IN THE
SUPREME COURT OF FLORIDA

DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, AND OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,

Appellants/Cross-Appellees,

v.

McKESSON CORPORATION, Et Al.,

Appellees/Cross-Appellants.
_____/

CASE NO. 70,368

On Remand From The United States Supreme Court

BRIEF OF AMICUS CURIAE ORLANDO HOLDING, INC.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Orlando Holding Incorporated ("OHI") is a Florida corporation. It is the successor in interest to Grantham Distributing Company, Inc. and Grantham Wine Company (the "Grantham Companies").[1] If the retroactive tax proposed by the Department of Business Regulation, Division of Alcoholic Beverages and Tobacco is imposed on OHI, it will bankrupt the company. It is estimated that the retroactive tax would amount to about 300% of net assets, excluding only goodwill.

OHI and its former subsidiaries, the Grantham Companies, are a family-owned and operated business built up over a period of many years with 105 employees. During the contested period, 1985-1988, the Grantham Companies were distributors of fine alcoholic beverages in Florida. During that time, Grantham Distributing distributed both wine and liquor and its sales were approximately 50% non-favored products and 50% favored products. During the same period, Grantham Wine distributed only wine. Its sales were approximately 95% non-favored products and 5% favored products. The Grantham Companies received monthly directions from the Department of Business Regulation, Division of Alcoholic Beverages and Tobacco ("DABT") as to how much tax it owed under

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1. The Grantham Companies were wholly owned subsidiaries of OHI during the contested period of 1985-1988. On July 29, 1989, Grantham Wine Co. was consolidated by merger into Grantham Distributing Co. On August 31, 1990, Grantham Distributing Co. dissolved pursuant to a formal plan of liquidation, and thereby consolidated into OHI. OHI thereby became the successor in interest to both Grantham Companies.

Florida law.[2] The Grantham Companies diligently complied with these instructions.

The Grantham Companies had long-established relationships with major retail chains. Because these customers purchased large volumes of product, the Grantham Companies received very small mark-ups over the cost of product acquired from manufacturers. During the contested period, the Grantham Companies received twenty-five cents ($0.25) per case gross profit, or approximately six cents ($0.06) per gallon of alcoholic beverage. The following example illustrates what was typically paid and received per gallon of favored product taxed under §565.12(2)(b), Florida Statutes, during the contested period:

Price paid to manufacturer:	$ X
Tax paid to state:	$ 4.95
Price received from retailer:	$ X+ $5.01
Gross profit per gallon:	$ 0.06

Therefore, the Grantham Companies realized only six cents per gallon gross profit on the sale of favored product during the contested period. The cost of doing business to earn this small

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2. To protect their interests, the Grantham Companies have filed a protective request for a refund with DABT. The Grantham Companies paid $15,856,678.00 more in liquor taxes under the general tax rates than would have been payable if the preferential rates had applied to all product. Approximately five million dollars of this was paid within three years of the refund request. The refund request was filed September 5, 1990, only after DABT announced it would seek a retroactive tax from distributors like Grantham. The primary desire of OHI is not to obtain a refund, although OHI would hardly refuse to accept one. The primary interest is to survive.

gross profit results in the net profit per sale being substantially less than six cents per gallon.

If, as DABT urges, tax liability on the gallon of liquor in the above example is retroactively increased to a rate of $9.53 per gallon, the illustration below would result:

Price paid to manufacturer:	$ X
Tax paid to state:	$ 9.53
Price received from retailer:	$ X+ $5.01
Gross <u>loss</u> per gallon:	($4.52)

Thus, by imposing retroactive taxation on sales of favored products at the non-favored rate, what had been profitable sales would suddenly become outrageous losses exceeding 7,500 per cent of the gross profit originally realized on those sales. Any such retroactive tax would result in a total tax liability exceeding the net value of OHI's assets. The retroactive tax bill would be several millions of dollars. A retroactive tax of such magnitude would be devastating. This result would arise from the Grantham Companies having done exactly what DABT instructed them to do in paying the liquor tax. Indeed, even after the court declared the statute unconstitutional, DABT directed that the lower tax rates be paid until the Court issued its mandate. (Appendix "A").

STATEMENT OF THE CASE AND FACTS

Amicus curiae accepts the Statements of the Case and Facts set forth in the briefs of the parties as sufficient.

SUMMARY OF ARGUMENT

The U. S. Supreme Court has mandated that a remedy be provided to McKesson Corporation. The selection of a remedy is a matter for the Court to decide. In exercising this judicial function, the Court should not mandate retroactive taxation. First, it is contrary to the interests of justice to impose a retroactive tax in this case, and such would run counter to fundamental limits on the power of the judiciary. Second, a retroactive tax would deny due process of law under the circumstances of this case. Third, a retroactive tax would violate the Contracts Clause of the Florida Constitution.

In the event the Court nonetheless decides to defer to DABT and impose a retroactive tax, the Court should require that no retroactive assessments be made until the particular distributor has been given the opportunity for a full evidentiary hearing in court to determine whether retroactive assessments can be constitutionally imposed on that distributor. The interrelated provisions of the statutes concerning liquor taxes and the proposed emergency rules of DABT would effectively deny procedural due process to those sought to be retroactively taxed unless the Court acts to prevent DABT from taking draconian measures.

ARGUMENT

I.

