



In June of last year, the Michigan Supreme Court appeared to put to bed the hotly contested question of whether businesses incorporated outside of Michigan could challenge lawmakers' 2014 repeal of the Multi-State Compact (Compact), when it refused to hear a consolidated group of challenges, including the case *Gillette Commercial Operations North America & Subsidiaries, et al. v. Dept. Treasury*. Gillette and other plaintiffs, like Sonoco Products, IBM, and Lubrizol, who had lost in the Court of Appeals, argued to the high court that the repeal violated provisions of both the state and federal constitutions by eliminating the election provision pertaining to a taxpayer's apportionment of taxes to the state of Michigan, retroactive to January 1, 2008.

Despite the ruling, Justice Markman left the door cracked open when he dissented on the grounds that the issues raised are "of considerable constitutional significance as to matters affecting the tax policy and procedures, the fiscal and business environments, and the jurisprudence of this state..."

With the Court of Appeals' January 17, 2017, two-page opinion in the case *Kimberly-Clark Corp & Subsidiaries v. Department Of Treasury*, nothing changes.

This dispute was like the others, centering on the question of whether an out-of-state taxpayer could apportion its income using the formula contained in Compact, rather than the one in the Michigan Business Tax law. Kimberly-Clark sought a refund of \$3.2 million for the tax years 2009-2012 by way of the submission of amended tax returns. According to Kimberly-Clark, Michigan's Department of Treasury (Department) refused to act on those amended returns, so the company sued on the grounds that it was entitled to apportion its income under the Compact.

In a somewhat unusual move, the trial court granted the Department summary judgment before the Department even responded to the complaint. The court relied on statutory and case law, reasoning that Kimberly-Clark premised its refund on Compact provisions that the legislature retroactively – and lawfully – repealed.

In its affirmation of the trial court's dismissal of Kimberly-Clark's suit, the appellate court referred to the outcome in the above-described *Gillette* case, "which the Supreme Court left entirely intact....The *Gillette* panel engaged in a detailed and well-reasoned analysis of the issues, and we are in full agreement with the decision."

At this time, there still may be some faint hope for a remedy for the plaintiffs. In *DIRECTV Group Holdings, LLC v. Michigan Department of Treasury*, the taxpayer asked the Court to consider the constitutionality of the underlying repeal of the Compact. DIRECTTV's petition for certiorari poses the following two questions:

1. Whether the Multistate Tax Compact has the status of a contract that binds its signatory States; and
2. Whether a state law that imposes retroactive tax liability for a period of almost seven years, in a manner that upsets settled expectations and reasonable reliance interests, violates the Due Process Clause.

The case started in the Michigan Court of Claims. There, the plaintiff lost, appealed to the Michigan Court of Appeals, where it lost again; and appealed again to the Michigan Supreme Court, which refused to hear the plaintiff's take on the matter. In part, DIRECTTV relied on Justice Markman's dissenting opinion that questioned the constitutionality of Michigan's unilateral abrogation of the Compact election provision, under contract and due-process jurisprudence.



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