Voluntary Payment Doctrine: Illinoisans' Shield Against Consumer Clawbacks

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In this installment of Prairie State Perspectives, the authors analyze the voluntary payment doctrine and the impact of the *McIntosh* decision on consumer suits.

Introduction

Illinois courts have long used the voluntary payment doctrine — a common-law rule barring the recovery of erroneous or illegal payments — to dispose of consumer suits for the repayment of mistaken tax charges. Over the past two decades, however, several state courts have held that the doctrine does not apply to claims brought under consumer protection statutes, and appellate courts in Illinois appeared to be following this trend. But a recent decision by the Illinois Supreme Court — *McIntosh v. Walgreens Boots Alliance Inc.*[1] — turned this trajectory on its head, conclusively determining that the voluntary payment doctrine applies to claims brought under the Illinois Consumer Fraud and Deceptive Business Practices Act and narrowing the exceptions to the doctrine's application.

This article analyzes the impact of *McIntosh* on consumer suits to recover erroneous tax payments by situating the case within the historical development of the voluntary payment doctrine and by examining the rationales for and against the doctrine's application to consumer protection statutes.

The Voluntary Payment Doctrine

The voluntary payment doctrine is a common-law rule that prevents a party that has made a voluntary payment from suing to recover the amount paid, even if the charge was erroneous or illegal.[2] The doctrine dates to early 19th century

[1] 2019 IL 123626, 2019 WL 2536882 (Ill. 2019).

[2] 66 *Am. Jur. 2d*, "Restitution and Implied Contracts" section 92 (2019) ("It is universally recognized that money voluntarily paid under a claim of right to payment and with knowledge of the facts by the person making the claim cannot be recovered on the ground that the claim was illegal, or that there was no liability to pay in the first instance.").

England and is an extension of the long-standing Anglo-American criminal law principle that "ignorance of the law is no excuse."[3]

In the tax context, the doctrine prevents a taxpayer from recovering payments of erroneous or illegal taxes, even though the taxpayer was unaware that the tax was improper. Regarding taxes, the doctrine has been justified as a "social policy to avoid the financial uncertainty that would be created by governmental collection of funds paid by taxpayers in a given budget year, followed by a subsequent requirement to refund the amounts after the monies had been spent."[4] More generally, the doctrine has been explained as "ensur[ing] that those who desire to assert a legal right do so at the first possible opportunity [so that] all interested parties are aware of that position and have the opportunity to tailor their own conduct accordingly."[5]

Like most state courts in the United States,[6] the Illinois courts have long adopted the voluntary payment doctrine. Since at least the mid-1800s, Illinois courts have applied the doctrine to prevent taxpayers from recovering payments of illegal and erroneous taxes from state and municipal governments.[7] Illinois law is clear that the doctrine applies with equal force to prevent recovery from intermediaries who collect taxes to remit to tax authorities.[8]

Exceptions to the Doctrine: Mistake of Fact, Fraud, and Duress

A taxpayer's voluntary payment made under the mistaken belief that a tax was lawfully and correctly levied — a mistake of law — may not be recovered under the voluntary payment doctrine. However, there are three long-standing defenses that prevent the doctrine's application and allow suits for the recovery of tax payments to go forward: mistake of fact, fraud, and duress.

Mistake of Fact

One common formulation of the voluntary payment doctrine states that "money voluntarily paid under a claim of right to the payment and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal."[9] As illustrated by this formulation, a payer's lack of "knowledge of the facts upon which to frame a protest" prevents the operation of the doctrine.[10] Thus, where the basis for a tax is obscured or inaccessible, the mistake of fact exception allows the taxpayer to recover her payment of an erroneous or illegal tax.[11]

For instance, in *Illinois Institute of Technology v. Rosewell*, plaintiffs sued Cook County for a refund of excessive taxes on several real estate parcels.[12] The taxes were calculated based on erroneous property records in the county's possession, to which the plaintiffs were denied access.[13] Because the plaintiffs were unable to access the property records on which the excess taxes were calculated, which contained "essential fact[s]" for challenging the validity of the taxes, the Illinois Supreme Court held that the mistake-of-fact exception to the voluntary payment doctrine applied, thereby allowing the plaintiffs to recover $69,000 of excess taxes paid.[14]