THE COURT SHOULD REJECT THE DABT PROPOSED REMEDY AS CONTRARY TO THE INTERESTS OF JUSTICE.

The United States Supreme Court has mandated that McKesson Corporation be provided a remedy. Understandably, the Court has sought the advice of DABT. It is the Court, however, that must fashion and implement a remedy.

All notions of justice and fairness are against the DABT proposal. The Florida Legislature enacted the unconstitutional statute to protect the interests of certain constituents.[3] The ones protected were not distributors, but Florida-based manufacturers and agricultural interests producing the crops from which the favored alcoholic beverages were made. It is the Florida Legislature, not the distributors, which has passed legislation unconstitutionally discriminating against non-Florida alcoholic beverages three times in recent years. The imposition of retroactive taxation by judicial mandate would permit the

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3. As noted in Nippert v. Richmond, 327 U.S. 416 (1946), "Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation." Similarly, scholars have observed: "Each state has an economic incentive to impose taxes whose burden will fall, so far as possible, on residents of other states." R. Posner, Economic Analysis of Law, §26.3 at 602 (3d. Ed. 1986).

Florida Legislature to escape the ramifications of its own misconduct. The political consequences of providing a remedy for the unconstitutional wrong committed in this case should fall on those who committed the wrong.

The inequity of retroactive taxation in this case is underscored by the reward it would provide to the state. The state would obtain many millions of dollars in retroactive tax revenues which the state never anticipated receiving. Those millions of dollars would come from the destruction and confiscation of the businesses of those who did nothing more than comply with the laws enacted by the Legislature. The consequence of unconstitutional conduct would be a reward in the form of windfall tax dollars.

Even more shocking, the cost of curing the unconstitutional wrong would fall on victims of the unconstitutional discrimination. As acknowledged by DABT, distributors on whom retroactive taxes would be imposed dealt in both favored product and non-favored product. The victims of the unconstitutional taxes would be required to pay more taxes.

Retroactive taxation in this case encourages future violations of the Commerce Clause. The Florida Legislature would be free to enact protectionist taxes to curry favor with some constituents, and then realize a windfall through retroactive taxation if the legislation is challenged and held unconstitutional.

Mandating retroactive taxation would have a chilling effect upon the assertion of constitutional rights. Any taxpayer pursuing a valid Commerce Clause claim would have to risk the devastating effect of retroactive taxation.

The Court should not do the terribly unjust thing DABT asks. The Court, of all the organs of Florida government, should be motivated by the needs of justice, rather than by the passing political consequences which motivate the DABT proposal. The only adequate words are blunt. OHI begs the Court not to destroy it. What did OHI do to deserve being destroyed? The family owning OHI has worked hard for decades to build a company, and that company has done exactly what DABT and the Florida Legislature told it to do. It paid its taxes as instructed by DABT. Now DABT asks the Court to act in a manner that threatens to destroy all that has been built. This would be done to remedy the wrong committed by the state, not any wrong committed by the Grantham Companies.

The Court has consistently refused to direct retroactive taxation in cases such as this. Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, 435 (Fla. 1973) (striking of unconstitutional tax reduction provision would operate prospectively only so as not to retroactively increase taxes of persons relying on unconstitutional statute). Indeed, even where a tax statute expressly authorized retroactive assessment of taxes, the Court has held that the taxing government not make retroactive assessments on taxpayers whose taxes were originally

reduced on the basis of unconstitutional acts. City of Naples v. Conboy, 182 So.2d 412 (Fla. 1965). The Court has so exercised its power to determine a remedy because fundamental values of fairness are offended by the thought of such retroactive taxation. As the Court stated in City of Naples, "it is better to impose the burden upon [the taxing authority] to exercise care [to act constitutionally] than to create uncertainty" for taxpayers.[4] Id. at 418.

Under National Distributing Co. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988), it appears that the unconstitutional statutory provisions involved in this case are severable. Amicus cannot argue otherwise without asking that National Distributing be overruled. However, National Distributing never addressed the question of retroactive taxation. To extend National Distributing to include authorization for retroactive taxation

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4. The Legislature has given no indication that it supports, or would even consider, retroactive taxation. Under Florida law, there is a presumption against retroactive application of legislation absent an express manifestation of legislative intent to the contrary. Fleeman v. Case, 342 So.2d 815 (Fla. 1976); Yamaha Parts Distributors, Inc. v. Ehrman, 316 So.2d 557 (Fla. 1975); In Re: Seven Barrels of Wine, 83 So. 627 (Fla. 1920; Seddon v. Harpster, 403 So.2d 409, 411 (Fla. 1981); Foley v. Morris, 339 So.2d 215 (Fla. 1976). For the Court to do as DABT requests would run counter to principles of constitutional government in the absence of legislation expressly requiring retroactive application. State ex rel Housing Authority of Plant City v. Kirk, 231 So.2d 522, 524 (Fla. 1970) (holding that where the Legislature might never have intended to impose a tax, approval of such a levy by the Court would amount to taxation by a judicial body); Cf. Brewer v. Gray, 86 So.2d 799, 803 (Fla. 1956) (Courts have no power to order the Legislature to exercise a purely legislative prerogative).

would place in question the basis of that decision.[5] "To extend the scope of an act's operation by invalidating a provision of limitation while allowing the remainder to continue in effect invites criticism on the ground that it amounts to judicial legislation." 2 Sutherland Statutory Construction, §44.13 at 523 (4th Ed.). It is for this reason that entire statutes usually are stricken if an exception is found invalid. Id. at 524. To find the unconstitutional provisions of the statutes in question severable might reflect legislative intent, but to then impose the re-made statutory tax scheme retroactively is the equivalent of law-making. Such brings into question the most fundamental aspects of constitutional government under the Florida Constitution mandate for separation of powers. See, Art. II, §3, Fla. Const.[6]

In 1988, the Court in this case withheld ordering a refund of taxes to McKesson for equitable reasons. The Court considered it likely that McKesson had passed-on the unconstitutional taxes to

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5. The Grantham Companies were among the plaintiffs in National Distributing.

