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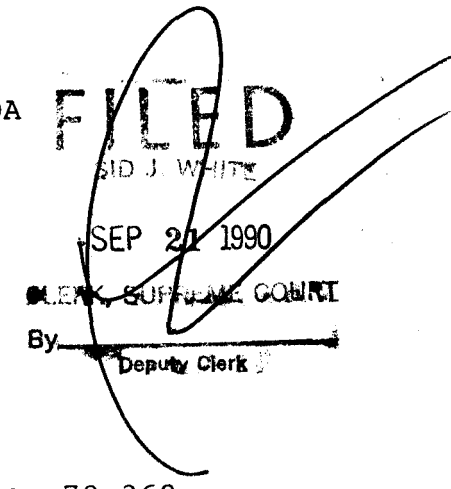
SUPREME COURT OF THE STATE OF FLORIDA



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

Appellants/
Cross-Appellees,

v.

CASE NO.: 70,368

McKESSON CORPORATION,

Appellee/
Cross-Appellant.

_____/

On Remand from the United States Supreme Court, No. 88-192

MCKESSON CORPORATION'S ANSWER BRIEF ON REMAND

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STATEMENT OF THE CASE AND OF THE FACTS

Introduction

McKesson Corporation ("McKesson") submits this statement of the case and the facts to supplement the statement in the Division of Alcoholic Beverages and Tobacco ("DABT") brief.

Florida Court Proceedings

On September 3, 1986, McKesson filed an action in the Circuit Court, Second Judicial Circuit, Leon County, challenging Florida's alcoholic beverage tax laws as unconstitutional under the United States and Florida constitutions. (J.A. 1)[1] In particular, McKesson alleged that Florida's tax scheme, which became effective July 1, 1985, discriminated against interstate commerce and thus violated the Commerce Clause.

On March 20, 1987, the circuit court entered an order declaring the tax scheme's discriminatory tax preferences unconstitutional. (J.A. 261) The circuit court stated in its order that the court's declaration of unconstitutionality would operate only prospectively, thus

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1 McKesson in this brief will cite to documents in the Joint Appendix, which McKesson and DABT submitted to the United States Supreme Court and is part of the record, as (J.A. __).

denying McKesson any refund of McKesson's payment of the unconstitutional taxes.

Both McKesson and DABT appealed. (J.A. 264, 292) DABT's appeal of the circuit court's decision caused a stay of the circuit court's preliminary injunction under Florida Rules of Appellate Procedure 9.310(b)(2). McKesson immediately moved the court to vacate the automatic stay and urged DABT to join its motion. McKesson argued that continued enforcement of the unconstitutional tax scheme pending appeal would further expose Florida's revenues to claims for refunds. (J.A. 272-76) DABT declined to join McKesson's motion, and the circuit court denied McKesson's motion. (J.A. 291) As a result, Florida continued to collect taxes under the tax scheme that the court had declared unconstitutional.

McKesson then asked the Florida District Court of Appeal, First District, to certify the case to this Court for immediate review. (J.A. 265) Again, McKesson noted that continued enforcement of the tax scheme exposed Florida's revenues to refund claims. (J.A. 267) On April 13, 1987, the court of appeal certified that the case required immediate resolution, and on April 22, 1987, this Court accepted jurisdiction. (J.A. 294)

On February 18, 1988, this Court unanimously held that the challenged tax scheme discriminated against

interstate commerce in violation of the Commerce Clause. Division of Alcoholic Beverages and Tobacco v. McKesson Corp., 524 So.2d 1000 (Fla. 1988). The Court, however, rejected retroactive relief and held that McKesson was not entitled to a tax refund.

United States Supreme Court Proceedings

On November 14, 1988, the United States Supreme Court granted McKesson's petition for a writ of certiorari to review this Court's denial of retroactive relief from Florida's unconstitutional tax scheme. On June 4, 1990, in a unanimous opinion, the Supreme Court reversed the judgment of this Court. McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, ___ U.S. ___, 110 S. Ct. 2238 (1990). The Supreme Court stated:

> [o]ur precedents establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional. We therefore agree with petitioner that the state court's decision denying such relief must be reversed.

McKesson, 110 S. Ct. at 2242. The Court held that "in this refund action the State must provide" McKesson with "a 'clear and certain remedy.'" Id. at 2251.

The Supreme Court held that, to remedy Florida's constitutional violation, this Court must require Florida to erase its tax discrimination against interstate commerce. Id. at 2251. In other words, this Court must provide a remedy that equalizes McKesson's historic tax rates and its competitors' historic tax rates. This Court cannot adopt a remedy unless the Court has determined that the remedy will correct the discrimination.

Thus, the Supreme Court determined that Florida may refund to McKesson "the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received," which would provide McKesson with a clear and certain constitutional remedy. Id. at 2252.

The Supreme Court added that this Court could consider the constitutionality of two alternative remedies to equalize Florida's taxation. Id. This Court can adopt one of the alternatives only if the alternative provides a "clear and certain" remedy for Florida's discriminatory taxation. "[T]o the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who benefited from the rate reductions during the contested tax period." Id. Florida also might provide "a combination of a partial refund to petitioner and a partial retroactive

assessment of tax increases on favored competitors." Id. The Supreme Court observed that since the Court did not know whether Florida would seek to impose retroactive taxation as an alternative remedy, the Court "need not decide whether this choice would violate due process by unduly interfering with settled expectations." Id. n.23.

SUMMARY OF ARGUMENT

DABT asks this Court to reject the constitutional remedy of a refund to McKesson of the unconstitutional taxes. Instead, DABT has proposed retroactive taxation, without any tax refund, as the remedy for Florida's unconstitutional taxation.

DABT acknowledges that it cannot impose retroactive taxation as an alternative to a tax refund if the retroactive taxation violates due process. DABT admits that retroactive taxation may be so harsh and oppressive in overturning settled expectations that it violates due process. DABT argues, however, that retroactive taxation to remedy Florida's unconstitutional tax scheme would not unduly interfere with settled expectations because McKesson's competitors should have known -- when the legislature enacted the tax scheme in 1985 -- that the tax scheme was unconstitutional, and that DABT eventually would seek retroactively to collect the full measure of taxes on the sales they made.

McKesson challenges DABT's retroactive taxation proposal. McKesson asks this Court to award an appropriate tax refund of the unconstitutional taxes.

