SUPREME COURT OF FLORIDA

IN RE)

ADVISORY OPINION OF THE GOVERNOR) CASE NO. 70,533
REQUEST OF MAY 12, 1987)

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REPLY BRIEF OF

FRANK J. CARVER, JOSEPH B. CARR, MAHLON HENDLEY AND OTHERS.

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REPLY BRIEF OF CARVER, CARR AND HENDLEY.

The main theme of our Initial Brief drew such little fire from the Governor and Legislature -- no comment at all, in fact, on our dominant premise -- that we suppose our argument obscured the stark fact of history: Not in years, if ever, has a court has been called on to determine the constitutionality of a privilege tax on the noncommercial exercise of a right of citizenship that is expressly protected by the Constitution -- the right of access to court and to the redress afforded there for injury. As precedent only the poll tax cases come close.

The Governor and Legislature neither concede nor contest this our historical premise. Nowhere in the Union now, they will surely agree, does a government seek to tax, let us say, speech itself, or voting. The right of access to court is, in Florida, equivalently protected by the Constitution, and access to a lawyer is necessary to that end. The Governor and Legislature should declare themselves: is not the incidence of this tax upon the exercise of a constitutional right?

We are past debating the Justices' decision to answer the Governor's questions in this proceeding. The Court is

capable of answering comprehensively and decisively. We wish, if we are able, to contribute coherence to that effort: to contribute, perhaps, an organizing theme for several of the questions to be addressed by the Justices.

The organizing theme put forward here is that the legal and practical incidence of this tax falls not on businesses that provide the taxed services, but on those citizens who need those services. That highly unique circumstance has very definite constitutional consequences, which the Governor and the Legislature have plainly overlooked.

I.

Let no consideration of alleged fiscal extremity justify the imposition of a tax on constitutional rights: any extremity results from deliberate public choices.

The Legislature wishes the Court to know first of all, and at length, that Florida's "tax base [is] inadequate to meet its obligations," its "'tax base is one of the most restrictive in the country.'" Leg. Br. p. 9, pp. 1-20. The implication of this seems to be that fiscal exigencies dictate this unusual tax.

The Justices should not agree. The Court should accept no responsibility to weigh the purported fiscal extremity, and these cries of necessity, against the rights this tax would burden. If Florida's tax base is restrictive, it is because the Legislature has sought so assiduously to avoid enacting anything that looks like a personal income tax.

Unique among the States, Florida has been content since 1924, through various constitutional revisions, to prohibit what

the political leadership have regarded as a scourge: the personal income tax. All states except nine levy such a tax, broadly, upon personal income. None of the nine except Florida prohibits the tax constitutionally. [1]

Avoiding that political heresy has become so much an article of faith that the Legislature dares not risk a broad-based wages tax such as its eminent counsel Professor Jacobs assures is not a prohibited tax on "personal income." J. Jacobs, "Florida's New 'Income' Tax," 14 Fla. St. U. L. Rev. 491, 501 (1986): [2]

> Essentially, the argument here is that an income tax, as a matter of constitutional law, must reach both earned income and investment income, the two types of "classical" income. A tax which reaches only earned income or only investment income is not a true income tax.

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1 Commerce Clearinghouse, Inc., State Tax Guide, 1987, pp. 262-63. Of the seven states that do not levy a personal income tax -- Alaska, Florida, Nevada, South Dakota, Texas, Washington and Wyoming -- Florida alone has that constitutional prohibition. Art. VII, § 5, Fla. Const. Article XI § 2, South Dakota Const., and Art. VIII § 1, Texas Const., specifically grant the state government power to levy a tax on income. Art. X, Nevada Const., Art VII, Washington Const., and Art. XV, Wyoming Const. are silent on the subject. Alaska had a personal income tax until it was repealed by § 10, Ch. 1, SSSLA, 1980 (retroactive to 1979). Art IX, Alaska Const., is silent on the subject. Both New Hampshire and Tennessee levy a personal income tax, but it is limited to income from interest and stock dividends. Prentice-Hall, Inc., State and Local Taxes, ¶55.102 (New Hampshire) and ¶55.100 (Tennessee) 1986.

