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James McAuley*

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TWIN CASES OF A TAXING SORT

JAMES MCAULEY*

I. INTRODUCTION

This legal note describes the circumstances leading up to the recent decisions of the Third District Court of Appeal, in *Florida Department of Revenue v. Leon*[1] and *Florida Department of Revenue v. Bridger (Bridger I)*,[2] and their implications for Florida taxpayers. This note contains argu-

* James F. McAuley currently holds the position of Chief Counsel in the Office of Financial Regulation. He has previously held positions with the Florida Office of the Attorney General as Chief Assistant Attorney General and Senior Assistant Attorney General. He is also a former Assistant General Counsel for the Florida Department of Revenue. He is an honors graduate of Nova University Law School. The author would like to express gratitude to his wife, Lisa Raleigh, a former law review editor at Florida State University College of Law and current Special Counsel for the Office of the Attorney General, for her critique of this article. He would also like to thank the Nova Law Review Editorial staff for their time and dedication to this article. This note is a greatly expanded version of a column previously published in the March 2007 issue of the *Florida Bar Journal* entitled *Getting Back Your Fair Share: Seeking Refunds of Unconstitutional Taxes and Fees*. While this note is not a republication of the same article, the author would like to acknowledge permission of the *Florida Bar Journal* to re-publish that article to the extent this note presents a common theme or argument.

1. 824 So. 2d 197 (Fla. 3d Dist. Ct. App. 2002).
2. 935 So. 2d 536 (Fla. 3d Dist. Ct. App. 2006).

ments that limitations found in Florida statutory "non-claim" provisions[3] should not be applied to run from the time of payment of an unconstitutional tax or fee, but rather, from the time the statute is first declared unconstitutional.

II. CONNECTING THE DOTS

"On October 14, 1988, [Mark] Herre was stopped by Monroe County sheriff's deputies after they received an anonymous tip that someone was transporting illegal drugs in a car fitting the description of the car Herre was driving."[4] The deputies thereafter proceeded to search "Herre's vehicle and found 300 pounds of marijuana in the trunk."[5] Unfortunately for Mr. Herre, one year earlier, in 1987, the legislature enacted a sales tax on illegal narcotics.[6] On November 17, 1988, the Department of Revenue, acting under Florida sales and use tax statutes, "sent Herre a notice of tax assessment and jeopardy findings."[7] Approximately eighteen years later, on June 7, 2006, the Third District Court of Appeal entered its decision in *Bridger I*.[8]

Bridger I arose as a class action regarding the collection of tax under section 212.0505 of the *Florida Statutes*, concerning the very same statute under which Herre was prosecuted.[9] These two points in time are directly connected because the *Bridger I* decision represents the latter of the twin class actions, the earlier being *Florida Department of Revenue v. Leon*.[10] The decisions discussed in this note represent but the latest chapters in a story of protracted litigation concerning maintenance of a class action against the State of Florida for unconstitutionally imposed taxes or fees. The latter of these two Third District class actions, decided in 2006, ended in 2007 with denial of jurisdiction by the Supreme Court of Florida.[11]

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3. *See* FLA. STAT. § 215.26 (2007).
4. Herre v. Fla. Dep't of Revenue (*Herre I*), 617 So. 2d 390, 390 (Fla. 3d Dist. Ct. App. 1993).
5. *Id.*
6. FLA. STAT. § 212.0505 (1987).
7. *Herre I*, 617 So. 2d at 390.
8. Fla. Dep't of Revenue v. Bridger (*Bridger I*), 935 So. 2d 536 (Fla. 3d Dist. Ct. App. 2006).
9. *Id.* at 537.
10. *See id.*; *see also* Fla. Dep't of Revenue v. Leon, 824 So. 2d 197 (Fla. 3d Dist. Ct. App. 2002).
11. Fla. Dep't of Revenue v. Bridger (*Bridger II*), 952 So. 2d 1189 (Fla. 2007).

III. LOOKING BACK TO *HERRE* AND IMPLICATIONS FOR FLORIDA TAX LAW

The decisions in *Bridger II* and *Leon* are directly connected to Mr. Herre by the decision of the Supreme Court of Florida in *Florida Department of Revenue v. Herre (Herre I)*.[12] Both of these class actions arose after the Court's 1994 decision, affirming *Herre I*,[13] declaring unconstitutional a 1987 Florida tax statute which imposed Florida sales and use tax on transactions involving illegal substances.[14] The statute imposed taxes on various forms of illegal narcotics trade and fundamentally had the noble, if somewhat misguided goal, of restricting the flow of illegal drugs via heavy taxation and statutory penalties.[15] This statute also imposed significant penalties and mandated disclosures to law enforcement.[16]

Unlike the recent class actions, the *Herre I* case presented the appeal of a single individual from a Department of Revenue final administrative order which reached the Third District without resolution of the constitutional questions presented.[17] The Third District reversed the final order, concluding that the Fifth and Fourteenth Amendments of the United States Constitution prohibited the sanctions imposed under the tax statute.[18] In so doing, not only did the Third District take a clear and bold step of declaring the statute unconstitutional, but it certified conflict with a prior First District opinion that upheld a Revenue assessment under the same statute by rejecting a challenge on common grounds.[19] As is always the case in tax cases, and usually the case of life in general, the devil, as they say, is in the details. One very important detail, which turned out to be of constitutional dimension for Mr. Herre and the State of Florida, was that chapter 212 of the *Florida Statutes* not only mandated payment of tax, but also required each "taxpayer" to disclose information concerning the sources of the transaction upon which

12. 617 So. 2d 390 (Fla. 3d Dist. Ct. App. 1993).

