

LEGAL ALERT: U.S. Supreme Court Vacates and Dismisses Sixth Circuit's *Cuno* Decision

May 15, 2006

I. Plaintiffs Lacked Federal Standing to Challenge Ohio's Investment Tax Credit

The U.S. Supreme Court today ruled unanimously in *DaimlerChrysler Corp. v. Cuno* and *Wilkins v. Cuno* that the Cuno plaintiffs, who challenged Ohio's investment tax credit (ITC) on Commerce Clause discrimination grounds, lacked standing to bring their suit in the federal courts. 547 U.S. ____ (May 15, 2006). As a result, the Supreme Court vacated the portion of the Sixth Circuit Court of Appeals' decision in *Cuno* that invalidated the ITC, and it remanded the cases for dismissal.

Because the Sixth Circuit's holdings were separately appealed – a municipal property tax exemption granted to DaimlerChrysler was found to satisfy the Commerce Clause – and the Court did not grant certiorari to hear the appeal of the property tax exemption, the portion of the Court of Appeals' decision upholding the municipal property tax exemption remains in force.

II. Rationale for Decision Stands on All Fours with Prior Decisions

The Court devoted its opinion to the question whether certain Ohio residents who paid municipal property taxes had standing (*i.e.*, the legal right to bring a lawsuit) under Article III of the Constitution to challenge a state corporate ITC on grounds that it discriminated against interstate commerce in violation of the Commerce Clause. In short, the Court concluded that the Ohio residents who sued lacked the required elements of standing, namely (1) the plaintiff alleges a personal injury (2) that is traceable to the defendant's allegedly unlawful conduct and (3) that is likely to be redressed by the relief that the plaintiff requests. The Court rejected the plaintiffs' assertion that they suffered the injury of an improper use (reduction) of state tax dollars, through enactment of the ITC, because a taxpayer's generalized grievance does not constitute an inadequate injury for Article III standing purposes.

The Court disregarded any standing arguments that might have applied to Ohio residents who claimed they were displaced as a result of the Jeep plant expansion, or to Michigan residents who claimed they lost out on benefits when DaimlerChrysler invested in Ohio rather than Michigan. The question remains open whether a business taxpayer that suffered an actual economic injury resulting from the ITC might have established standing to challenge the ITC in federal court, in this or another incentives lawsuit. However, the Supreme Court noted that

plaintiffs' counsel did not identify or preserve the standing arguments for these other plaintiffs in the *Cuno* case.

Interestingly, the plaintiffs originally brought the case in state court, and the case was removed to federal court by the defendants. Today's Supreme Court decision concerned federal court standing. It does not prohibit the plaintiffs from bringing this suit once again in state court.

III. Commerce Clause Implications

The Supreme Court expressed no opinion regarding the constitutionality of Ohio's ITC:

We are obligated before reaching this Commerce Clause question to determine whether the taxpayers who objected to the credit have standing to press their complaint in federal court. We conclude that they do not, and we therefore can proceed no further.

Thus, this decision does not provide any authority regarding the Commerce Clause issue.

IV. What's Next?

Now that the U.S. Supreme Court has vacated the Sixth Circuit's decision concerning the constitutionality of Ohio's ITC, it is likely that additional similar cases will be brought. In fact, Peter Enrich, counsel for Charlotte Cuno and the other plaintiffs challenging the Ohio ITC, repeatedly has noted his intention to re-litigate this case in the Ohio courts if the Supreme Court vacates the Court of Appeals' decision on standing grounds. Note, however, that the plaintiffs must still satisfy the *State* standing requirements; the counsel for Ohio asserted in oral argument before the Supreme Court that these plaintiffs lacked even state court standing. Likewise, in a recent North Carolina Superior Court decision, the challengers to Dell, Inc.'s tax incentives to locate a facility in that state were tossed out of court for lack of standing. *See Blinson v. North Carolina*, No. 05 CVS 8378 (Wake County Sup. Ct., May 12, 2006).

In the interim, the Sixth Circuit decision, while it no longer constitutes legal precedent, casts a pall over the constitutionality of tax incentives, and the Supreme Court's action in *Cuno* has done nothing to quell the debate over the constitutional parameters of tax incentives. Hence, taxpayers and taxing jurisdictions need clarity to ensure that all interested parties can rely on the availability of these tax provisions.

Federal legislation already introduced in the House of Representatives (H.R. 2471) and the Senate (S. 1066) is intended to provide such clarity. This legislation, which is supported by the Council On State Taxation (COST) (to which Sutherland serves as counsel), would explicitly authorize states and localities to grant a broad array of economic development tax incentives and shield them from a constitutional attack. The legislation does carve-out or exclude seven

categories of incentives that would remain vulnerable to dormant Commerce Clause attacks. The Supreme Court's latest action underscores the compelling need for this legislation; moreover, even if Professor Enrich were successful in bringing a case through the state courts (and ultimately before the Supreme Court), it is likely that an additional decision would not provide the level of comprehensive authority that tax administrators and taxpayers need. Hence, Sutherland will continue to be involved in, and to report on, efforts to enact the Economic Development Act of 2005.



For additional information on what this means for your business, or our State and Local Tax practice, please contact:

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