

# Hot Topics in the DEC's Office of General Counsel

## New York State Returnable Container Act: 2009 Amendments Tied Up in Court



Presentation to:  
The Business Council  
2009 Annual Industry-Environment Conference  
October 15, 2009

Presented by:  
Cristin M. Clarke  
Senior Attorney  
Office of General Counsel  
NYS Department of Environmental Conservation



# Today's Discussion



- Background & Basics of the RCA
- Major changes made by the 2009 Amendments
- Litigation: *IBWA, et al. v. Paterson, et al.*
  - Timeline of Events
  - Practical Effects
- Specific issues regarding implementation of the Amendments



# Returnable Container Act (RCA)

Also known as:

- “Bottle Bill”
- Returnable Container Law
- Deposit Law
- 2009 Amendments:  
    “Bigger Better Bottle Bill”



# Laws & Regulations

- Statute: Article 27, Title 10 of the ECL:  
§§ 27-1001 to 27-1019
  - Enacted on June 15, 1982 by Chapter 200, Laws of 1982 (effective July 1, 1983)
  - Laws of 1983, 1984, 1988 and 1997 made changes to the original law
  - Most recent, enacted on April 7, 2009 by Chapter 59, Laws of 2009
- Regulations: 6 NYCRR Part 367



# Entities Involved

- **Bottler** – Person who bottles, cans or otherwise packages beverages in beverage containers.
- **Distributor** - Engages in the sale of beverages in beverage containers to dealers.
- **Dealer** – Engages in the sale of beverages in beverage containers to consumers for off-premises consumption.
- **Redemption Center** – Businesses that register with the DEC and offer to pay refund value of empty containers, receive refund value + 3.5-cent handling fee for each empty container returned to distributor/deposit initiator.
- **Third-Party Systems/Pickup Service** – a business that has an agreement or contract with a deposit initiator to pick up the empty containers from distributors, dealers and redemption centers.



# Deposit Initiator

A deposit initiator is the first bottler, distributor, dealer or agent to collect the refund value (deposit) on a beverage container sold in New York State.

- The amended Law allows for options as to who may be the initiator.
- The deposit initiator may be:
  - A bottler of beverages
  - A distributor of beverages in a beverage container with an established refund value and did not purchase the container from a registered deposit initiator.
  - A dealer who sells or offers for sale a beverage in a beverage container and did not purchase the container from a registered deposit initiator.
  - An agent acting on behalf of a registered deposit initiator.



# Basic Distribution System

Deposit Initiator



5¢ Deposit

(Distributor)



