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## Tampons and Sanitary Napkins are Medical Appliances Exempt from Chicago Sales Tax

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**Landowner Liability** (continued from page 85)

gence.

The Colorado Supreme Court first considered Gallegos' claim that section 13-21-115 violated the protections provided by the fourteenth amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and the due process clause of the Colorado Constitution, Colo. Const. art. II, § 25. The first section of the fourteenth amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Article II, section 25, of the Colorado Constitution "guarantees that all parties who are similarly situated receive like treatment by the law." Colo. Const. art. II, § 25. Since the statute did not infringe on a fundamental right, a suspect class, or a classification triggering an intermediate standard of review, the court determined that in order to prevail in his claim that section 13-21-115 was unconstitutional, Gallegos had to prove that the section 13-21-115 had no rational basis in fact and bore no rational relationship to a legitimate Colorado state interest. To determine whether Gallegos met his burden, the court used a two part test. First, the court ascertained the legitimate state interest that section 13-21-115 was intended to promote. Next, the court determined whether the statute actually promoted that interest.

**Purpose of Landowner Liability Statute.** The court ascertained the Colorado legislature's purpose in enacting section 13-21-115 by reviewing the history of Colorado landowner liability law, the circumstances surrounding the statute's enactment, and the intentions expressed by the legislators who sponsored the legislation in the General Assembly. The court noted that prior to 1971, Colorado followed the common law with respect to landowner liability. The common law traditionally imposed upon landowners a greater duty of care towards invitees than licensees or trespassers. For example, a landowner was merely required to

refrain from willfully or wantonly injuring a licensee, but the landowner had an affirmative duty to make his land reasonably safe for invitees.

In 1971, the Colorado Supreme Court abolished the use of the common law distinctions between licensees, invitees, and trespassers, and imposed a general standard of care upon landowners. *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971). Under this more general standard, a landowner was simply required to manage his land as a reasonable person would in view of the foreseeability of injuries to others. However, in 1986, the Colorado legislature noted that the reasonable person standard established by *Mile High Fence* led to unpredictable and inequitable results, especially with regard to trespassers. Therefore, the legislature enacted section 13-21-115.

The Colorado legislature expressly enacted section 13-21-115 to promote responsibility among both landowners and those upon the land by re-establishing the common law distinction among trespassers, licensees, and invitees, and defining a landowner's duty of care according to the landowner's relationship to the person upon his land. The court in the present case found that this purpose addressed a legitimate state interest, and thereby satisfied the first part of the two part test.

**Promoting the State's Interest.** The court next addressed whether section 13-21-115 promoted the state's interest. The court examined the language of the section as it pertained to licensees and invitees and determined that section 13-21-115 inverted a landowner's duties, as compared to the common law, by according a higher degree of protection to a licensee than an invitee. This result defeated the Colorado legislature's intent of re-establishing the common law scheme of landowner liability. It also contradicted logical reasoning which requires a landowner to take more precautions to protect someone he has invited on his land for

his own purposes, than a person whose presence is merely permitted. The court held that section 13-21-115 could not be interpreted to fairly allocate responsibility within the limitations imposed by the federal and state constitutional guarantees of equal protection of the law, and was, therefore, unconstitutional.

Because the verdict against Gallegos was based on Red Ram's duties toward Gallegos under section 13-21-115, the court reversed the judgment and remanded the case for a new trial under the standard of liability imposed prior to the enactment of section 13-21-115.

Karen M. Cichowski

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## TAMPONS AND SANITARY NAPKINS ARE MEDICAL APPLIANCES EXEMPT FROM CHICAGO SALES TAX

In *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill.2d 389, 544 N.E.2d 344 (1989), purchasers of female hygienic products ("the purchasers") brought a class action suit alleging that the City of Chicago illegally taxed tampons and sanitary napkins purchased from various retailers. The Illinois Supreme Court found that because the products were necessities with no substitutes, the purchasers had no choice but to pay the taxes. Therefore, the court held that the purchasers, having paid under duress, could challenge the tax. On the merits, the court held that tampons and sanitary napkins were "medical appliances" and exempt from the city sales tax.

### Background

The purchasers' class action suit alleged that the Illinois Department of Revenue, the City of Chicago, the Chicago Department of Revenue, and the Regional

Transportation Authority ("the city") charged illegal taxes on tampons and sanitary napkins purchased from Dominick's Finer Foods, Inc., Jewel Food Stores, Inc., Walgreens Company, and K mart Corporation ("the retailers"). Before the trial court, the city and the retailers sought to dismiss the purchasers' claim, arguing that the purchasers could not recover because they had voluntarily paid the taxes. The trial court held that the purchasers sufficiently showed that they paid the taxes under duress. Consequently, the trial court denied the city and retailers' motion to strike and dismiss the claim.