The United States Supreme Court emphasized that McKesson is entitled to a clear and certain constitutional remedy for Florida's unconstitutional taxation. The Court expressly did not approve retroactive taxation as a constitutional remedy. Rather, the Supreme Court did not decide the question because DABT had not informed the Court that DABT had any intention of imposing retroactive taxation.

The United States Supreme Court decisions addressing retroactive taxation provide the federal constitutional standard for reviewing this due process challenge to DABT's proposal. The Supreme Court has held that a tax that has a limited retroactive reach does not necessarily offend due process because of its retroactivity. See McKesson, 110 S. Ct. at 2252 n.23. The Court generally has allowed tax legislation retroactively to reach "recent transactions," usually within the calendar year of enactment. See Welch v. Henry, 305 U.S. 134 (1938). Thus, the Supreme Court has accommodated government's practical need for some flexibility in tax legislation but has recognized the due process constraint against "unduly

interfering with settled expectations." McKesson, 110 S. Ct. at 2252 n.23.

DABT's proposal to impose retroactive taxation collides with settled expectations in violation of due process. DABT proposes, without prior notice, to tax transactions that occurred as long as five years ago. McKesson's competitors had no reason whatsoever to anticipate retroactive taxation in this case. From the Florida legislature's enactment of the unconstitutional statutes in 1985, the Florida legislature has never acted to impose retroactive taxation, and DABT never even suggested that retroactive taxation might be an alternative remedy. Indeed, in DABT's briefs in the United States Supreme Court, DABT expressly rejected retroactive taxation as unfair and unwise. DABT's current targets could hardly anticipate that Florida would reverse course and seek to impose a substantial retroactive tax burden on their past sales.

DABT's argument that McKesson's competitors could not rely on Florida's duly enacted tax laws, which DABT duly enforced, does not make sense. McKesson's competitors understandably had an obligation to follow, rather than ignore, the Florida legislature's tax enactment and to observe, rather than ignore, this Court's decision denying retroactive relief. As a result, DABT's proposed interference with settled expectations would be severely

harsh and oppressive. DABT's proposed retroactive tax necessarily would convert sales that were profitable when transacted years ago into losses today. DABT, in fact, before it abruptly reversed its position, acknowledged the harsh and oppressive consequences of retroactive taxation as a remedy in this case. DABT in its briefs in the United States Supreme Court characterized retroactive taxation as an "exceedingly harsh" approach that "would create more inequity than it eliminated."

DABT's proposed retroactive tax violates the Florida Constitution's Due Process Clause as well as the United States Constitution's Due Process Clause. See State Dep't of Transp. v. Knowles, 402 So.2d 1155 (Fla. 1981); McCord v. Smith, 43 So.2d 704 (Fla. 1949). DABT's proposal also violates the Florida Constitution's Contract Clause. Retroactive taxation in this case would retroactively turn "otherwise profitable contracts into losing propositions" and therefore is prohibited. See In re Advisory Opinion to the Governor, 509 So.2d 292, 314-15 (Fla. 1987).

In light of the United States Supreme Court's opinion in this case, McKesson is entitled to an appropriate tax refund of the unconstitutional taxes. A tax refund -- the traditional remedy under both federal and Florida law -- is the only constitutional clear and certain remedy in this case. The Supreme Court's opinion soundly rejected DABT's

"equitable" argument that a refund of the discriminatory taxes Florida unconstitutionally collected, under the second of Florida's three successive unconstitutional tax schemes, would impose too great a cost.

After four years of litigation, Florida can no longer evade its obligation to return the unconstitutional taxes.

ARGUMENT

I. DABT'S RETROACTIVE TAXATION WOULD VIOLATE THE UNITED STATES CONSTITUTION

This Court should note that DABT's proposal to impose retroactive taxation by administrative fiat preempts the legislature's exclusive authority under Florida law to impose state taxes. Florida law allows the collection of taxes only by explicit legislation, not by administrative order or judicial decree. Belcher Oil Co. v. Dade County, 271 So.2d 118, 122 (Fla. 1972); Maas Bros., Inc. v. Dickinson, 195 So.2d 193, 197-98 (Fla. 1967); Overstreet v. Ty-Tan, Inc., 48 So.2d 158, 160 (Fla. 1950); State ex rel. Seaboard Air Line R. v. Gay, 160 Fla. 445, 35 So.2d 403, 409 (1948); State ex rel. Dos Amigos, Inc. v. Lehman, 100 Fla. 1313, 131 So. 533, 539 (1930).

Contrary to DABT's suggestion, Florida law does not authorize the Department of Revenue to impose unenacted taxes, for any period of time. See DABT's Brief at 24 n.9. Section 95.091, Florida Statutes, by its terms, establishes

a time limit upon the State's ability to collect taxes that have been assessed or are delinquent under the applicable tax laws. The statute does not empower an administrative agency to revise the applicable tax laws and impose additional taxes.

In State ex rel. Housing Auth. of Plant City v. Kirk, 231 So.2d 522 (Fla. 1970), this Court refused to approve the State's interpretation of a particular tax scheme that, without clear legislative direction, would have authorized an additional tax levy. The Court stated:

> [u]nder our present Constitution, the Legislature meets at such close intervals that problems such as this -- if the Department of Revenue's contention is sound -- could (and should) be presented to and resolved there. Where an act purports to overturn long-standing legal precedent and completely change the construction placed on a statute by the courts, it is not too much to require that it be done in unmistakable language. Precedent and logic require this . . . . It could well be that the Legislature never intended to impose such a tax; a power vested solely in it. If this Court would, under such circumstances, approve such levy it would be tantamount to a tax levy by a judicial body.

Id. at 524. The Court's reasoning in that case applies in this case. DABT has not demonstrated that the legislature would choose a retroactive taxation remedy, with its severe burden upon the formerly favored companies, rather than defer to the traditional statutory remedy, a tax refund.

However, McKesson agrees with DABT that this Court now should decide whether retroactive taxation may replace a tax refund as a clear and certain remedy for McKesson's constitutional injury. This Court must now resolve this critical issue because retroactive taxation in this case is facially unconstitutional, and no governmental authority can seek to impose it. The Florida legislature's enactment of a retroactive tax to remedy Florida's discrimination would not, in any measure, save such a tax from constitutional attack.