6. In the case at bar, the Executive Branch of government is effectively asking the Judicial Branch to promulgate a retroactive liquor tax. "The power to tax is legislative, it cannot be conferred on the judiciary." State v. Lehman, 131 So. 533, 539 (Fla. 1930). The power to tax is limited to the Legislature under Article VII, §1(a), Florida Constitution, which provides that "no tax shall be levied except in pursuance of law." See also, Jackson Lumber Co. v. Walton County, 116 So. 771, 790 (Fla. 1928), appeal dismissed, 296 U.S. 667 (1928)(questions of creating additional tax burdens are political questions outside the sphere of judicial power).

customers and any refund would amount to a windfall. The Florida Legislature then promptly enacted a further unconstitutional import tax which the Court struck in 1989. Ivey v. Bacardi Imports Co., 541 So.2d 1129 (Fla. 1989). There can be little doubt that this brazen flouting of the Constitution by the Legislature left the U.S. Supreme Court no alternative to mandating that a remedy be given to McKesson. It appears obvious that the Florida Legislature persisted in its unconstitutional goals in no small part because there was no concern that the courts of Florida would order a refund. DABT's proposal to retroactively tax law-abiding businesses, rather than exhibiting the courage to carry the burden the state has created, is consistent with the role model provided by the Legislature's unconscionable doggedness in violating the Constitution. It is a model, however, from which the Court should shrink.

Florida has been placed in a shameful spotlight before the entire nation. The Court is the only hope for justice in a system of government that appears to have lost the moral courage to do that which is right. It is a judicial function to order a remedy to right a wrong. It is no remedy, however, to impose one injustice to rectify an earlier one. The Court should not order retroactive taxes which compound the shame.

II.

DABT'S PROPOSED RETROACTIVE TAXATION REMEDY DENIES DUE PROCESS OF LAW.

The DABT proposal denies due process of law on two separate but related grounds. First, the proposal denies due process of law to all distributors because it is blatantly harsh and oppressive to impose a five-year retroactive tax on completed transactions when only someone with omniscience could have foreseen such a tax. Second, DABT seeks to impose the tax through the mandate of the Court without any opportunity for distributors to have a pre-assessment hearing in which the constitutionality of a retroactive tax as applied to the individual distributor can be appropriately examined on a full, factual record.

A.

The Retroactive Tax Proposed By DABT Violates Due Process On Its Face.

In McKesson the United States Supreme Court stated that, in order to correct the unconstitutional effect of Florida's discriminatory tax scheme, the "State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period...." McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, __U.S.__, 58 L.W. 4665, 4671 (1990). However, in a footnote to that passage, the Supreme Court stated:

> We have previously held that the retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased, though beyond some temporal point the retroactive imposition of a significant tax burden may be "so harsh and oppressive as to transgress the constitutional limitation," depending on "the nature of the tax and the circumstances in which it is laid." [Citations omitted.]
>
> Because we do not know whether the State will choose in this case to assess and collect back taxes from previously favored distributors, we need not decide whether this choice would violate due process by unduly interfering with settled expectations....

McKesson, at 4671, n. 23. Thus, the Supreme Court has warned that retroactive taxation might violate due process guarantees. The Court is left to decide what to do.

The U.S. Supreme Court has looked to various factors in examining whether a retroactive tax violates due process rights. The relevant factors can be grouped into three categories: (1) temporal limits; (2) notice to taxpayers that a retroactive tax was likely at the time of a taxable transaction; and (3) the likelihood that taxpayers would have altered their conduct if they had known of the retroactive tax at the time they acted. As indicated by the Supreme Court in McKesson, these factors give different perspectives on the same question: Does the retroactive tax unduly interfere with settled expectations? None of these factors gives support to DABT's proposed retroactive tax. It would very clearly interfere with settled expectations beyond all boundaries established by due process of law.

1. Temporal Limits

Although no absolute time limit has been declared, the length of time involved in a retroactive tax has been considered critical to whether such a tax is unconstitutionally harsh, arbitrary or unfair. Retroactivity of more than a year or two is generally considered highly suspect, and "[t]he longest period of retroactivity yet known to have been sustained has been three years." 2 Sutherland Statutory Construction, §41.10, 406 (4th Ed.).

Several U.S. Supreme Court opinions are instructive as to temporal limitations placed upon retroactive taxation. In United States v. Hudson, 299 U.S. 498, 500 (1937), the Supreme Court upheld a special income tax that operated retroactively for a period of 35 days. The Court found this limited retroactivity permissible and observed:

> As respects income tax statutes it long has been the practice of Congress to make them retroactive for relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment; and repeated decisions of this Court have recognized this practice and sustained it as consistent with the due process of law clause of the Constitution.