13. Fla. Dep't of Revenue v. Herre (*Herre II*), 634 So. 2d 618, 621 (Fla. 1994).

14. *See id.* at 618. "Every person is exercising a taxable privilege who engages in this state in the unlawful sale, use, consumption, distribution, manufacture, derivation, production, transportation, or storage of any medicinal drug, as defined in chapter 465, cannabis, as defined in [section] 893.02, or controlled substance enumerated in [section] 893.03." *Id.*

15. *Id.* "For the exercise of such privilege, a tax is levied on each taxable transaction or incident, including each occasional or isolated unlawful sale, use, consumption, distribution, manufacture, derivation, production, transportation, or storage . . . ." *Id.*

16. Under subsection 212.12(2) of the *Florida Statutes*, the Florida Legislature imposed a penalty for failing to file a return and an additional 100 percent of the tax due penalty for willful intent to evade payment of the tax. FLA. STAT. § 212.12(2) (1993).

17. *Herre I*, 617 So. 2d at 392.

18. *Id.*

19. Harris v. Fla. Dep't of Revenue (*Harris I*), 563 So. 2d 97, 100 (Fla. 1st Dist. Ct. App. 1990).

the tax was paid by the filing of a return.[20] While this mechanism represents a mundane necessity for collection of most excise tax transactions, it proved anything but mundane to a person engaging in the "privilege" of illegal narcotics trafficking within the state.[21] Because of this mechanism and related penalty provisions, the Supreme Court of Florida relied on *Marchetti v. United States*[22] in accepting Mr. Herre's arguments.[23] The Court reached the conclusion that Mr. Herre's position under Florida law was indeed indistinguishable from the United States Supreme Court decision in *Marchetti,* with respect to the violation of Mr. Herre's Fifth and Fourteenth Amendment rights.[24]

IV. ENTER *NEWSWEEK*, *VICTOR CHEMICAL*, AND *KUHNLEIN*

In 1990, the Supreme Court of Florida declared unconstitutional a statutory scheme that imposed a sales tax on magazines, but not on newspapers.[25] Relying on this ruling, Newsweek magazine sought a tax refund of sales tax paid to Florida claiming that it had been compelled to pay taxes pursuant to the unconstitutional statutory scheme.[26] The Florida trial and appellate courts rejected the magazine's request by granting summary judgment to the state on procedural grounds,[27] notwithstanding earlier United States Supreme Court precedent in *McKesson Corp. v. Florida Department of Business Regulation.*[28] The Florida courts did so by reasoning that, unlike the circumstances in *McKesson*, a remedy existed to dispute the tax prior to payment.[29] The appellate opinion relied squarely on reasoning which has its parallel in

20. FLA. STAT. § 212.12(2)(a) (1993). Subsection 212.12(2) stated in part: "[w]hen any person . . . required . . . to make any return or to pay any tax . . . imposed by this chapter fails to timely file such return or fails to pay the tax . . . due within the time required hereunder, . . . a specific penalty shall be added." *Id.* This provision was identified by the court in *Herre II* as imposing a requirement which created Fifth Amendment implications. Fla. Dep't of Revenue v. Herre (*Herre II*), 634 So. 2d 618, 621 (Fla. 1994).

21. *See Herre II*, 634 So. 2d at 620–21.

22. 390 U.S. 39 (1968).

23. *See id.* at 61.

24. *Herre II*, 634 So. 2d at 620–21.

25. Dep't of Revenue v. Magazine Publishers of Am., Inc., 565 So. 2d 1304, 1310 (Fla. 1990).

26. Newsweek, Inc. v. Dep't of Revenue (*Newsweek I*), 689 So. 2d 361, 362 (Fla. 1st Dist. Ct. App. 1997).

27. *Id.* at 364.

28. 496 U.S. 18, 22 (1990).

29. *Newsweek I*, 689 So. 2d at 363.

the *Leon* and *Bridger I* opinions.[30] In *Leon* and *Bridger I*, the view was taken that persons who paid the unconstitutional tax, found in section 212.0505 of the *Florida Statutes*, but failed to timely challenge the statue—meaning within three years of payment—lost those rights.[31] The Florida appellate opinion in *Newsweek I* stated:

> In the present case, the taxpayer could have availed itself of a predeprivation remedy under section 72.011, Florida Statutes (1987). Newsweek had the option of filing suit in circuit court to contest the legality of this tax and paying the amount of the contested tax into the registry of the court.[32]

Ultimately, this position was rejected by the United States Supreme Court in *Newsweek, Inc. v. Florida Department of Revenue (Newsweek II),*[33] when the case reached it based upon certiorari jurisdiction.[34] As will be discussed in more detail below, the *Newsweek II* Court observed, inter alia, that the case arrived before the Court in the context of the underlying taxing statute having been declared invalid on constitutional grounds.[35] In this context, it ruled that procedural due process required access to a post-petition refund provision under Florida law.[36] In so doing, the Court observed that under Florida law, there has been "a longstanding practice of permitting taxpayers to seek refunds under [section] 215.26 for taxes paid under an unconstitutional statute."[37] The practice of providing redress for an unconstitutional taxing was followed in *Department of Revenue v. Kuhnlein.*[38] In the *Kuhnlien* decision, Florida residents challenged the constitutionality of an impact fee imposed on cars purchased out-of-state but later brought into Florida.[39] The Supreme Court of Florida declared this statute to be facially unconstitu-

30. *See id.*; *see also* Fla. Dep't of Revenue v. Bridger (*Bridger I*), 935 So. 2d 536, 539 (Fla. 3d Dist. Ct. App. 2006); Fla. Dep't of Revenue v. Leon, 824 So. 2d 197, 200–01 (Fla. 3d Dist. Ct. App. 2002).