2 Professor Jacobs argues that Florida's antipathy to the personal income tax "has its roots in the federal constitutional law of income taxes" and that the 1924 amendment prohibiting same was "intended to prohibit exactly what Congress was prohibited from doing prior to the sixteenth amendment: imposition of a . . . broad-based tax reaching both earned income and investment income." Op. cit. at 501, 502.

If the Legislature believes that argument is untenable, for reasons legal or political, the alternative of a a broad-based receipts tax, on all sorts of businesses, is obviously tenable. State ex rel. McKay v. Keller, 140 Fla. 346, 191 So. 542 (1939), struck down Tampa's gross receipts tax on professionals, but that ipse dixit [3] was at odds with City of Lakeland v. Amos, Justice Buford thought, [4] and Keller has not been critically examined for more than a generation.

We quite agree with able counsel for the Legislature, therefore, that (Leg. Br. p. 59):

> The vitality of Keller was called into question by Gaulden v. Kirk [47 So.2d 567 (Fla. 1950)], and, we would submit, critically undermined by this Court's decision in Volusia County Kennel Club v. Haggard, 73 So.2d 884, 886-87 (Fla. 1954), holding that a state

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[3] The basis for the Keller holding is hardly clear. 191 So. at 547:

> It is not difficult to distinguish between [sic] an excise tax or tax on the privilege of engaging in an occupation . . . and hold that they are not controlled or fall within the inhibitions of Section 11 of Article IX . . . . The relator is an attorney and the receipts, either net or gross, cannot be classified as an excise tax, sales tax or tax on the privilege of practicing law within the meaning of Section 11 of Article IX whereby it is unlawful to levy on the income of citizens . . . . The learning and legal ability of an attorney are among his business assets and differ materially from capital invested in a merantile business.
>
> [The Tampa ordinance] is in contravention of and falls within the inhibitions of Section 11 of Article IX . . . .

[4] 191 So. at 548 (Buford, J., dissenting.) City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744, 747 (1932) upheld a state tax on the gross receipts of "'all corporations, firms and individuals * * * receiving payment for electricity for light,' etc. . . ." The tax was unequivocally upon receipts, for the law "does not require the tax to be specifically collected by the selling corporation from the purchaser. . . ."

gross receipts tax upon dog tracks "is not an income tax."

So: if Chapter 87-6 were instead, effective Monday June 22, the broad-based personal earnings tax that Professor Jacobs distinguishes from the "classic" personal income tax, the public would gain tax revenue uniformly from all the lawyers including Professor Jacobs, whether privately or publicly employed, who will earn fees or wages by addressing this Court in argument.

And if the tax were on gross receipts such as New Mexico levies on lawyers and doctors and virtually all others "For the privilege of engaging in business," [5] the public would derive tax revenue, again with a high degree of uniformity, from all the private firms whose lawyers' arguments to this Court will earn fees. The fees their firms receive would be taxed, not the compensation the fees made possible for lawyer-employees. Section 7-9-17, NMSA. [6]

The same would be true if this tax, effective Monday June 22, were like Hawaii's. Hawaii levies and annually collects "privilege taxes against persons on account of their

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[5] Fragments of New Mexico's Ch. 7, Art. 9 "Gross Receipts and Compensating Tax Act" are found in Appendix C to our initial brief (blue paper). The tax is unequivocally imposed "For the privilege of engaging in business," § 7-9-4A, NMSA, on "gross receipts" including any money received "from performing services in New Mexico." § 7-9-3F, NMSA. Though the receipts of government and its agencies are exempt, § 7-9-13, not so the receipts by private firms from government, for such services as the Governor and Legislature engaged special counsel in this case.

[6] Sec. 7-9-17, NMSA: "Exempted from the gross receipts tax are the receipts of employees from wages, salaries, commissions or from any other form of remuneration for personal services."

business" in Hawaii, Hawaii Rev. Stat., § 237-13 (1985), and specifically:

> (8) Professions. Upon every person engaging or continuing within the State in the practice of a profession, including those expounding the religious doctrines of any church, there is likewise hereby levied and shall be assessed and collected a tax equal to four per cent of the gross income on the practice or exposition.

