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Opinion No. 04-044

Constitutionality of Senate Bill 3183 Imposing An Equity Assessment Fee On Tobacco Product Manufacturers Who Are Not Participating in the Tobacco Master Settlement Agreement.

## QUESTION

Is Senate Bill 3183, imposing an equity assessment on cigarette manufacturers who are not participating in the States' Master Settlement Agreement ("MSA"), constitutional?

## OPINION

Senate Bill 3183 is constitutionally defensible.[1]

1. Senate Bill 3183 is constitutionally defensible under the Commerce Clause.

2. Senate Bill 3183 is constitutionally defensible under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the analogous provisions of the Constitution of Tennessee.

3. Senate Bill 3183 is constitutionally defensible against a due process challenge.

4. Senate Bill 3183 is constitutionally defensible under the First Amendment.

[1]Although this Opinion addresses only the constitutional questions raised by the proposed legislation, a party could conceivably argue that the imposition of this equity assessment, without the consent of parties to the Master Settlement Agreement ("MSA"), is an unauthorized amendment to the Tennessee Tobacco Manufacturers' Escrow Fund Act ("Escrow Act"), TENN. CODE ANN. §§ 47-31-101, *et seq.*, thereby putting all of Tennessee's future MSA payments at substantial risk. (*See* MSA, Section IX(d)(2)). Tennessee's Escrow Act is virtually identical to the various "qualifying" or "model" statutes mentioned in cases cited in this Opinion. *See, e.g., Star Scientific v. Beales*, 278 F.3d 339 (4th Cir.2002), *cert. denied, Star Scientific v. Kilgore*, 537 U.S. 818 (2002); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004).

5. Although there is a recent Second Circuit decision[2] which could be used to argue otherwise, Senate Bill 3183 is constitutionally defensible under the Supremacy Clause.

6. Senate Bill 3183 is constitutionally defensible against an attack under the Bill of Attainder Clause.

## ANALYSIS

Senate Bill 3183 would impose an "equity assessment fee" on tobacco product manufacturers that are not participants to the tobacco MSA ("Non-Participating Manufacturers" or "NPMs"). The stated purposes of the equity assessment fee are as follows:

> (1) To prevent nonparticipating manufacturers from undermining the state's policy of reducing underage smoking by offering their cigarettes for sale substantially below the price of cigarettes of other manufacturers;
>
> (2) To protect funding, which is reduced as a result of the growth of nonparticipating-manufacturer cigarette sales, for programs funded in whole or in part by payments to the state under the master settlement agreement, as defined in § 47-31-102(5), and to recoup settlement-payment revenue lost to the state as a result of nonparticipating-manufacturer cigarette sales;
>
> (3) To fund enforcement and administration of title 47, chapter 31, and title 67, chapter 4, part 26, related nonparticipating-manufacturer legislation, and the equity assessment imposed by this section, including reasonable administrative costs incurred by persons subject to subsection (e) of the legislation by reason of the requirements of that subsection; and
>
> (4) To fund such other purposes as the general assembly shall determine.

As an initial matter, contrary to the assertions made in the opinion request, Senate Bill 3183 is not identical to the laws that have been challenged and upheld in Minnesota and in the United States Court of Appeals for the Fourth Circuit. The law challenged in *CITM America, et al. v. Minnesota*, No. C1-03-7120, slip op. at 1 (Sec. Jud. Dist. Nov. 19, 2003) imposes a fee on the sale of cigarettes in Minnesota that were manufactured by companies that have not entered into a settlement with the State of Minnesota under which the companies agree to make annual payments to the state. The fee is imposed on "any person engaged in business as a distributor, and upon the use or storage by consumers of nonsettlement cigarettes." The Minnesota state trial court found that the law withstood due process, equal protection and bill of attainder clause challenges. Senate Bill

[2] *See Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004).

3183 differs from the Minnesota law in that Senate Bill 3183 is an assessment imposed directly on the manufacturers themselves. Additionally, because Minnesota did not join the MSA, Minnesota did not already have a qualifying or escrow statute when it imposed this fee on the sale of cigarettes by companies who were not a party to its separate settlement with the tobacco companies.