31. *See Bridger I*, 935 So. 2d at 539; *Leon*, 824 So. 2d at 200–01.

32. *Newsweek I*, 689 So. 2d at 363.

33. 522 U.S. 442 (1998).

34. *Id.* at 445.

35. *Id.* at 442.

36. *See id.* at 445.

37. *Id.* at 444 (citing State *ex rel.* Hardaway Contracting Co., v. Lee, 21 So. 2d 211 (Fla. 1945)).

38. 646 So. 2d 717 (Fla. 1994).

39. *Id.* at 719; *see also* FLA. STAT. § 319.231 (1991).

tional as a violation of the Commerce Clause.[40] The *Kuhnlein* decision rejected the State's argument that a class action was an inappropriate mechanism to deal with tax refunds, and that class members could not seek a refund of a vehicle impact fee because they failed to comply with the requirements in section 215.26.[41] Despite the failure of the class members to apply for a refund from the Comptroller, as mandated by the statute, the Supreme Court of Florida concluded that the class action for a refund could proceed.[42]

Given the history of the Florida "non-claim" statute, as discussed further below, it is not surprising that the *Kuhnlein* ruling by the Supreme Court of Florida sparked controversy and uncertainty in the district courts about the limits of its application. Florida's jurisprudence had previously established that "[a] refund is a matter of grace and if the statute of non-claim is not complied with, the statute becomes an effective bar in law and in equity."[43] This often repeated, unequivocal language was derived, not only through the establishment of time-tested jurisprudence, but also by successive reenactments of section 215.26 by the Florida Legislature over several decades. Notwithstanding the weight of this legislative and jurisprudential background, the *Kuhnlein* court seemed to eliminate the need to file a refund application with the State of Florida when a law was declared facially unconstitutional.[44] However, this reading of the *Kuhnlein* decision seemed to create an exception to the jurisprudence previously established by *State* ex rel. *Victor Chemical Works v. Gay*[45] and other Florida decisions; in fact, the Supreme Court of Florida acknowledged this shift in its later decision in *Department of Revenue v. Nemeth* (*Nemeth II*).[46]

40. *Kuhnlein*, 646 So. 2d at 726. Section 319.231, *Florida Statutes* (1991), imposed a $295.00 impact fee upon the titling of a motor vehicle in Florida. Act effective July 1, 1991, ch. 91-82, § 9, 1991 Fla. Laws 619, 622.

41. *Kuhnlein*, 646 So. 2d at 720.

42. *Id.*

43. Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295, 297 (Fla. 1967); State *ex rel.* Victor Chem. Works v. Gay, 74 So. 2d 560, 562 (Fla. 1954); *see also* State *ex rel.* Butler's Inc. v. Gay (*Gay II*), 29 So. 2d 246, 247 (Fla. 1947); State *ex rel.* Butler's, Inc. v. Gay (*Gay I*), 27 So. 2d 907, 908 (Fla. 1946); N. Miami v. Seaway Corp., 9 So. 2d 705, 706 (Fla. 1942); City of Orlando v. Gill, 174 So. 224, 226 (Fla. 1937).

44. *See Kuhnlein*, 646 So. 2d at 725.

45. 74 So. 2d 560 (Fla. 1954).

46. 733 So. 2d 970, 973 (Fla. 1999).

V. THE SUPREME COURT OF FLORIDA REAFFIRMS ITS 1954 DECISION: *VICTOR CHEMICAL WORKS* IN *NEMETH II*

In *Nemeth II*, the Supreme Court of Florida returned to the issues raised in *Kuhnlein*, after conflict arose in district opinions, when it answered the Fourth District's certified question concerning the remaining validity of *Victor Chemical Works*.[47] Following an initial ruling by the circuit court relying on *Victor Chemical Works* in favor of the State, the Fourth District reversed, relying on *Kuhnlein*, by ruling that the Nemeths, the named plaintiffs, need not satisfy the requirements of section 215.26 of the *Florida Statutes* because it determined the statute was facially unconstitutional and read the *Kuhnlein* case to eliminate the "non-claim" statutory requirements of section 215.26.[48] The Fourth District nonetheless certified the case to the Supreme Court of Florida as being in conflict with a Third District decision.[49] The Supreme Court of Florida subsequently clarified that it intended to honor the statutory "non-claim" limitations on the right to redress—regardless of the existence of facially unconstitutional taxation—by breathing life back into its *Victor Chemical Works* decision, post *Kuhnlein*.[50] In so doing, the Court overturned the Fourth District's 1997 decision in *Nemeth I*.[51]

The First and Fourth District Courts of Appeal seem to have read *Kuhnlein* to eliminate the need for taxpayers to comply with the provisions of *Florida Statutes* section 215.26 in the narrow context of a facially unconstitutional statute.[52] But this ultimately did not prove to be the case as the Supreme Court of Florida relied upon its precedent in *Victor Chemical Works* and its reading of the *McKesson* decision from the United States Supreme Court, and restricted the right to a refund to those who paid the tax and filed an action for refund within three years.[53] This limitation was imposed by requiring compliance with section 215.26.[54]