Id. at 500. The U.S. Supreme Court has since upheld retroactive income tax statutes confined to including profits from transactions occurring in the year of enactment. See, for example, United States v. Darusmont, 449 U.S. 292 (1981).

In Welch v. Henry, 305 U.S. 134 (1938), the U. S. Supreme Court cautioned that the period of retroactive taxation must be limited. In Welch, the taxpayer challenged a 1935 Wisconsin income tax statute which retroactively taxed dividend income received in 1933. The Welch court noted that the Wisconsin Legislature had acted promptly by acting in the first legislative session convened following the tax year in which the income was received. Id. at 150-151. The Supreme Court suggested that this degree of retroactivity reached the limit of due process, stating: "While the Supreme Court of Wisconsin thought that the present tax might 'approach or reach the limit of permissible retroactivity', we cannot say that it exceeds it." Id. at 151.

The Pennsylvania Supreme Court has applied Welch to hold unconstitutional any tax applied retroactively beyond the year of the legislative session immediately preceding the year of enactment. Gulf & Western Corp. v. Commonwealth, 459 A.2d 1369, 1372 (Pa. 1983); Commonwealth v. Budd Co., 108 A.2d 563, 569 (Pa. 1954), appeal dismissed 349 U.S. 935 (1955). The U.S. Ninth Circuit Court of Appeals ruled likewise in Wheeler v. Commissioner of Internal Revenue, 143 F.2d 162, 168 (9th Cir. 1944), striking a federal income tax statute. On review of the Ninth Circuit decision, the U.S. Supreme Court reversed on other grounds without criticizing the Ninth Circuit's construction of Welch. Commissioner of Internal Revenue v. Wheeler, 324 U.S. 542

(1945).[7] The Maryland Court of Appeals found the Ninth Circuit's analysis persuasive in Comptroller of Treasury v. Glenn L. Martin Co., 140 A.2d 288, 300 (Md. 1958), cert. denied, 358 U.S. 820 (1958)(striking a retroactive tax statute which affected transactions between three and six years old). See also, People v. Graves, 21 N.E.2d 371 (N.Y. 1939) (striking sixteen-year retroactive tax).

The courts of other states have expressed the view that retroactivity is permissible only for very short periods of time, and have generally limited retroactivity of a tax to the calendar year in which the tax was enacted. For example, in Keniston v. Board of Assessors of Boston, 407 N.E.2d 1275, 1285 (Mass. 1980), the focus was a statute which retroactively abated a taxation review board's procedures so as to effectuate an increase in the taxes payable as much as three years earlier. The statute was stricken because "the period of retroactivity reaches assessments levied so far back as to be oppressive and unjust." The court did allow the statute to have retroactive effect for the calendar year in which the statute was enacted. Accord, Lacidem Realty Corp. v. Graves, 43 N.E.2d 440 (N.Y. 1942)(striking utility tax

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7. The Supreme Court found that the challenged income tax statute did nothing more than codify a preexisting Treasury regulation which the Ninth Circuit had not examined. The Supreme Court held that the preexisting regulation was valid, and that the statute therefore had no impact whatsoever on the taxpayer. The Supreme Court thus held that "no question of retroactivity is presented." Id. at 546.

retroactive for four years, but allowing tax to apply to entire calendar year of its enactment).[8]

Only one U. S. Supreme Court decision has sustained a retroactive tax exceeding two years against a due process challenge. In United States v. Heinszen & Co., 206 U.S. 370 (1907), the issue focused on a tariff imposed on goods shipped into the Philippines after it came under United States military control. In 1899, a treaty was ratified that ended the Spanish-American War. The United States continued to collect the tariff even though it was without authority to do so. In 1902 Congress approved the tariff and extended it. The United States Supreme Court subsequently held that the government was without authority to collect the tariff from 1899 to 1902. Congress in 1906 enacted legislation authorizing the collection of the tariff in the hiatus years of 1899 to 1902. The United States Supreme Court sustained this retroactive tariff, finding that Congress could

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8. State court decisions upholding retroactive taxes have dealt with statutes relating back for truly short periods. See, Replan Development, Inc. v. Department of Housing, 517 N.E.2d 200 (N.Y. 1987), appeal dismissed, 485 U.S. 950 (1988)(retroactive less than three months to beginning of calendar year of enactment); Gunther v. Dubno, 487 A.2d 1080, 1091 (Conn. 1985)(retroactive six months to beginning of calendar year of enactment); Klebanow v. Glaser, 403 A.2d 897 (N.J. 1979)(retroactive for seven months to beginning of calendar year of enactment); Philadelphia Life Ins. Co. v. Commonwealth, 309 A.2d 811 (Pa. 1973)(retroactive less than two months to beginning of calendar year of enactment); Colonial Pipeline Co. v. Commonwealth, 145 S.E.2d 227 (Va. 1965), appeal dismissed, 384 U.S. 268 (1966)(retroactive less than three months to beginning of calendar year of enactment).

> 'cure irregularities, and confirm proceedings which, without the confirmation, would be void because unauthorized, provided such confirmation does not interfere with intervening rights.'

Heinszen, 206 U.S. at 384 (emphasis supplied). Thus, temporal limitations imposed by due process were relaxed with respect to curative statutes that do not interfere with intervening rights.