In *Star Scientific v. Beales,* 278 F.3d 339 (4th Cir. 2002), the Fourth Circuit considered a challenge to Virginia's "qualifying statute" which required NPMs to make annual escrow deposits based on the number of cigarettes sold in Virginia during the preceding year. The escrow deposits are available to pay a judgment or settlement in a lawsuit brought by Virginia to recover on certain claims against an NPM of the kind released in the MSA. If there is no judgment or settlement, the funds revert back to the manufacturer after twenty-five (25) years unless they are released earlier under the release provisions of the statute. Va. Code Ann. § 3.1-336.2A.2 (1999). The manufacturer receives interest as earned on the escrow account. Va. Code Ann. § 3.1-336.2B (1999). The Court considered Plaintiff's arguments that the escrow requirement ran afoul of due process, equal protection and the Commerce Clause and held that there was no constitutional violation. Senate Bill 3183 differs from Virginia's qualifying statute in that it is an assessment as opposed to an escrow obligation imposed under the state's police and regulatory power.[3]

Accordingly, while the Minnesota trial court and the United States Court of Appeals for the Fourth Circuit found the Minnesota and Virginia laws, respectively, passed constitutional muster, neither opinion is determinative of the constitutionality of Senate Bill 3183.

## I. Commerce Clause

The Commerce Clause expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST., art. I, § 8, cl. 3. In addition to this affirmative grant of power, the "negative" or "dormant" Commerce Clause prohibits state actions that interfere with interstate commerce. *See Quill v. North Dakota*, 504 U.S. 298, 309 (1992) (citing *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938)).

A tax on a seller located out-of-state will be sustained even if it affects interstate commerce as long as the tax "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The United States Supreme Court held in *Quill*, in the context of sales and use taxes, that the "substantial nexus" prong of the *Complete Auto* test requires a physical presence within the taxing state. It is our opinion that a credible argument can be made that the Senate Bill 3183 tax falls outside the physical presence requirement enumerated in *Quill* because that was a narrow holding applying specifically to sales and use taxes. It is true that in *J.C. Penney National Banks v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999); *perm. app. denied* (Tenn. May 8, 2000), *cert. denied*, 531 U.S. 927 (2000), the Tennessee Court of Appeals applied a physical presence test to strike down an

[3]Tennessee's qualifying statute is codified at TENN. CODE ANN. §§ 47-31-101, *et seq.* (2001 & Supp. 2003).

assessment under Tennessee's corporate excise tax, but that Court refrained from holding that a physical presence is required for every potential state tax. *J.C. Penney National Bank*, 19 S.W.3d at 842. In *America Online, Inc. v. Johnson*, 2002 WL 1751434 (Tenn. Ct. App. July 30, 2002), another section of the Court of Appeals cautioned against an overly-broad reading of *J.C. Penney*, noting that it would be wrong merely to replace the term "nexus" with "physical presence" as the standard for the first prong of the *Complete Auto* test. Instead, the Court in *AOL*, in reversing a finding of lack of nexus by the trial court, was willing to look at a number of cumulative factors. 2002 WL 1751434, at *3.

In addition, courts in other states have not extended *Quill's* physical presence test beyond sales and use taxes. *See Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 510 U.S. 992 (1993); *K-Mart Properties, Inc. v. Taxation and Revenue Dep't*, No. 21,140 (slip opinion) (N.M. Ct. App. Nov. 27, 2001) *cert. granted*, 131 N.M. 564, 40 P.3d 1008 (2002); *Syms Corp. v. Commissioner*, 265 N.E.2d 758 (2002). These and other cases have generally found an "economic presence" sufficient to justify a state's taxing power over an out-of-state company that derives benefits from that state's marketplace.

In this context, the charge that would be imposed on NPMs has a strong regulatory flavor. While the charge is not structured exactly as a fee, it does relate to the harm that is caused in Tennessee by the NPMs' products. Thus, the State would appear to have the ability under due process standards to impose a similar charge on NPMs as a regulatory fee. *See Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890 (6th Cir. 2002). That being the case, it is likely that the courts would also uphold the proposed tax, since it meets the requirements of due process. We do not think that the Commerce Clause nexus requirement would demand more in this context because of the direct impact of the NPMs' products on the economy, public health, and government resources in Tennessee. Without a physical presence requirement, the substantial nexus prong of the Commerce Clause test is arguably satisfied because the NPMs are selling their products, directly or indirectly to Tennessee consumers, and producing substantial economic and health consequences in Tennessee.