Importantly, a taxpayer's mistaken assumption that a tax imposed by a retailer is valid does not constitute a mistake of fact. Rather, "where taxpayers assert[ ] that payments of illegal taxes were made under the mistaken assumption that the taxes were valid, courts have uniformly concluded that such mistakes were mistakes of

[3] *See Randazzo v. Harris Bank Palatine N.A.*, 262 F.3d 663, 667 (7th Cir. 2001) (citing Stephen L. Camp, Note, "The Voluntary-Payment Doctrine in Georgia," 16 *Ga. L. Rev.* 893, 895-98 (1982)); *see also* John E. Campbell and Oliver Beatty, "*Huch v. Charter Communications Inc.*: Consumer Prey, Corporate Predators, and a Call for the Death of the Voluntary Payment Doctrine Defense," 46 *Val. U. L. Rev.* 501, 502 n.3 (2012).

[4] 1 A.L.R. 6th 229.

[5] *Randazzo*, 262 F.3d at 668.

[6] *See* Campbell and Beatty, *supra* note 3, at 506; *see also* Colin E. Flora, "Practitioner's Guide to the Voluntary Payment Doctrine," 37 *S. Ill. U. L.J.* 91, 119-25 (2012) (listing cases discussing the voluntary payment doctrine).

[7] *See Elston v. City of Chicago*, 40 Ill. 514, 518-19 (1866).

[8] *See, e.g., Freund v. Avis Rent-A-Car Systems Inc.*, 499 N.E.2d 473, 475 (Ill. 1986).

[9] *Illinois Glass Co. v. Chicago Telephone Co.*, 85 N.E. 200, 201 (Ill. 1908).

[10] *Getto v. City of Chicago*, 426 N.E.2d 844, 849 (Ill. 1981).

[11] *See, e.g., Getto*, 426 N.E.2d at 850; and *Illinois Institute of Technology v. Rosewell*, 484 N.E.2d 837, 840 (Ill. App. Ct. 1985).

[12] *Rosewell*, 484 N.E.2d at 838.

[13] *Id.* at 839.

[14] *Id.* at 839-41.

law, and as such recovery [is] barred by the voluntary payment doctrine."[15]

Fraud

Since its earliest adoption in the United States, the voluntary payment doctrine has contained an exception allowing plaintiffs to recover voluntary payments made under fraudulent transactions.[16] In *Flournoy v. Ameritech*, for example, the Illinois Supreme Court held that the voluntary payment doctrine did not bar a plaintiff from suing to recover telephone service fees incurred by the service provider's fraudulent practice of deliberately dropping calls to inflate per-call fees.[17]

However, it is clearly established that the fraud exception does not apply when the payee has charged for a service or levied an erroneous tax in good faith. For instance, the voluntary payment doctrine prevents consumers from recovering payment of a tax mistakenly imposed by a retailer, so long as the retailer has remitted the payment to the tax authority.[18]

Duress

Payments made under duress or coercion are deemed involuntary and therefore are not subject to the voluntary payment doctrine.[19] Originally, the duress exception was only available in cases of actual or threatened physical harm or seizure of goods.[20] Modern courts, however, have expanded the exception to include situations such as business duress, in which payment is compelled by business necessity,[21] and have generally loosened the requirements for the duress exception to apply.[22]

Illinois courts have articulated a two-part test for payments to qualify for the duress exception. First, the payment must be for "essential" goods or services — that is, goods or services on which people rely and for which "no reasonable alternative product exists."[23] For example, the Illinois Supreme Court has held that electricity, telephone service, and menstrual products are necessities, while an amusement park ticket is not.[24] Second, the payer must be forced to choose between "pay[ing] the taxes or do[ing] without" the good or service.[25] Such compulsion occurs, for instance, when the service is offered by a monopolist or when the tax is imposed by all retailers selling the good.[26]

Interaction With Consumer Protection Statutes

In the past two decades, a handful of state courts have held that the voluntary payment doctrine is not available as defense to claims brought under consumer protection statutes.[27] Many of these state courts have reasoned that the voluntary payment doctrine's harsh bar on recovery is irreconcilable with the statutes' aims of deterring predatory business practices and expanding relief for defrauded consumers.[28] These decisions reflect a global trend among common law jurisdictions toward curtailing application of the voluntary payment doctrine.[29]

In Illinois, several cases from 2007 to 2013 indicated that Illinois might follow this trend. First, in *Brown v. SBC Communications Inc.*, the U.S. District Court for the Southern District of Illinois found that the fraud exception to the voluntary payment doctrine applied to the plaintiff's Consumer Fraud Act (CFA) claim that a telephone service provider had fraudulently charged him for services he did not request.[30] Nonetheless, the court included a footnote "express[ing] some

[15] 1 A.L.R. 6th 229.

