

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

P&C FOOD MARKETS, INC.

DECLARATORY
RULING

For a Declaratory Ruling Pursuant to
Section 204 of the State Administrative
Procedure Act

DEC 27-17
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Introduction

P&C Food Markets, Inc. ("Petitioner") seeks a Declaratory Ruling, pursuant to §204 of the State Administrative Procedure Act and 6 NYCRR Part 619, to determine whether a notice relating to redemption of beverage containers that it posts in its supermarkets in New York State violates the Returnable Container Act, Environmental Conservation Law, Article 27, Title 10 and the regulation promulgated thereunder, 6 NYCRR Part 367.

The scope of the requirements that a dealer can properly impose upon a redeemer of a returnable beverage container is of statewide importance and may impact every consumer. Consequently, it is in the public interest and appropriate to issue a Ruling that educates the regulated industry and consumers on the requirements of the Returnable Container Act and its implementing regulations.

Facts

The following facts are based solely on Petitioner's representations in its Petition and are assumed solely for the purposes of this Ruling.

The notice posted by Petitioner states:

NEW YORK STATE CONTAINER LEGISLATION:
HELP US-HELP YOU!

We ask our customers to please follow these guidelines.

- o All container returns empty and clean.
- o Remove all caps
- o Seperate [sic] containers by brand (Party Club, Pepsi, Coke, ect. [sic])
- o P&C is required by law to accept for redemption all containers we sell.
- o Must have N.Y. Refund imprinted on bottle or can.
- o Make arrangements at least 48 hours in advance if you wish to return more than 240 containers.
- o Return in original carton or case.

After you receive your redemption receipt from the bottle return register, you may:

- o Use it to deduct from your order.
- o Take it to a register or Courtesy Center for cash.
- o Hold on to the receipt and use it later at any P&C.
- o P&C cannot replace any lost receipts.

Thank you...

YOUR COOPERATION IS APPRECIATED

The above-described sign appears in all of Petitioner's New York stores. Petitioner believes that the sign constitutes a request to the consumer to assist the store in handling beverage containers brought in for redemption. A Department employee who observed the redemption operation at Petitioner's Penn Yan store witnessed no refusals to redeem even when consumers did not comply with certain of the "guidelines", and Petitioner's employees did

not require consumers to comply with any or all of the sign's provisions. He did observe, however, some redeemers, after glancing at the sign, removing caps and sorting containers by brand.

Discussion

The Returnable Container Act ("the Act"), requires a "dealer"¹ who sells "beverages"² in "beverage containers"³ to accept from a "redeemer"⁴ any beverage container of the design, shape, size, color, composition, and brand sold by the dealer and to pay to the redeemer the beverage container's refund value. ECL §27-1007(1). The Act specifies that the dealer may refuse to accept beverage containers otherwise required to be accepted under only three circumstances:

1 A "dealer" means every person, firm or corporation who engages in the sale of beverages in beverage containers to a consumer for off premises consumption in this State. ECL §27-1003(4).

2 A "beverage" means carbonated soft drinks, mineral water, soda water, beer and other malt beverages. ECL §27-1003(1).

3 A "beverage container" means the individual, separate, sealed glass, metal, aluminum, steel or plastic bottle, can or jar used for containing one gallon or 3.8 liters or less at the time of sale of a beverage intended for use or consumption in this State. Beverage containers sold or distributed aboard aircraft or ships are considered as intended for use or consumption outside this State. ECL §27-1003(2).

4 A "redeemer" means every person who demands the refund value provided for in the Act in exchange for the empty beverage container, but does not include a dealer as defined in ECL §27-1003(4). ECL §27-1003(8). Hence, a consumer, as that term is generally understood to mean, is a "redeemer" when he or she brings his or her beverage containers to a dealer's place of business to recover the beverage containers' deposits.

- if the beverage container does not state thereon a refund value as established by law;
- if it is a broken bottle, or corroded or dismembered can; or
- if it contains a significant amount of foreign material.

ECL §27-1009 and 6 NYCRR §367.7. In addition, the Department is authorized to promulgate rules and regulations governing the conditions of redemption. ECL §27-1013 and §27-1014. Hence, except for these three statutory circumstances and except where allowed by regulation, a dealer is not authorized to condition acceptance of beverage containers he or she is required to accept. Any such additional conditions violate the Act, subjecting the violator to penalties and other remedial action prescribed by law. See ECL §27-1015 and §71-2727.

This Ruling will address the redemption provisions in their order of appearance on the notice.

1. "All container returns empty and clean"

Petitioner may properly refuse to redeem if containers are not returned empty and clean. "A dealer or operator of a redemption center may...refuse to accept...any beverage container which contains a significant amount of foreign material, as determined in rules and regulations...." ECL §27-1009(2). "Significant amount of foreign materials" is defined in the implementing regulation, 6 NYCRR §367.7(e), as:

any material such as paper, sticks or
cigarette butts which are foreign to the

original contents of the container. Small amounts of dust, dirt or moisture do not constitute a significant amount of foreign material.