The United State Supreme Court repeatedly has stressed that the taxpayer who challenges unconstitutional taxes does not have to wait for a state legislature to consider the issue of an appropriate remedy. The taxpayer in every case can "not be 'remitted to the necessity of awaiting such action'" by the legislature. See McKesson, 110 S. Ct. at 2250 (quoting Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931)). Certainly, McKesson in this case does not have to wait for the legislature to engage in an unconstitutional and, therefore, futile exercise of enacting a retroactive tax in violation of due process.

A. The United States Supreme Court Did Not Approve DABT's Retroactive Taxation In This Case

Contrary to DABT's suggestion, the United States Supreme Court expressly did not approve retroactive taxation in this case. The Court chose not to decide a question -- whether retroactive taxation would violate due process -- that it did not need to decide. McKesson, 110 S. Ct. at 2252 n.23. DABT had not informed the Court that DABT had any intention of imposing retroactive taxation as an alternative to a tax refund. Indeed, DABT in its briefs to the Court had expressly disavowed retroactive taxation as both unfair and unwise. See Brief for Respondents on Reargument at 24-26.

DABT's assertion in its draft emergency rule (Retroactive Assessment of Special Liquor Products Tax, Intent) that the Supreme Court "authorized" DABT to impose retroactive taxation as a remedy in this case is simply false. The Supreme Court carefully noted, when referring to retroactive taxation as a possible alternative remedy, that the State could impose retroactive taxation only if the taxation were "consistent with constitutional limitations." McKesson, 110 S. Ct. at 2254. The Court specifically noted that due process imposes a temporal limit on retroactive taxation. Id. at 2252 n.23.

B. DABT's Retroactive Taxation Would Violate Due Process Under the United States Constitution

DABT's proposal does not provide the "clear and certain" remedy for Florida's unconstitutional taxation. See McKesson, 110 S. Ct. at 2248, 2251, 2252, 2254, 2258. DABT proposes to remedy its unconstitutional taxation with further unconstitutional taxation.[2] DABT asks this Court to approve a tax scheme that would retreat more than five years to tax transactions that occurred as long ago as July 1985. DABT's proposal offends due process under the United States Constitution.[3]

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2 McKesson has standing to challenge DABT's proposal to remedy McKesson's injury by retroactively taxing McKesson's competitors. This Court, in light of the United States Supreme Court's opinion, must determine the proper constitutional remedy. Florida must provide McKesson with a refund of unconstitutional taxes unless DABT, as a clear and certain remedy, can constitutionally retroactively tax McKesson's competitors. Thus, in arguing that retroactive taxation violates due process, McKesson espouses not the interests of its competitors, but its specific interest in securing "meaningful backward-looking relief" from Florida's tax discrimination. McKesson, 110 S. Ct. at 2247. See generally Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-476 (1982). DABT's proposed remedy for unconstitutional taxation is not a meaningful remedy but rather no remedy at all.

3 In proposing retroactive taxation in lieu of a tax refund, DABT comments: "[f]or McKesson to complain of the choice which the State has made is merely self-serving." DABT's Brief at 10. DABT's comment is vacuous. Every litigant who seeks to enforce any constitutional right is "self-serving."

1. Retroactive Taxation May Be Constitutional In Some Cases

Historically, commentators have condemned tax legislation that reaches back to tax transactions that occurred in the past. 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). "Perhaps the most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences." Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 692 (1960).

The Supreme Court, however, has accepted the legislative judgment that certain limited retroactivity in tax legislation may be consistent with due process. For example, in 1928, Justice Brandeis observed that "[f]or more than half a century, it has been settled that a law of Congress imposing a tax may be retroactive in its operation." Untermyer v. Anderson, 276 U.S. 440, 447 (1928) (Brandeis, J., dissenting). Justice Brandeis noted that various tax acts had applied, retroactively, to income earned during the full calendar year of enactment or, in some cases, to income earned during the previous year. Id. at 447-49.

In United States v. Hudson, 299 U.S. 498 (1937), the Court upheld a special income tax that operated retroactively for a period of 35 days. The Court found that the brief period of retroactivity was not unreasonable. Id. at 501. The Court observed:

> [a]s 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 (emphasis added).

A year later, in Welch v. Henry, 305 U.S. 134 (1938), the Court established a flexible standard to determine whether retroactive taxation violated due process. The Court stated that "a tax is not necessarily unconstitutional because retroactive." Id. at 146. "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." Id. at 147.

The Court in Welch also established that, consistent with due process constraints, the period of retroactive taxation must be limited. In Welch, the

taxpayer challenged a 1935 tax statute that imposed a tax on income received in 1933. The taxpayer objected that the retroactive taxation imposed a burden without any advance notice. Id. at 148. The Court stated that "[a]ssuming that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here." Id.

The Court in Welch noted that the Wisconsin legislature had acted promptly to effect its retroactive revision. The legislature enacted its revision of the tax laws applicable to 1933 income at its first opportunity after the returns of 1933 income were filed. Id. at 150-51. The Court stated: "we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, Cooper v. United States, 280 U.S. 409, 411 (1930), must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment." Id. at 150 (emphasis added). The Court noted that "[w]hile 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 Supreme Court more recently has reaffirmed its acceptance of limited retroactivity in tax legislation. In United States v. Darusmont, 449 U.S. 292 (1981), the Court

reviewed a challenge to federal tax provisions enacted in October 1976 but which operated retroactively to cover the entire calendar year 1976. The Court observed that Congress routinely has given tax statutes an effective date prior to the enactment date. Id. at 296. "This 'retroactive' application apparently has been confined to short and limited periods required by the practicalities of producing national legislation." Id. at 296-97 (emphasis added). The Court added: "[t]he Court consistently has held that the application of an income tax statute to the entire calendar year in which enactment took place does not per se violate the Due Process Clause of the Fifth Amendment." Id. at 297.

The Supreme Court's opinion in McKesson also observed the doctrine that retroactive taxation, when appropriately limited in reach, may be consistent with due process constraints.

> We previously have 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."

McKesson, 110 S. Ct. at 2252 n.23 (citations omitted).

