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Tobacco companies sue state for cigarette fee

By: Catherine Sweeney The Journal Record June 8, 2017

OKLAHOMA CITY – The tobacco fee's critics warned that the state might get sued because of the measure, and they were right. Tobacco companies filed a lawsuit Wednesday to argue the measure is unconstitutional.

Tobacco giant Phillip Morris USA is teaming up with several local residents and businesses, including tobacco companies, wholesalers, distributing companies, gas stations and others to sue the state government and ask for a stay on the measure, which would temporarily suspend it.

Senate Bill 845, which Gov. Mary Fallin signed on May 31, added a $1.50-per-pack fee on wholesalers. There was no emergency clause passed, which would have made it take effect July 1, said Paula Ross, a spokeswoman for the Oklahoma Tax Commission. Without a stay, the fee would go into effect Aug. 25.

The group's complaints are similar to those that echoed throughout the session's final week. The argument focuses on the state constitution, as well as a law that requires revenue bills to originate in the House of Representatives, be introduced before the last five days of the session and be passed with a supermajority. The lawsuit notes that the measure began in the Senate during the last week of session and passed by a simple majority. Attorneys argued that this measure in isolation poses its own problems, but it also sets a troubling precedent.

SB 845 was far from the first bill that aimed to introduce new revenue based on cigarette sales. Similar plans can be found in House Bill 1841, House Bill 2414, House Bill 2365 and House Bill 2372. The brief noted that the fee plan came only after each of those had been killed.

"SB 845 emerged phoenix-like from the ashes of these four failed bills," the lawsuit reads.

If the bill is ruled unconstitutional, the $215 million it is projected to bring in would suddenly drop out of the budget, leaving lawmakers two options: come to a special session to find replacement revenue or implement cuts. The attorneys argued larger problems loom in the future if the measure is ruled constitutional.

“If SB 845 stands, any tax increase can evade constitutional prerequisites for tax hikes if legislators employ verbal hocus-pocus to enact it as a ‘fee,’” it reads. “Allowing SB 845 to remain law also incentivizes the precise ills (the state constitution) was designed to prevent: putting off difficult budget issues to the session’s final days and ramming through poorly conceived, patchwork revenue bills.”

The Attorney General’s Office is responsible for representing the state in lawsuits such as these, and Attorney General Mike Hunter issued a statement about the lawsuit Thursday afternoon.

“Just as the office has handled lawsuits challenging legislation in the past, we will move forward to respond to this lawsuit as we look to provide the best outcome for our clients, which include the governor, the legislature and the citizens of the state of Oklahoma,” it read in part.

Fallin’s office responded with a written statement that said the governor hopes the matter gets solved quickly.

“It now is up to the state Supreme Court to decide the matter, and I hope the justices will deal with it expeditiously,” it read. “I’m confident the attorney general’s office will competently defend the issue.”

Senate President Pro Tempore Mike Schulz’s and Senate Minority Leader Jon Sparks’ offices declined to comment. Sparks was out of the country and unavailable for comment. Neither Fallin nor House Minority Leader Scott Inman responded to requests for comment by press time.

Phillip Morris USA, R.J. Reynolds Tobacco, and the local participants hired six attorneys, two based in Washington, D.C., and the rest from Oklahoma City and Tulsa.

Local litigants include James Naifeh and his business, Standard Distributing Co.; Corey Cooper and the company he leads, Stephenson Wholesale Co.; and Brian Hutchinson and his company, Hutchinson Oil Co., which owns an Elk City gas station and Rogers Oil Co.

They’re suing the state, the Oklahoma Tax Commission, Gov. Mary Fallin, Schulz and House Speaker Charles McCall in their official capacities.

The four bills that would have increased the sales tax on cigarettes dispersed the revenue the same way, to several health-related agencies, including the ones that oversee the university hospitals and the State Department of Health.

Under SB 845, only four agencies got funding. The Alcoholic Beverage Laws Enforcement Commission, which wouldn’t have gotten any money under the other four measures, got $1 million to crack down on underage smoking. The rest went to the Oklahoma Health Care Authority, which dispenses Medicaid, the Department of Human Services and the Department of Mental Health and Substance Abuse Services.

The OHCA and DHS, despite the bump in funding from SB 845, will have to cut about $30 million each from their budgets.

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