Notably, however, a supposedly curative Florida statute challenged in Forbes Pioneer Boat Line v. Board of Commissioners Everglades Drainage District, 258 U.S. 338 (1922), was stricken as violating due process of law. In Forbes the drainage district had collected a canal toll without statutory authorization. On the same day judgment giving the taxpayer a refund was entered, the Legislature enacted a statute retroactively authorizing the toll. The U.S. Supreme Court, speaking through Justice Holmes, held the Florida statute unconstitutional because the taxpayer was deemed to have had no cognizable expectation of having to pay the unauthorized canal toll and the Legislature was found to be without constitutional authority to retroactively impose a toll on canal usage occurring two years previously.

The similarity between the Forbes and Heinszen factual situations has led to much discussion in court decisions. The analysis made by the Court of Appeals of Maryland in Comptroller of the Treasury v. Glenn L. Martin Co., 140 A.2d 288 (Md. 1958), cert. denied, 358 U.S. 820 (1958), is highly instructive. As the Maryland court explained, in Heinszen Congress acted to cure a

truly technical deficiency in regard to a situation where those paying the tariff had no reasonable expectation that they would not have to pay the tariff; while in Forbes the Florida Legislature had acted to substantively impose a canal toll retroactively in the guise of curing an oversight and sought to impose the retroactive toll on a person who had a right at the time of use not to pay a toll.

Similar to Forbes, the DABT proposal would impose a substantive burden on those who engaged in business with no cognizable expectation of having to pay doubled taxes and who not only had the right not to pay such high taxes at the time, but were told by DABT to pay the lower taxes. Curative enactments of the type dealt with in Heinszen are markedly different from the case at bar. The tariff in Heinszen had previously been collected, but the retroactive tax DABT seeks in this case has not been collected. The result reached in Heinszen is therefore much less harsh than the sudden tax burden DABT seeks to impose on unsuspecting distributors.[9] Moreover, in Heinszen everyone expected to pay the tariff, while in the case at bar the distributors were entitled to do business under the tax structure existing at the time they were engaging in business. The mitigating circumstances traditionally found in regard to

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9. It should be noted that DABT is effectively asking the Court to extend the period of limitations applicable to tax collections. DABT seeks to impose a retroactive tax going back more than 5 years, but the applicable statute of limitations is only 4 years. §95.11(3)(f),(k), Florida Statutes.

curative acts are not present in this case. No mere technical oversight is involved here. This case concerns a blatantly unconstitutional tax scheme. Heinszen does not provide support for relaxing in this case the temporal limitations customarily imposed by notions of due process on retroactive taxation.[10]

In the case at bar, DABT proposes a five-year retroactive tax. A retroactive tax reaching back so far markedly exceeds any retroactive tax which has been upheld by the U.S. Supreme Court. The proposed retroactive tax affects transactions so remote that it is unquestionably harsh and unfair.

2. Notice To The Taxpayer

Amicus has searched to find the earliest indication that this litigation might conceivably result in a court order directing retroactive taxation. Throughout proceedings in the courts of Florida, it has been consistently argued by DABT that

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10. Curative retroactive taxation was upheld in Temple University v. United States, 769 F.2d 126, 134 (3d Cir. 1985), cert. denied, 476 U.S. 1186 (1986), involving a four-year retroactive period. There had been a long-established regulatory rule concerning income tax withholding payments, which rule had been followed by the taxpayer. A U.S. Supreme Court decision construing the Internal Revenue Code effectively overturned that long-established regulatory ruling. Congress then amended the tax code to reinstate the long-established preexisting policy, but the taxpayers sought a refund of payments made when the regulatory rule had been in effect. The retroactive effect of the statutory amendment was held not to violate due process because there was no effect on the taxpayer who had complied with the preexisting regulations during the years in question. Accord, Canisius College v. United States, 799 S.2d 18 (2d Cir. 1986), cert. denied 481 U.S. 1014 (1987)(upholding the same statute as was involved in the Temple University case).

the taxes in question either would be refunded if found unconstitutional, or that relief would be prospective only. It appears that it was not until the case was before the U. S. Supreme Court that a remedy of retroactive taxation was discussed. See, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 106 L. Ed.2d 586 (1989)(memorandum order requesting briefing on the issue of whether a remedy of retroactive taxation would violate due process). DABT then argued to the U. S. Supreme Court that, while it could not say with certainty that retroactive taxation would violate due process, retroactive taxation would not be an acceptable remedy, that retroactive taxation would create inequity, and that "it would, in our opinion, be harsh and oppressive." (Brief of Respondents on Reargument at 6 and 25-26, App. "B".)

If there was any discussion of the possibility of retroactive taxation prior to proceedings in the U. S. Supreme Court, amicus has not found it. It appears that only prescience would have provided notice to distributors that DABT would ever suggest such a thing.

The lack of any notice to the proposed taxpayer at the time of the transaction sought to be taxed weighs heavily against retroactive taxation under due process standards. See, Untermyer v. Anderson, 276 U.S. 440 (1928).

DABT argues that distributors on whom it now seeks to impose a five-year retroactive tax should have foreseen that there was an unconstitutional violation of the Commerce Clause.

