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Justices Won't Hear Case On W.Va.'s \$160K Cigarette Fine

By Daniel Tay

Law360 (June 17, 2019, 5:55 PM EDT) -- The U.S. Supreme Court declined Monday to review whether the West Virginia Tax Department's fine on a cigarette wholesaler was unconstitutionally excessive, leaving undisturbed a state high court decision that the fine did not violate the Eighth Amendment.

The U.S. Supreme Court rejected Ashland Specialty Co.'s request for a review of its \$159,398 fine, which the department had imposed on the company for selling 12,230 packs from cigarette brands delisted by West Virginia. The company had argued that the high court's guidance was necessary because lower courts had applied disparate tests to determine whether a penalty was excessive.

Mark Allen Loyd Jr., counsel for Ashland, told Law360 on Monday he was disappointed, saying that without clear direction, state and federal taxing authorities could assess "increasingly oppressive fines and penalties, without regard for Eighth Amendment protections."

Loyd said imposing oppressive fines was an issue "that particularly adversely affects individuals and small businesses, though even large businesses are also affected." According to Loyd, even a \$10,000 penalty could be constitutionally excessive, but it might cost even more to fight the penalty.

"A penalty of that magnitude can have quite a harsh or even a devastating effect on an individual or a small business. Accordingly, such unconstitutionally excessive fines and penalties often evade judicial review," Loyd said.

Ashland's penalty was 500% of the cigarettes' value, which Ashland claimed violated the Eighth Amendment prohibition on excessive fines. The state Supreme Court of Appeals said the penalty was reasonable because Ashland's maximum fine could have been \$5,000 per pack of cigarettes it sold, or \$61 million, adding that the company had violated the law twice before.

The department had argued that the Supreme Court, in [United States v. Bajakajian](#), had provided considerations and "several fact-specific guideposts" to inform the application of the gross disproportionality standard. Ashland contended that state courts "pay lip service" to Bajakajian and urged the U.S. Supreme Court to resolve what it asserted were lower-court splits. In particular, the company urged the court to adopt the framework for determining when a penalty is unconstitutionally excessive that the court previously set out in its decision in [Cooper Industries v. Leatherman Tool Group](#).

Loyd said he expected that the issue would come before the high court again and that "hopefully, they will take the next one and provide clearer standards to protect our Eighth

Amendment rights.”

Representatives for the department did not respond to requests for comment

Ashland is represented by Mark Allen Loyd Jr., Brent R. Baughman and Bailey Roese of Bingham Greenebaum Doll LLP.

The department is represented by Lindsay Sara See of the West Virginia Attorney General's Office.

The case is Ashland Specialty Co. Inc. v. Dale W. Steager, State Tax Commissioner of West Virginia, case number 18-1053, in the U.S. Supreme Court.

--Editing by Robert Rudinger.

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