



## No Slam Dunk: Filings of New York Sales Tax Class Actions Continue Despite *Dunkin'* Decision

In May 2017, the Second Circuit rejected an attempted class action lawsuit that sought to hold a retailer liable for allegedly overcharging sales tax. In *Estler v. Dunkin' Brands, Inc.*, the court upheld summary judgment in favor of the retailer, finding that, under New York law, if the retailer is merely performing the "ministerial act" of collecting sales tax on the taxing authority's behalf, its customers' exclusive remedy is to seek a refund from the taxing authority.

While the *Dunkin' Brands* decision should have put the issue to rest, recently, new class actions have been filed in which it appears that certain aggressive plaintiffs' counsel are maneuvering to avoid the *Dunkin' Brands* holding by alleging factual issues.

These are courses of action retailers may want to consider:

- Undertake a review of their sales tax practices to ensure compliance with law.
- If sued, seek to limit discovery to those facts that will lay the groundwork for summary judgment based on *Dunkin' Brands*.
- Review exposures in other states.
- Conduct an internal review, protected by the attorney-client privilege, and consider steps to remedy any noncompliance, including through voluntary disclosure agreements.

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