

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

S. MARTINELLI & COMPANY

For A Declaratory Ruling.

Declaratory
Ruling
27-10

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Petitioner, S. Martinelli & Company, ("Martinelli") produces and sells sparkling apple juice and cider. Martinelli seeks a declaratory ruling pursuant to §204 of the State Administrative Procedure Act and 6 NYCRR Part 619, that its products known as "Martinelli's Gold Medal Sparkling Apple Juice" and "Sparkling Cider" are not a "beverage" subject to the redemption requirements of the New York State Returnable Beverage Container Act, L. 1982, Ch. 200, codified as Title 10 of Article 27 of the Environmental Conservation Law ("Act").

Martinelli has voluntarily complied with the Returnable Beverage Container Act by suspending sale of its products in New York State pending this clarification of whether the Act applied to its products. Insofar as the Act is not clear on its face with respect to Martinelli's products, it is in the public interest to grant the petition.

Martinelli's products consist of undiluted apple juice, enriched with the addition of vitamin C and carbonated and pasturized in the bottle. No preservatives are used. No sugars are added. Martinelli's Sparkling Cider won Gold Medals for its quality in competitions around the turn of the century, e.g. in Sacramento in 1890, Buffalo in 1901 and San Francisco in 1914.

It is marketed in a sturdy glass bottle designed much like a champagne bottle in appearance. Martinelli's products are non-alcoholic.

Under the Act, beverage containers for specifically defined beverages are assigned a refund value at the point the product is sold to a consumer. A "beverage" is defined under §27-1003(1) to mean "carbonated soft drinks, mineral water, soda water, beer, and other malt beverages." Martinelli's products are not mineral water, soda water, beer or malt drinks. The question raised in the instant petition is whether or not a carbonated fruit juice is a "carbonated soft drink." For the following reasons, I conclude that Martinelli's products are not a beverage under the Act and may be sold without a refund value and redemption requirement affixed to the beverage container.

New York's Legislature adopted the Act in the wake of a growing volume of beverage container litter. "The Legislature hereby finds that litter composed of discarded soft drink, beer and ale bottles and cans is a growing problem of state concern and a direct threat to the health and safety of the citizens of this State." In attempting to reduce litter and abate increasing solid waste disposal demands on municipalities, the Legislature singled out beer and soft drink containers for regulation.

This determination followed extensive legislative investigation and debate. Beer and soft drink containers were found to be a readily identified and substantial component of the entire litter and solid waste problem. It was a rational and deliberate

choice to regulate these containers. The Legislature may regulate some components of the solid waste and litter problem "without imposing analogous controls on other forms of litter." F. Grad, 1A Treatise on Environmental Law §4.04 (1982 Ed.).

The inclusion of "carbonated soft drinks" as a regulated container must be construed in the usual and commonly understood meaning of that term. McKinney's Statutes §232. The express inclusion of "soft drinks," necessarily leaves unregulated fruit juices, milk products, still and sparkling wines, and other drinks, under the maxim expressio unius est exclusio alterius.

When a fruit juice is carbonated, as here, does it become a "carbonated soft drink" within the terms of the statute? The answer must be found with reference to the purpose of the Act and the intent of the Legislature.

By including only referenced classes of drinks, the Legislature has chosen to adopt a selected approach as the most immediately effective means to abating litter and enhancing solid waste control in New York State as found in §27-1001, ECL. Had the Legislature wished to include fruit juices, whether carbonated as with some mineral waters or still, it could have expressly included that class of beverages among its definitions. Since the Legislature amended the Act in 1983, L. 1983, Ch. 149, and made no effort to revise the definition, it can be assumed that the Legislature intended to limit the scope of beverages. The Act and its amendments also constituted a Temporary State Commission to study the operation of the Act's redemption program and report

to the Legislature by December 1, 1984. Any extension of the coverage of the Act can be addressed by the Commission and the Legislature. The Department of Environmental Conservation chose not to define "carbonated soft drink" further in its regulations, 6 NYCRR Part 367.

Although the legislative history of the Act, including the bill jackets and floor debates*, reveals no express definition of "carbonated soft drink," reference to the use of the term in other statutes reinforces the conclusion of this ruling that a natural fruit juice, carbonated, does not become a "soft drink."