The Supreme Court has always appreciated that any retroactive tax legislation, to some extent, disturbs

taxpayers' expectations. The Supreme Court's decisions reflect the Court's acknowledgment that, notwithstanding taxpayers' expectations, sometimes the practicalities of enacting tax legislation require a certain flexibility. See United States v. Darusmont, 449 U.S. 292, 296-97 (1981). Thus, in addressing due process challenges to retroactive tax legislation, the Court generally has allowed the legislation retroactively to reach "recent transactions." Welch v. Henry, 305 U.S. 134, 150 (1938). Usually, the retroactive application has been confined to the calendar year of enactment. See Darusmont, 449 U.S. at 296-97. In Welch, the Court extended the approved retroactivity period for tax legislation to include "the year of the legislative session preceding that of its enactment." Welch, 305 U.S. at 150.

In numerous cases following Welch, federal courts of appeals and state supreme courts have applied the Supreme Court's due process standard in reviewing retroactive taxation. The courts have refused to allow states to engage in retroactive taxation that unduly upsets the settled expectations of taxpayers and, therefore, violates due process. The Court of Appeals for the Ninth Circuit, in Wheeler v. Commissioner of Internal Revenue, 143 F.2d 162 (9th Cir. 1944), rev'd on other grounds, 324 U.S. 542

(1945), provides a review of court decisions concerning the constitutionality of retroactive tax statutes:

> the courts have held that there is a point of time when such retroactivity is beyond the legislative power. The rule that such amendment to legislation must come within the next session of the legislature or within a reasonable length of time as analyzed in [Welch] is the sounder law.

Id. at 168.

Thus, under the Supreme Court's constitutional standard, federal courts of appeals and state supreme courts have approved brief periods of retroactivity, particularly within the calendar year of enactment.

For example, in Shanahan v. United States, 447 F.2d 1082 (10th Cir. 1971), the Court of Appeals for the Tenth Circuit reviewed applicable decisions addressing retroactive taxation and approved a two-month retroactivity period. "The short period of retroactivity was neither arbitrary nor unreasonable." Id. at 1084 (emphasis added).

In Replan Dev., Inc. v. Department of Hous. Preservation and Dev., 517 N.E.2d 200 (N.Y. 1987), appeal dismissed, 485 U.S. 950 (1988), the New York Court of Appeals observed that ["r]etroactivity provisions in tax statutes, if for a short period, are generally valid." 517 N.E.2d at 202 (emphasis added). The court stated that "excessive periods have been held to unconstitutionally deprive taxpayers of a reasonable expectation that they

'will secure repose from the taxation of transactions which have, in all probability, been long forgotten.'" Id. at 203 (citations omitted). The court in Replan found that the challenged tax provision's one-year retroactivity period was not excessive.

Other courts, also noting the due process constraints, have similarly approved limited retroactivity periods in tax legislation. See, e.g., Westwick v. Commissioner of Internal Revenue, 636 F.2d 291, 292 (10th Cir. 1980) (10-month retroactivity period); Gunther v. Dubno, 195 Conn. 284, 487 A.2d 1080 (1985) (six-month retroactivity period); Klebanow v. Glaser, 80 N.J. 367, 403 A.2d 897, 902 (1979) (seven-month retroactivity period); Colonial Pipeline Co. v. Commonwealth of Va., 206 Va. 517, 145 S.E.2d 227, 231 (1965) (three-month retroactivity period), appeal dismissed, 384 U.S. 268 (1966).

Under the constitutional standard, the courts also have rejected retroactivity periods that were not sufficiently limited.

For example, in Keniston v. Board of Assessors of Boston, 380 Mass. 888, 407 N.E.2d 1275, 1285 (1980), the Supreme Judicial Court of Massachusetts rejected a three-year retroactivity period. The court held that the period of retroactivity "reaches assessments levied so far back as to be oppressive and unjust under the due process

clause." Id. The court, however, approved a more limited retroactivity period that included only the fiscal year of enactment. Id.

In Washington Nat'l Arena Ltd. Partnership v. Treasurer, Prince George's County, 287 Md. 38, 410 A.2d 1060, cert. denied, 449 U.S. 834 (1980), the Court of Appeals of Maryland rejected an eight-year retroactivity period.

> The Supreme Court and this Court have held that retroactive statutes, imposing taxes or other governmental charges and reaching voluntary transactions completed significantly before the enactment of the statutes, unconstitutionally deprive persons of property or contract rights.
>
> * * *
>
> Generally, cases upholding the constitutionality of retroactive tax legislation have involved relatively short periods of unanticipated retroactivity; they have not involved periods even approaching the eight years in the present case.

Id. at 1064 n.3 (citations omitted).

In Commonwealth v. Budd Co., 379 Pa. 159, 108 A.2d 563 (1954), appeal dismissed, 349 U.S. 935 (1955), the Pennsylvania Supreme Court held a corporate income tax with retroactive application void under the Due Process Clause. The court stated: "[f]ollowing Welch v. Henry, we decide that a tax may not be retroactively applied beyond the year of the general legislative session immediately preceding

that of its enactment; to provide otherwise constitutes a denial of due process." Id. at 569 (emphasis in original).[4]

Thus, the United States Supreme Court has expounded, and the lower courts have applied, a retroactivity doctrine that permits Congress and legislatures to make tax legislation retroactive for brief periods, particularly within the calendar year of enactment. The Court's constitutional doctrine accommodates the legislative practical need for flexibility and recognizes the due process constraint against "unduly interfering with settled expectations." McKesson, 110 S. Ct. at 2252 n.23.

Under McKesson, states may use retroactive legislation as a remedy for unlawful tax discrimination if

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4 In Canisius College v. United States, 799 F.2d 18, 23-27 (2d Cir. 1986), cert. denied, 481 U.S. 1014 (1987); Wilgard Realty Co., Inc. v. Commissioner of Internal Revenue, 127 F.2d 514, 517 (2d Cir. 1942), cert. denied, 317 U.S. 655 (1942); Temple Univ. v. United States, 769 F.2d 126, 134-35 (3d Cir. 1985), cert. denied, 476 U.S. 1182 (1986), the courts also observed that due process limits the permissible retroactivity period. In each of these cases, the courts upheld "ratifying" or "curative" legislation that reached back more than the usual brief period because the retroactive legislation had merely ratified past practice. See Canisius College, 799 F.2d at 26-27; Wilgard Realty, 127 F.2d at 517; Temple Univ., 769 F.2d at 135.