The Hawaii tax, if effective here next Monday, would offer no exemption or exception to the private lawyers whom the Governor and the Legislature have engaged and will pay for arguments against the constitutional position of citizens such as Carver, Carr and Hendley. Were this Hawaii's tax, "special counsel" to those governmental branches would pay a tax on their receipts as would all others who receive fees for like service.

But the tax enacted by the Legislature and the Governor being instead what it is -- not a personal earnings tax as defended by Professor Jacobs, not New Mexico's nor Hawaii's broad-based "gross receipts" tax -- Florida will gain no tax revenue from the salary paid any State-employed lawyer who addresses the Court; [7] for the same reason, no revenue from the compensation of staff counsel who appear for The New York Times Company, or of CBS Inc., National Broadcasting Company, Inc., Miami Herald Publishing Company, or Proprietary Association,

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[7] Section 3 of Ch. 87-6 (Laws of Florida, pp. 14, 15) enacting Sec. 212.0592(2): **"Exemptions from sales or use tax on services.** -- There shall be exempt from the tax on the sale or use of services imposed . . . the following: . . . (2) Services by an employee to an employer measured by the compensation or remuneration paid to an employee . . . ."

Inc.; and, for another reason, no tax revenue from the fees paid by the Governor and the Legislature to their private counsel -- their compensation for arguing to sustain the tax against the likes of Carver, Carr, and Hendley. 8/

Carver, Carr, and Hendley therefore understand all too well what the Legislature's special counsel means when he says, Leg. Br. 18, "The best tax is always the one paid by the other fellow." They understand that they shall pay this tax on the value of their lawyer's services, but that others employing lawyers for the same purpose, because their more constant need for lawyers is deemed more privileged, will not pay.

This aberration demonstrates why the income tax is the virtual unanimous modern choice, fair and uniform, for the funding of governments. The gross receipts tax upon the privilege of doing a professional or commercial business in the state, is another broadly-based choice -- and would be payable alike by the lawyers employed by Carver, Carr, and Hendley, and by those specially employed by the Governor and the Legislature.

Until Florida's political leadership gains the will to risk the universal taxation of those who exercise the privilege of engaging in businesses and professions, the Governor's and Legislature's lamentations about Florida's "narrow tax base," and scarce tax revenues, will have a hollow ring. At any rate,

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8 Section 14 of Ch. 87-6 (Laws of Florida, p. 68) creating § 212.08(6): **"Exemptions; political subdivisions.--** There are also exempt from the tax imposed this chapter sales made to the United States government, the state, or any county, municipality, or political subdivision of this state when payment is made directly to the dealer by the governmental entity. . . .

the claimed exigency should be afforded no influence over the constitutional objections of those who are called on to pay while others are not, though they are equally or better able to pay.

II.

No other government in the Union purports to tax the citizen's necessity for legal services.

Despite the showing in our main brief, the Legislature persists in the Department of Revenue's flawed analysis during the session (Initial Brief p. 7 et seq., App. B), and says Florida like New Mexico and Hawaii is taxing "some industries and professions" who "maintained that they were immune from taxation and threatened suits." The Legislature says, Br. pp. 18-19, fn. 40:

> In April of 1987 the President of the Bar said in an address to a Senate committee:
>
> > What you're now considering is a tax that's never been enacted in these United States for over 200 years.
> >
> > In the 211 years of our history there never has been a tax on legal services...
>
> The **Florida Bar News**, May 1, 1987, at 1. This statement may have inadvertently overlooked New Mexico, N.M.Stat.Ann., ch 7-9-3 (1978), and Hawaii. Haw.Rev.Stat. § 237-2,3,7 (1985). Both states tax attorneys' fees. . . .

New Mexico and Hawaii, we repeat, "tax attorneys' fees" just as they tax the receipts by most other professionals for the privilege of practicing their professions; New Mexico and Hawaii tax receipts, broadly and uniformly. The Legislature is persistently and fundamentally incorrect in comparing its tax product to that of those enlightened states.

