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Subway Restaurants Dispute Class Action Over Ill. Soda Tax

By **Hannah Meisel**

Law360, Springfield (September 25, 2017, 9:12 PM EDT) -- After having the case moved to Illinois federal court on Friday, the franchiser of all Subway restaurants in the U.S. asked the court to dismiss for lack of jurisdiction the suit over the alleged misapplication of the Cook County, Illinois, soda tax to unsweetened tea.

Florida-based Doctor's Associates Inc., which owns all American Subway restaurants, took aim at the plaintiffs who filed the putative class action last month, just a few weeks after the implementation of Cook County's new penny-per-ounce tax on sugar-sweetened beverages. The suit is one of many filed after the tax was released from an injunctive order put on the matter in July while a Cook County judge weighed the merits of several constitutional questions regarding the tax.

The suit alleges that two named plaintiffs from Illinois and Ohio, in addition to thousands of other putative class members, were illegally charged 21 cents extra for their purchases of FUZE Fresh Brewed Unsweetened Tea, which is served in the same beverage cups as soda, which is subject to the tax. But Doctor's Associates Inc. called the plaintiffs on what the company said was a naked play at litigation.

"Plaintiffs Charles Drake and Mario Aliano — in an apparent rush to file lawsuits over the recently-enacted Cook County sweetened beverage tax — went to local Subway franchise locations and purchased fountain cups for the sole purpose of filling them with unsweetened tea so they could file this putative class action just a few days later," Doctor's Associates said in its Friday motion to dismiss. "Plaintiffs contend they were charged the sweetened beverage tax on the purchase of their fountain drink cups, and that they later decided to fill their cups with an unsweetened drink from a self-service beverage station."

Drake and Aliano had alleged in an Aug. 18 suit filed in Cook County Circuit Court that the point-of-sale system used by all Subway restaurants was controlled by Doctor's Associates and that restaurants in Cook County could not reprogram their POS systems to account for unsweetened beverages. The one-count suit alleged Doctor's Associates violated the Illinois Consumer Fraud and Deceptive Trade Practices Act by charging plaintiffs 21 cents in sweetened beverage tax for their unsweetened tea.

"Plaintiffs enjoy Subway's food and beverages, including unsweetened tea, and intend to patronize defendant's stores in Cook County in the future," the complaint said. "However, due to the fact that local Subway stores cannot control how the sweetened beverage tax is applied, plaintiffs are unable to purchase unsweetened tea at Subway stores without being required to pay an unlawful sweetened beverage tax."

But Doctor's Associates disputed the plaintiffs' allegations of lack of local control of POS systems, writing in its motion to dismiss that the company does not control every restaurant's POS system, which it said is a theory that "is both entirely unsupported and belied by common sense."

"At best, plaintiffs contend — 'on information and belief' — that [Doctor's Associates] controls the franchisees' point-of-sale systems and does not permit retail stores to program the system," the motion said. "This 'information and belief' pleading, however, is false. [Doctor's Associates] has no control over franchisees' pricing of goods, nor does it control franchisees' imposition, collection and remittance of federal, state or local taxes. It is each franchisee's responsibility to collect the requisite taxes in compliance with all applicable laws and regulations."

In its Friday notice of removal to federal court, Doctor's Associates pointed out the cost involved with the injunction the putative class seeks in its complaint, and again accused the named plaintiffs of manufacturing the circumstances in order to file a case.

"[Doctor's Associates] would have to assist franchisees in developing, testing and implementing physical modifications to each store in Cook County to relocate the self-serve beverage station and iced tea carafes such that consumers could no longer serve themselves — and thus could no longer, as plaintiffs did here, request a fountain drink and then change their mind and select an unsweetened tea after the tax had been imposed," Doctor's Associates said. "Such a change would include, but is not limited to, the following for each of the more than 400 Subway stores in Cook County: purchase of behind-the-counter beverage dispenser; purchase of back-room ice machine maker; removal of current equipment, counter and floor repair; relocation of electrical, water, drain and soda lines; and purchase of new back counter for beverage dispenser."

Those costs, Doctor's Associates said, were more than enough to rise above the \$75,000 threshold for removal to federal court.

An attorney for Doctor's Associates declined to comment Monday, citing pending litigation. Representatives for the plaintiffs could not be reached for comment on Monday.

The plaintiffs are represented by Thomas Zimmerman, Sharon Harris, Matthew De Re, Nickolas Hagman and Maebetty Kirby of Zimmerman Law Offices PC.

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

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

--Editing by Alanna Weissman.