For a discussion of the distinction between "curative" legislation and unconstitutionally retroactive legislation, see Justice White's opinion, dissenting from dismissal of appeal, in Van Emmerik v. Janklow, 454 U.S. 1131 (1982). Curative retroactive legislation merely ratifies past practice, curing "administrative, procedural, and technical defects unrelated to the underlying policy." Id. at 1131-1134. Thus, curative legislation does not upset settled expectations.

the remedy does not impose an unanticipated and substantially increased burden upon transactions that occurred many years ago. For example, where a state acts promptly to end unconstitutional tax discrimination and retroactively equalize the tax burden, the relatively brief retroactivity period may comport with due process, particularly if the state previously has acknowledged retroactive taxation as an available remedy. In those cases, retroactive taxation may be a reasonable remedy that does not unduly interfere with settled expectations.

2. Retroactive Taxation Would Not Be Constitutional In This Case

McKesson submits that DABT's retroactive taxation would not be constitutional in this case. DABT's proposal departs radically from the established constitutional standard. Specifically, DABT proposes to reach back and tax transactions that occurred as long as five years ago. DABT wants to tax retroactively all favored transactions under the Florida statutes from the statutes' effective date in July 1985 through this Court's mandate in May 1988, following its declaration of unconstitutionality. DABT's five-year retroactive tax is far more offensive than the qualified two-year retroactivity period in Welch, which presumably "'approach[ed] or reach[ed] the limit of permissible retroactivity.'" Welch v. Henry, 305 U.S. 134, 151 (1938). DABT's five-year retroactivity period obviously would exceed

the "short and limited periods" acknowledged in United States v. Darusmont, 449 U.S. 292, 296-97 (1981), and the limited period the Court found "not unreasonable" in United States v. Hudson, 299 U.S. 498, 501 (1937). Indeed, when so much time has elapsed, such retroactive action would be tantamount to confiscation, rather than taxation. See generally Novick & Petersberger, Retroactivity in Federal Taxation, 37 Taxes 407, 420 (1959).

DABT would impose this unprecedented five-year retroactive tax despite Florida's utter failure to provide any notice to permit taxpayers to anticipate and adjust to the enormous burden. McKesson's competitors had no reason to anticipate that the Florida legislature or the Florida courts would approve any retroactive taxation.

McKesson's competitors, who had watched the Florida legislature enact three successive tax schemes to protect their interests, had no reason to expect Florida to contradict its policy with injurious retroactive taxation. In fact, the Florida legislature, during the entire course of this litigation, has never acted to tax retroactively. Florida did not act after McKesson in 1986 filed this action, after the Florida circuit court in 1987 found Florida's tax discrimination unconstitutional, or after this Court in 1988 ultimately struck down Florida's discriminatory scheme. When the Florida legislature in 1988 again enacted a discriminatory

alcoholic beverage tax scheme, see Ivey v. Bacardi Imports, Co., Inc., 541 So.2d 1129 (Fla. 1989), the legislature eschewed any retroactive taxation. In the new act, the legislature added a "savings clause" that, if the new discrimination were held unconstitutional, would equalize the tax burden prospectively, but not retroactively. § 564.06(11), Fla. Stat. (Supp. 1990).

McKesson's competitors, who have watched the Florida courts deny any retroactive relief, had no reason to expect the courts to authorize retroactive taxation as a remedy in this case. The Florida courts, during the entire course of this litigation, never suggested that appropriate constitutional relief would include retroactive taxation. The circuit court expressly determined that Florida could provide only prospective relief. This Court affirmed the circuit court's determination and provided only prospective relief. When this Court considered the question of retroactivity or prospectivity, the Court only addressed the retroactive remedy of a tax refund. No Florida court has discussed even the possibility of retroactive taxation.

The Florida courts, of course, never considered retroactive taxation because DABT never suggested that retroactive taxation might be an alternative remedy. In 1986, when McKesson challenged the tax scheme and sought a refund, in 1987, when the circuit court found the tax scheme

unconstitutional, in 1988, when this Court held the tax scheme unconstitutional, and in 1989, when the United States Supreme Court conducted two oral arguments, DABT never advised the courts or the parties to anticipate retroactive taxation as an alternative remedy if the Florida statutes were unconstitutional. Indeed, in DABT's first brief in the Supreme Court and, more distinctly, in its second brief in the Supreme Court, DABT unequivocally declared its opposition to retroactive taxation in this case. "We do not believe," DABT stated, "that a retroactive tax on exempted sales can reasonably be included on the list of alternative remedies." Brief for Respondents on Reargument at 24. Retroactive taxation "would create more inequity than it eliminated." Id. at 26. See also Brief for Respondents at 14.

McKesson's competitors had no reason to suspect that Florida and its courts would reject an appropriate tax refund as the available remedy in this case. Florida's traditional remedy for unlawful taxation is a tax refund. See, e.g., Osterndorf v. Turner, 426 So.2d 539 (Fla. 1982); State ex rel. Palmer-Florida Corp. v. Green, 88 So.2d 493, 495 (Fla. 1956); State ex rel. Victor Chem. Works v. Gay, 74 So.2d 560 (Fla. 1954). Before McKesson even filed this action, the Florida Department of Business Regulation acknowledged the tax refund remedy for unlawful taxation. The Department, which recommended that the Governor veto the discriminatory tax

scheme that McKesson challenged in this case, stated that the tax scheme would leave Florida vulnerable to tax refund actions. (J.A. 158-65) After McKesson filed the action, DABT's counsel rejected a suggestion to place certain taxes in escrow, instead stating that Florida's refund statute would be available for the recovery of taxes. (J.A. 286)

Thus, DABT's proposal to impose retroactive taxation reaching back more than five years collides with the distributors' settled expectations in violation of due process.

DABT has answered the compelling due process challenge to its proposal with a remarkable argument. DABT in its brief asserts that McKesson's competitors should have been more attuned to constitutional concerns than the Florida legislature, the Florida courts, and DABT officials. DABT in its brief argues that McKesson's competitors easily could have foreseen that Florida's tax statutes were unconstitutional. Therefore, DABT asserts, "the argument that these distributors had settled expectations, based upon the [tax statutes], has a hollow ring." DABT's Brief at 20.[5]

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5 DABT makes two other arguments that do not actually respond to the due process challenge but rather avoid it.