Florida alone -- not New Mexico, not Hawaii, not South Dakota, [10] not any state -- places the legal and the economic or practical incidence of its excise tax on legal services upon the citizen requiring them. Unlike Florida's sales tax previously, its tax on the cost of services is not imposed on the business privilege of rendering that service. Section 212.07(1)(a) requires that Florida's tax be collected from the person who needs and pays for the services.

Certain other states that impose a sales tax on various services place both the legal and practical incidence of their tax on the consumer: Iowa does, and Oklahoma and Minnesota. [11] But those states do not impose their sales or service taxes on the rendition of legal services. Florida alone, among those states, tax necessary legal services to him who needs them.

In short, the other states invoked as precedent by the Department of Revenue (initial brief, App. B) and now by the Legislature itself (brief, pp. 18-19, fn. 40), forthrightly tax the lawyers for their business privilege, if they tax legal services at all. No state except Florida taxes citizens in need

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[10] New Mexico: see United States v. New Mexico, 581 F.2d 803 (10th Cir. 1978), approved 455 U.S. 720, 738, 102 S.Ct. 1373, 1381, 71 L.Ed. 2d 580, 594 (1982). South Dakota allows, it does not require, payment of the tax by the person in need of the service. S.D. Codified Laws § 10-45-22, (1982). Hawaii's statute being silent is similarly permissive. Hawaii Rev. Stat. Ch. 237, (1985).

[11] Retailers in Iowa, Oklahoma and Minnesota must add the service tax to the consideration charged for the services. Iowa Code Ann. § 422.48(1)(West 1971); Okla. Stat. Ann. Tit. 68, § 1361 (West Supp. 1986-87); Minn. Stat. Ann § 297A.03 (West 1972).

of legal services on account of their need, and certainly none do so while exempting governmental and commercial entities who are pleased to employ lawyers full time to meet their perceived needs.

III.

Because the Florida Constitution expressly protects the right of access to court, necessarily by means of a lawyer, a tax laid upon that right is (a) per se invalid or (b) invalid if selective of rights preferred and not preferred.

Article I, Section 21, secures redress for injuries and does so by assuring access to "open" courts:

> **Access to courts.--** The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

The services of a lawyer are not a matter of convenience for access to courts; they are a necessity, virtually so by law, absolutely so as a practical matter. "Even those who believe lawyers are an evil usually concede that lawyers are a necessary evil." 12/ The equation: **access to courts = access to lawyers**, if it is not an alignment of identical constitutional values, is very nearly so. To employ as metaphor the First Amendment speech and press vocabulary in which others here are debating, the right to access a lawyer is at least **penumbral** to the constitutional right of access to courts.

As the Supreme Court said in Griswold v. Connecticut, 381 U.S. 479, 482-84, 85 S.Ct. 1678, 14 L.Ed.2d 510, 514 (1965),

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12 C. Kuenzel, "Attorneys' Fees in a Responsible Society," 14 Stetson L. Rev. 283, 289 fn. 16 (1985), in the course of criticizing contingent fee compensation of lawyers.

the individual's right to buy and read a newspaper is very near, in the constitutional hierarchy, the right of speech and press:

> The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . . Without those peripheral rights the specific rights would be less secure. [citations omitted]
>
> . . .
>
> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

See also Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L.Ed.2d 542, 549 (1969).

It would be a mocking Article I, Section 21, in other words, if the right of Carver, Carr, and Hendley to access "open" courts for redress of their injuries "without sale, denial or delay," were burdened with State-imposed impediments to their employment of counsel. The tax levied here is such an impediment, and it is unconstitutional whether considered (a) a per se infringement of the right of access to courts or (b) an infringement because, with denigrating effect upon the right of access, the Legislature separates for favored and disfavored tax treatment what that Branch considers to be essential and nonessential rights.

The tax is unconstitutional as burdening one's constitutional right per se.

Let us imagine that the Florida Legislature is pressed on all sides by fiscal demands and (what it considers to be) its

constitutional disability to impose a gross receipts tax broadly on the privilege of individuals doing business here. On lawyers, on doctors, on newspapers, advertisers, restaurateurs and so on.

