

Board of County Commissioners

Agenda Request

Date of Meeting: May 3, 2010

Date Submitted: April 26, 2010

To: Honorable Chairman and Members of the Board

From: Heather J. Encinosa, County Attorney

Subject: Request Board Direction Regarding County of Monroe, Florida v. Priceline.com Inc. et al., Case No. 09-10004-CIV-MOORE/SIMONTON and other Tourist Development Tax Lawsuits

Statement of Issue:

On April 13, 2010, Wakulla County received notice of its inclusion in a class (consisting of all counties with a Tourist Development Tax) that was certified by the United States District Court for the Southern District of Florida in County of Monroe, Florida v. Priceline.com Inc. et al., Case No. 09-10004-CIV-MOORE/SIMONTON. The County must determine whether it wants to remain in this class or opt out of the class in accordance with Federal Rule of Civil Procedure 23. Additionally, the County may want to elect to join a separate lawsuit seeking recovery of unremitted tourist development taxes.

Background:

In County of Monroe, Florida v. Priceline.com Inc. et al., Case No. 09-10004-CIV-MOORE/SIMONTON, Monroe County has sued Priceline.com, Inc., Travelweb LLC, Travelocity.com, LP, Site59.com, LLC, Expedia.com, Inc., Hotels.com, LP, Hotwire Inc., Trip Network, Inc., and Orbitz LLC, alleging that they have failed to pay the full amount of the tourist development taxes due to Monroe County and other counties that levy a tourist development tax. Wakulla County levies a tourist development tax and was therefore included within the class certified by the court.

The basis of Monroe County's lawsuit (and other similar lawsuits that have been filed in Florida and around the nation) is that the defendant travel companies have not been remitting the full amount of tourist development taxes that are due. The defendant travel companies have been remitting tax only based upon the wholesale rates they pay and not on the full retail rate that is ultimately charged to the consumer.

Analysis:

Monroe County Class: Wakulla County is currently a member of the certified class in the Monroe County lawsuit, but is entitled to opt out and not be bound by the judgment in that case. If the Board

elects to opt out, we must do so no later than May 24, 2010. The County would then be free to join the Leon County lawsuit, file its own suit, or do nothing.

If the County remains in the class, the County's rights would be litigated in Monroe County by counsel retained by Monroe County. In accordance with the legal service agreement between Monroe County and class counsel, the class counsel is working on a contingent basis and seeking to be paid 33% of the gross recovery plus costs. In the event, this matter goes up on appeal, the class counsel is seeking 38% of the gross recovery plus costs. In essence, the final attorneys' fees award would be subject to the court's approval, but this could require Wakulla County to pay 33-38% of any entitled recovery. Wakulla County would not have any ability to direct class counsel.

The main benefit to remaining in the Monroe County Class is that this case is currently scheduled to go to trial in July and the class counsel has allegedly already retained an expert who has quantified damages across the state on a county-by-county basis. This damages information is not being released to any of the counties in the class. Given that these same online travel companies are facing numerous lawsuits, seeking recovery of unpaid taxes across the nation, there is a concern about the online travel companies' abilities to pay any recovery. The Online Travel Companies' SEC filings indicate that they have been setting aside reserves in the event they were ever sued on this issue, but it is not clear whether this amount is sufficient to cover all potential damages nationwide.

Leon County Case: In Leon County et al. v. Expedia, Inc. et al., Case No. 2009-CA-4319 (2nd Judicial Circuit in and for Leon County, FL), Leon County and 11 other Florida counties have filed a suit seeking a declaratory judgment that the tourist development taxes are owed. The theories of this case and the Monroe case are the same: that the defendant online travel companies have not been remitting the full amount of tourist development taxes due because they have been remitting tax only based upon the wholesale rates they pay and not on the full retail rate that is ultimately charged to the consumer. The counties currently in the Leon County litigation are: Leon County, Flagler County, Lee County, Manatee County, Pinellas County, Polk County, St. Johns County, Escambia County, Charlotte County, Walton County, Hillsborough County, and Pasco County.

The County Attorney's law firm – Nabors, Giblin & Nickerson, P.A. – has been retained by these 12 counties. If desired, Wakulla County would be able to join the Leon County lawsuit as a county plaintiff and also be represented by Nabors, Giblin & Nickerson, P.A. Nabors, Giblin & Nickerson is working on a contingent basis and seeking to be paid 30% of the gross recovery plus costs. This would require Wakulla County to pay 30% of any entitled recovery.

The main benefit to joining the Leon County case is the ability to be represented by counsel you know and be able to participate in the direction of the litigation. Another benefit is the ability to use

a favorable result from the Monroe class action as persuasive authority. The main disadvantage is timing. The Leon County case is not as far along as the Monroe County class action. A discovery schedule is currently being developed with the goal of filing a summary judgment within the next 60 days. If successful, the next step would be to ascertain damages and seek supplemental relief. Given that these same online travel companies are facing numerous lawsuits, seeking recovery of unpaid taxes across the nation, there is a concern about the online travel companies' abilities to pay any recovery. The Online Travel Companies' SEC filings indicate that they have been setting aside reserves in the event they were ever sued on this issue, but it is not clear whether this amount is sufficient to cover all potential damages nationwide.

Pending Legislation: It is important to note that there is legislation being discussed on the federal and state level that could limit the County's ability to seek recovery of these unpaid tourist development taxes. At the federal level, a bill has been circulated, but not filed that would prevent taxation of electronic commerce by state and local governments. This would prevent the tax from being levied on the full amount paid to the online travel companies.

At the state level, HB 1241 has passed out of committee and, as of the writing of this item, is scheduled to be heard in the house. This bill modifies the existing tourist development tax statute to provide that tax is only due on the rate paid to the lodging establishment and not the full retail rate paid by the consumer. However, it also contains a savings clause, providing that "This act shall not affect any lawsuit existing on July 1, 2010, relating to the taxes imposed by the provisions of law amended by this act." However, as of this writing, the Senate companion bill, SB 2436, has not even been heard in a committee.

Options

1. Elect to Opt out of the Monroe County Class Action.
2. Do Not Elect to Opt out of the Monroe County Class Action.
3. Elect to Join the Leon County lawsuit.
4. Do Not Elect to Join the Leon County lawsuit.
5. Board Direction.

Recommendation

Options #1 and #3

Attachments:

- A. Notice of Pendency of Class Action