

MEMORANDUM FROM
MARC GERSTMAN, Deputy Commissioner and General Counsel

New York State
Department of Environmental Conservation

July 11, 1989

TO: Distribution

RE: Declaratory Ruling: Legal Action Center for the
Homeless

27-23

Attached for your information is a copy of a Declaratory Ruling holding that a dealer must redeem all empty beverage containers, other than those described in ECL 27-1009.2 and 6 NYCRR 367.7, brought to its place of business unless a notice has been prominently posted at the point in the place of business where empty beverage containers are accepted for redemption stating that the business will accept only a specified maximum number (which cannot be less than 240) of empty beverage containers per redeemer at any one time per day. In no event, however, may the dealer refuse to redeem fewer than 240 empty beverage containers at a time. If a dealer posts such a notice, it also must state that any redeemer may make 48-hour advance arrangements to redeem an unlimited number of empty beverage containers. If a dealer's place of business is open 24 hours per day, then it must redeem for the entire time. If it is open less than 24 hours per day, then it must redeem for the entire time the business is open, except the first and last half hour.



Marc S. Gerstman

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NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of :
LEGAL ACTION CENTER FOR THE HOMELESS : DECLARATORY RULING
for a Declaratory Ruling : DEC 27-25
----- X

INTRODUCTION

WALTER J. WALSH, ESQ., an attorney having as clients a class of homeless persons who collect and redeem returnable beverage containers, has petitioned for a Declaratory Ruling on the following question concerning the Returnable Container Act (the "Act"), Environmental Conservation Law ("ECL") Article 27, Title 10:

Is a dealer in compliance with [the Act] when it refuses to redeem up to 240 returnable beverage containers per redeemer at any one time, if that dealer permits each redeemer to redeem 240 cans over the course of each day, either by making repeated visits or by returning to the dealer during specified hours?

The answer to this question raises matters of statewide importance and may have an impact on every consumer and on numerous businesses. Accordingly, it is in the public interest to grant the petition and to issue a Declaratory Ruling.

DISCUSSION

The Returnable Container 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.⁵

The Act specifies that a dealer may refuse to accept beverage containers otherwise required to be accepted if:

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

ECL §27-1009. In furtherance of the statutory objective to reduce litter the Department in 1983, promulgated regulations that more clearly delineate the circumstances under which large quantities of containers may be redeemed. Set forth in 6 NYCRR 367.5(d) and (e), these grounds represent a reasonable balancing between the legitimate right of redeemers to receive their refunds and the interruptions redemptions may cause dealers during peak business hours:

- ° 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.

- ° A dealer may not limit the hours for acceptance of empty beverage containers for redemption to less than the hours the dealer is open for business, except that on any day that the dealer is open for business less than 24 hours, the dealer may restrict or refuse redemptions during the first and last half hour of the hours the dealer is open for business.

Hence, except for the five enumerated statutory and regulatory circumstances, a dealer is not authorized to condition acceptance of beverage containers it is required to accept. Any additional conditions imposed by a dealer violate the Act, subjecting the dealer to penalties and other remedial action prescribed by law. ECL §§27-1015, 71-2727.

Since the Act is intended to address in an economically efficient manner the adverse environmental and health consequences associated with unrestricted discard of beverage containers, ECL §27-1001, and since such a purpose is intended to promote the public health, safety and welfare; and since the Act is remedial in nature, the provisions of the Act and its implementing regulations must receive a liberal construction and be expounded in such a manner that they may, as far as possible, suppress the mischief and attain the end in view. See McKinney's STATUTES, §§321, 341. Hence, the Department must interpret its regulations to promote the attainment of the Legislature's objectives in enacting the Act. In the matter under review, the Department is obligated to interpret the Act and its implementing regulations in such a way as to prevent, inter alia, the undesirable and improper chilling of the right of redemption

that ordinarily would be freely exercised by redeemers. To do otherwise would frustrate the intent of the Act in addressing the proper management of a significant component of the solid waste stream.