Imagine that the Legislature determines in that exigency that it shall impose a tax on the right of one to speak. The right of one to vote. The right of one not to give evidence incriminating himself. Of such a thing the Supreme Court said quite some time ago -- again we use First Amendment vocabulary as metaphor -- in Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 112, 63 S. Ct. 870, 874, 87 L.Ed. 1292 (1943):

> We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.

Having posed that dichotomy with ringing clarity, the Court went on to invalidate the tax so imposed,

> . . . for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment.

The decisive question, of course, is whether the activity where the excise or "privilege" tax has its incidence -- where its burden falls as a legal and practical matter -- is really a "privilege" or instead a protected right.

The right to vote in state elections, for example, "is nowhere expressly mentioned" in the United States

Constitution. Harper v. Virginia State Board of Elections, 383 U.S. 663, 664, 86 S. Ct. 1079, 16 L.Ed.2d 169, 171 (1966). It was therefore necessary for United States courts to speak of that "right" as associated with the "freedom of speech", which is of course expressly protected by the First Amendment hence by the Fourteenth. Harper, id. at fn. 2, so quoted Judge Thornberry writing for the three-judge district court in United States v. Texas, 252 F.Supp. 234, 254 (W.D.Tex. 1966), aff'd sub nom. Texas v. United States, 384 U.S. 155, 86 S. Ct. 1383, 16 L.Ed.2d 434 (1966):

> Since, in general, only those who wish to vote pay the poll tax, the tax as administered by the State is equivalent to a charge or penalty imposed on the exercise of a fundamental right.
>
> . . . If the State of Texas placed a tax on the right to speak at the rate of one dollar and seventy-five cents per year, no court would hesitate to strike it down as a blatant infringement of the freedom of speech. Yet the poll tax as enforced in Texas is a tax on the equally important right to vote.

The right of Carver, Carr, and Hendley to unimpeded access to "open" courts, by means of employing a lawyer to seek their redress there, is expressly protected by the Florida Constitution, Article I, Section 21. That right may no more be burdened by a "privilege" tax than may those other rights that are constitutionally secured.

Let us contrast, at yet another level of analysis, the claims made in this proceeding by certain others, invoking constitutional immunities. As is manifest, the news media and advertising industry assert that their businesses may not

constitutionally be burdened by this sales or service tax. They claim this protected status under the First Amendment of the United States Constitution and Article I, Section 4 of the Florida Constitution.

We abstain from that dispute except as necessary to point out the difference between a tax levied directly on the consumption and enjoyment of a constitutional right, and a tax levied uniformly on business privileges not excluding those whose business deals in expression protected by the First Amendment.

The gross receipts tax imposed by New Mexico on the building contractor who dealt with the Mescalero Apache Tribe, for example, was simply a universal tax on the privilege of doing business. As the Tenth Circuit said, "It is something everybody pays," so the tax did not burden, as such, the superior federal constitutional interest in Indian affairs. Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967, 969, 971-72 (10th Cir. 1980), cert. den. 450 U.S. 959, 101 S. Ct. 1417, 67 L.Ed.2d 383 (1981).

Similarly, it would appear that a nondiscriminatory tax falling on businesses that deal in First Amendment expression, instead of in Apache construction needs, does not burden the First Amendment; not unless it treats the Press differently from other businesses on which the tax falls, Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), or discriminates against certain segments of the press. Arkansas Writers'

Project v. Ragland, ____ U.S. ____, 55 U.S.L.W. 4522 (April 22, 1987).

In contrast, then, to those who object to Florida's tax as impermissibly burdening their commercial traffic in protected First Amendment expression, no commercial enterprise of any sort is implicated in the assertion by Carver, Carr, and Hendley of a right to access to courts in Florida, unimpeded by the burden of this tax.

By choosing to tax the enjoyment of particular services including legal services, rather than the privilege of carrying on a business or professional practice for the delivery of such services, Florida places the legal and practical incidence of its tax where no other government in the Union places it: upon the right of access to courts.

The tax cannot be rationalized, either in legal or practical incidence, as a nondiscriminatory tax upon an aspect of the "privilege" of conducting commercial business in Florida. The tax falls per se on the exercise of a constitutional right. The tax is per se unconstitutional.