2. "Remove all caps"

3. "Separate containers by brand"

These provisions constitute conditions on acceptance not authorized under the Act or regulations. ECL §27-1009 and 6 NYCRR §367.7. Consequently, Petitioner cannot refuse to redeem on the basis of a redeemer's failure to abide by either of these provisions.

4. "P&C is required by law to accept for redemption all containers we sell"

The meaning of this provision is unclear. If its reference to "all containers we sell" means that Petitioner will redeem all beverage containers of the design, shape, size, color, composition, and brand it sells, then it states the present law. ECL §27-1007(1). However, if it means that Petitioner will redeem only those individual beverage containers that it has actually sold to consumers, the provision is a restriction on the redeemer's opportunity to redeem in violation of the Act. The implementing regulation, 6 NYCRR §367.5(a)(1), states that:

A dealer must...accept at his place of business and from any redeemer, any empty beverage containers of the type sold by the dealer regardless of whether or not the filled beverage container was originally sold by the dealer....

Thus, because the provision is ambiguous and may have the effect of thwarting legitimate redemption, the provision is improper.

5. "Must have N.Y. Refund imprinted on bottle or can"

Petitioner may properly refuse to redeem if this provision is not met. Every beverage container except those specified in 6 NYCRR §367.8(e) must indicate the refund value and contain the words "New York" or the abbreviation "N.Y.". ECL §27-1009(1) and §27-1011(1)(a), and 6 NYCRR §367.8(a). Specific requirements concerning labelling, especially permanent marking, are set forth at 6 NYCRR §367.8(b), (c), and (d).

6. "Make arrangements at least 48 hours in advance if you wish to return more than 240 containers"

This provision is authorized by regulation, 6 NYCRR §367.5(d), which states:

A dealer may not limit the number of empty beverage containers to be accepted for redemption at the dealer's place of business to less than 240 containers per redeemer per day. A dealer who chooses to so limit the number of empty beverage containers accepted for redemption must post a notice of such limit in a prominent place at the point at the dealer's place of business where empty beverage containers are accepted for redemption. Such notice must also state that any redeemer may make 48-hour advance arrangements to redeem an unlimited number of empty beverage containers.

The authority for such regulation is found in ECL §27-1013(4) which authorizes the Department to promulgate regulations governing the right of dealers to restrict or limit the number of containers redeemed.

7. "Return in original carton or case"

Petitioner cannot refuse to redeem on the basis of a redeemer's refusal to abide by this provision because it is a

condition on acceptance not authorized under the Act or regulations.

It does not appear that Petitioner's use of a "redemption receipt" violates the Act since the receipt appears to be readily convertible to cash at any of Petitioner's stores and can be used there as money.⁵ Department regulations merely state that the dealer must pay the refund value of the beverage container to the redeemer. 6 NYCRR §367.5(1)(ii).

The last matter to be addressed is whether the notice itself, which sets forth a mixture of lawful and unlawful grounds for refusal to accept beverage containers sought to be redeemed, violates the Act. I conclude that it does. A sign setting forth unlawful grounds for refusal to accept beverage containers sought to be redeemed is presumptive evidence that the dealer who put up the sign will refuse to accept such redemptions on those grounds.⁶

At best, the notice ambiguously suggests that its provisions are voluntary. However, it improperly combines both lawful and unlawful grounds upon which the dealer might refuse to redeem a

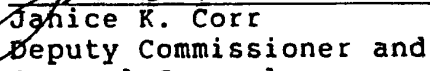
⁵ Cf. the Department Enforcement Hearing Convenient Food Market (dated October 12, 1984), in which the Commissioner of Environmental Conservation found respondent in violation of the Act for having refused to allow a redeemer to convert his credit slip to cash.

⁶ See, e.g., Department Enforcement Hearing In the Matter of Pathmark Food Store (dated September 18, 1984), where the respondent was found to have violated the Act by placing a notice in its store limiting the hours of redemption to less than the hours the dealer was open for business, without a showing that any person was injured by a refusal occurring beyond the posted hours.

container. Because the notice provides inconsistent direction with respect to the nature of its requirements as well as the effect of non-compliance, some of the terms of redemption contained in the notice which must be voluntary under the law can reasonably be construed by a prospective redeemer to be conditions precedent to redemption. Consequently, the notice may have the undesirable and improper result of chilling the right of redemption that would ordinarily be freely exercised by redeemers under many of the circumstances covered by the notice.

The observations of the Department employee concerning the conduct of Petitioner's employees, who did not refuse to accept redemptions based on the unlawful grounds set forth in Petitioner's notice, is irrelevant. At a minimum Petitioner's notice appears to condition redemption of beverage containers on terms not authorized under the Returnable Container Act, and accordingly a redeemer may reasonably read the notice as discouraging redemptions unless its provisions are met. In view of this, the notice must be revised to explicitly and separately state what the redeemer must do, and what Petitioner requests that redeemers voluntarily do, in order to redeem. Alternatively, separate notices which contain such explanations may be used.

Dated: Albany, New York
June 25, 1987



Janice K. Corr
Deputy Commissioner and
General Counsel