First, DABT asserts that the discriminatory provisions in the unconstitutional tax statutes are severable. Therefore, DABT argues, Florida may "collect taxes, albeit retroactively, pursuant to the statute's valid remainder." DABT's Brief at 12. The fundamental problem with DABT's discussion in its brief is that it confuses extraordinary

FOOTNOTE 5 CONTINUED ON NEXT PAGE

DABT correctly notes that the United States Supreme Court found that Florida, which had enacted successive discriminatory tax statutes, could "hardly claim surprise at the Florida courts' invalidation of the scheme." McKesson, 110 S. Ct. at 2255. Florida should have known that the tax scheme it enacted was plainly unconstitutional after Bacchus. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984). Id. Therefore, the Court rejected DABT's "equitable" claim that it had relied on a presumptively valid statute. Id. DABT now has "deduced" from the Supreme Court's reasoning that because Florida may not assert reliance upon its unconstitutional tax laws to deny retroactive relief, McKesson's competitors also

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retroactive severance with ordinary prospective severance, such as this Court's injunction barring future discrimination. Id. at 12-15. Prospective severance, by definition, does not interfere with past expectations and therefore does not raise such due process concerns. Retroactive severance, of course, does interfere with past expectations and therefore does raise such due process concerns.

Second, DABT asserts that the unconstitutional preferential provisions in the tax statutes are "void ab initio." DABT's Brief at 16. Therefore, DABT asserts, the full tax "is and has always been applicable" to the favored products. Id at 18. DABT, which enforced the unconstitutional taxes until this Court's 1988 decision, cannot deny that, for all distributors, the tax rates were, and always have been, the particular rates Florida actually imposed under the applicable tax scheme. DABT's present discovery that Florida's tax scheme was void ab initio is simply beside the point. This Court has to decide whether due process permits Florida to remedy its invalid tax scheme with retroactive taxation. Indeed, later in its brief, DABT acknowledges that its "void ab initio doctrine" does not erase the due process question. Id. at 19.

may not assert reliance upon Florida's tax laws to resist retroactive taxation. DABT's Brief at 20-22. "These distributors, like Florida, 'can hardly claim surprise at the Florida courts invalidation of the Liquor Tax scheme.'" Id. at 21.

DABT's error in its reasoning is obvious. Florida, not the distributors, imposed the unconstitutional law. The Florida legislature enacted the law, DABT implemented the law, and DABT enforced the law. The distributors, accordingly, followed the law, paying the tax that DABT commanded. Every month, beginning in August 1985, DABT informed McKesson's competitors by official memoranda what their preferential tax rates would be for the following month.[6] Even after this Court held those preferential tax rates unconstitutional in this case, DABT ordered the distributors to continue paying the special rates that DABT had established until this Court issued its mandate.

In light of Florida law and DABT's actions, DABT's assertion that McKesson's competitors "can hardly claim to have been lulled into a sense of reliance upon the invalid provisions" does not make sense. DABT's Brief at 20. The Supreme Court rejected only Florida's asserted reliance upon

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6 McKesson has attached a copy of these memoranda to this brief as Appendix A. This Court may take judicial notice of these official actions in accordance with section 90.202 of the Florida Evidence Code.

its own invalid law. McKesson's competitors, however, had no choice under Florida law but to rely upon the tax scheme that Florida imposed and DABT enforced.

DABT's assertion, if valid, would have taxpayers ignore this Court's instruction that "an act of the Legislature is presumed constitutional until invalidated by a final appellate decision." Deltona Corp. v. Bailey, 336 So.2d 1163, 1166 (Fla. 1976). DABT implicitly asks this Court to reverse Florida's traditional rule that citizens may rely upon the constitutionality of a Florida statute. See Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433, 435 (Fla. 1974). Instead, ahead of the courts, Florida taxpayers would have to determine on their own the constitutionality of tax laws and then make economic decisions on the basis of their own, rather than the courts', determinations.

DABT further compounds the error in its reasoning. DABT apparently argues that since McKesson's competitors should have known that the tax rates Florida imposed were unconstitutional, they also presumably should have known that, more than five years after implementing the discriminatory tax, DABT would propose retroactive taxation to remedy the discrimination.[7] DABT implies that McKesson's competitors did

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7 As support for its conclusion, DABT observes that McKesson's competitors probably employed lobbyists. DABT Brief at 20 n.6. Apparently, DABT believes that distributors, who, as the federal Constitution allows, employ lobbyists to petition legislators, are expected to
FOOTNOTE 7 CONTINUED ON NEXT PAGE

not have settled expectations which DABT's proposal would breach because no court had reviewed the challenged tax scheme. DABT's argument ignores that each Florida court that considered McKesson's challenge, including a unanimous Florida Supreme Court, held that no retroactive relief of any kind was required in this case. Further, no Florida court addressed retroactive taxation because no party, including DABT, ever suggested that retroactive taxation would ever be an alternative remedy.

DABT's defense of its retroactive taxation proposal -- that DABT will not unduly interfere with settled expectations because the distributors had no settled expectations -- thus relies on a series of remarkable, and erroneous, propositions. McKesson's competitors should have concluded, as early as July 1985, when DABT implemented the alcoholic beverage tax scheme, that the tax scheme was not valid. McKesson's competitors should have ignored the Florida circuit court's and a unanimous Florida Supreme Court's determination that no retroactive relief was required to remedy Florida's unlawful tax scheme. McKesson's competitors should have overlooked Florida's traditional tax refund remedy and ignored DABT's explicit rejection in the United States

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anticipate United State Supreme Court decisions. In other words, distributors with lobbyists are supposed to predict what the Florida legislature and courts did not.

Supreme Court of retroactive taxation as an alternative remedy. They, therefore, should have anticipated that the United States Supreme Court would require retroactive relief and that DABT would, in 1990, seek to impose a retroactive tax on the sales they made as early as 1985.

The Supreme Court, citing Welch, has stated "[w]hether or not a person who could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct has been significant" in retroactive tax cases. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 n.16 (1976). McKesson's competitors necessarily made sales commitments and pricing decisions in light of their anticipation of Florida's tax treatment of their daily transactions. See Novick & Petersberger, Retroactivity in Federal Taxation, 37 Taxes 407, 420 (1959).

