

Subway Franchiser Demands Sanctions In Ill. Soda Tax Suit

By **Shayna Posses**

Law360, New York (October 25, 2017, 2:28 PM EDT) -- The U.S. franchiser of Subway restaurants asked a federal judge on Tuesday to sanction consumers leading a suit over the alleged misapplication of a Cook County, Illinois, soda tax to unsweetened tea, saying their request to send the proposed class action back to state court is frivolous.

Lead plaintiffs Charles Drake and Mario Aliano moved to remand their suit Monday, noting that Doctor's Associates Inc. removed the action because the cost of the consumers' requested injunctive relief — namely that the franchiser reprogram its point-of-sale terminals to comply with the tax — met the threshold for federal court jurisdiction. However, after Doctor's Associates removed the suit, Cook County passed an ordinance repealing the tax, so that remedy isn't necessary and there's no longer any basis for removal, the consumers asserted.

But Doctor's Associates contended the next day that the consumers' argument defies decades-old U.S. Supreme Court and Seventh Circuit precedent holding that post-removal changes in the amount in controversy don't impact a removal that was proper at the time. Since even the consumers admit that the suit was properly removed, there is no basis for their request, Doctor's Associates argued.

"What is more, plaintiffs have failed to even amend their complaint, and thus still seek the very injunctive relief that formed the basis of removal," the franchiser said. "While the repeal of the sweetened beverage tax further highlights the opportunistic nature of this case, it does not impact removal. This court should deny plaintiffs' motion to remand and issue sanctions through its inherent authority in the amount of fees expended by [Doctor's Associates] in responding to the instant motion."

Drake and Aliano filed suit Aug. 18 in Cook County Circuit Court, joining a sea of actions that were filed in the wake of the implementation of the county's penny-per-ounce tax on sugar-sweetened beverages.

The consumers alleged that they were illegally charged 21 cents extra for their purchases of FUZE Fresh Brewed Unsweetened Tea, contending that the point-of-sale systems required by Doctor's Associates automatically add the tax to every fountain beverage purchase, even if the patron wants an unsweetened beverage.

The franchiser then **removed the action** to federal court in late September, saying the cost of complying with the consumers' injunctive relief request triggers jurisdiction.

Doctor's Associates would have to provide significant programming and training guidance to franchisees in Cook County in order to modify their POS systems and make sure consumers are properly charged, on top of figuring out how to relocate the self-serve beverage stations and iced tea carafes so consumers can no longer serve themselves, the franchiser noted, estimating the total costs at more than \$5 million.

At the same time, the franchiser asked the federal court to ax the suit, saying it was a naked play at litigation. Doctor's Associates alleged that the consumers went to their local Subway franchise locations and bought soda cups just so they could fill them with unsweetened tea and file suit a few days later.

The franchiser also blasted the consumers' contention that it controls every restaurant's POS system, saying that's simply not true. Each franchisee is in charge of its own pricing and is tasked with collecting and remitting taxes, Doctor's Associates argued.

However, on Oct. 11, Cook County passed an ordinance repealing the sweetened beverage tax, the consumers noted Monday. This change in circumstances nullifies the injunctive relief requested and renders the notice of removal defective, so the suit should be sent back to state court to handle the remaining claim for money damages, the consumers contended.

That argument didn't sit well with the franchiser, though. On Tuesday, Doctor's Associates called the consumers' contention that courts have the discretion to remand a case back to state court because of changed circumstances "wildly inaccurate and intentionally misleading."

Representatives for the parties didn't immediately return requests for comment Wednesday.

The consumers are represented by Thomas A. Zimmerman Jr., Sharon A. Harris, Matthew C. De Re, Nickolas J. Hagman and Maebetty Kirby of Zimmerman Law Offices PC.

Doctor's Associates is represented by David S. Almeida, Courtney C. Booth and Mark S. Eisen of Benesch Friedlander Coplan & Aronoff LLP.

The suit is Drake et al. v. Doctor's Associates Inc., suit number 1:17-cv-06850, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Hannah Meisel. Editing by Orlando Lorenzo.

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