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W.Va. Penalty On Cigarette Biz Reasonable, Justices Told

By **Daniel Tay**

Law360 (May 16, 2019, 7:57 PM EDT) -- A West Virginia penalty imposed on a cigarette wholesaler was not excessive and shouldn't be reviewed by the U.S. Supreme Court, the state tax commissioner has said.

Dale Steager, the West Virginia state tax commissioner, in a Wednesday brief, disagreed with Ashland Specialty Co.'s **assertion that the** high court's **recent ruling in** *Timbs v. Indiana* did not create legal guidelines for courts to determine if a fine was excessive under the Eighth Amendment. Instead, the commissioner said the Supreme Court had already established standards and guideposts and that state and federal courts have been applying the standards consistently.

"Virtually all courts use the gross disproportionality standard to resolve various types of excessive fines clause challenges, and they apply that standard in very similar fashions," the commissioner said.

Ashland, a wholesale cigarette distributor, was fined \$159,398 for selling 12,230 packs of cigarette brands delisted by West Virginia. The penalty was 500% of the cigarette's value, which Ashland claimed violated the Eighth Amendment prohibition on excessive fines. The state 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.

Steager said in the brief 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. In *Bajakajian*, the court considered the penalty's harshness, the severity and nature of an offense and the degree of culpability in analyzing gross disproportionality. The company's assertion that the court had not previously identified factors for consideration was false, he said.

Steager also said the cases Ashland cited as evidence of differences in standards between courts actually demonstrated "remarkable unity about state and federal courts." The commissioner further disagreed with Ashland's assertion that the court's recent decision in *Timbs* only established incorporation of the excessive fines clause against states under the Fourteenth Amendment without establishing standards for state and federal courts to follow. Instead, Steager said states could continue to look to *Bajakajian*, just as the West Virginia Court of Appeals had.

Steager said that the penalty was constitutional under any standard, given that Ashland was an admitted third-time offender and its current offense was on a "significantly greater scale" than its previous violations. Steager said the penalty had been calibrated to the increasing severity of the company's violations and the 500% penalty had not been determined using a one-size-fits-all calculation, as asserted by Ashland.

Mark Allen Loyd Jr., counsel for Ashland, reiterated to Law360 Thursday that there was no set list of factors for evaluating a penalty for gross disproportionality.

"The clear implication of the question as framed by West Virginia is that when the penalty assessed is less than the maximum penalty, no matter how grossly inflated that maximum is, the assessed penalty is, for all intents and purposes, beyond judicial review," Loyd said. "Without a uniform set of

factors, the Eighth Amendment provides no real protection to individuals or small businesses, especially small out-of-state businesses like Ashland Specialty.”

Representatives for the state Tax Department did not respond to requests for comment

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

Steager 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.

--Additional reporting by David Hansen. Editing by Neil Cohen.

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