

August 16, 2002

COURT DECLINES TO RESCIND PROPOSED MISSOURI INITIATIVE TO RAISE TAXES *(Overfelt v. McCaskill)*

The Missouri Court of Appeals upheld a trial court decision that left intact a proposed ballot initiative to raise taxes on tobacco products, despite the failure of the State Auditor to conduct a study of the fiscal impact of the initiative upon local governments as required by Missouri's initiative and referendum law. The Washington Legal Foundation (WLF) had filed a brief with the court in June urging it to overturn the trial court. In a related legal development, the elections board determined that the measure did not receive a sufficient number of signatures to qualify for the ballot.

The proposed initiative would have raised the state tax on cigarettes an additional 55 cents, from the current 17 cents per pack to 72 cents per pack. Under Missouri law regarding the certification of ballot initiatives, the State Auditor is required to conduct a fiscal impact of the measure, prepare a fiscal note describing that impact, and a fiscal note summary, which is a component of the ballot title. Missouri law requires the State Auditor to assess the fiscal impact of the measure on both state *and* local governments.

In computing projected state revenues, the State Auditor simply multiplied the number of cigarette packs sold last year in Missouri by the additional proposed tax of 55 cents. This figure totally ignores empirical evidence from other states which also increased their cigarette taxes, that in-state sales will be sharply reduced by cross-border purchases in neighboring jurisdictions with lower taxes; by purchases of out-of-state "bootleg" cigarettes; and by reduced consumption. More troubling, the Auditor neglected altogether to assess the initiative's impact on those local jurisdictions that impose a *local* tax on cigarettes in addition to the state tax, the proceeds of which fund local services. Reduced in-state sales will clearly have a negative impact on local revenue; state revenue will increase, but certainly not by the amount calculated by the State Auditor.

The trial court found that the Auditor failed to conduct the required local government assessment, but believed that its hands were tied because the law did not give it authority to

remand the matter to the Auditor to conduct a proper study. WLF argued in its brief that the law does not preclude the award of other relief, such as common law remedies, injunctive relief, and mandamus.

In its decision, the court of appeals held that the only remedy available under the statute is one that permits "a trial court to correct any insufficient or unfair language of the ballot title and to certify the corrected official ballot title to the secretary of state." Accordingly, the burden is on the challenging party to "present sufficient evidence to allow the trial court to determine what the fiscal note should have said and to draft a different fiscal note summary." Because the petitioner did not provide such evidence, the court had no alternative but to affirm the ballot title.

The court also concluded that the ballot summary statement was not deceptive or misleading as alleged by the petitioner, considering the fact that the summary statement is limited by law to only one hundred words.

The petitioner is considering appealing this decision in the Missouri Supreme court. WLF's brief was drafted by WLF attorneys and filed by local counsel David A. Linehan of Shank & Hamilton, P.C., of Kansas City, Missouri.

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