The second prong of the *Complete Auto* test ensures that each state taxes only its fair share of an interstate transaction. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995). The notion of fair apportionment involves both internal and external consistency. *Oklahoma Tax Comm'n*, 514 at U.S. at 185. Internal consistency looks to whether a tax, if applied in every state, would place interstate commerce at a disadvantage as compared with intrastate commerce. *Id.* Because Senate Bill 3183 only assesses sales of cigarettes in Tennessee, the notion of internal consistency is preserved. The external consistency test "asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989) (citation omitted). To prevail on an external consistency challenge, a taxpayer must prove by "clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted. . . in that State, or has led to a grossly distorted result." *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983) (*internal quotations and citations omitted*). As the

proposed assessment in Senate Bill 3183 only pertains to cigarette sales, *i.e.* activities, in Tennessee, it comports with the requirements of external consistency.

Regarding the third prong, Senate Bill 3183 does not discriminate against interstate commerce because it applies evenly to interstate and intrastate commerce. Because Senate Bill 3183 imposes the assessment on all NPMs in an even-handed manner, it is not discriminatory. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981).

Finally, the fourth *Complete Auto* prong is satisfied because it focuses on "the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." *Goldberg*, 488 U.S. at 267. This wide range of benefit can include a taxpayer's receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society. *Id.* Here, the benefits may be as indirect as the tax-supported legal and commercial infrastructure in Tennessee that makes it possible for NPMs to sell products in Tennessee or as direct as the equity assessment fee providing additional funding for the State to enforce escrow and related statutes against their competitors. Senate Bill 3813, therefore, is constitutionally defensible under the Commerce Clause.

## II. Equal Protection

Article XI, § 8 of the Tennessee Constitution provides, in pertinent part, as follows:

> The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

This is Tennessee's state constitutional equivalent to "equal protection of the laws" within the meaning of the Fourteenth Amendment to the Constitution of the United States. *Gallaher v. Elam*, 104 S.W.3d 455 (Tenn. 2003); *State v. Smoky Mtn. Secrets, Inc.*, 937 S.W.2d 905 (Tenn. 1996).

Although the state and federal equal protection guarantees "are historically and linguistically distinct,"[4] the respective state and federal analyses are parallel and mutually reinforcing. *See Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994), *cert. denied, Cox v. Newton*, 513 U.S. 869 (1994). Here, the rational basis test applies because no suspect classification, quasi-suspect classification or "fundamental right" is implicated. *See San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 16 (1973); *Newton v. Cox*, *supra*, at 109.

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[4] *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993).

The phrase "equal protection" as used in the Fourteenth Amendment to the United States Constitution requires that all persons and entities be treated similarly under like circumstances and conditions, both as to privileges conferred and liabilities incurred. *Genesco, Inc. v. Wood*, 578 S.W.2d 639 (Tenn. 1979). The equal protection provision of the Fourteenth Amendment is not violated when persons in different situations receive different treatment. It requires only that a statutory distinction have some relevance to the purpose for which the distinction was made. *Id.* at 641. As stated in *Ross v. Moffitt*, 417 U.S. 600, 612 (1974), the Fourteenth Amendment "does not require absolute equality or precisely equal advantages." Things which are different in fact or opinion are not required by either constitution to be treated the same. *Doe v. Norris*, 751 S.W.2d 834, 840-42 (Tenn. 1998).

> The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States, and legislatures are given considerable latitude in determining what groups are different and what groups are the same. In most instances, the judicial inquiry into the Legislative choice is limited to ***whether the classifications have a reasonable relationship to a legitimate state interest.***

*Id.* at 840-42 (emphasis added).

Classifications do not violate the Tennessee Constitution or the federal constitution if "**any possible reason can be conceived to justify the classification, or if the reasonableness be fairly debatable . . . ."** *Estrin v. Moss*, 430 S.W.2d 345, 349 (1968) (*emphasis added*). Moreover, the reasons for the classification need not appear on the face of the legislation. *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 442 (Tenn 1978).