Obviously, DABT's retroactive taxation would disrupt the distributors' settled expectations about their economic decisions. The distributors, for example, considered the applicable Florida tax rates on particular products before they even decided to sell the products. The distributors factored the Florida tax rates into their decisions about what prices to charge. All the distributors' decisions, including their decisions about wages, dividends, and investments, necessarily reflected their understanding of their costs,

including Florida taxes. DABT, however, now proposes to change the applicable tax rates retroactively, long after the decisions and sales were made and long after the distributors could reasonably have adjusted to an additional tax burden.

DABT's proposal would retroactively increase, many times over, the Florida tax burden upon the distributors' products. This Court does not need further evidence to recognize the harsh dislocation that DABT's proposal would create. The Court need only look at the former tax scheme. For example, in September 1985, the preferred tax rate for low-alcohol wines was $0.00. (Appendix A, 8/23/85 Memorandum) DABT's retroactive tax proposal would now, five years later, increase the tax on the favored low-alcohol wines sold in September 1985 from $0.00 to $2.25 per gallon. See § 564.06(1), Fla. Stat. (1985). During the same month, the preferred tax rate for wine coolers was $0.40 per gallon. (Appendix A, 8/23/85 Memorandum) DABT's proposal would increase the tax on the favored wine coolers sold in September 1985 from $0.40 per gallon to $2.25 per gallon. See § 564.06(1), Fla. Stat. (1985).

Orlando Holdings, Inc.'s amicus curiae brief in this Court in this case illustrates the devastating impact DABT's retroactive tax proposal necessarily would have on distributors who engaged in transactions years ago. Orlando Holdings, Inc. simply applies DABT's proposed retroactive

taxes to its actual sales of favored products years ago, and concludes that DABT's proposal would convert the company's profitable sales into substantial losses. Orlando Holdings reports that DABT's enormous, unanticipated taxes would force the company into bankruptcy. See Brief of Amicus Curiae Orlando Holdings, Inc.

DABT, in fact, has acknowledged the harsh and oppressive consequences of retroactive taxation as a remedy in this case. In its first brief in the United States Supreme Court, DABT observed that "it would be impractical in most cases, as well as exceedingly harsh," to "demand back taxes from exempted individuals." Brief for Respondents at 14. DABT reiterated its opposition to retroactive taxation in its second brief in the Supreme Court.

> We do not believe, however, that a retroactive tax on exempted sales can reasonably be included on the list of alternative remedies. As an initial matter, it is by no means clear to us that a retroactive tax under the circumstances here would be constitutional.
>
> * * *
>
> We cannot say with any certainty whether a retroactive tax here would be "so harsh and oppressive" as to violate due process. But it would, in our opinion, be harsh and oppressive.

Brief for Respondents on Reargument at 24-25. DABT concluded that a retroactive tax "would create more inequity than it eliminated." Id. at 26.

The United States Supreme Court's opinion requires this Court to ensure that Florida erases its discrimination against interstate commerce. Therefore, DABT cannot argue that, under its current proposal, DABT could exempt any distributors from full retroactive taxation upon their demonstrating the obvious harsh and oppressive consequences of DABT's remedy. Under the Supreme Court's opinion in this case, requiring a clear and certain remedy that fully eliminates Florida's discrimination, DABT may not avoid a tax refund to McKesson by claiming that DABT will use a retroactive tax but will later determine whether to collect such a tax from all competitors. Under the Supreme Court's remand, this Court must order a refund unless DABT establishes that DABT can, and will, collect the discriminatory taxes from all competitors without a violation of due process.[8]

DABT has not even satisfied its burden of demonstrating that retroactive taxation is feasible in this case. McKesson, which suffered the discriminatory taxation

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8 In its opinion, the Supreme Court noted that some of McKesson's competitors may no longer be in business. McKesson, 110 S. Ct. at 2252 n.23. The Court observed that a good-faith effort to impose retroactive taxation would probably not be invalid merely because tax collectors could not collect from a few defunct businesses. See id. The Court, however, plainly did not hold that DABT could impose retroactive taxation as an alternative remedy but deliberately fail to collect the taxes from competitors that are still in business.

cannot be required "to assume the burden of seeking an increase of the taxes which the others should have paid." Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931) McKesson cannot "be remitted to the necessity of awaiting such action by the state officials upon their own initiative". Id. McKesson challenges DABT's ability to collect the tax. In view of the passage of more than five years, DABT cannot undertake a credible retroactive tax collection effort. For example, Florida law requires alcoholic beverage manufacturers and distributors to retain sales records for only three years. § 561.55, Fla. Stat. (1987).

Finally, DABT cannot support its unprecedented retroactive taxation proposal by citing Johnson Bros. Wholesale Liquor Co. v. Commissioner of Revenue, 402 N.W.2d 791 (Minn. 1987). The Minnesota court, which did not cite the Supreme Court's standard in Welch v. Henry, 305 U.S. 134 (1938), approved retroactive taxation as a remedy for an unconstitutional alcoholic beverage tax. The Minnesota case is constitutionally different from the Florida case because Minnesota only had to collect $1,658 by its retroactive tax. 402 N.W.2d at 792. Minnesota apparently acted immediately to impose its retroactive tax after a lower court invalidated its tax law. Id. Thus, Minnesota's de minimis retroactive taxation was neither harsh nor oppressive.

By contrast, DABT has estimated that it would have to collect $8.2 million by its retroactive tax, not including interest. DABT's Brief at 10 n.4. Further, DABT has waited three and one-half years after the lower court invalidated its tax law to announce its retroactive tax proposal, without any previous suggestion that DABT would propose such a remedy. DABT cannot equate its proposed action with Minnesota's action.

II. DABT'S RETROACTIVE TAXATION WOULD VIOLATE THE FLORIDA CONSTITUTION

DABT's proposed retroactive tax also would violate the Florida Constitution's Due Process Clause.

This Court, in McCord v. Smith, 43 So.2d 704 (Fla. 1949), articulated a due process standard under the Florida Constitution for reviewing retroactive legislation. The Court stated:

> [a] retrospective provision of a legislative act is not necessarily invalid. It is so only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, in connection with transactions or considerations previously had or expiated.

Id. at 708-09 (emphasis added). In this case, DABT's proposed retroactive tax plainly imposes a new obligation in connection with previous transactions.

