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# NEWS

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By [Michael J. Bologna](#)

Cook County's controversial tax on sweetened beverages continues to provoke controversy, this time with the U.S. Department of Agriculture.

In a series of letters released to news organizations Aug. 10, USDA's Food and Nutrition Service (FNS) informed the State of Illinois that \$87 million in federal food stamp funds are in jeopardy because Cook County's beverage tax, as it is administered, violates the federal Food and Nutrition Act (FNA). The asserted violation relates to federal rules prohibiting state or local sales tax from being collected on food items purchased under the Supplemental Nutrition Assistance Program (SNAP), more commonly known as food stamps.

On another front, the lawsuits continue to mount against retailers selling products subject to the penny-per-ounce levy on sales of sweetened beverages in Illinois' largest county. Plaintiff attorneys seeking to represent taxpayers have filed class actions in Cook County Circuit Court against Walgreens Boots Alliance Inc., 7-Eleven Inc., and McDonald's Corp.

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And in a separate development, Cook County has agreed to abandon its demand for \$17 million in damages against retailers challenging the constitutionality of the county's so-called "soda tax" regime.

### **USDA Warning**

In a [letter](#) to the Illinois Department of Human Services dated Aug. 7, FNS outlined its objections to Cook County's application of the sweetened beverage tax with regard to SNAP recipients.

FNS noted that Cook County tried to accommodate certain retailers unable to modify their point-of-sale systems in time for the Aug. 2 start date, giving them the option to refund the tax charged on SNAP purchases after initial collection. But USDA said this interim arrangement violates FNS prohibitions on state and local sales collections involving SNAP benefits.

The federal government's views were also reflected in an Aug. 9 [letter](#) from Illinois Department of Human Services Secretary James Dimas to Cook County Board President Toni Preckwinkle. Dimas called on Preckwinkle to immediately develop a strategy that complies with FNS. Failure to take "corrective action" would jeopardize \$87 million in federal funds coming to the state, Dimas said.

"It is FNS's strict interpretation that retailers may not charge the tax to SNAP recipients at any time and that providing an immediate subsequent refund at a customer service desk does not cure the problem or the violation of the law," Dimas wrote.

Frank Shuftan, a spokesman for Preckwinkle, said the county had many discussions with USDA during the development of the tax program and the county was never informed its interim approach would violate federal guidelines. He added, however, the county's revenue department would work with USDA and the state to remedy any SNAP compliance problems.

"It was never our intention in drafting the sweetened beverage regulations to put federal SNAP funding for the state in jeopardy, nor do we think Regulation 2017-3 jeopardizes the State's participation in SNAP," Shuftan said in an emailed message. "At this time, we believe we are in compliance with existing SNAP rules. We do however recognize that USDA's

powers against the State in this regard are substantial and we will work collaboratively with both the State and USDA to address USDA's concerns.”

### **Soda Lawsuits Mounting**

Meanwhile, a growing number of class actions are being filed against retailers. At least two lawsuits contend that large retailers collect the tax on products exempted from taxation.

On Aug. 9, plaintiff Kelly Tarrant filed suit against 7-Eleven, alleging the convenience chain unlawfully charged 28 cents in tax on her purchase of an unsweetened coffee purchased in a Super Big Gulp cup. The action alleges 7-Eleven “automatically and uniformly” charges the sweetened beverage tax on all purchases in a “Gulp cup” ( *Tarrant v. 7-Eleven Inc.* , Ill. Cir. Ct., No. 2017 CH 10873, complaint filed 8/9/17 ).

On Aug. 8, plaintiff Yvan Wojetecki filed suit against McDonald's and several franchise operations. The lawsuit alleges McDonald's cash register and billing systems improperly calculate sales tax by first applying the sweetened beverage tax to a purchased product and then imposing the various state and local sales taxes. The lawsuit points to the plaintiff's purchase of a sweetened beverage, triggering a 23-cent soda tax payment. A sales tax of 2 cents was then applied on the beverage tax ( *Wojetecki v. McDonald's Corp.* , Ill. Cir. Ct., No. 2017 L 008008, complaint filed 8/8/17 ).

And on Aug. 4 plaintiff Vincent DeLeon filed an action against Walgreens. The lawsuit alleges the retailer collected the soda tax on purchases of Dasani sparkling water and Lipton pure leaf unsweetened green tea, which aren't subject to the tax ( *DeLeon v. Walgreens Boots Alliance, Inc.* , Ill. Cir. Ct., No. 2017-CH-10758, complaint filed 8/4/17 ).

### **Waiving Damages**

Meanwhile, Shuftan confirmed Aug. 9 that Cook County had withdrawn its petition for damages in a lawsuit originally filed by retailers. He characterized the waiver of damages as a cooperative gesture to retailers, who are responsible for collecting the levy on sales of all sweetened beverages.

The fight over the soda tax began in June when the Illinois Retail Merchants Association (IRMA) challenged the tax on behalf of groceries and other retailers. The challenge resulted in a [temporary restraining order](#) that barred Cook County from collecting the tax for more than a month and interrupted a major source of revenue for the municipality.

On July 28, a Cook County Circuit Court judge [granted](#) Cook County's petition to dismiss the merchants' challenge. An appellate court declined to review the issue on an emergency basis, leading to Cook County's demand for damages.

IRMA expressed frustration with Preckwinkle's posture on damages, noting the parties are discussing legitimate issues of law.

"The filing of the motion for damages displayed a dangerous disdain for legal rights we all enjoy," Rob Karr, president and chief executive of IRMA, said in a statement. "We look forward to the Preckwinkle Administration beginning to exercise cooperation and good faith with the county's retail industry."

### Lost Revenue

Despite Preckwinkle's decision to forgo damages, Shuftan stressed that Cook County was within its rights to request compensation for the lost tax revenue. The tax was scheduled to commence July 1, but IRMA's challenge prevented collections until Aug. 2.

"It was always our intention to protect the revenue that finances the County's critical public health and public safety services," Shuftan told Bloomberg BNA in an email. "Now that the Appellate Court has rejected the emergency motion that would again prevent us from collecting the sweetened beverage tax, we believe we should move forward cooperatively and in good faith with the County's retail industry. As a result, the County has determined that withdrawing its petition for damages would serve the public interest."

Ryan McLaughlin, a spokesman for IRMA, said the core tax issues remain unresolved. He noted that IRMA filed a [notice of appeal](#) in the case Aug. 1.

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