The "equity assessment" in Senate Bill 3183 appears to be a tax because it is imposed primarily for the purpose of raising revenue. *See Op. Tenn. Att'y Gen.* 86-75 (Mar. 26, 1986) (*citing Memphis Retail Liquor Dealers' Ass'n, Inc. v. City of Memphis*, 547 S.W.2d 244 (Tenn. 1977)). It is well settled in Tennessee that the rational basis test applies to challenges to tax statutes, such as the one at issue. *Brentwood Liquors Corp. v. Fox*, 496 S.W.2d 454, 457 (Tenn. 1973); *City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997); *Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 443; *Nolichuckey Sand Co. v. Huddleston*, 896 S.W.2d 782, 789 (Tenn. Ct. App. 1994). Anyone challenging the constitutionality of a Tennessee revenue statute "bears a heavy burden." *Id.*, 896 S.W.2d at 788 (*quoting Vertrees v. State Bd. of Election*s, 141 Tenn. 645, 214 S.W. 737, 740 (1919)). "The right to tax is essential to the existence of government, and is particularly a matter for the Legislature." *Id.*, 896 S.W.2d at 788 (quoting *Vertrees v. State Bd. of Election*s, 141 Tenn. 645, 214 S.W. 737, 740 (1919))

Under Senate Bill 3183, NPMs are not treated differently from others similarly situated, *i.e.*, other NPMs. Moreover, the proposed equity assessment passes equal protection scrutiny because it has a rational relationship to a legitimate legislative purpose. The stated purpose is to prevent NPMs from undermining the state's policy of reducing underage smoking. If the cost of cigarettes

made by NPMs increases due to the equity assessment, then fewer minors will be able to afford cigarettes. Furthermore, the goal of raising additional revenue to fund the activities described in the bill is a legitimate legislative purpose.

NPMs may complain that the equity assessment will impair their ability to compete with manufacturers who are participating in the tobacco settlement. But mere competition between two entities is not enough to require that they must be taxed alike. *Union Bank & Trust Co. v. Phelps*, 288 U.S. 181 (1933) (statute exempting from taxation capital, property, and shares of building and loan associations, industrial loan corporations, etc., competing with banks accepting deposits and doing general commercial business, upheld against equal protection challenge based on reasonable classification). Because there is a rational basis for the equity assessment, Senate Bill 3183 is constitutionally defensible under the Equal Protection of the Fourteenth Amendment to the U.S. Constitution and the analogous provisions of the Constitution of Tennessee.

## III. Due Process

Article I, § 8 of the Tennessee Constitution provides as follows:

> That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

This section of our state constitution with its phrase "law of the land" is synonymous with the phrase "due process of law" used in the Fifth Amendment and in the first section of the Fourteenth Amendment to the Constitution of the United States. *State v. Hale*, 840 S.W.2d 307 (Tenn. 1992); *Dearborne v. State*, 575 S.W.2d 259 (Tenn. 1978); *Kittrell v. Kittrell*, 409 S.W.2d 179 (1966).

The proposed bill complies with state and federal due process requirements. The Fourteenth Amendment's Due Process Clause protects life, liberty and property. Due process imposes either substantive or procedural limitations upon a particular deprivation.

In Tennessee, the "privilege" of selling cigarettes is replete with restrictions. *See* Tenn. Code Ann. §§ 39-17-1501, *et seq.* (no cigarette sales to minors); Tenn. Code Ann. § 47-18-2001, *et seq.* (minimum pack size); Tenn. Code Ann. §§ 47-25-301, *et seq.* (no cigarette sales below cost); Tenn. Code Ann. §§ 47-31-101, *et seq.* (tobacco product manufacturers which have not joined the MSA must maintain and fund private escrow accounts); Tenn. Code Ann. §§ 67-4-2601, *et seq.* (tobacco product manufacturers must comply with Tenn. Code Ann. §§ 47-31-101, *et seq.* as an ongoing prerequisite to the privilege of selling cigarettes in Tennessee); Tenn. Code Ann. §§ 67-4-1002 (tax imposed upon "privilege" of selling cigarettes and other tobacco products in Tennessee). Consequently, to the extent that a tobacco product manufacturer might assert that the assessment contemplated by Senate Bill 3183 impermissibly impedes a tobacco product manufacturer's property interest in selling cigarettes in Tennessee, it is clear that these manufacturers have no such property interest or right. In the absence of a property interest or a "legitimate claim of entitlement" to selling

cigarettes in Tennessee under state law, there can be no cognizable due process interest. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *See, e.g., Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003); *Med Corp. v. City of Lima*, 296 F.3d 404, 410-411 (6th Cir. 2002). The need for procedural due process protections, accordingly, is not triggered by the proposed assessment set out in Senate Bill 3183. Despite this, Senate Bill 3183 provides procedural due process; it provides for a hearing and remedies, at the request of the NPM, after seizure of the contraband. *See* Tenn. Code Ann. § 67-4-1021. *See Stockton v. Morris & Pierce*, 110 S.W.2d 480 (Tenn. 1937) (statutes relating to enforcement of a tax by seizing the property taxed would not deny due process, if provision were made for notice to and hearing of the property owner at some stage in the proceeding).