For instance, New York expressly prohibits the sale or distribution of adulterated natural apple juice. Section 204-d, Agriculture and Markets Law. No comparable regulation of artificial soft drinks is found. The State's Alcoholic Beverage Control Law differentiates soft drinks from other beverages when it authorizes brewers to produce "soft drinks and other non-alcoholic beverages." Section 51(7), Alcoholic Beverage Control Law. The Tax Law distinguishes between natural fruit juices, which are a food exempt from sales and use taxes, and "fruit drinks which contain less than seventy percent of natural fruit juice" on the one hand and "soft drinks, sodas and beverages such as are ordinarily

* There is an oblique reference in floor debate to including fruit juice bottles marketed in six-packs, in "glass disposable bottles," New York Senate Stenographic Record, Pauline E. Williman, Certified Shorthand Reporter, May 26, 1982, pp. 3290-3291, but debate later clarified that six packs of fruit juices "wouldn't be prohibited under this bill." *Id.* at 3308. To the extent it is helpful the legislative debate leads to the conclusion that fruit juice was excluded from the Act.

dispensed at soda fountains" on the other hand. Section 1115(a)(1) Tax Law and ²⁰ NYCRR Part 528.2(b). Thus, the Legislature indicates its recognition that the class of "soft drinks" is a subset of a range of non-alcoholic beverages.

It is elementary that when statutes deal with the same subject they are to be read in pari materia and accorded a consistent interpretation. A fruit juice is not a soft drink as New York's Legislature has chosen to use the term.

New York's usage is in accord with that of other jurisdictions. For instance, one federal court has defined "soft drinks" to be non-alcoholic, non-dairy beverages manufactured for human consumption by the addition of a flavored extract to water and usually carbonated. Bayou Bottling, Inc. v. Dr. Pepper Co., 543 F. Supp. 1255, 1258 (D.C., La.). Originally, the adjective "soft" primarily distinguished such drinks from alcoholic beverages; common usage has evolved to differentiate natural fruit juices from fruit drinks with a reduced percentage of natural juice and additions of colors, artificial flavorings and preservatives. Institutional Food House v. Coble, 221 S. E. 2d 297, 306 (N.C.) The Federal Food & Drug Administration in its requirements & interpretation manual, "Fair Packaging and Labeling Manual," distinguishes cider from a soft drink at 7601: "The commonly accepted definition of 'soft drink' would apply to a fabricated drink rather than a single strength fruit juice." Once a pure fruit juice is diluted, the FDA prohibits reference to it as a juice and defines it as a beverage or drink. 21 CFR §102.33.

The U. S. Environmental Protection Agency in its Solid Waste Management Guidelines for Beverage Containers, 40 CFR Part 244, setting forth the comparable redemption process for federal agencies, defines beverage to mean "carbonated natural or mineral waters; soda water and similar carbonated soft drinks; and beer or other carbonated malt drinks in liquid form and intended for human consumption." 40 CFR §244.101. Since soda water is water charged with a gas like carbon dioxide, the reference to "similar" soft drinks evidently embraces water based drinks rather than effervescent natural fruit juices.

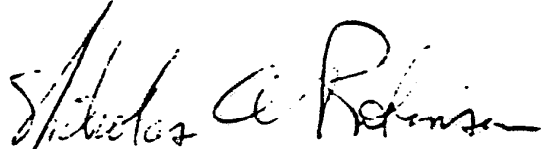
Industry usage is in accord with the differentiation between natural fruit juices and soft drinks. A representative of the National Soft Drink Association this year defined a "carbonated soft drink" to be "carbonated water with added flavored syrup and edible acid(s)." Bert Dobbs, "Basic Carbonated Beverage Technology," in "Proceedings of the Symposium on Beverages; Today's Health Concerns" (Oregon State University, May 17, 1983) at 39. "The most basic ingredient of a soft drink is water which constitutes approximately ninety percent of the beverage." Id. at 40.

Thus, while the Legislature could amend the Act further to provide a definition of soft drink as a term of art, or to include in the Act fruit juices marketed in the same fashion as beer or soft drinks, there is no basis presently to construe "carbonated soft drink" to include natural fruit juices which are carbonated.

Accordingly, Martinelli's Gold Medal Sparkling Apple Juice

and Sparkling Cider are not a beverage as defined in the New York State Returnable Container Act and are not subject to the Act.

DATED: Albany, New York
October 27, 1983



Nicholas A. Robinson
Deputy Commissioner/General Counsel
New York State Department of
Environmental Conservation