Moreover, *Nemeth II* did not abandon the earlier decision in *Kuhnlein*, but rather distinguished it in part and followed the earlier ruling in part by reaffirming *Kuhnlein's* elimination of the need to pursue administrative re-

47. *Id.* at 971.
48. Nemeth v. Fla. Dep't of Revenue (*Nemeth I*), 686 So. 2d 778, 780 (Fla. 4th Dist. Ct. App. 1997).
49. *Id.*
50. *Nemeth II*, 733 So. 2d at 973.
51. *Id.* at 975.
52. *See Nemeth I*, 686 So. 2d at 779–80; Pub. Med. Assistance Trust Fund v. Hameroff, 689 So. 2d 358, 359 (Fla. 1st Dist. Ct. App. 1997).
53. *Nemeth II*, 733 So. 2d at 973–75.
54. *Id.* at 974.

medies before seeking redress in court.[55] At the same time, this rule was restricted to those circumstances when *the sole issue contested* was whether the tax statute was facially unconstitutional.[56] Later cases, such as the First District's decision in *Department of Highway Safety & Motor Vehicles v. Sarnoff*,[57] although not relevant here, further explicated this distinction.[58] For various reasons, including principles of exhaustion of remedies—outside the context of constitutional issues—and judicial economy, this limitation made sense. This exception has been referred to as the "direct-file" rule because of the elimination of administrative compliance with *Florida Statutes* section 215.26(2).[59] In *Nemeth II*, the Supreme Court of Florida also harmonized its many prior decisions regarding the exhaustion of remedies with the futility of such a procedure by saying: "We recognize that the Comptroller cannot declare a tax unconstitutional, and thus, when the claim is solely that the refund is required because the tax is unconstitutional, to file the claim with the Comptroller would be a futile act."[60]

VI. *LEON* AND *BRIDGER I* AND THEIR CLAIMS TO *MCKESSON* FOLLOWING *NEMETH II*

Elimination of administrative remedies is all well and good under such circumstances as found in both *Kuhnlein* and *Nemeth II*, but the elimination of administrative procedures did little to alleviate the sting of the State's extraction of tax monies based upon a facially unconstitutional statute as found in the *Bridger*, *Leon*, and *Nemeth* cases.[61] *Kuhnlein* addressed this problem by requiring backward-looking relief.[62] *Nemeth II* did not deny such relief,

55. *Id.*

56. *Id.*

57. 776 So. 2d 976 (Fla. 1st Dist. Ct. App. 2000).

58. *Id.* at 978–79.

59. *Id.* at 978. In deciding *Nemeth II*, the Supreme Court of Florida returned to early precedent in *Reynolds Fasteners, Inc. v. Wright*. *Nemeth II*, 733 So. 2d at 974 n.8 (citing *Reynolds Fasteners, Inc. v. Wright*, 197 So. 2d 295, 298 (Fla. 1967)). The *Reynolds Fasteners, Inc.*, case is interesting because it was decided based upon a general statute of limitations (chapter 95) rather than a specific statute of non-claim—such as *Florida Statutes* section 215.26. *Reynolds Fasteners, Inc.*, 197 So. 2d at 296.

60. *Nemeth II*, 733 So. 2d at 974. It is well established that a challenge to the facial constitutionality of a statute cannot be resolved by an administrative agency. Key Haven Associated Enters., Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund, 427 So. 2d 153, 157 (Fla. 1982).

61. *See* Fla. Dep't of Revenue v. Bridger (*Bridger I*), 935 So. 2d 536, 537 (Fla. 3d Dist. Ct. App. 2006); Fla. Dep't of Revenue v. Leon, 824 So. 2d 197, 199 (Fla. 3d Dist. Ct. App. 2002); *Nemeth II*, 733 So. 2d at 972.

62. Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 726 (Fla. 1994).

but narrowed the availability of it by subjecting the class members to compliance with the refund statute.[63] *Nemeth II* eliminated administrative compliance with the refund process administered by the Department of Revenue, but it did nothing to eliminate the need to take legal action, once payment occurred, under the penalty of a ticking legal clock.[64] Unfortunately, elimination of compliance with administrative remedies proved to be a distinction—without a difference—because it did not help by redressing constitutional injury through backward-looking relief.[65]

This decision separated *Nemeth* from *Kuhnlein* but resolved the conflict because certain Florida district courts read *Kuhnlein* to stand without exception—albeit limited to a facially unconstitutional statute—for the legal maxim: "[N]either the common law nor a state statute can supersede a provision of the federal or state constitutions."[66] Ultimately, this maxim was the basis upon which *Kuhnlein* was grounded.[67] However, in *Nemeth II*, as discussed earlier, the Court reaffirmed that the legislature, through enactment of *Florida Statutes* section 215.26, limited a taxpayer's right to obtain a refund, including redress from an unconstitutional statute.[68] At the end of the day, the reaffirmation of the validity of *Victor Chemical Works* means that the Florida Legislature has the right to establish limitations on redress from unconstitutional taxation—whether the "non-claim" period is decided to be one year or three years.[69] This interpretation eliminated the Nemeths from class representative status in the case of the automobile fee,[70] and ultimately, directed the outcome of the *Leon* and *Bridger* decisions by limiting class participation in their circumstances as well.[71]