Similarly, Senate Bill 3183 provides that "before its cigarettes may be offered for sale in [Tennessee]", an NPM seeking to enter the Tennessee market is required to pre-pay a monthly assessment based on an estimate by the Tennessee Department of Revenue or the statute's $50,000.00 minimum. The prepayment feature does not violate due process because the statute expressly provides for reimbursements to NPMs in the event of an overpayment.

Senate Bill 3183 prohibits the sale of cigarettes for which an NPM has not paid the required equity fee assessment. This provision refers to the "complementary legislation," Tenn. Code Ann. §§ 67-4-2601 *et seq.* which provides for administrative hearings in a similar context. *See* Tenn. Code Ann. § 67-4-2606(a). Although it is not crystal clear from the language of Senate Bill 3183, it appears that the intent of the legislation is to follow the hearing provisions set out in Tennessee's complementary legislation. Given this procedural recourse, it appears that these provisions of Senate Bill 3183 do not violate any due process guarantee.

Assuming for the sake of discussion that cognizable property interests are implicated by Senate Bill 3183, it is clear that this proposed statute does not violate substantive due process. Because the proposed assessment neither burdens a fundamental right nor targets a suspect class, it survives due process analysis so long as it bears a rational relationship to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631 (1996); *see also Fitzgerald v. Racing Assoc. of Central Iowa*, 539 U.S. 103, 123 S.Ct. 2156, 2159 (2003); *Riggs v. Burson*, 941 S.W.2d 44, 53 (Tenn. 1997), *cert. denied*, 522 U.S. 982 (1997). As discussed in Section II, above, this proposed equity assessment is rationally related to a legitimate governmental interest. Senate Bill 3183, therefore, is constitutionally defensible against a due process challenge.

## IV. First Amendment

It is possible that a party would challenge Senate Bill 3183 and allege that it violates the First Amendment to the United States Constitution. The argument would likely be that Senate Bill 3183 is an attempt to coerce NPMs to join the MSA thereby surrendering their free speech rights. Similar arguments have been made against other state laws relating to tobacco and the MSA. *See, Council for Independent Tobacco Manufacturers of America, supra,* and *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179, 1206 (C.D. Cal. 2000).

Under the doctrine of unconstitutional conditions, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *United States v. America Library Ass'n*, 539 U.S. 194, 123 S. Ct. 2297, 2307 (2003) (internal quotation marks and citations omitted). Accordingly, the State could not deny an exemption from a statutory fee based on the exercise of First Amendment rights. *See Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("[A] discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech.") Such a denial would involve impermissible economic coercion: "[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.* at 519. A tobacco product manufacturer may, however, voluntarily join the MSA thereby, knowingly and voluntarily waiving certain First Amendment rights. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1986) (under "clear and compelling" circumstances, a party may waive First Amendment rights").

Where State action does not target free speech rights, it does not run afoul of the First Amendment. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 598 (1972) (remanding to the district court where respondent had "yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech," rather than for a permissible reason); *cf. Speiser*, 357 U.S. at 519 (reversing state's denial of tax exemption where denial was "frankly aimed at the suppression of dangerous ideas") (citation omitted); *Grosjean v American Press Co.*, 297 U.S. 233 (1836) (indicating that a tax on newspapers was "bad not because it takes money from the pockets of the [newspapers]" but "because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees"). There is nothing in the articulated purposes of Senate Bill 3183 that indicate the abridgement of free speech rights is intended.

When a tobacco company joins the MSA, it agrees to the following non-monetary provisions:

1. A ban on outdoor and transit advertising (Section III(d));
2. Restrictions on sponsorships (Section III(c));
3. A ban on the use of cartoons in promotional material (Section III(b));
4. Bans on certain brand name merchandise, such as t-shirts (section III(f)); and
5. Ban on payment related to tobacco products ad media (Section III(e)).

