

Retailers accused of bullying cities into lowering property tax assessments

Legal challenges could ultimately cost homeowners

By [Kevin Crowe](#) of the Journal Sentinel
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Community and business leaders often tout how new commercial developments will increase the local tax base. But two recent court rulings are eating into that idea — and other property owners may feel the tax bite.

In separate rulings, judges sided with Walgreen Co. and CVS Health in taxation cases that drastically reduced property assessments — and taxes — on their stores in Oshkosh and Appleton.

The decisions seem certain to erode the commercial property tax bases in communities around the state and increase the financial burden on residential owners, especially in areas with new development.

In some communities, such as Oak Creek or the City of Pewaukee, commercial properties account for roughly one-third of the tax base.

A [Milwaukee Journal Sentinel investigation into assessment problems](#) found that in dozens of communities across the state at least 20% of residential property taxes are being paid by the wrong people, in part due to lack of uniform taxation. Court rulings that lower some property assessments and not others create a similar dynamic on the commercial side.

Walgreen has been one of the principal drivers of a trend in which large retailers seek lower assessments, sometimes through lawsuits that small municipalities are ill-equipped to fight. The company and its lawyers have challenged assessments across the state, ultimately suing municipalities at least 50 times in the past decade.

"More companies are bringing them," said Amie Trupke, a Madison-based attorney who represents municipalities in assessment cases. "Walgreens was probably the pioneer. But now we have Sears, Target, Menards, Kohl's, Fleet Farm, Farm & Fleet and the fast-food chains bringing challenges."

Assessors and their attorneys point to the increasing number of legal challenges as evidence Walgreen and other companies with deep pockets are bullying cities, towns and villages into lowering property assessments.

Walgreen says it is simply fighting back against aggressive assessors who have overassessed its properties.

"We want to pay our fair share, and not that much more than our fair share," said Don Millis, an attorney who has represented Walgreen, Target, Sears and Farm & Fleet in dozens of assessment lawsuits.

From 2008 to 2014, Walgreen filed more excessive assessment claims against the City of Milwaukee than any other property owner, according to a Journal Sentinel analysis of data provided by the city attorney's office. The company has filed claims on all of its 18 stores almost every year, normally claiming the city owes it between \$1.2 million and \$1.4million in excessive taxes.

The city has ultimately settled twice, paying out a total of \$4.5 million.

Leases at center of battles

For more than a decade, the way Walgreen develops and leases its properties has been at the center of fights between the company and property assessors.

The company typically contracts with developers to buy land in high-traffic areas and then construct buildings to its specific standards. Walgreen then leases the land and the store for an amount that not only covers the monthly rent, property taxes and operating costs, but also the development and construction costs.

The contracts, called triple net leases, result in Walgreen paying more per square foot than other commercial renters because they are essentially financing the construction of stores through the leases. The deals also put the company in the role of challenging property assessments.

The company argues assessors shouldn't use its above-market leases to calculate the values of its properties. Instead, company attorneys say, assessors should use the wider commercial market rate, which is always substantially lower.

Walgreen has won two significant cases in Wisconsin courts, one in 2008 against Madison at the state Supreme Court, and another more recently against Oshkosh at the appellate level in December.

"They say, 'Value us like the Dollar Store,'" said Amy Seibel, an attorney who has represented municipalities in fights with Walgreen. "The courts have bought into that."

Walgreen isn't the only company that uses a triple net lease model.

"That's why this whole thing is going to mushroom," Seibel said. "If I'm the Dollar Store, then I'm going to say I'm overassessed."

In January, a judge in Outagamie County used similar rationale — [and the same math](#) — to cut in half the property assessment of a CVS store in Appleton.

Skirmishes in the war

The first key ruling came in 2008, when the state Supreme Court found Madison used Walgreen's "above market rent" inappropriately in calculating the assessments of its stores.

"The Wisconsin Property Assessment Manual does not contain language which similarly requires or allows appraisers to *increase* the market value of the property when the lease rate is *above* the market," the court [wrote in its opinion](#).

The court found the city was not following the manual and was [taxing business value instead of just property value](#). As a long-term, secure tenant, Walgreen adds value to a property.

"One of the things I argued back in 2008 at the Supreme Court is if Walgreens and I have properties across the street from each other and we pay the same rent, which property is worth more?" said Millis, the attorney for the company. "Walgreens is worth more. I'm not a billion-dollar company."

After that decision, the City of Milwaukee settled a set of claims with Walgreen by [refunding \\$807,000 in taxes paid by the company](#). The city also agreed to keep the assessments for the stores low for 2008 and 2009.

