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## Lawyer: County's \$17M soda bid seems to punish plaintiffs

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Cook County's bid to collect nearly \$17 million in damages from the retailers who challenged its sweet beverage tax presents a question of whether the municipality is trying to punish the plaintiffs for taking it to court.

Assistant Cook County State's Attorney Kent S. Ray reportedly denied that premise during a Tuesday hearing on the petition, but Circuit Judge Daniel J. Kubasiak and some other lawyers in the field are skeptical.

The filing requests that Kubasiak award the county \$16.89 million in damages so it can recoup the anticipated revenue it could not collect while the penny-an-ounce tax on certain sweetened beverages was temporarily restrained between July 1 and July 28.

But Kubasiak didn't seem convinced and expressed concern that granting such a petition would send the message that "you best not challenge us because if you are proven wrong, we will come and get damages from you," according to a Crain's report citing transcripts of Tuesday's hearing.

The message Kubasiak shared evokes litigation the legislature intended to stem when it passed the Citizen Participation Act. The statute, which took effect in August 2007, provides that "[a]cts in furtherance of the constitutional rights to petition, speech, association and participation in government are immune from liability, regardless of intent or purpose," unless the action was brought in bad faith.

The law was passed to curb strategic lawsuits against public participation, or SLAPPs — generally filed as a new action by a party seeking damages it allegedly incurred while litigating a prior lawsuit.

The county filed its request for damages in an already-pending case. In that context, solo appellate attorney Michael W. Rathsack said, it can be argued the county's petition does not run akin to SLAPP litigation.

"But I can't imagine the court ever allowing this to proceed for the same reasons the legislature had when it passed the anti-SLAPP statute," he said. "If the county is going to do this it is going to have to have a really sound legal basis."

The cited statute in the petition, 735 ILCS 5/11-110, states a judge "shall" award damages after the dissolution of a temporary restraining order or preliminary injunction after the requesting party files a petition assessing those alleged damages.

Rathsack said the statute's use of the word "shall" could serve as a valid legal argument for the county in bringing its action. But deciding the petition solely based on that one word would leave no room for Kubasiak to use his judicial discretion, he said.

"Typically, despite the statute, you do not see the costs of delay piled back on the person who made the challenge," he said. "Some place in there, the court has got to have some ability to do the equitable thing. Otherwise, you couldn't afford to challenge any statute where your cause is going to delay collecting monies."

Mandell Menkes LLC partner Steven P. Mandell said the county's petition is "seemingly the exact type of conduct that an anti-SLAPP statute is designed to prohibit."

He said while the anti-SLAPP statute could theoretically kill the petition, the Illinois Supreme

Court's ruling on *Sandholm v. Kuecker*, 2012 IL 111443, essentially "emasculated the statute."

If the county's petition is considered SLAPP litigation, Mandell said, the Supreme Court's *Sandholm* decision interprets the anti-SLAPP statute in such a way that the retailers would have to show the county's petition was both retaliatory and meritless.

And that's a "daunting hurdle" the retailers may not be able to jump in this case, given the case law that has come down since the *Sandholm* decision, Mandell said.

"I think that at least in the theoretical context, an effective

anti-SLAPP statute would or could conceivably apply to what Cook County has done here," he said. "But as a practical matter, if the legislature really wants to do something good for the public, they really need to go back to this anti-SLAPP statute and give it some teeth again."

The parties will spend the month briefing the petition and return for a status hearing on Sept. 5.

The case is *Illinois Retail Merchants Association, et al. v. The Cook County Department of Revenue, et al.*, 17 L 50596.