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News Flash! Supreme Court Decides To Hear Case Involving State Tax Incentives And The Commerce Clause

Gregory A. Castanias
Washington, DC
(202) 879-3639

Jennifer L. Swize
Washington, DC
(202) 879-5417

As promised in the February 2005 issue of the *State Tax Return*, we return again to this space to report that the U.S. Supreme Court has decided to review the decision in *Cuno v. DaimlerChrysler, Inc.*, 386 F.3d 738 (6th Cir. 2004), in which the U.S. Court of Appeals for the Sixth Circuit held that Ohio's economic-development-incentive tax credit to businesses that install new manufacturing equipment in the state violated the dormant Commerce Clause. The dormant Commerce Clause, remember, is implied from the text of the Constitution's Commerce Clause (which gives Congress the "Power . . . [t]o regulate Commerce . . . among the several States"), and prohibits any state regulations, including state taxes, that discriminate against, or otherwise impermissibly burden, interstate commerce. In *Cuno*, the Sixth Circuit accepted the plaintiffs' argument that the Ohio tax credit discriminated against interstate commerce by "coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state" and "encourag[ing] further investment in-state at the expense of development in other states."

In February, we reported that the defendants—the losing parties—were in the midst of seeking review by the Supreme Court (by filing "petitions for writs of certiorari"). We left you with the observation that *Cuno*, as a case of national importance, was definitely a possible candidate for Supreme Court review, but cautioned that that's not always enough.

The Supreme Court's grant of the defendants' petitions, on September 27, 2005, ends that suspense: The parties will brief and argue before the Court whether the tax credit is unconstitutional discrimination in violation of the dormant Commerce Clause.

But the Supreme Court will not necessarily *decide* whether the tax credit is unconstitutional. In granting the petitions, the Court directed the parties to also brief and argue the preliminary issue of whether the plaintiffs, who are taxpayers of Ohio and Michigan alleging that the tax credit reduces Ohio's revenues and prevents economic development in Michigan, have standing (the legal right) to challenge the credit. To have standing, a plaintiff generally must have suffered a harm that is concrete and particularized, rather than generalized or hypothetical. There is some question regarding whether the plaintiffs in *Cuno*, none of whom are competitors of taxpayers receiving the favorable tax credit, have suffered a sufficiently concrete harm to

challenge the tax credit. (You'd think a competitor might make a better plaintiff for that kind of claim.)

Assuming that no party successfully applies to extend the time to file their briefs, the briefs of both the petitioners (the defendants below) and the respondents (the plaintiffs below) are due within the next few months. Specifically, the petitioners' briefs are due by Monday, November 14, 2005; the respondents' briefs are due by Monday, December 19, 2005; and the petitioners' reply briefs are due by Monday, January 24, 2006. Oral argument has not been scheduled yet, but can be expected to take place sometime in February or March 2006.

And again, we'll keep you posted on this case as further events warrant.■



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