These promotional restrictions are important public health provisions.

Commercial speech (as opposed to private or political speech) is speech which proposes a commercial transaction. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 771 n. 24 (1976). The First Amendment to the U.S. Constitution protects commercial

speech from unwarranted regulation by the federal or state[5] governments. For the limited purposes of this opinion, we assume that the above-listed promotional restrictions in the MSA regulate commercial speech[6]. Because the equity assessment fee's relationship to whether a tobacco company uses cartoons or agrees to the other promotional restrictions is, at best, tenuous, it is unlikely that a court would view the proposed equity assessment fee as coercive. In a similar context, the Minnesota District Court in *Council for Independent Tobacco Manufacturers of America*, *supra*, recently rejected this "coercion" argument under the First Amendment, and ultimately upheld Minnesota's assessment.

The MSA is, of course, a contract. Accordingly, it should be evaluated under general contract law principles. Under Tennessee law, every contract includes an implied covenant of good faith and fair dealing. *See*, *TSC Industries v. Tomlin*, 743 S.W.2d 169, 173 (Tenn. App. 1987); *Davidson & Jones Development Co. v. Elmore Development Co.*, 921 F.3d 1343, 1350 (6th Cir. 1991). Similarly, the claim that the proposed equity assessment statute would violate the First Amendment because it coerces NPMs to join the MSA should be analyzed in light of the basic principle that constitutional issues should be avoided if other legal grounds provide a sufficient rationale for decision. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

Reviewing the MSA's modest lobbying restrictions in light of the covenant of good faith and the judicial maxim of declining to reach unnecessary constitutional questions, the lobbying restrictions appear to be entirely commensurate with the covenant of good faith under Tennessee law. In this context, the MSA would mean very little if the tobacco companies were completely free to use their lobbying budgets and influence to secure legislation which would directly or indirectly dismantle it.

Unlike the MSA's promotional restrictions, moreover, the MSA's lobbying restrictions have no separable substantive benefit to the states, but rather these lobbying restrictions merely offer some expression of the parties' pre-existing obligation to act in good faith on the subject matter of the contract. In other words, the MSA's lobbying restrictions serve no purpose in the MSA except to prevent the tobacco companies from using their lobbying power in bad faith to undermine the MSA. In the unique circumstances of the MSA, therefore, the MSA's limited lobbying restrictions are necessarily included in the parties' covenant of good faith. Given this view of the MSA's lobbying restrictions and the earlier discussion about the MSA's promotional restrictions, Senate Bill 3183 is constitutionally defensible against a claim that it "coerces" NPMs to join the MSA in violation of the First Amendment to the United States Constitution.

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[5]The First Amendment applies to the states because it is incorporated in the Fourteenth Amendment to the U.S. Constitution. *See Davis-Kidd Booksellers v. McWherter*, 866 S.W.2d 520, 523 (Tenn. 1993).

[6]The MSA also contains limitations on lobbying, which are closely tied to conduct designed to undermine the MSA. These limitations may be asserted to constitute non-commercial or political speech. MSA § III(m).

## V. Supremacy Clause

The Supremacy Clause of the U.S. Constitution provides that "the laws of the United States . . . shall be the supreme law of the land." U.S. CONST., art. VI, cl. 2. The U.S. Constitution delegates specific power to regulate matters of national concern to the federal government while allowing the states to retain general legislative authority. Although this constitutional design permits some overlapping of state and federal sovereignty, the Supremacy Clause ensures that federal law supercedes state law when federal law expressly or impliedly preempts state law or when state law is in actual conflict with federal law. *Millsaps v. Thompson*, 259 F.3d 535, 538 (6th Cir. 2001); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). The United States Supreme Court has recognized a presumption against preempting state statutes designed to foster public health, particularly when the state and federal governments are pursuing common purposes. *See Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715-718 (1985); *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644 (2003).

In *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), the Second Circuit, in deference to the allegations in the complaint, reversed the trial court's dismissal of the plaintiffs' claims that New York's statute declaring cigarettes sold by Non-Participating Manufacturers who were not in compliance with New York's qualifying statute to be contraband under the Sherman Act. In reaching this result, the Court concluded that "the *Parker* state action immunity doctrine does not immunize the Contraband Statute from preemption by the Sherman Act." *Id.* 357 F.3d at 209. The Court, however, affirmed the dismissal of the plaintiff's Commerce Clause attack on New York's Contraband Statute.