5¢ Deposit

Dealer/Retailer

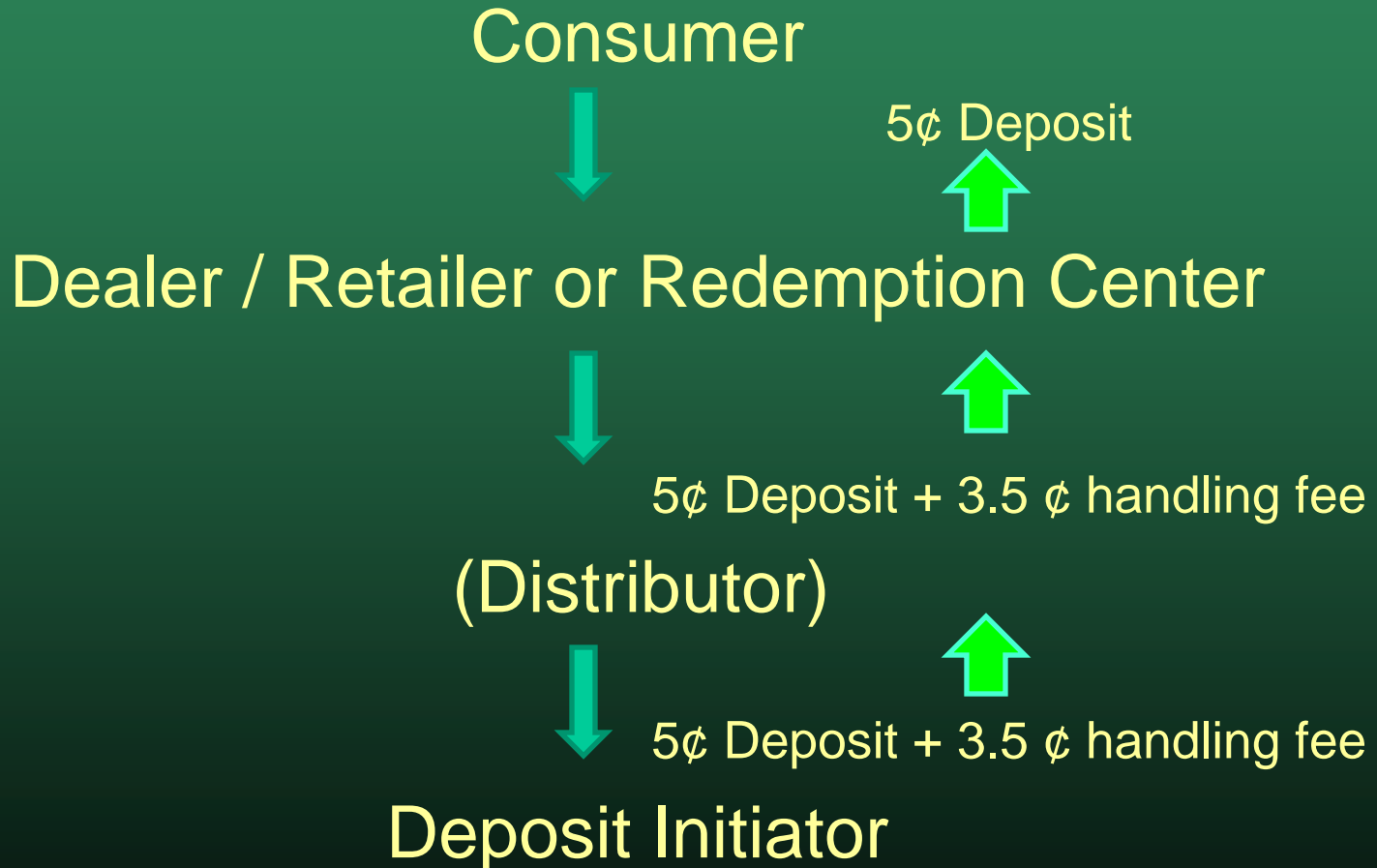


5¢ Deposit

Consumer



# Basic Redemption System



# 2009 Amendments

- Effective dates
  - April 1, 2009
  - April 7, 2009
  - June 1, 2009
  - March 1, 2010



# Amendments: Some Major Changes

## 1) Added water to the list of covered beverages

Water: “any beverage identified through the use of letters, words or symbols on its product label as a type of water, including any flavored water or nutritionally enhanced water, provided, however, that ‘water’ does not include any beverage identified as a type of water to which a sugar has been added.”



# Amendments:

## Some Major Changes (cont'd)

- 2) Requires deposit initiators to register with the Tax Dept., file quarterly reports, and remit 80% of unclaimed deposits to the State
- 3) Increased handling fee from 2¢ to 3.5¢ per container
- 4) NY-specific UPC Code\*



# IBWA et al. v. Paterson, et al.

Litigation: *International Bottled Water Association, et al. v. Paterson, et al.*,  
United States District Court, Southern  
District of New York;

Case # 1:09-CV-04672 (DAB)



# The Parties: Plaintiffs

- International Bottled Water Association (IBWA);
- Nestlé Waters North America, Inc.; and
- Polar Corp. d/b/a Polar Beverages.



# The Parties: Defendants

- NYS Governor Paterson;
- AG Andrew Cuomo;
- Commissioner of DEC Alexander Grannis;
- Commissioner of Dept. of Agriculture and Markets Patrick Hooker; and
- Commissioner of Dept. of Taxation and Finance Robert Megna.



# Issues

- New York-specific UPC Code
- June 1, 2009 Effective Date
- Exclusion of “water to which a sugar has been added”



# Litigation Timeline

- May 18, 2009: Plaintiffs' Complaint for declaratory and injunctive relief filed; Order to Show Cause for injunctive relief filed May 20<sup>th</sup>.
- May 27: Hearing on Plaintiffs' motion for a preliminary injunction.
- May 29<sup>th</sup> Order: Enjoined ALL of the 2009 Amendments



# Litigation Timeline (cont'd)

- June 10: Defendants' file motion to modify the preliminary injunction; hearing set for June 18<sup>th</sup>.
- June 12: American Beverage Association (ABA) granted intervenor status
- June 18 to July 16: Settlement Discussions
- August 13<sup>th</sup> Order: Court grants defendants' motion to modify the PI without a hearing



# Order of August 13, 2009

- Court's injunction of the NY-exclusive UPC provisions (ECL §27-1012(12)) remains in full force & effect.
- Lifted the injunction against implementation & enforcement of amendments impacting beverages other than bottled water.
- All parties must appear on Oct. 22, 2009 at which time Plaintiffs must show cause why Due Process requires a continuation of the injunction.



# Timeline (cont'd)

- September 4: ABA (Intervenor-Plaintiff) requests a pre-motion conference to modify the Aug. 13<sup>th</sup> Order
- September 14<sup>th</sup> Order: Court “did not contemplate or intend retroactive application of . . . [the] Amendments.”



# Practical Effects

- Increased handling fee of 3.5 cents must be paid on all containers accepted from dealers and redemption centers on and after August 13, 2009
- By September 21, 2009, deposit initiators on containers other than water must file first quarterly report and remit 80% of the unclaimed deposits collected for the period Aug. 13, 2009 - Aug. 31, 2009



# What's Next?

October 22, 2009



# Implementation of the Amendments: Specific Issues

- NY-specific UPC is NOT required
- Water to which a sugar has been added
- Options as to who can be the deposit initiator
- Requirements for Reverse Vending Machines (RVMs)
- Requirements for certain signs to be posted
- Responsibilities for deposit initiator and distributors regarding pick up of containers
- Preventing illegal redemption
- Beverage container assistance program



