

Sales Tax Class Action Moves Forward Against BJ's Wholesale Club

by Celia Ampel

BJ's Wholesale Club is over-taxing customers according to a Miami judge, and the store may soon be under a court order to change its ways.

Miami-Dade Circuit Judge John Thornton certified a class of about 750,000 BJ's members in Florida, paving the way for them to seek a permanent injunction against a tax practice Thornton ruled in February was improper. The plaintiffs' ultimate goal is to seek damages in the hundreds of millions of dollars, said co-lead class counsel Victor Diaz of VM Diaz & Partners in Miami Beach.

The case was filed after an eagle-eyed Cutler Bay shopper noticed she paid \$98 in sales



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tax for a \$770 TV that was discounted from \$1,400 for BJ's members. She realized she was charged sales tax for the undiscounted price, and wondered if that was legal.



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Under Florida law, retailers can charge tax on the full price if the discount is funded by the manufacturer — but not if it's funded by the retailer. BJ's funds a substantial part of its member discounts, said co-lead counsel Steve Silverman of Kluger, Kaplan,

Silverman, Katzen & Levine in Miami.

“There is no way for the consumer to know, and BJ’s does not tell its members, what portion of the discount is being funded by the manufacturer and what portion is being funded by the retailer,” Silverman said. “Consumers are being deceived, and their money is being wrongfully taken from them.”

A BJ’s spokeswoman declined to comment. The retailer, which has 31 Florida stores, is represented by Foley & Lardner attorneys Kevin Reck and Christina Kennedy in Orlando, and James McKee in Tallahassee.

The Florida Department of Revenue disagreed with Thornton’s ruling and objecting to class certification. In his May 24 order granting class certification, Thornton rejected the state’s arguments and scolded the department for trying to “re-litigate” his earlier decision.

Thornton also ruled BJ’s had waived arbitration and

rejected the retailer’s argument that a Florida-specific class should not be certified because members have access to BJ’s stores in 15 states.

“Taken to its logical conclusion, BJ’s argument would render this Court powerless to stop or enjoin any improper consumer practice in the state of Florida, by virtue of the fact that BJ’s offers cross-state or national membership,” Thornton wrote.

Diaz said the litigation, filed in 2015, has been fought tooth-and-nail.

“What’s particularly curious about this case is why BJ’s, rather than comply with court order and align itself with the best interest of its members who have demonstrated their loyalty by continuing to shop at BJ’s, would continue a practice that the court has ruled is inappropriate and would remit the money to the state to the detriment of its own customers,” he said. “I think BJ’s has a lot of explaining to do to its members.”

The Florida class includes only in-store shoppers. BJ’s follows state law in taxing online shoppers, Diaz said.

The plaintiffs will have to pursue separate class certification to seek damages from BJ’s for those who shopped there in the four years leading up to the filing of the lawsuit. Diaz said the store keeps extensive records of members’ shopping history, so if the litigation makes it to that stage, it should be easy to establish the amount of damages for each customer.

Diaz and Silverman said they knew of one other action against BJ’s for improper sales tax. The case, filed in Pennsylvania, is being handled by that state’s revenue department.

Erin Bohannon of Kluger Kaplan and Jorge Lorenzo of VM Diaz & Partners also represent the Florida plaintiffs class.

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