VII. LEON AND BRIDGER SEEK REDRESS RELYING UPON *MCKESSON*?

In *Public Medical Assistance Trust Fund v. Hameroff*,[72] the First District read the *Kuhnlein* decision, what appeared to be at face value, as rejecting a belated invitation of the Department of Revenue to tie refunds in com-

63. *Nemeth II*, 733 So. 2d at 974.
64. *Id.*
65. *Kuhnlein*, 646 So. 2d at 726.
66. *Id.* at 721.
67. *Id.* at 725–26.
68. *Nemeth II*, 733 So. 2d at 974.
69. *Id.* at 973–74.
70. *See id.*
71. *See* Fla. Dep't of Revenue v. Bridger (*Bridger I*), 935 So. 2d 536, 539 (Fla. 3d Dist. Ct. App. 2006); Fla. Dep't of Revenue v. Leon, 824 So. 2d 197, 202 (Fla. 3d Dist. Ct. App. 2002).
72. 689 So. 2d 358 (Fla. 1st Dist. Ct. App. 1997).

pliance with *Florida Statutes* section 215.26, regardless of the basis for the claim.[73] The First District made the observation that

> [s]overeign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supercede a provision of the federal or state constitutions.[74]

This observation was set forth because of the contrast between this viewpoint and the results in *Nemeth I*, *Leon,* and *Bridger I.* As reported in the Third District opinion in *Leon*, on February 8, 1990, while the criminal charges were pending against Ana Leon,

> the Department served Leon with its form "Notice of Assessment and Jeopardy Findings," alleging that she owed $45,798.75 in taxes and penalties, pursuant to section 212.0505. On March 21, 1991, the Department issued a revised Notice, lowering the amount due to $10,502.28. With her criminal case still pending, Leon paid the assessment.[75]

Likewise, another member of the *Leon* class, Richard Munson,

> received the same form "Notice" in May 1989, seeking $24,750 in taxes and penalties. Munson, unlike Leon, filed a timely administrative challenge to the assessment, but his appeal was denied. Due to his cooperation with state law enforcement authorities, however, the Department agreed to reduce the assessment to $7,500, which Munson paid.[76]

These facts are recited, not as a mere recitation of the mundane facts of this case, but instead, because payments of these tax assessments became important, post *Nemeth*, due to the circumstances which surrounded the payments—how the amount of payment was established and finally paid. In the scenarios in this case, unlike in *Nemeth* or *Victor Chemical*, the payments were made following a "Notice of Assessment and Jeopardy Findings."[77] The Notice of Assessment and Jeopardy Findings was important because in

73. *See id.* at 359.
74. *Id.*
75. *Leon*, 824 So. 2d at 200.
76. *Id.*
77. *Id.*

Leon, the court made the following important observations about these jeopardy findings.

> The appellees in this case are the plaintiff class members in the circuit court, constituting the 815 taxpayers who, between 1986 and 1994, were identified by the Department as accused drug traffickers and served with jeopardy tax assessments under section 212.0505. The class members were notified that *their assets would be frozen or seized if the tax and penalties were not immediately paid.*[78]

Thus, the court in *Leon* acknowledged the existence of a classic case of state imposed duress in the extraction of the tax payments.[79] The existence of this duress, in the extraction of an unconstitutional tax via jeopardy findings, represents distinguishing circumstances from the circumstances of *Nemeth* and *Victor Chemical*. As discussed above, under Florida law found in *Victor Chemical* and reaffirmed in *Nemeth II*, the right to seek a refund of taxes and fees alike, even when paid pursuant to an unconstitutional statute, accrued upon payment and was limited to three years from the date of payment by legislative fiat.[80] In *Leon* and *Bridger*, the class plaintiffs argued due process, as found in *McKesson*, required that section 215.26 of the *Florida Statutes* should be read to allow access to a statutory remedy via the refund provisions of Florida law.[81] In *Leon*, the Third District reversed the trial court, granting final summary judgment to the named taxpayers, Leon and Munson, because they had paid taxes under their Notice of Assessment and Jeopardy Findings, more than three years before the Supreme Court of Florida's ruling in *Herre II*.[82] The direct result of the Third District's application of the *Nemeth II* precedent to the facts before the court in *Leon*, and subsequently in *Bridger I*, eliminated the right to a refund with respect to the original class representatives.[83] As reported in *Leon*, the class representatives argued that the right to a refund should not have accrued until the Supreme Court of Florida acted to declare the statute unconstitutional in *Herre*

78. *Id.* at 199 (emphasis added).

79. *See generally id.* at 198–202.

80. *See* Dep't of Revenue v. Nemeth (*Nemeth II*), 733 So. 2d 970, 974 (Fla. 1999) (citing FLA. STAT. § 215.26(2) (1999)); State *ex rel.* Victor Chem. Works v. Gay, 74 So. 2d 560, 565 (Fla. 1954) (citing FLA. STAT. § 215.26(2) (1954)).

81. Fla. Dep't of Revenue v. Bridger (*Bridger I*), 935 So. 2d 536, 537 (Fla. 3d Dist. Ct. App. 2006); *Leon*, 824 So. 2d at 201; *see also* McKesson Corp. v. Fla. Dep't of Bus. Reg., 496 U.S. 18, 24 (1990).