At the city and retailers' request, the trial court certified three questions for review, which the appellate court consolidated into two issues: (1) whether, by alleging that tampons and sanitary napkins were necessities, the purchasers sufficiently pleaded duress under the voluntary payment doctrine; and (2) whether tampons and sanitary napkins qualified as "medical appliances" and were exempt from the Chicago Sales Tax Ordinance ("the ordinance"). Chicago Municipal Code § 200.6 (1984).

In reversing the trial court's decision on the first issue, the appellate court held that merely pleading that an item is a necessity does not adequately demonstrate duress. The appellate court did not address the second issue. The Illinois Supreme Court granted the purchasers' motion to appeal.

#### **Illinois Supreme Court: Duress and Voluntary Payment**

The court first examined the voluntary-payment doctrine. Under this doctrine, a taxpayer cannot recover taxes voluntarily paid, even if the taxes were imposed illegally. A taxpayer has paid taxes involuntarily if, at the time of payment, he did not know the facts upon which to protest the taxes, or if he paid the taxes under duress. The court noted that paying under protest was the usual means by which taxpayers indicated that they were not paying a tax voluntarily. However, whether the plaintiffs actually protested the taxes was irrelevant to a finding of duress

because the absence of protest does not establish a voluntary payment.

The court discussed two cases in determining whether the purchasers, by alleging that tampons and sanitary napkins are necessities, sufficiently pleaded duress under the voluntary-payment doctrine. In *Getto v. City of Chicago*, 86 Ill. 2d 39, 426 N.E.2d 844 (1981), the plaintiff challenged a telephone service tax and claimed that he paid the tax involuntarily. He argued that the payments were made under duress because he feared his telephone service would be disconnected. The defendants noted that the plaintiff paid the taxes without protest and could have resolved the dispute with the Illinois Commerce Commission without risking termination of his service. The *Getto* court found that telephone service was a necessity and that protesting to the Commission would have been pointless because the Commission had approved the telephone service tax. Therefore, the *Getto* court held that the voluntary payment doctrine did not apply because the plaintiff paid the tax under duress.

Similarly, in *Ross v. City of Geneva*, 71 Ill. 2d 27, 373 N.E.2d 1342 (1978), the plaintiff challenged a surcharge imposed on his electric bill. He paid the bill but indicated on his check that he was paying under protest. The *Ross* court held that because he was faced with the choice of paying the bill or having his electricity terminated, the plaintiff paid the tax under duress.

#### **Duress: Nature of Service and Consequence of Nonpayment**

The *Geary* court found that the *Getto* and *Ross* decisions controlled on the issue of duress. The court stated that in both cases it was the relationship between the nature of the service and the consequence of nonpayment that was significant. The court said that if the service had not been a necessity or if the service would not have been terminated for nonpayment, then the plaintiffs in *Getto* and *Ross* would not have been found to have paid under duress.

The court found that similar

to the invention of the telephone and electricity, the invention of sanitary napkins and tampons created a reliance on these products. The court stated that like any other retail purchase, a customer had to pay the taxes on tampons and sanitary napkins or the retailer would refuse to sell the products. Finding no substitute product for tampons and sanitary napkins, the court labeled the products necessities.

The court rejected the city and retailers' argument that the purchasers had to plead that they could not purchase the products elsewhere without paying the taxes. The court reasoned that all stores had to comply with the city or state sales tax laws. Also, the court refused to require the purchasers to plead that they had tried unsuccessfully to purchase the products without paying the taxes. In *Getto*, the plaintiff was not required to protest to the Illinois Commerce Commission because the Commission had already approved the tax. Similarly, in the present case, the purchasers were not required to attempt to purchase tampons and sanitary napkins without paying taxes because that attempt was sure to fail. The court noted that in this case the purchasers had no immediate relief other than to pay the taxes. If the purchasers refused to pay the taxes, retailers would refuse to sell the products. Because the products were necessary, the possibility that retailers would refuse to sell was a sufficiently immediate and significant injury to constitute duress. In addition, the court held that the retailers had actual or threatened power over the purchasers. Although the retailers had not actually refused to sell the products to the purchasers, retailers routinely refuse to sell products to consumers who do not pay the charged sales tax.