DABT then seems to suggest that distributors not only should have foreseen that the Florida Legislature had enacted an unconstitutional taxing scheme, but also that there would be a retroactive tax to remedy the violation of constitutional rights.[11] Assuming for the purposes of argument that distributors might have foreseen that the state's taxing scheme was unconstitutional, it is respectfully submitted that the ordering of retroactive taxation to cure the violation was not reasonably foreseeable. To the contrary, the focus of the litigation was whether McKesson should receive a refund as a remedy or only receive prospective relief in the form of an injunction. The Court found it appropriate under existing Florida precedent for McKesson to receive only prospective relief. It is respectfully suggested that lay business people should not be expected to have better knowledge of how an unconstitutional statute should be remedied than all of the justices of the Supreme Court of Florida ruling unanimously.

Moreover, DABT itself states that:

> "In the instant case, the U. S. Supreme Court took exception to its traditional stand in cases where a state tax scheme

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11. Amicus finds it curious that DABT suggests distributors should have recognized the constitutional infirmities in the liquor tax when DABT itself was denying any infirmity. If DABT by its argument is acknowledging a conscious effort to violate the Constitution on the part of itself and the Florida Legislature, it would appear particularly appropriate that the Court direct DABT to give refunds of the unconstitutional tax, and leave to the Legislature the need to make up for the loss, rather than putting the burden on those whom DABT has regulated and instructed to pay taxes in accordance with the statutes now declared unconstitutional.

> has been invalidated on Commerce Clause grounds."

(Appellants' Initial Brief on remand at 2.) Thus, DABT argues that distributors should have been sufficiently prescient to know they would be subjected to a retroactive tax going back five years, when all of the justices of the Supreme Court of Florida had no such notion when ruling in this case previously, and when DABT itself views the U. S. Supreme Court as having departed from traditional practice by directing that McKesson receive a remedy other than prospective injunctive relief.

In its efforts to avoid the political consequences of its own acts, the state would destroy the businesses of those who did nothing more than obey the law as written by the Florida Legislature and as enforced by DABT. All DABT can point to as a reason for devastating businesses which obeyed DABT is that those businesses should have had a better crystal ball than DABT and the learned justices of the Court.

Respectfully, justice cannot be found in so transparent a fiction.

3. Likelihood Taxpayer Would Have Altered Conduct

In applying due process standards to retroactive taxes, the courts have put heavy emphasis on whether persons subjected to the retroactive tax would likely have changed their conduct if the tax had existed at the time of the transactions involved. In cases dealing with retroactive gift taxes, the courts have deemed it of overriding importance that the donor might well not have

made a gift if a gift tax had been applicable at the time of the gift. Because such a retroactive tax would be plainly unfair and oppressive, virtually all retroactive gift taxes have been declared unconstitutional. See, for example, Nichols v. Coolidge, 274 U.S. 531 (1927); Untermyer v. Anderson, 276 U.S. 440 (1928).

In cases concerning retroactive income taxes, the courts have assumed that a taxpayer would not have foregone the receipt of income just because a greater portion of it might be taxed. Welch v. Henry, 305 U.S. 134, 148 (1938).

Retroactive taxes on sales of products is a different kind of tax, but partakes of the same qualities from a due process perspective as a gift tax. During the contested period, the Florida liquor tax was calculated according to the volume of product sold. §564.06(10), Florida Statutes. Although it is not a sales tax collectable in connection with each individual transaction, the economic operation of the liquor tax is the same as a sales tax. It is only rational that a business person selling product will establish prices based upon the taxes applicable to the volume of product being sold, as well as other normal costs of doing business. Once the sales transaction is completed, the business has no opportunity to recoup an unanticipated cost from the customer. Distributors are merely conduits through which the state collects liquor taxes.[12] It is

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12. Distributors of alcoholic beverages in Florida are mere intermediaries between manufacturers and retailers. See,
(footnote continued on next page)

obvious that prices are set by distributors based upon the taxes imposed under the liquor tax statutes.[13] Indeed, it is essential that they do so since liquor taxes are as high as, or higher than, the cost of acquiring alcoholic beverages from a manufacturer. Any distributor interested in avoiding bankruptcy must include in its prices the taxes being paid to the state on that product.

Just as the courts have found it unreasonable and arbitrary to impose a retroactive gift tax because the existence of such a tax would be reasonably expected to alter the conduct of a donor, it is unreasonable and arbitrary to impose a mammoth retroactive liquor tax on distributors. The level of taxation can be reasonably expected to alter the conduct of distributors in regard to the very transactions on which the retroactive tax is to be imposed. See, George W. Davis & Sons, Inc. v. Askew, 343 So.2d 1329 (Fla. 1st DCA 1977)(sport fishing charter boat operator found to be collection agent for state taxes, and state

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(footnote continued from previous page)
§561.14, Florida Statutes. The state could have made liquor taxes payable by manufacturers, or by retailers, but has instead elected to make distributors the focal point for imposing taxes primarily due to administrative convenience. The liquor tax is no more appropriately payable by a distributor than by any other entity handling an alcoholic beverage product. The primary beneficiaries of the unconstitutional tax at issue in this case were the manufacturers of preferred products, certain agricultural interests and consumers.