In the tobacco context, several cases have rejected antitrust theories on immunity or other grounds. *Mariana v. Fisher*, 338 F.3d 189 (6th Cir. 2003); *Forces Action Project v. California*, Fed. Appx. 322, 2003 WL 343230 (9th Cir. 2003); *Hise v. Philip Morris, Inc.*, 46 F. Supp. 2d. 1201 (N.D. Okla. 1999); *Bedell v. Philip Morris, Inc.*, 263 F.3d 239, 246 (2001). We could not find a Tennessee state court case or a Sixth Circuit Court of Appeals case that adopts the analysis used in *Freedom Holdings, supra.* In the motion to dismiss context, moreover, there is some suggestion that a Tennessee court would depart from the Second Circuit's approach under the Supremacy Clause and

not defer to conclusory "output cartel" allegations.[7] Senate Bill 3183, therefore, is constitutionally defensible under the Supremacy Clause.

## VI. Bill of Attainder

A "bill of attainder" is a legislative act which inflicts punishment without a judicial trial. *Nixon v. Administrator of Gen. Servs.*, 433 U. S. 425, 468 (1977)*; Davis v. Beeler*, 185 Tenn. 638, 207 S.W.2d 343 (1947). To show that a legislative enactment is a bill of attainder, a plaintiff must demonstrate the following three elements: (1) specification of the affected persons; (2) punishment; and (3) lack of a judicial trial. *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 847 (1984).

In order to meet the first requirement, the specification requirement, a plaintiff must show more than that the challenged law "merely designates a properly general characteristic." *United States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir. 1999) (*quoting Selective Serv. Sys.*, 468 U.S. at 847 (1984)). The proposed bill applies to those cigarette manufacturers who elect not to join the MSA. Their inclusion within or exclusion from the group subject to the proposed assessment is one of choice.

Second, the proposed equity assessment, in and of itself, does not constitute punishment. The meaning of punishment typically includes "imprisonment, banishment, and the punitive confiscation of property by the sovereign." *Nixon*, 433 U.S. at 474. Viewing the equity assessment in the proposed bill as a tax, taxes have typically served the salutary purpose of raising revenue, just as the proposed bill contemplates. *Dept. of Revenue v. Kurth Ranch*, 511 U.S. 767, 779 (1994). The Court in *Kurth Ranch* explained that a high tax rate and even a deterrent purpose would not automatically render a tax punitive. *Id*. In these cases, the courts must examine whether the particular measure at issue operates in a "usual" manner consistent with its historically salutary or mixed purposes.

Qualifying statutes, such as Tenn. Code Ann. § 47-31-101, *et seq.*, which require escrow deposits by NPMs, have withstood challenges as bills of attainder. *See PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp.2d 1179 (C.D. Cal. 2000) (court dismissed claim that California's Qualifying State

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[7] "Likewise, the plaintiffs' assertion that the statute was preempted by the Federal Aviation Act was a legal conclusion that should not have been accepted as true. Whether a federal law expressly implicitly preempts a state law requires an investigation of Congress's intent in passing federal legislation. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 515-16, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). Here, both parties argued their interpretations of the Federal Aviation Act and offered supporting legal authority for whether the Act expressly or implicitly preempted the statute. The trial court properly addressed the preemption issue in the context of the motion to dismiss, without an evidentiary hearing. *See e.g., Broyde v. Gotham Tower, Inc.*, 13 F.3d 994 (6th Cir.), *cert. denied*, 511 U.S. 1128, 114 S.Ct. 2137, 128 L.Ed.2d 866 (1994).

Accordingly, we conclude that the Court of Appeals erred in accepting the legal conclusions in the plaintiffs' complaint as true and in remanding the case for an evidentiary hearing, and that the trial court acted correctly in addressing all the legal issues in the motion to dismiss."

*Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997).

under the Master Settlement constituted a bill of attainder). Those statutes provide for NPMs to either join the MSA or pay money into an escrow fund. California, whose qualifying statute was challenged in *PTI*, did not have an additional equity assessment tax. However, it appears that the proposed bill, because it generates revenue and has a legitimate public purpose, would not violate the prohibition against bills of attainder.

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