82. *Leon*, 824 So. 2d at 200, 202; *see also* Fla. Dep't of Revenue v. Herre (*Herre II*), 634 So. 2d 618 (Fla. 1994).

83. *Bridger I*, 935 So. 2d at 539; *Leon*, 824 So. 2d at 202.

II.[84] The focus of this argument, discussed separately below, depends on an examination of the *McKesson* decision, but because of *Nemeth II*, the court did not have the authority to approve such a result even if it so desired.[85]

In *Bridger I*, the court observed that the decisions of the court in *Leon*, its sister case, fell within "the law of the case" doctrine.[86] The *Bridger I* opinion both rejected and seemed to chastise attempts to reargue the issues decided in *Leon*, following from the law of the case doctrine.[87] The *Bridger I* decision, concerning the law of the case, held in favor of a class action that consisted of taxpayers who fell within a specified range.[88] That range, incorrectly decided by the trial court, represented all taxpayers who paid tax under the unconstitutional statute "within the preceding three-year period of when this action was originally filed (after January 16, 1993)."[89]

VIII. INQUIRING WHETHER LEON AND BRIDGER'S CLAIM TO *MCKESSON* HAS MERIT

The opinion in *Leon* reflects the fact that the Third District reluctantly, but given the precedent, correctly disagreed with the *Leon* class' arguments, based upon the controlling precedent of *Nemeth I*.[90] Given this history, the key to the *Leon* opinion, beyond the obvious observation by the court of the existing *Nemeth I* precedent, was the *rejection* of the argument that under *McKesson* the state had not provided adequate post-petition relief.[91] Clearly, this argument was not one which the Third District had the luxury of indulging, given the *Nemeth I* precedent. Moreover, in *Bridger I*, the Supreme Court of Florida did not accept jurisdiction to speak again on its *Nemeth I* decision.[92] Nevertheless, questions remain outside of the context of strict legal precedent within Florida jurisprudence.

Discussion of what *McKesson* means to the facts involved in these cases, as well as equitable consideration should, at the very least, be aired. *McKesson* may be fairly characterized as holding that "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."[93]

84. *Leon*, 824 So. 2d at 199.
85. *See* Dep't of Revenue v. Nemeth (*Nemeth II*), 733 So. 2d 970, 975 (Fla. 1999).
86. *Bridger I*, 935 So. 2d at 537.
87. *Id.* at 538.
88. *Id.*
89. *Id.* at 539.
90. Fla. Dep't of Revenue v. Leon, 824 So. 2d 197, 201 (Fla. 3d Dist. Ct. App. 2002).
91. *Id.*
92. *Bridger I*, 935 So. 2d at 539.
93. McKesson Corp. v. Fla. Dep't of Bus. Reg., 496 U.S. 18, 31 (1990).

But the Court also acknowledged, in dicta, the right of the state to maintain sound fiscal planning by interposing procedural requirements to refund requests.[94] Notwithstanding the importance of sound fiscal planning, when considering what was equitable in these twin cases, the *Leon* and *Bridger I* class' argument has great appeal based upon logic, fairness, and principles of adequate notice.

First, as to the logic, the simple and clear logic, if applied with no other criteria, would dictate a refund because it is the decision by a court which precipitates the right to refund, not the actual date of payment of the tax.[95] Beyond arguments based simply on logic, there exists an issue of fairness to taxpayers. The fairness issue simply flows from the logic just described, but the need for fairness is heightened by the existence of duress in the acquisition of the tax monies. It is of no great mental stretch to understand that the date of payment of the tax represents a unique, and in many instances, compelled act by the taxpayer, following state action with the threat of the imposition of significant financial, if not criminal, penalties. For example, in these twin cases, the class was subject individually to a penalty of fifty percent of the estimated tax due.[96] Therefore, it is clear that duress accompanied payment. However, the decision to declare a state tax statute unconstitutional, in particular, is not only a rare event—it is the rare event which triggers the right to a refund.[97] Finally, awareness of the decision, even if the "non-claim" statute were to be applied from the date of a trial court decision, would at least establish a clear demarcation point for all previous taxpayers.

A rhetorical question can be raised, based upon the facts surrounding the original class representatives found in *Leon* and *Bridger I*: Should a taxpayer who has paid tax, and, as reported in the *Leon* decision, filed a challenge as a named class member, be left without redress when the tax statute is subsequently declared facially unconstitutional? Clearly, the reason persons so situated received no recompense for this particular unconstitutional taking is the payment of tax under duress. Under such circumstances, it is both unjust and ironic that the duress used by the state, in extraction of the tax, works against the taxpayer twice. First, the duress works to compel payment wrongly, and then, once payment is received, the compelled payment works against the right to recovery instead of providing grounds for a refund. This is because the payment operates under Florida's non-claim sta-

94. *Id.* at 44–45.

95. *See, e.g.*, *Bridger I*, 935 So. 2d at 539; *Leon*, 824 So. 2d at 202.

96. Fla. Dep't of Revenue v. Herre (*Herre II*), 634 So. 2d 618, 618 (Fla. 1990); *see also Bridger I*, 935 So. 2d at 537; *Leon*, 824 So. 2d at 198–200.

97. *Bridger I*, 935 So. 2d at 537.

tute so as to trigger a dwindling hour-glass of time under the statute.[98] In essence, time begins to run out under the refund statute once the money is paid regardless of the unconstitutional nature of the statute and the duress used in its acquisition.[99] How fair or just is such a result and does it really comply with federal due process?

