

# Chicago Daily Law Bulletin

## Water-bottle tax suit can move ahead

Walgreen can't cite voluntary payment to end class action

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Chicago's 5-cent tax on bottled water is not supposed to apply to carbonated or flavored water drinks such as LaCroix or Perrier.

Yet a class-action lawsuit claims Walgreen Co. forced customers to pay the tax on such items anyway.

The drugstore chain argued the claims should be thrown out because the plaintiff, Destin McIntosh, conceded the argument by paying the company the extra money on several purchases in 2015.

But a state appeals panel this week ruled Walgreen's argument won't work, writing in a 12-page order on Monday that the voluntary payment doctrine does not preclude claims under the state's Consumer Fraud and Deceptive Business Practices Act.

Justice Daniel J. Pierce wrote that McIntosh sufficiently alleged fraud under the law and cited cases suggesting his payment of the tax was a "natural and predictable consequence" of being asked to do so by the mega-chain.

"Here, plaintiff alleged that defendant represented to customers that the bottled beverages they purchased were subject to the bottled-water tax when the purchased products were, in fact, exempt from the tax and represented to cus-

tomers that the purchase price of the beverages included the required tax," Pierce wrote in the unpublished order issued on Monday.

"Plaintiff further alleged that defendant intended that its customers rely on its representation that the products were subject to the tax when the customers were in fact buying tax-exempt products. Taking those allegations as true, the defendant could be found to have engaged in a deceptive act, which precludes the application of the voluntary payment doctrine as a defense."

The bottled-water tax took effect in January 2008. The Chicago Municipal Code states that it should apply to generally "all brands of noncarbonated bottled water intended for human consumption."

A guide published by the city's Revenue Department lists examples of 12 nontaxable examples of items defined by city ordinance as "soft drinks," including mineral water and "other products similar to those listed above due to carbonation and/or other features such as flavoring."

In November 2015, several news outlets reported that Walgreens stores in the city continued charging the tax for sparkling and flavored waters.

Walgreen subsequently announced it had corrected the issue. But McIntosh claimed later that same year that he purchased bottles of Perrier, LaCroix and Smeraldina from Walgreens stores around the city and was charged the tax on each one.

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## Voluntary payment can't beat deception claim in consumer fraud law

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He filed a one-count complaint in Cook County Circuit Court under the consumer fraud act arguing the store knowingly overcharged for the products and that it qualified as a "deceptive and unfair practice" under the law.

Cook County Circuit Judge Diane Joan Larsen granted the defendant's motion to dismiss in January 2017. The motion argued the parameters of the tax were known to the plaintiff and other customers at the time, and the fact he still paid it meant his claims were barred by the voluntary payment doctrine.

McIntosh's appeal made two arguments — that the doctrine does not apply to claims under the Consumer Fraud Act, and that even if they do, his claim satisfies the fraud exception to the doctrine.

To state a claim under the law, Pierce wrote, a plaintiff must allege a deceptive act or practice by a defendant; the defendant's intent that the plaintiff rely on that deception; and the occurrence of the deception during trade or commerce.

The voluntary payment doctrine, meanwhile, says money voluntarily paid under a claim of right to the

payment, with knowledge of facts by the person making said payment, cannot be recovered by arguing the payment was illegal.

The panel cited multiple cases in which it upheld consumer fraud claims against the voluntary payment doctrine. One was *Naru v. Sears, Roebuck & Co.*, 2013 IL App (1st) 122063, in which the plaintiff claimed state sales taxes were improperly assessed on digital TV converters and the justices found the voluntary payment doctrine did not apply when payments were procured by deception or fraud.

In *Floornoy v. Ameritech*, 351 Ill. App.3d 583 (2004), the plaintiff argued the phone utility deliberately terminated collect calls from prison, resulting in higher rates for call recipients. The 2nd District Appellate Court ruled the plaintiff sufficiently alleged deception and that the claim was in the nature of fraud.

The *Floornoy* panel wrote that claims based on "unfair practices" are barred by the payment doctrine, but claims based on deception or fraud are not.

Pierce wrote that both *Naru* and *Floornoy* "make clear that when a plaintiff sufficiently pleads a Consumer Fraud Act claim based on a



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deceptive act or that is in the nature of fraud, the voluntary payment doctrine does not apply and is not a bar to the plaintiff's claim."

The panel analyzed whether McIntosh alleged sufficient facts to produce a claim based on deception or fraud. The justices noted that he alleged at the time he purchased the products that the Walgreens store represented its total price included taxes required and allowed by law; that it still charged the tax on purchases that were exempt; that it intended customers to rely on that representation; and that it acted in the course of trade

or commerce.

"We find that plaintiff's complaint sufficiently alleges a deceptive act and stated a claim under the Consumer Fraud Act, and therefore the voluntary payment doctrine does not bar plaintiff's claim," Pierce wrote, citing the *Naru* decision and adding that "the defendant's intent that the plaintiff rely on a deceptive act might be established by the fact that the customer's payment of the tax was a natural and predictable consequence of the defendant asking the plaintiff to do so."

Pierce was joined in the decision by Justices John B. Simon and Mary L. Mikva.

Walgreen was represented by Kenneth M. Kiebard, Gregory T. Fouts and Kristal D. Petrovich, of Morgan, Lewis & Bockius LLP. A spokeswoman for the firm could not be reached for comment.

McIntosh was represented by Joseph J. Siprut, Todd L. McLawhorn and Richard S. Wilson of Siprut PC. Siprut could not be reached for comment.

The case is *McIntosh v. Walgreens Boots Alliance*, 2018 IL App (1st) 170362-U.

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