13. This was a finding of fact in National Distributing, concerning the predecessor statute, which the Court affirmed and to which the Grantham Companies were parties.

held to be estopped to require payment of taxes when there was no opportunity to go back in time to collect taxes from customers). In the situation of the Grantham Companies, a tax of about 7500% of gross profit would certainly have altered how business was conducted. The Court should not authorize DABT to impose its mammoth retroactive tax upon distributors who can no longer obtain reimbursement from their customers.

There is no basis upon which one can presume that any distributor benefitted financially from the lower tax rate imposed on favored products. Even DABT makes no attempt to quantify any benefit received by distributors as a result of the unconstitutional tax. To the contrary, when before the U.S. Supreme Court DABT stated that a retroactive tax could be wholly disproportionate to the benefit, if any, received by distributors from the unconstitutional tax and that such would "plainly be unfair." (Brief for Respondents on Reargument at 6, App. "B".) Indeed, it is notable that the unconstitutional tax did not create classes of favored distributors and non-favored distributors. Rather, the unconstitutional tax created classes of favored products and non-favored products. It was the products favored that received the benefit, not the middlemen who distributed them. To the extent distributors' sales volume might have increased in favored products, it was offset by decreased sales volume in non-favored products.

Under these circumstances, it is all the more obvious that distributors would have altered their conduct if the proposed

retroactive tax had been in effect at the time of the transactions in which they engaged.

4. Due Process Would Be Denied

None of the factors generally examined to determine whether a retroactive tax is permissible under the due process clause give any support to a retroactive tax being imposed in the circumstances of this case. The proposed retroactive tax would stretch back many years, with no reasonable notice to any of the distributors sought to be taxed. The distributors would be taxed not because of anything they did in conducting their businesses, but solely because the state violated the Constitution and DABT seeks to avoid the consequences of a refund.

DABT relies heavily on the decision in Johnson Brothers Wholesale Liquor Company v. Commissioner of Revenue, 402 N.W.2d 791 (Minn. 1987), which concerned a similarly unconstitutional liquor tax. The Supreme Court of Minnesota ruled that it was not necessary to give a refund because the state had already collected from favored wineries all but $73.00 of the extra taxes those wineries had to pay in order for all to have been taxed on a constitutionally equal basis. Wholly unlike the case at bar, the Minnesota reassessment was imposed on wineries which directly benefitted from the preferences, not distributors who received no benefit. Moreover, the Supreme Court of Minnesota was never asked to review the constitutionality of the retroactive assessment. Indeed, there were only two small wineries

benefitted by the unconstitutional Minnesota tax. Over the five-year period that the unconstitutional tax treatment occurred, the wineries paid only $1,658.00 less in taxes than they would have otherwise. The sum involved was so small that it would be difficult to find economic justification for anyone to have challenged the retroactive assessment. The Johnson Brothers decision simply has no relevance to the issues now before the Court.

B.

DABT's Proposed Retroactive Tax Would Deny Procedural Due Process of Law.

The proposal of DABT is for the Court to order retroactive taxation, with DABT adopting emergency rules for the collection of the retroactive tax. The proposed emergency rules would allow a retroactively taxed distributor 30 days to pay in a lump sum, or permit payment over 60 months at an interest rate of 1% per month on the unpaid balance, with the first installment being due within 30 days. A distributor would be given only 21 days to contest the calculation of the retroactive tax, and would be relegated to the administrative procedures established under Chapter 120, Florida Statutes. It is well established, of course, that those administrative procedures are of no avail in regard to constitutional claims, since administrative agencies cannot determine constitutional issues. Department of Revenue v. Amrep Corp., 358 So.2d 1343, 1349 (Fla. 1978); Department of

Revenue v. Young American Builders, 330 So.2d 864, 865 (Fla. 1st DCA 1976).

Thus, it is only by bringing an action in circuit court that a distributor can obtain a forum in which to present evidence as to the unconstitutionality of retroactively taxing the individual distributor. Under the circumstances of this case, such an action in circuit court is an illusory protection. Under §§562.17 and 210.14, Florida Statutes, the failure to timely pay a liquor tax assessed by DABT can give rise to a warrant being issued equivalent to a judgment, including the full power to have execution levied to obtain payment of the unpaid liquor taxes, plus a penalty of 50% of the assessed tax and interest on the total of 1% per month, together with the cost of execution of the warrant. A more draconian set of powers and penalties is not believed to exist in Florida law. DABT can also revoke or decline to renew a distributor's license if an assessed liquor tax is not timely paid. §§561.29(1)(a) and 561.24(5), Florida Statutes. There is no procedure available by which a distributor can contest the constitutionality of such a retroactive assessment as applied to the individual distributor before having to pay the tax. Distributors in the position of OHI would be rendered insolvent and without the means to pursue relief in court. Only a huge infusion of new capital would allow survival long enough to get a hearing.

The U. S. Supreme Court reviewed Florida law concerning challenges to the validity of a tax assessment, and found that

"Florida does not purport to provide taxpayers...with a meaningful opportunity to withhold payment and to obtain a pre-deprivation determination of the tax assessment's validity...." The Supreme Court held that due process requires Florida to "provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy'...to insure that the opportunity to contest the tax is a meaningful one." McKesson, 58 L.W. at 4671. The procedures proposed by DABT do not give a meaningful opportunity to challenge the legal validity of the proposed retroactive assessment on individual distributors.