Originally, *Kuhnlein* seemed to say no,[100] but *Nemeth II* said yes.[101] Moreover, under the maxim, "neither the common law nor a state statute can supersede a provision of the federal or state constitutions," there should be, at least in theory, no legislative impasse to access a refund once such a wrong has been committed.[102] This result, however, was not the outcome for all but for approximately fifty-one class members in *Leon* and *Bridger,*[103] nor was it given the same hour-glass reading of the refund statute in the earlier decision in *Nemeth II.*[104] Despite the equity of such arguments, as presented in *Leon* and *Bridger,* the result did not follow in these cases. Different conclusions can be drawn, but one logical one suggests that under current Florida law, as found in *Nemeth,* due process would dictate no recompense is necessary.[105] Returning to the *McKesson* case, by examining the later decisions from the United States Supreme Court, regarding unconstitutional taxation and refunds of state taxes and decisions of other states on the same subject, can perhaps add further light, if not heat, to the issues.

IX. RETURNING TO *MCKESSON* VIA *NEWSWEEK*, A TAX PROCEDURE CASE, AND ITS SIGNIFICANCE

In *Newsweek II,* the United States Supreme Court rejected the state district court's interpretation of the *McKesson* decision, as rationalized by Florida, during the state appeals process, but prior to arriving in the United States Supreme Court.[106] As touched upon earlier, during this process, a rationalization was accepted that *McKesson* was distinguishable, balanced on the basis of the existence of a pre-deprivation statutory remedy.[107] The state court accepted the argument that the absence of a pre-deprivation remedy,

98. FLA. STAT. § 215.26(2) (2007).
99. *See id.*
100. Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 726 (Fla. 1994).
101. Dep't of Revenue v. Nemeth (*Nemeth II*), 733 So. 2d 970, 975 (Fla. 1999).
102. *Kuhnlein*, 646 So. 2d at 721.
103. Fla. Dep't of Revenue v. Bridger (*Bridger I*), 935 So. 2d 536 (Fla. 3d Dist. Ct. App. 2006); Fla. Dep't of Revenue v. Leon, 824 So. 2d 197, 201 n.1 (Fla. 3d Dist. Ct. App. 2002);
104. *See Nemeth II*, 733 So. 2d at 970.
105. *See id.* at 974–75.
106. Newsweek, Inc. v. Fla. Dep't. of Revenue (*Newsweek II*), 522 U.S. 442, 443 (1998).
107. *Id.* at 442.

which had been enacted into Florida law after the *McKesson* decision, eliminated the need for access to refund statutes.[108] The *Newsweek II* Court observed that the effect of the district court's opinion was to cut off a post-petition remedy to section 215.26, thus denying a retroactive remedy to taxpayers affected by an unconstitutional statute, when it stated: "While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax."[109]

Moreover, in *Newsweek II*, the Court explicitly indicated the reasoning found in *Reich v. Collins (Reich II)*[110] was applicable.[111] In the *Reich* decision, the Court observed a set of facts parallel to those which later arose in *Leon* and *Bridger*.[112] The Court disapproved the ruling by the Supreme Court of Georgia, which, if let stand, would have allowed the state of Georgia to refuse a refund when "the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid."[113] The very nature of the circumstances outlined in *Reich*—a state tax statute declared unconstitutional when duress existed in the extraction of the tax, mandated retroactive relief[114]—establish the grounds for redress. These are the same circumstances present in the twin class actions, *Leon* and *Bridger*.[115] The issue of payment of a tax under duress, as alluded to earlier, is a circumstance which the United States Supreme Court called for remedial solution.[116] In *McKesson,* the Court stated:

> The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful

108. *Id.* at 443.
109. *Id.* at 444–45.
110. 513 U.S. 106 (1994).
111. *Newsweek II*, 522 U.S. at 443.
112. *See* Fla. Dep't of Revenue v. Bridger (*Bridger II*), 952 So. 2d 1189 (Fla. 2007); Fla. Dep't of Revenue v. Leon, 824 So. 2d 197 (Fla. 3d Dist. Ct. App. 2002).
113. *Reich II*, 513 U.S. at 109 (quoting Reich v. Collins (*Reich I*), 422 S.E.2d 846, 849 (Ga. 1992)).
114. *Id.* at 111.
115. *See* Fla. Dep't of Revenue v. Bridger (*Bridger II*), 952 So. 2d 1189 (Fla. 2007); Fla. Dep't of Revenue v. Leon, 824 So. 2d 197 (Fla. 3d Dist. Ct. App. 2002).
116. *See* McKesson Corp. v. Fla. Dep't of Bus. Reg., 496 U.S. 18, 31 (1990).