If it is not per se unconstitutional, the tax discriminates irrationally against protected services.

As we have seen, the Florida Constitution in the context of legal services protects the citizen-client's right of access to the courts, not the privilege of his lawyer to engage in the business of lawyering.

As a business enterprise, the legal profession in Florida has no more constitutional protection against taxation

than do lawyers in New Mexico and Hawaii who pay a tax on their receipts for the privilege of lawyering. But without like precedent in by the United States Constitution, the Florida Constitution by Article I, Section 21 declares the means of access to the courts as, in tax parlance, an "essential service."

The Legislature is not at liberty to disregard the hierarchy of services protected under the Constitution, taxing those to needy citizens while substituting its own categories of more-favored "essential" services. The Legislature has undertaken to exempt from its tax the following "essential" services:

° all medical services described in Major Group 80 of the SIC Code, ranging from physicians of all sorts, to dieticians and nutritionists, through nurses, and laboratories, etc., Ch. 87-6, Sec. 212.0592(12);

° the services of insurance agents and brokers described in SIC Major Group 64, including fire loss appraisals and patrol services, § 212.0592(13);

° finishing schools, aviation and commercial art schools, and other trade schools in SIC Major Group 82, § 212.0592(9);

° the services provided by a host of membership organizations including their bars and restaurants, SIC Group 8641, § 212.0592(17);

° trucking services including garbage, package and parcel delivery, log trucking and so on, SIC Group 4212, § 212.0592(19);

° and of course, the celebrated barber shop, barber college and beauty culture schools, in SIC Group 7231, 41, § 212.0592(40).

These exemptions the Legislature characterizes as "transactional" or "user" policy exemptions. Leg. Br. pp 4-5. Having embarked upon a taxing scheme that burdens or exempts access to services based on policy preferences, the Legislature is not at liberty to ignore the policy preference expressed by the Constitution, Article I, Section 21. As this Court recently stated in Smith v. Department of Insurance, So.2d , 12 F.L.W. 189, 192 (Fla. Apr. 23, 1987),

> There are political systems where constitutional rights are subordinated to the power of the executive or legislative branches, but ours is not such a system.

Our initial brief has adequately demonstrated, and we do not here revisit, the added discriminatory impact of these classifications upon those whose access to court for redress of their injuries is secured by the pure contingent fee. The imposition of a tax upon the agreed value of that service extracts the tax from an award granted to redress lost income, and is the purposeful equivalent of a tax on that lost income.

Even those states that forthrightly tax the "income" of their inhabitants withhold the tax from court awards granted to recompense lost income. Alabama, Arkansas, California, Louisiana, Mississippi, New Jersey and North Carolina specifically exclude such recoveries from their definitions of "income", and Pennslyvania excludes such receipts from its definition of taxable income. All the other income-taxing states utilize the federal concept of "income," which excludes

from "adjusted gross income" recoveries by settlement or judgment in personal injury or worker's compensation awards. 13/

IV.

The futility and arbitrariness of shifting the tax burden to the losing party by court judgment.

If the Legislature's purpose by Section 42 14/ is really to shift the burden of a tax upon attorney's fees away from the citizen who must pay the State -- rather than to create the appearance of relieving an unconstitutional imposition -- Section 42 is quite useless in practical terms. Leg. Br. p

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13 References are to Prentice-Hall paragraph numbers, State and Local Taxes, 1986:

Alabama, ¶10,720; ¶11,480
Arkansas, ¶10,873; ¶12,440.22
California, ¶55,233; ¶55,243
Louisiana, ¶12,340
Mississippi, ¶11,430
New Jersey, ¶55,834; ¶55,839
North Carolina, ¶10,480; ¶10,720

Pennsylvania ¶55,260, 72; Penn. Statutes § 7303.56(1)