If the Court defers to DABT in determining a remedy for the unconstitutional wrong committed in this case, OHI begs the Court not to compound the wrong. OHI begs for a pre-assessment opportunity to show the outrageous effect a retroactive assessment would have on it. Unless the Court can comfortably rule that it is constitutional to have a retroactive tax destroy a law-abiding family business for no reason other than the state's desire to avoid a refund of unconstitutional taxes, the Court should mandate that no retroactive assessment occur until after the constitutional validity of the assessment is individually determined on a full factual record.

This may mean a multiplicity of similar lawsuits across the state. It may mean that the Court has to devise special procedures for efficient individualized determinations. It may mean that the end result is that no distributor can be

constitutionally taxed, and that a refund to McKesson is still required to implement the mandate of the U. S. Supreme Court. None of these possibilities detract from having pre-assessment proceedings. To the contrary, these possibilities underscore the need for those who would be retroactively taxed to have a meaningful opportunity to assert their constitutional rights. It also underscores the need for the Court not to act in a vacuum. The Court's decision as to what remedy to provide McKesson will affect real people who are not before the Court as parties, but whose families' and employees' futures are on the line. Please give them a chance to present their case and be heard before an economic death penalty is imposed.

III.

THE RETROACTIVE TAX PROPOSED BY DABT CONSTITUTES AN UNCONSTITUTIONAL IMPAIRMENT OF CONTRACTS.

Article I, §10 of the Florida Constitution prohibits the retroactive taxation proposed by DABT. The Court has held that it is "axiomatic that subsequent legislation which diminishes the value of a contract is repugnant to our Constitution." Dewberry v. Auto-Owners, Ins. Co., 363 So.2d 1077, 1080 (Fla. 1978); accord, Pinellas County v. Banks, 19 So.2d 1 (Fla. 1944). Although not constituting legal authority, the advisory opinion rendered by the justices of the Court in In Re Advisory Opinion to the Governor, 509 So.2d 292, 314 (Fla. 1987), is highly persuasive. The justices of the Court advised that a sales tax on services provided by contractors which would retroactively place a tax burden on construction contracts made prior to enactment of the services tax was "facially unconstitutional" under the contract clause of the Florida Constitution. Judicial remedies impairing contracts have been found to violate the contract clause. Sepielli v. Wilson P. Abraham Construction Corp., 313 So.2d 122, 123 (Fla. 3d DCA 1975); Morton v. Zuckerman-Vernon Corp., 290 So.2d 141, 145 (Fla. 3d DCA 1974), cert. denied, 297 So.2d 32 (Fla.). See also, U.S. ex rel Vermont Investment Co. v. Cocoa, 17 F. Supp. 59, 60 (S.D. Fla. 1936)(stating the spirit of the contract clause should govern the courts as well as the legislature).

There is no viable distinction between the retroactive tax sought to be imposed by DABT by court mandate and the basis of the advisory opinion issued to the Governor in 1987. The services tax applied to individual contracts and was enacted by the Legislature. DABT's proposal would call for retroactive taxes imposed on all sales occurring during each calendar month as a group, and would be imposed by judicial mandate. There is no distinction between a sales tax imposed according to individual sales transactions, and one imposed based upon the total of all sales transactions during each month. In both instances the economic effect of the tax is identical. The fact that DABT would impose a retroactive tax by judicial mandate rather than legislation surely does not give stronger ground for such an action.

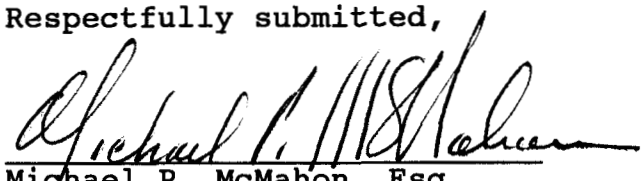
Courts and scholars have historically condemned retroactive taxation. See generally, Note, Setting Effective Dates for Tax Legislation: A Rule of Prospectivity, 84 Harv.L.Rev. 436 (1970); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn.L.Rev. 775 (1936). When a legislature uses its powers to tax retroactively, it stretches all concepts of fairness to the limit. Respectfully, a court should not engage in seeing how thinly fairness can be stretched. The remedy of a refund may be hard, but it is fair. The Legislature can double liquor taxes on everyone prospectively to pay the refund, or use its other taxing

powers. Distributors have no such power to pay for the state's wrongdoing.

CONCLUSION

For the reasons stated above, the Court should not order imposition of a retroactive tax on law-abiding distributors as a remedy for the unconstitutional actions of the state of Florida. Consistent with the mandate of the U. S. Supreme Court, this necessarily requires that a refund be ordered. Amicus is unable to devise an alternative. The remedy of a refund may be hard, but it is fair. The remedy of a retroactive tax is both harsh and unfair.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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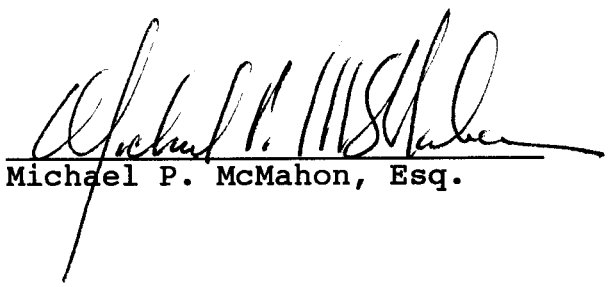

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APPENDICES