In City of Naples v. Conboy, 182 So.2d 412 (Fla. 1965), the Court considered whether a city could reassess

property that had been unlawfully undervalued during the previous three years. The Court concluded that the city could reassess only prospectively, not retroactively. Id. at 417. The Court held that retroactive reassessment would unfairly interfere with the particular taxpayers' settled expectations, upon which they had relied. Id. at 418.

> The city has affirmatively acted in assessing taxes as agreed under the contracts with the various developers over a period of years and it is reasonable to believe that the developers have long acted in reliance thereupon. Where the taxing authority is in full possession of all pertinent facts it is better to impose the burden upon it to exercise care than to create uncertainty as to the tax status of property for prior years.

Id.

More recently, in State Dep't of Transp. v. Knowles, 402 So.2d 1155 (Fla. 1981), this Court addressed a due process challenge to retroactive legislation. The Court observed that "[u]nder due process considerations, a retroactive abrogation of value has generally been deemed impermissible." Id. at 1158 (footnote and citations omitted). In Knowles, the Court distinguished the effects of retroactivity in that case from the "merely . . . procedural adjustment of . . . remedies" in Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978). 402 So.2d at 1158.

As in Knowles, in this case, DABT's "abrogation" -- or interference with settled expectations -- outweighs any public interest in retroactive taxation. See State Dep't of Transp. v. Knowles, 402 So.2d 1155, 1158 (Fla. 1981). DABT's five-year retroactive tax proposal might save Florida the expense of a tax refund. However, the action would cost Florida taxpayers their constitutional right to accrue, and act upon, settled expectations in reliance upon Florida law, policy, and practice.

DABT's proposed retroactive tax also would violate the Florida Constitution's Contract Clause.

DABT's proposed retroactive taxation would severely diminish, if not wholly abrogate, the value of sales contracts that McKesson's competitors previously executed. The substantial, unanticipated retroactive tax would necessarily convert formerly profitable transactions into unprofitable transactions. According, DABT's proposal would run afoul of the Contract Clause. "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).

This Court recently addressed a Contract Clause challenge to the retroactive operation of a Florida tax on construction contracts. In re Advisory Opinion to the Governor, 509 So.2d 292 (Fla. 1987). The Court opined that

the prospective tax burden was permissible but the retroactive tax burden was facially unconstitutional.

> Once enacted into law, contractors were placed on notice that they should take their upcoming tax burden into consideration when entering into construction contracts after May 1, 1987. The act, however, does not limit its effect to this permissible burden. Instead, by retroactively placing a tax burden upon all construction contracts that are incomplete by June 30, 1988, and thereby adding an unknown, uncontemplated cost, it retroactively burdens contracts that were in existence before any party could have reasonably been on notice of the impending tax.

Id. at 314.

Similarly, in this case, DABT's proposed retroactive taxation would impose an uncontemplated cost upon sales contracts without any prior notice. McKesson's competitors obviously could not take the unanticipated tax burden into consideration when entering into the contracts.

As the Justices stated in the Advisory Opinion, citing Dewberry, "[a] statute which retroactively turns otherwise profitable contracts into losing propositions is clearly . . . a prohibited enactment." Id. at 314-15.

III. FLORIDA'S REFUND TO MCKESSON OF THE UNCONSTITUTIONAL TAXES IS THE ONLY CLEAR AND CERTAIN CONSTITUTIONAL REMEDY

In light of the United States Supreme Court's unanimous opinion in this case, McKesson is entitled to a refund of "the difference between the tax it paid and the tax it would have been assessed were it extended the same

rate reductions that its competitors actually received." McKesson, 110 S. Ct. at 2252. Retroactive taxation is not available to Florida as an alternative remedy in this case. Florida has enacted three successive discriminatory alcoholic beverage tax statutes, each of which violated the United States Constitution. Florida may not now impose a fourth unconstitutional tax -- DABT's five-year retroactive tax proposal -- to avoid providing a clear and certain constitutional remedy for its unconstitutional taxation.

McKesson acknowledges that the United States and Florida Constitutions will require Florida to make a substantial refund to McKesson.[9] The Supreme Court's opinion in this case, however, is clear that Florida cannot deny a tax refund to McKesson because it does not want to spend the money.

> Just as a State may not object to an otherwise available remedy providing for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful, so also Florida cannot object to a refund here just because it has other ideas about how to spend the funds.

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9 However, DABT's estimate of the cost of providing a tax refund is blatantly misleading. DABT in its brief refers not only to a McKesson claim but also to "outstanding refund claims of $298,020,159." DABT Brief at 10 n.4. DABT apparently has added the face amount of any alcoholic beverage excise tax refund claims, without distinguishing between claims purportedly seeking a refund of total taxes paid and claims purportedly seeking a refund of any discriminatory taxes paid. To McKesson's knowledge, DABT has never conceded the validity of any other distributors' claims, and no court has ever adjudicated their merit.

McKesson, 110 S. Ct. at 2257 n.35.

Moreover, as the United States Supreme Court recognized, Florida -- and DABT in particular -- failed to take several steps that might have reduced the ultimate cost of a tax refund. Id. at 2254-2255, 2257. The Court noted that --

> [f]or example, even after the Florida trial court held that the Liquor Tax violated the Commerce Clause and enjoined the tax preferences for local products, the State did not join petitioner's motion to vacate the stay automatically imposed pending appeal, thus continuing the unconstitutional tax assessment for an extra 11 months . . . . The State also opposed the suggestion that it place into a separate escrow account the discriminatory portion of taxes collected during this period of time, on the ground that "[t]here is a statutory mechanism in place . . . allowing for refunds."

Id. at 2255 n.29.

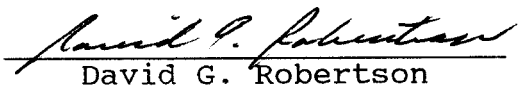
Florida, of course, retains the right to finance the cost of a tax refund to McKesson by a measured prospective, and nondiscriminatory, increase in alcoholic beverage taxes. The Supreme Court's opinion only prevents Florida from continuing to evade its obligation to return to McKesson the unconstitutional taxes Florida collected.

CONCLUSION

McKesson respectfully asks this Court to remedy Florida's violation of the Constitution by awarding McKesson a tax refund of "the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received." McKesson, 110 S. Ct. at 2252.

Dated: September 20, 1990

Respectfully submitted,

By 
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