> backward-looking relief to rectify any unconstitutional deprivation.[117]

Perhaps, the Court did not literally mean that meaningful "backward-looking relief to rectify an unconstitutional deprivation" does not always mean a refund, but the strength of the language and the choice of these words, in the context of the discussion of the Georgia tax involved in the case, clearly gives this impression. [118] Under these circumstances, the mere *potential* access to a tax procedure, at some point in time prior to the declaration of the unconstitutional nature of the tax, would appear to be inadequate to meet the standard set forth in *Reich.* It should also be stated, however, that the establishment of time limits for refund actions, whether in the form of a statute of limitations or a statute of non-claim, is a generally accepted method of insuring a state's fiscal stability.[119]

State tax courts in other jurisdictions have addressed this issue in light of *McKesson.*[120] The New York Tax Court opinion in *Brault v. New York State Tax Appeals Tribunal,*[121] represents one example of the common rationale that is found in these opinions. That rationale is simply one grounded in the state's need for fiscal planning.[122] The *McKesson* Court addressed this by saying: "The State's interests in avoiding serious economic and administrative dislocation and additional administrative costs may play a role in choosing the form of and fine-tuning the relief to be provided McKesson, though Florida's interest in financial stability does not justify a refusal to provide relief."[123]

Thus, the *McKesson* Court seemed to acknowledge the need for such overarching concerns such as "financial stability," but did not suggest these concerns eroded the need for relief.[124] The circumstances of *Leon* and *Bridger* can be viewed as particularly inequitable to the taxpayers, even beyond the use of duress in obtaining payment of the unconstitutional tax. Indeed, an argument within the bounds of reason could go so far as to characterize the denial of relief after the application of duress as a type of legal "gotcha." This is not simply attributable to the existence of duress in extracting payments, but also because the unconstitutional nature of the underlying tax

117. *Id.*
118. *Id.*
119. *See id.* at 44.
120. *See* Reich v. Collins (*Reich II*), 513 U.S. 106, 109 (1994); *see also* Newsweek, Inc. v. Fla. Dep't of Revenue (*Newsweek II*), 522 U.S. 442, 443 (1998).
121. 696 N.Y.S.2d 579 (App. Div. 1999).
122. *McKesson*, 496 U.S. at 44.
123. *Id.* at 21.
124. *Id.* at 37.

statute, as a Fifth Amendment violation, was raised on appeal in the First District in an appellate decision preceding the class actions and let stand by the Supreme Court of Florida in *Harris v. Florida. Dep't of Revenue (Harris I)*.[125] This decision and jurisdictional appeal occurred before conflict jurisdiction ultimately brought the constitutionality of the unlawful statute before the court in *Herre*.[126] Also, as in *Newsweek I*, taxpayers reasonably relied upon the apparent availability of a post-payment remedy when paying the tax.[127] Unfortunately, the post-payment remedy represented an hour-glass of rights, which was tipped over upon payment; therefore, it ran out before the statute was declared unconstitutional. Such a remedy sounds in theory, more than fact, if it begins to disappear once a tax is paid, especially if paid under duress.

In *Kuhnlein*, the Supreme Court of Florida appeared to follow the *McKesson* decision because it recognized that the statute at issue was both *void ab initio* and, equally important under *McKesson*, there was no way the State of Florida could correct the wrong which had resulted from the imposition of the fee.[128] In the *Newsweek II* and *McKesson* decisions, an adequate remedy was not balanced upon elimination of an administrative application for refund. Instead, the legal lens was focused on remedies of constitutional dimensions. Both cases addressed tax procedures to provide backward looking relief from facially unconstitutional taxation.[129] Under the circumstances present in *Leon* and *Bridger*, elimination of an administrative exhaustion step, via the State of Florida, provided no adequate backward looking relief to the original class of plaintiffs and therefore, *it may be argued*, an incomplete constitutional remedy. Application of precedent, such as *Victor Chemical*, based upon a concept of sovereign immunity, through the enactment of a non-claim statute, seems incongruent with the maxim that statutory limitations cannot override constitutional rights. As stated eloquently by the Supreme Court of Florida in *Kuhnlein*: "Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will."[130] Therefore, to begin the running of an

125. 563 So. 2d 97 (Fla. 1st Dist. Ct. App. 1990), *review denied*, 574 So. 2d 141 (Fla. 1990).

126. Herre v. Fla. Dep't of Revenue (*Herre I*), 617 So. 2d 390, 390 (Fla. 3d Dist. Ct. App. 1993); *see also* Fla. Dep't of Revenue v. Herre (*Herre II*), 634 So. 2d 618, 618 (Fla. 1994).

127. Newsweek, Inc. v. Fla. Dep't of Revenue (*Newsweek I*), 689 So. 2d 361, 363 (Fla. 1st Dist. Ct. App. 1997).

128. Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 726 (Fla. 1994).

129. *See* Newsweek, Inc. v. Fla. Dep't of Revenue (*Newsweek II*), 522 U.S. 442, 442–44 (1998); *see also McKesson*, 496 U.S. at 31.

130. *Kuhnlein*, 646 So. 2d at 721.

hour-glass statute of "non-claim" from the payment of a tax, paid under duress and pursuant to a statute later declared to be facially unconstitutional, appears, at the very least, inequitable, offers no relief for wrongfully injured parties, and steps outside the spirit, if not the letter of the law, found in the context of *McKesson*, *Reich*, and *Newsweek*, as well as the Supreme Court of Florida's earlier decision in *Kuhnlein*.

X. CONCLUSION

Perhaps statutory limitations and/or interpretation of the same, as outlined in this note, will be subsequently altered by the courts in the proper case. Or perhaps alternatively, the issues will be addressed and remedied by the Florida Legislature through amendment to *Florida Statute* section 215.26, thus eliminating the bar to recovery when taxes or fees are determined by Florida's courts to be facially unconstitutional. This would be accomplished by removing such circumstances in cases from the view that an hour-glass effect begins at the time of payment, especially if payment occurs under duress. Rather, under such circumstances, "non-claim" limitations should not begin to run before the statute, under which the tax was paid, has been declared unconstitutional.