Arizona, ¶10,340
Colorado, ¶10,155
Connecticut, ¶55,120
Delaware, ¶55,250
Washington, D.C., ¶12,631
Georgia, ¶10,275
Hawaii, ¶10,690
Idaho, ¶10,290; ¶10,300
Illinois, ¶10,292
Indiana, ¶10,140
Iowa, ¶10,142
Kansas, ¶10,182
Kentucky, ¶10,400
Maine, ¶10,292
Maryland, ¶10,225
Massachusetts, ¶55,100
Michigan, ¶55,280; ¶55,290
Minnesota, ¶11,130
Missouri, ¶10,084
Montana, ¶55,101
Nebraska, ¶10,254
New Mexico, ¶10,540
New York, ¶55,380
North Dakota, ¶11,052
Ohio, ¶55,285
Oklahoma, ¶10,260
Oregon, ¶55,255
Rhode Island, ¶55,500
South Carolina, ¶10,310
Utah, ¶55,350
Vermont, ¶10,100.15
Virginia ¶10,150
West Virginia, ¶55,100.20
Wisconsin, ¶10,274

14 Section 42 of Chapter 87-6, amending Section 57.071 to tax as costs "(3) Any sales or use tax due on legal services provided to such party, notwithstanding any other provision of law to the contrary."

63. Only by massively increasing the number and percentage of cases taken to judgment can the judicial system effect this purpose.

In fact, this provision is arbitrarily "regressive" in an entirely new sense. It punishes those Article I, Section 21 claimants who successfully settle their cases rather than carrying them all the way through the judicial system to judgment. By analogy to the First Amendment cases discussed above, Section 42 renders Chapter 87-6 impermissibly discriminatory in both senses described by Minneapolis Star and Arkansas Writers.

While the sales tax may appear a generally applicable economic regulation, we have already shown that it arbitrarily singles out the entire group of citizens seeking court access for redress of personal injuries. Now within that group, the act on its face treats those citizens who successfully settle their claims short of trial (the vast majority) less favorably than those who carry their claims to final judgment. 15/

There is no sound policy behind this encouragement of unnecessary consumption of judicial resources, encouragement that certainly would be very real to a plaintiff who otherwise incurs sizeable reductions in the recovery he will have left to

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15/ Section 42 also arbitrarily punishes the losing party in civil litigation, through the wholly inappropriate means of taxing someone else's unconstitutionally-levied tax burden upon them. As the costs to be taxed will vary with the amount of the fee paid by the prevailing party, as a matter of contract, to his attorney, the costs will vary without judicial control for their reasonableness, "notwithstanding," as the Act says, "any other provision of law to the contrary."

devote to essential services.

By capturing the very judicial system itself as a means of shifting, spreading and even collecting the tax due the State through taxation of costs under Chapter 57, Florida Statutes, the Act encounters another infirmity by violating the single subject requirement in Article III, Section 6 of the Florida Constitution.

Taxation of taxes for legal services as costs explicitly addresses the administration of justice and the courts, a subject not properly connected with a general taxation measure. The structuring of the tort recovery and settlement system, whatever its tenuous connection with insurance reform, certainly is not a topic properly addressed in a general taxation measure. While Section 42 of the Act may in some sense further the goals of the remainder of the Act, a court's taxation of costs by the losing party to a lawsuit is a separate subject from the Legislature's taxation of the public at large to raise general revenues.

Finally, the notion that an illegal tax is rendered legal if its burden is shifted to a non-governmental payor is interesting in itself. If the tax is levied in a manner prohibited by the Constitution, the statutory provisions imposing it should be stricken and declared invalid. Amos v. Mathews, 99 Fla. 1, 65, 126 So. 308 (1930). It is no proper remedy, nor any justifiable activity of the Judicial Branch, to remedy the unconstitutional incidence of this tax by shifting its burden to someone else.

The proper judicial remedy for illegal taxation is, of course, refund or recovery of taxes paid from the state. See generally, 50 Fla.Jur.2d Taxation, Chapter 14; State ex rel. Hardaway Contracting Co. v. Lee, 155 Fla. 724, 21 So.2d 211 (1945).

Conclusion.

Chapter 87-6 is unconstitutional for these various reasons. The Governor should be so advised, and the Court should employ such writs as are necessary to prevent the imposition of this unlawful tax.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the reply brief of Frank J. Carver, Joseph B. Carr, Mahlon Hendley and others is furnished by United States mail this 18th day of June, 1987 to the following:

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