[16] *See Bank of the United States v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838).

[17] 814 N.E.2d 585, 588-89 (Ill. App. Ct. 2004).

[18] *See Freund*, 499 N.E.2d at 475; *see also Lusinski v. Dominick's Finer Foods Inc.*, 483 N.E.2d 587, 590 (Ill. App. Ct. 1985).

[19] *See, e.g., Galesburg & G.E.R. Co. v. West*, 108 Ill. App. 504, 509 (1903); and *King v. First Capital Financial Services Corp.*, 828 N.E.2d 1155, 1172 (Ill. 2005).

[20] *See* Campbell and Beatty, *supra* note 3, at 510 n.63.

[21] *See Randazzo*, 262 F.3d at 668-69.

[22] *See* Campbell and Beatty, *supra* note 3, at 509-10.

[23] *Geary v. Dominick's Finer Foods Inc.*, 544 N.E.2d 344, 348 (Ill. 1989).

[24] *Id.* at 348-49, 351.

[25] *Id.* at 349; *see also King*, 828 N.E.2d at 1171-72.

[26] *See Geary*, 544 N.E.2d at 349; *see also King*, 828 N.E.2d at 1171-73.

[27] *See* Campbell and Beatty, *supra* note 3, at 513-20 (examining state court decisions barring the application of the voluntary payment doctrine to alleged consumer protection statute violations in Georgia, Indiana, Missouri, New York, Tennessee, and Washington).

[28] *See id.* at 512-16.

[29] *See id.* at 518-19 (noting that the voluntary payment doctrine has been abolished in Australia, Canada, England, France, Germany, Italy, New Zealand, Scotland, and South Africa).

[30] No. 05-CV-777-JPG, 2007 WL 684133, at *1, *9 (S.D. Ill. Mar. 1, 2007).

skepticism about the applicability of the voluntary payment doctrine to [the plaintiff's] claim under the ICFA [Illinois Consumer Fraud and Deceptive Business Practices Act]."[31] The district court explained that Illinois's consumer protection statute was intended to "afford[ ] consumers broad protection" and cited a number of cases in which Illinois courts had held that "remedial legislation like the ICFA is not subject to common-law defenses."[32]

Similarly, in *Ramirez v. Smart Corp.*, the plaintiff alleged that a medical records retrieval and copying service company charged excessive prices for its services.[33] The Illinois Appellate Court for the Third District determined that the duress exception precluded application of the voluntary payment doctrine but, as in *Brown*, added a footnote noting that "the intent and purpose of [the Illinois CFA] lend additional support to our refusal to apply the voluntary payment doctrine to this case."[34] Although the court's explanation of the relationship between the Illinois CFA and the voluntary payment doctrine is not entirely clear, the court implied that the voluntary payment doctrine should not apply to the plaintiff's CFA claim of unfairly high charges because the act was "intended to give broad protection to consumers . . . against fraud, unfair methods of competition, and other unfair and deceptive business practices."[35]

Finally, in *Nava v. Sears, Roebuck & Co.*, the Illinois Appellate Court for the First District held that the voluntary payment doctrine "cannot apply to impede causes of action based on statutorily defined public policy" and therefore "should not apply to claims brought under the [Illinois CFA]."[36] To reach this conclusion, the *Nava* court relied exclusively on the *Ramirez* footnote.

