No. 16-267, petition for cert. filed 8/29/2016,ruling below at 814 F.3d 1129 (10th Cir. 2016), the DMA—a group of businesses and organizations that market products via remote channels, such as catalogs and the Internet—asks the U.S. Supreme Court to review a ruling by the U.S. Court of Appealsfor the Tenth Circuit regarding the constitutionality of Colorado's notice and reporting requirements imposed on retailers that ‘do not collect Colorado sales tax.‘

In the Tenth Circuit's ruling, the circuit court held that Colorado's law ‘does not violate the dormant Commerce Clause because it does not discriminate against or unduly burden interstate commerce.‘ The Tenth Circuit's decision reversed an earlierfederal district court's ruling, which granted DMA's motion for summary judgment regarding the unconstitutionality of Colorado's notice and reporting obligations and enjoined the Colorado Department of Revenue (‘CDOR ‘) from enforcing the law. DMA nowpetitions the U.S. Supreme Court to review the circuit court's ruling, alleging that, by finding the Colorado law did not discriminate against interstate commerce, the Tenth Circuit wrongly relieved Colorado of its heavy burden of justifying, under the ‘strictestscrutiny,‘ the ‘patent discrimination‘ of the state's notice and reporting requirements.

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DMA's petition for certiorari stems from a 2010 Colorado law requiring remote retailers selling to in-state customers to comply with a number of notice and reporting obligations intended to improve the state's use tax collections. On 3/3/15, the U.S. SupremeCourt previously held that the federal Tax Injunction Act ('TIA') does not bar federal courts from hearing DMA's challenge (*see Direct Marketing Association v. Brohl*, 135 S. Ct. 1124 (2015) ('*Brohl I* ')). The Court,however, did not address the merits of DMA's claim.

In its current petition for certiorari, DMA presents the following questions for review:

1. 'Whether a state statute that imposes regulatory obligations that apply, as a matter of law, solely to out-of-state companies, but does not use 'language explicitly identifying geographical distinctions' in its text discriminates againstinterstate commerce?'

2. 'Whether the Tenth Circuit erred in adopting a 'comparative burdens' test for discrimination, under which the burden of regulatory requirements imposed solely on out-of-state retailers may be offset by different obligations imposed on in-stateretailers?'

****9** 3. 'Whether the Tenth Circuit erred in concluding that out-of-state retailers that do not collect Colorado sales tax are 'not similarly situated' to their direct in-state competitors who collect Colorado sales tax?'

(For more background on this case, including a detailed discussion of the latest Tenth Circuit ruling, see U.S. Supreme Court Update, 26 JMT 42 (November/December 2016).)

Court asked whether Wash.'s retroactive application of amendments to B&O tax comports with due process. In *Dot Foods, Inc. v.Washington Dep't of Revenue,* Docket No. 16-308, ruling below at 372 P.3d 747 (Wash. 2016), the Washington Supreme Court held that the Washington Department of Revenue's ('Department ') retroactive application of an amendment to the state's 'directseller's representative' exemption under the Business and Occupation ('B&O') tax comported with the Due Process Clause of the U.S. Constitution. Accordingly, the court denied a refund claim by Dot Foods, an Illinois-based food reseller, for B&O taxes paid under protest in the four years prior to the state's amendment.

Dot Foods now petitions the U.S. Supreme Court for review, arguing that the Court has 'never endorsed a retroactive period of more than a year or two—that is, a period covering the year preceding the legislative session in which the law was enacted'—andasking the Justices 'whether, or under what circumstances, imposing additional tax beyond the year preceding the legislative session in which the law was enacted violates due process.' (For more background on this case, including a detailed discussionof the Washington Supreme Court's ruling, see U.S. Supreme Court Update, 26 JMT 39 (January 2017).)

Kimberly-Clark joins a growing list of taxpayers that have petitioned the U.S. Supreme Court to review the state-by-state exodus from the Multistate Tax Compact's apportionment regime.

[T]he Minnesota Supreme Court found 'no unmistakable or express promise surrendering the State's legislative authority' to amend its tax laws.

American Business challenges the Florida Supreme Court's ruling and asks the U.S. Supreme Court to consider whether 'a State [can] collect sales tax on out-of-state property ordered over the internet for out-of-state delivery . . . .'

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