

ARIZONA STATE UNIVERSITY  
CORPORATE AND BUSINESS LAW JOURNAL  
FORUM

---

---

VOLUME 2

MARCH 2020

NUMBER 22

---

---

**COMMENTARY**

*TECH COMPANY'S BATTLE ANOTHER SYMPTOM OF COVID-19  
AS STATES LOOK TO RECOUP LOSSES*

JACE RILEY \*

Maryland recently overruled the Governor's veto to enact a gross receipts tax on digital advertisement revenue to help earn back some of the lost profits due to the COVID-19 Pandemic. However, tech companies are quickly challenging the tax as unconstitutional.<sup>1</sup> While Maryland's tax specifically targets digital advertisements, states across the country are looking at many ways to make back some of the lost revenues stemming from the virus.<sup>2</sup>

Maryland's legislation is arguably grounded on good intentions; the state (like many others) has been ravaged by COVID-19. The policy arguments used to oppose the tax by tech companies like Facebook and Google are that the tax is not restricted to big tech, and that any digital advertisement can be taxed even those by small, local businesses.<sup>3</sup> However, the legislation is limited to companies that reach a certain threshold of revenue, specifically at least \$100 million global annual gross revenue.<sup>4</sup> While the opponents of the bill may be correct that any company may be subject to the tax, the revenue threshold of the bill shows a much more targeted tax.

The legal arguments focus on the constitutionality of the legislation. Specifically, the plaintiffs are arguing that the tax has a punitive nature (a sign of a penalty, not a tax), the legislation being pre-empted by the Internet Tax Freedom Act (ITFA), and violations of the Due

---

\*J.D. Candidate, Class of 2022, Arizona State University Sandra Day O'Connor College of Law.

<sup>1</sup> John D. McKinnon & Alexandra Bruell, *Tech Industry Challenges Maryland Online Ad Tax*, THE WALL ST. J. (Feb. 18, 2021 05:26 ET), <https://www.wsj.com/articles/tech-industry-challenges-maryland-online-ad-tax-11613679371>

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> H.B. 732, 2020 Leg., 442nd Sess. (Md. 2020) <http://mgaleg.maryland.gov/2020RS/bills/hb/hb0732E.pdf> (not positive on this site)

Process and Commerce Clauses of the United States Constitution.<sup>5</sup> In fact, Maryland's Attorney General warned there was a chance that act would be seen as unconstitutional by a court.<sup>6</sup> Further, the U.S. Chamber of Commerce is supporting the fight against this Act.<sup>7</sup> While Maryland may see this act as a way to get a global company to contribute to a local fund, it is clear that there are some hurdles it must clear, and those who would be subjected to the tax are not going down without a fight.<sup>8</sup>

While a person would normally think of a local business being affected, local and state governments are not immune. In fact, States are funding the vaccine distribution after a year of low income.<sup>9</sup> Not only are their funds lower given the slower economy, but now States must spend to help facilitate the vaccine rollout.<sup>10</sup>

While the constitutionality of the legislation is not certain, states are in need of some solution to regain lost income, and they need it soon. From refrigeration to staffing, the vaccine rollout will not be cheap. Maryland is on the forefront of local governments who are trying to fill in the void that has been created by COVID-19. One could easily wager on an array of various, specific taxes being implemented like the digital advertising one. Any tax that is passed must and should be constitutional, but it would not be surprising if states try and push the envelope. Their desperation to generate revenue will be the driving force to cure another symptom of the raging virus.

If the challenge fails, the legislation will become active on March 14, 2021.<sup>11</sup>

---

<sup>5</sup> Complaint at 5-6, Chamber of Commerce of the United States of America, et. al. v. Franchot, No. 21-cv-410 (N.D. Md. 2021).

<sup>6</sup> David Shepardson, *Internet groups, U.S. Chamber sue Maryland over digital advertising tax*, REUTERS (Feb. 18, 2021 02:16 PM), <https://www.reuters.com/article/us-usa-internet-maryland/internet-groups-u-s-chamber-sue-maryland-over-digital-advertising-tax-idUSKBN2A12VM>

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Stephanie Armour & Scott Calvert, *Getting Covid Vaccines to People Will Cost States Billions They Don't Have*, THE WALL ST. J. (Dec. 13, 2020, 05:30 AM ET), [https://www.wsj.com/articles/getting-covid-vaccines-to-people-will-cost-states-billions-they-dont-have-11607855400?mod=article\\_inline](https://www.wsj.com/articles/getting-covid-vaccines-to-people-will-cost-states-billions-they-dont-have-11607855400?mod=article_inline)

<sup>10</sup> *Id.*

<sup>11</sup> Charlie Kearns, Charles Capouet, & Samantha Trencs, *The Latest on Maryland's Digital Advertising Tax*, SALT SHAKER (Feb. 24, 2021), <https://www.stateandlocaltax.com/digital-economy/the-latest-on-marylands-digital-advertising-tax/>