Ramirez and *Nava* signaled the Illinois appellate courts' rejection of the voluntary payment doctrine's application to the Illinois CFA in favor of advancing the public policies reflected in consumer protection statutes. At the same time, other Illinois appellate courts continued to apply the voluntary payment doctrine to dismiss CFA claims for the recovery of erroneous taxes imposed by retailers and remitted to the state.[37]

While the state appellate courts debated the viability of the voluntary payment doctrine as a defense to CFA claims, the Illinois Supreme Court continued to reject arguments that the voluntary payment doctrine should not bar suits alleging behavior that was "against public policy."[38] In the 2006 case *Vine St. Clinic v. HealthLink Inc.*, for instance, the court applied the voluntary payment doctrine despite the plaintiff's argument that the defendant's fees were "illegal and against public policy," stating that "no rule of law is better settled than that money voluntarily paid in consideration of the payee doing, or agreeing to do, something opposed to public policy, can not be recovered back."[39]

As of the appellate court's decision in *Nava*, however, the Illinois Supreme Court had not yet addressed whether the public policy concerns reflected in consumer protection statutes sufficed to nullify the voluntary payment doctrine. That changed in June with the court's decision in *McIntosh*.[40]

McIntosh v. Walgreens: Reviving the Voluntary Payment Doctrine

In *McIntosh*, the plaintiff, Destin McIntosh, sued Walgreens for erroneously imposing the city of Chicago's bottled water tax on his purchases of sparkling water, which were exempt from the tax.[41] McIntosh filed a class action lawsuit claiming that the erroneous tax was a deceptive practice under the Illinois CFA. According to McIntosh's theory, Walgreens knowingly misapplied the tax and deceived consumers into

[31] *Id.* at *9 n.3.

[32] *Id.*

[33] 863 N.E.2d 800, 806 (Ill. App. Ct. 2007).

[34] *Id.* at 810 n.2.

[35] *Id.*

[36] 995 N.E.2d 303, 311 (Ill. App. Ct. 2013).

[37] *See, e.g., Karpowicz v. Papa Murphy's International LLC*, 2016 IL App (5th) 150320-U, paras. 11, 15.

[38] *Vine St. Clinic v. HealthLink Inc.*, 856 N.E.2d 422, 437 (Ill. 2006); *see also King*, 828 N.E.2d at 1173-74.

[39] 856 N.E.2d at 437 (quoting *Evans v. Funk*, 38 Ill. App. 441, 444 (1890)).

[40] 2019 WL 2536882 (Ill. June 20, 2019).

[41] *Id.* at *2.

believing that the tax was valid by including the tax in the total price charged for sparkling water.[42]

Walgreens moved to dismiss the suit, arguing that the plaintiff's claim was barred by the voluntary payment doctrine. The circuit court agreed and dismissed the case, but the appellate court held that the voluntary payment doctrine did not apply to claims alleging deceptive practices under the CFA, such as McIntosh's.[43]

The Illinois Supreme Court reversed, rejecting the appellate court's determination that the voluntary payment doctrine does not apply to claims brought under the CFA. The court held that the precedents relied on by the appellate court — *Ramirez* and *Nava* — "do not establish a categorical exemption from the voluntary payment doctrine for claims brought under the Consumer Fraud Act."[44] Disagreeing with the reasoning in *Ramirez* and *Nava*, the court explained that the public policy underlying consumer protection statutes is no different than other public policy aims, all of which are insufficient to overcome the voluntary payment doctrine.[45] As the court said, it has "repeatedly rejected an argument that the voluntary payment doctrine cannot be used to defeat public policy."[46]

In further support of the applicability of the voluntary payment defense to claims brought under the CFA, the *McIntosh* court noted that, under "well-established principles," common law rules such as the voluntary payment doctrine "remain in full force in this state unless expressly repealed by the legislature or modified by court decision."[47] Concluding that the CFA did not expressly repeal the doctrine, and overruling *Nava* and *Ramirez*'s determinations that the voluntary payment doctrine does not apply to CFA claims, the court "reject[ed] McIntosh's assertion that statutory consumer fraud claims are categorically exempt from the voluntary payment doctrine" under this second rationale as well.[48]

McIntosh thus reaffirmed the viability of the voluntary payment doctrine as a defense against claims brought under the CFA, solidifying the doctrine as a "vibranium shield" against consumer claims for restitution of erroneous taxes collected and remitted in good faith. Of course, the traditional exceptions to the voluntary payment doctrine — mistake of fact, fraud, and duress — still apply. Regarding the duress exception, however, the *McIntosh* court affected another, more subtle strengthening of the voluntary payment defense.