The decision sent assessors around the state scrambling to find another way to accurately value Walgreen properties. Assessors from Milwaukee, Madison, Green Bay, Brookfield and other municipalities [got together to formulate a plan for assessing Walgreen's](#) properties and other properties with triple net leases.

In Wisconsin, there are three main tiers used in assessing the value of a commercial property. The first level deals with sales of the property itself, followed by sales of comparable properties. The third tier uses an income approach to determine value by focusing on the rent paid by the tenant and the rent paid by the rest of the market.

Since the Supreme Court had tossed out a Madison assessment that largely used the income approach, the assessors decided to home in on sales of Walgreens and properties.

Properties like Walgreen sell periodically on investment exchanges to real estate investment trusts, which are a vehicle for investors to park money for a period of time as an investment. The [sales can involve 100-plus properties](#) in multiple states.

The [assessors figured these sales would better satisfy](#) the first two tiers of the assessment hierarchy.

"They made a decision that 'We're going to include these sales and we're not going to factor out the triple net aspect of it,'" said Vince Moschella, an assistant city attorney in Milwaukee who handles assessment challenges.

In 2010, using the sales approach, assessors in Milwaukee doubled some of the assessments on Walgreens stores in the city.

In Oshkosh, assessors had already used the sales in part to calculate values for two Walgreens stores there. Walgreen sued Oshkosh, contending assessors incorrectly valued the property based on its leases.

This time, Millis argued the leases inflated sales prices, so such sales prices shouldn't be used to calculate the property value. The circuit court sided with Walgreen, awarding the company a \$69,548.99 tax refund.

In December, the appellate court [upheld the lower court's ruling](#).

The appellate decision has not yet been published, but it's having repercussions around the state — including the CVS case in Appleton.

"A lot of people were awaiting the outcome of this case," said Alan Marcuvitz, a Milwaukee attorney who has worked on taxation cases in Wisconsin for decades.

The state Department of Revenue has not yet updated the manual for assessors. In the meantime, assessors will have to decide if they'll use the full values of expensive leases in their calculations and risk a challenge, or apply the courts' decisions to their own cities, towns and villages.

Even as the Oshkosh case progressed, the City of Milwaukee [settled with Walgreen in April 2014](#), this time for \$3.7 million. The city also agreed to keep the assessments at a lower, agreed-upon level for 2015.

"The problem is these recent court decisions have pretty much got us, so it's time to settle up and move on," Moschella said. "As far as the future, it's a dead issue."

The decisions not only open the doors to other challenges, but might also give assessors pause as they work to value properties like Walgreens, said Russ Schwandt, the assessor in Green Bay. Ultimately, he said, it will lead to lower values and lower taxes paid on the commercial side.

"There will be an erosion of all commercial property because it becomes a uniformity issue," he said.

Legal battles have a price

There are more than 200 Walgreens stores in Wisconsin, and the company has been successful in getting judgments and settlements in its favor when it has challenged.

Defending assessments against challenges can cost municipalities \$50,000 to \$100,000. Smaller municipalities often must hire an attorney. Everyone has to pay for experts.

In Milwaukee, the number of claims of excessive assessment — including those on the residential side — have tripled since 2008. The city has two attorneys almost completely dedicated to handling assessment challenges.

Given the costs, attorneys and assessors say there's little incentive for smaller municipalities to fight big companies such as Walgreen when they challenge assessments.

"Communities can't afford to fight anymore," said Seibel.

In some cases, losses are compounded.

Milwaukee, for example, collects taxes on behalf of Milwaukee County, Milwaukee Area Technical College and the Milwaukee Public Schools. But the city alone is on the hook to pay the refund. To recover the portion of tax money that went to the other entities, the city has to file a charge-back request through the state Department of Revenue. There's no guarantee that will be approved.

"When commercial property owners start that process, how often is a community going to go through that?" said Rocco Vita, the assessor in Pleasant Prairie. "That's a lot of taxpayer money."

But assessors and city officials say there is a reason to fight the challenges.

If the assessments, and ultimately taxes, go down for Walgreens, Target and other big commercial properties, that burden shifts largely to residential owners.

"Their attorneys are not looking for fair taxation, but advantageous taxation," said Bob Lorier, a former assessor in Brookfield. "A lot of communities don't understand the value of having good commercial assessments."

Millis countered that some communities look at big commercial properties as an opportunity to lessen the tax load on residential owners — and overassess on the commercial side.

"I think for some communities it's about shifting the burden," he said. "Who would you rather have pay? People who live there or people who don't live there? I think there's a political motive in some places."