With respect to the question of limiting the number of empty beverage containers a redeemer may offer for redemption at any one time, it has been argued that the phrase "so limit" in 6 NYCRR 367.5(d) refers to limiting 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. This interpretation is incorrect. While perhaps inartful, the phrase "so limit" is clearly intended to mean that a dealer may limit to 240 or more the number of empty beverage containers to be accepted for redemption at the dealer's place of business but only if the dealer has posted a sign so noting the limit. Any other construction would allow a dealer to post a notice saying that the dealer will not accept any empty beverage containers for redemption. Such an interpretation would totally eviscerate the redemption rights afforded under the Act and its regulations.

To allow a dealer to limit the number of beverage containers a redeemer may redeem at any one time to fewer than 240 would likewise serve as a substantial impediment to redemption that has no foundation in the Act or its implementing regulations. Hence, for example, a redeemer having 240 empty beverage containers would have to return to

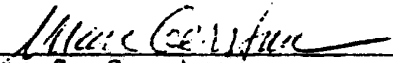
a particular dealer 24 times to redeem those 240 beverage containers if that dealer were to have a notice stating that empty beverage containers could be redeemed only ten at a time. Such a condition would discourage the redeemer from attempting to redeem beverage containers at that particular dealer's place of business, thus having a chilling effect on the redemption rights afforded to consumers under the Act.⁶

With respect to the question of whether a dealer may require a redeemer to redeem during specified hours, the Department, since the Act and its implementing regulations took effect July 1, 1983, has consistently interpreted the Act and its regulations to prohibit a dealer from limiting the hours of redemption to fewer than those identified in the regulations, and has consistently employed that interpretation in its administrative enforcement proceedings. See, e.g., Associated Foods (dated May 29, 1984); B&D Grocery Market (dated July 30, 1984); Beverage Barn (dated October 12, 1984); C-Town Supermarket (dated December 10, 1984); Cumberland Farms of Port Chester, ibid.; Dairyland Deli (dated November 16, 1984); Diana Grocery (dated October 12, 1984); G&F Grocery Store (dated December 20, 1984); Joseph G. Heisler/Semels Foods, Inc. (dated May 25, 1989); Rafael and Damuris Henriquez (dated December 20, 1984); Kwick Stop Foods (dated September 18, 1984); Pathmark Food Store (dated September 18, 1984); Wilson Rivera (dated December 20, 1984).

RULING

In summary, a dealer must redeem all empty beverage containers, other than those described in ECL 27-1009.2 and 6 NYCRR 367.7, brought to its place of business unless a notice has been prominently posted at the point in the place of business where empty beverage containers are accepted for redemption, which notice states that the business will accept only a specified maximum number (which cannot be less than 240) per redeemer per day. In no event, however, may the dealer refuse to redeem fewer than 240 empty beverage containers at a time. If a dealer posts such a notice, it also must state that any redeemer may make 48-hour advance arrangements to redeem an unlimited number of empty beverage containers. If the dealer's place of business is open 24 hours per day, then it must redeem for the entire time. If it is open less than 24 hours per day, then it must redeem for the entire time the business is open, except the first and last half hour.

DATED: Albany, New York
July 6, 1989



Marc S. Gerstman
Deputy Commissioner
and General Counsel

¹A "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.

²A "beverage" means carbonated soft drinks, mineral water, soda water, and beer and other malted beverages. ECL 27-1003.1.

³A "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 and consumption in this State. Beverage containers sold or distributed aboard aircraft or ships are considered as intended for use or consumption outside the State. ECL 27-1003.2.

⁴A "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.

⁵ECL 27-1007.1.

⁶With regard to limiting the number of containers, see, e.g., A&G Deli (dated October 14, 1984); Solaman Abishour (dated May 29, 1989); Associated Market (dated April 18, 1988), a case in which a sign was posted: "No more than 19 Bottles or Cans to Each Person"; Cumberland Farms of Port Chester (dated April 18, 1988), a case in which the dealer posted a sign: "We can only accept up to a maximum of 12 returns per day per customer"; Donald E. Hannigan (dated May 25, 1989), a case in which a redeemer attempted to redeem about 100 empty beverage containers and the dealer refused to do so, stating that the number of containers was too great; Pioneer Supermarket (December 4, 1987), a case in which the dealer posted a sign: "We . . . limit returns to 20 bottles and cans per customer"; and Steve's Market (dated December 3, 1984), a case in which the dealer accepted for redemption only six of the empty beverage containers sought to be redeemed.