McIntosh's Implications for the Duress Exception

After concluding that the voluntary payment doctrine applies to claims brought under the CFA, the court addressed McIntosh's argument that the fraud exception applied.[49] McIntosh contended that Walgreens's inclusion of the tax in the total sale price was fraudulent because it falsely represented that the tax was valid.[50] This argument was to no avail; the court determined that McIntosh's assumption that the tax was valid — a mistake of law — provided no defense against the voluntary payment doctrine.[51] While this determination concluded the case, one other aspect of the opinion bears mentioning.

In discussing the voluntary payment doctrine, the court noted that McIntosh did not contend that the duress exception applied. The court framed the duress exception as requiring that "the purchase of carbonated or flavored water was a necessity and could not have been obtained from any other source without paying the municipal tax."[52] In this brief articulation of the duress exception, the court reinforced the requirement that a good or service be unobtainable "from any other source without paying the municipal tax" for the duress exception to apply.

Such reinforcement is notable considering the Illinois Supreme Court's 1989 decision in *Geary v. Dominick's Finer Foods Inc*.[53] There, plaintiffs sued to recover payments of illegal taxes on tampons

[42] *Id.*
[43] *Id.*
[44] *Id.* at *5.
[45] *Id.* at *6.
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at *6-8.
[50] *Id.* at *7.
[51] *Id.* at *7-8.
[52] *Id.* at *7.
[53] 544 N.E.2d 344 (Ill. 1989).

and sanitary pads. To determine whether the duress exception applied, the court applied the two-part test for duress, which requires both that the payment be for an "essential" good and that the payer be forced to choose between "pay[ing] the taxes or do[ing] without" the good.[54] The court easily concluded that menstrual products were essential goods. However, to satisfy the second prong — that the plaintiffs were forced to "pay the taxes or do without the tampons and sanitary napkins" — the court held that the "plaintiffs did not have to allege that they could not buy the products elsewhere," even at other stores in the area.[55]

In part, this holding reflected the court's assumption that all other stores in the area imposed the tax, as Chicago required retailers to collect and remit sales tax on menstrual products.[56] However, the *Geary* court did not explicitly limit its holding to situations in which an illegal tax was uniformly imposed. Thus, after *Geary*, a consumer could potentially qualify for the duress exception by purchasing an "essential" good to which a valid tax had mistakenly been applied, even if the consumer may have been able to buy that good tax free at a neighboring store.

More recently, the Illinois Supreme Court has rejected this interpretation of the duress exception. In *King v. First Capital Financial Services Corp.*, the court held that the plaintiffs' failure to demonstrate that all mortgage lenders charged a certain fee precluded the duress exception from applying, as the plaintiffs could not show that they were "compelled to either pay the fee or forgo their loan transactions."[57] To reconcile *King* with *Geary*, the *King* court said that the duress exception had applied in *Geary* only because all retailers had been required to impose the illegal tax.[58]

In *King*, the court reimposed the duress exception's requirement that a good or service be unobtainable tax free from another source. The *McIntosh* court's articulation of the duress exception's requirements — that the sparkling water purchased by McIntosh "was a necessity and could not have been obtained from any other source without paying the municipal tax" — reaffirms that the standard for duress announced in *King*, rather than in *Geary*, controls.[59] To obtain the duress exception, consumers must show that they could not have purchased the good without the tax from another source.

Closing Thoughts

For over two centuries, courts have relied on the voluntary payment doctrine to help curtail the proverbial floodgate of litigation. With the rise of the modern consumer class action, the need for the voluntary payment doctrine's bar on recovery of mistaken tax payments is arguably more necessary than ever. Despite the scaling back of the doctrine in a handful of states, Illinoisans can remain confident in the doctrine's strong defense against claims to claw back tax errors from retailers and tax authorities alike. ■

[54] *Id.* at 348-49; *see also King*, 828 N.E.2d at 1171-72.

[55] *Geary*, 544 N.E.2d at 349.

[56] *Id.*

[57] 828 N.E.2d 1155, 1173 (Ill. 2005).

[58] *Id.*

[59] *McIntosh* at *7