#### **"Medical Appliances" Exemption from Chicago Sales Tax**

The court next addressed whether tampons and sanitary napkins were exempt from the city sales tax. The city's ordinance imposed a tax on tangible personal

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**Tampons Exempt From Sales Tax** (continued from page 87)

property, but exempted "medical appliances" from the tax. Chicago Municipal Code § 200.6-4 (1984). However, the Chicago Department of Revenue ("the Chicago department") did not define "medical appliances" to expressly include tampons and sanitary napkins.

The State of Illinois exempted "medical appliances" from its Retailers' Occupation Tax (Ill.Rev.Stat., ch. 120, para. 441 (1985)) and Use Tax (Ill.Rev.Stat. ch. 120, para. 439.3 (1985)). The Illinois Department of Revenue ("the Illinois department") definition of "medical appliances" was nearly identical to the Chicago department's definition. In 1985, the Illinois department began construing "medical appliances" to include tampons and sanitary napkins, thus exempting them from taxes. The city continued to tax these products.

The purchasers challenged the Chicago department's failure to interpret "medical appliances" to include tampons and sanitary napkins. The city and retailers argued that tampons and sanitary napkins were only used for hygienic purposes and should be considered nonmedical appliances. The court pointed out that tampons and sanitary napkins perform an absorbent function similar to cotton and band-aids, two products that were considered "medical appliances" under the city ordinance.

Furthermore, the court noted that when the state exempted soft drinks from its taxes the city amended its ordinance to exclude soft drinks. In doing so, the Chicago City Council and the Chicago department indicated their intent to enforce the ordinance consistent with Illinois tax law. The court found the Chicago department's refusal to exempt tampons and sanitary napkins from the ordinance to be against the expressed intent of the Chicago City Council in passing the ordinance. Accordingly, the court held that tampons and sanitary napkins were "medical appliances" and exempt from the city tax.

**Michael I. Leonard**

## GEORGIA CITY ORDINANCE REQUIRING TOWING SERVICES TO ACCEPT CHECKS HELD CONSTITUTIONAL

In *Porter v. City of Atlanta*, 384 S.E.2d 631 (Ga. 1989), the Supreme Court of Georgia held constitutional city ordinances requiring towing service operators to post signs indicating towing fees and to accept payment by insured checks and credit cards.

### Background

A-Tow, Inc. ("A-Tow") was a towing company owned and operated by Val J. Porter ("Porter"). A-Tow and Porter were convicted of violating two Atlanta ordinances by failing to accept checks and to post towing rates. A-Tow and Porter appealed the convictions and challenged the constitutionality of the ordinances.

### City's Authority to Enact Ordinances

On appeal A-Tow and Porter challenged the validity of the city ordinances, contending that Atlanta lacked the power to regulate businesses. To determine the ordinances' validity, the supreme court applied a two-pronged analysis: (1) whether the city possessed the power to enact the ordinances and, (2) if the power existed, whether the exercise of power was clearly reasonable.

The court noted that a municipality's power to regulate private enterprise is one of its most significant, but controversial, powers. The court emphasized, however, that the controversy was not the result of uncertainty concerning the source of a city's power to regulate trade: that power is firmly embedded in the right of the legislature to regulate trade and to authorize cities to do so. Rather, the controversy stemmed from courts' inconsistent analysis of

whether such regulations are reasonable.

### Power To Enact Ordinances

In its analysis of the ordinances, the court found that three sections of the Atlanta city charter authorized the city to regulate towing and wrecker services. First, the city charter provided the city with the general authority to license and regulate "privileges, occupations, trade and professions." Atlanta, Ga., City Charter, app. I, § (2). In addition to this general authority, the charter supplied the city with the specific authority to regulate city businesses that "may be dangerous to persons or property" (Atlanta Ga., City Charter, app. I, § (18)), and to "regulate and license vehicles operated for hire . . . and parking" (Atlanta, Ga., City Charter, app. I, § (37)). The court concluded that the city possessed the power to enact towing and wrecking service regulations.

### Reasonable Exercise of Power

Having established that the ordinances satisfied the first prong, the court analyzed the ordinances' reasonableness. The court noted that the purpose behind the power to regulate is to allow the governing authorities to shield the public from the excesses of private entities and their activities. The extent of government control must not exceed the danger of the regulated activity because although private interest can pose a danger of abuse, excessive government control in the name of protectionism can pose an even greater danger.

Because both the government and the private sector are potential sources of abuse, courts must carefully view the exercise of government regulatory power over private activities. Such regulations are not presumed to be reasonable, but must be demonstrated to be reasonable after the protection the regulation affords the public is balanced against the oppressive-ness imposed on individual rights.

In determining the reasonableness of the ordinances, the court initially examined the nature