# Determining if a Water Product Needs a Deposit

Generally, look for the following\*:

- #1 Determine if the product is identified as a type of water through the use of symbols, letters or words on the product label
- #2 Check nutrition label to see if a sugar has been added. If “Nutrition Facts” label indicates:
  - “Sugars” is 0 grams, the water requires a deposit
  - “Sugars” is more than 0 grams, then no deposit is required



# Deposit Initiator

- It does not matter which entity (bottler, distributor, dealer, agent) actually initiates the deposit, as long as it is initiated either before or when the beverage container is first sold or offered for sale in NY. If no one collects, or has already collected, the deposit on a beverage container, then such container must not be sold in NY.
- \*\* No one may sell a beverage container in NY unless the deposit on the beverage container is or has been collected by a registered deposit initiator. (ECL §27-1005)
- This is something that needs to be discussed and agreed upon between parties.



# Reverse Vending Machines (RVMs)

- A dealer must pay the refund value in legal tender, or a scrip or receipt from a reverse vending machine, provided that the scrip or receipt can be exchanged for legal tender for a period of not less than sixty days without requiring the purchase of other goods.
- The use of RVMs does not relieve a dealer of its redemption responsibilities if the machines are broken or full.



# RVMs

- Effective March 1, 2010, a dealer whose place of business is part of a chain engaged in the same general field of business under common ownership, which operates 10 or more stores in NY, must install and maintain a certain number of RVMs based on the stores' square footage:
  - 40,000 sq. ft. and less than 60,000 sq. ft., must install 3 RVMs
  - 60,000 sq. ft. and less than 85,000 sq. ft., must install 4 RVMs
  - more than 85,000 sq. ft., must install 8 RVMs
- This requirement does not apply to stores selling only individual, refrigerated containers 20 ounces or less.



# Posted Signs

- All dealers must post the “New York Bottle Bill of Rights” sign conspicuously at the point of sale. Point of sale can be the customer service area or the cash register area.
- All dealers and redemption centers must post at each redemption area a “Redemption Warning” sign warning that there is a penalty for returning containers on which a deposit was never paid in New York.
- A dealer that is at least 40,000 sq. ft. that is not required to use reverse vending machines must post a sign at each public entrance describing where the redemption area is located.



# Deposit initiator/distributor pick up responsibilities

- A deposit initiator's or distributor's failure to pick up empty beverage containers, including those processed in a RVM, from a redemption center, dealer or operator of a RVM, is a violation.
- Deposit initiators or distributors must provide to a dealer or redemption center a sufficient number of bags, cartons, or other suitable containers, **at no cost**, for the packaging, handling and pick up of empty beverage containers that are not redeemed through a reverse vending machine.



# Deposit initiator/distributor pickup responsibilities

- Deposit initiators or distributors may not require a dealer or redemption center to load their own bags, cartons, or containers into a deposit initiator's or distributor's vehicle, nor may the deposit initiator or distributor require that they provide the staff or the equipment needed to do so.
- Deposit initiators or distributors may not require empty containers to be counted at a location other than the redemption center or dealer's place of business, and the dealer or redemption center has the right to be present at the count.



# Preventing Illegal Redemption

- A redeemer, dealer, distributor or redemption center shall not knowingly redeem an empty beverage container on which a deposit was never paid in New York state.
- No person can return or assist another to return to a dealer or redemption center an empty beverage container for its refund value if such container had previously been accepted for redemption by a dealer, redemption center, or deposit initiator who initiates deposits on beverage containers of the same brand.



# Illegal Redemption: Violations

- Any person who willfully tenders to a dealer, distributor, redemption center or deposit initiator more than 48 empty beverage containers for which such person knows or should reasonably know that no deposit was paid in NYS may be assessed a civil penalty of up to \$100 for each container or up to \$25,000 for each such tender of containers.
- At each location where a person tenders containers for redemption, dealers and redemption centers must conspicuously display a sign in letters that are at least one inch in height with the following information: "WARNING: Persons tendering for redemption containers on which a deposit was never paid in this state may be subject to a civil penalty of up to one hundred dollars per container or up to twenty-five thousand dollars for each such tender of containers."

ECL §27-1015(4).



# Beverage Container Assistance Program

- ECL § 27-1018
- This is a grant program, but Legislature did not allocate any funding for it.
- DEC is taking contact information to create a list of people that are interested , so when Empire State Development and DEC are ready to give out money to businesses , municipalities, or not-for profit entities ,we will have a mailing list.
- Send information to: [nybottle@gw.dec.state.ny.us](mailto:nybottle@gw.dec.state.ny.us)



# Resources

- DEC website:  
[www.dec.ny.gov/chemical/8500.html](http://www.dec.ny.gov/chemical/8500.html)
- NYS Dept. of Taxation & Finance:  
[www.nystax.gov/bev](http://www.nystax.gov/bev)



# Speaker Contact Information

Cristin M. Clarke

Senior Attorney

NYS Department of Environmental Conservation

Office of General Counsel

625 Broadway, 14th Floor

Albany, New York 12233-1500

Phone: (518) 402-9507

Email: [cmclarke@gw.dec.state.ny.us](mailto:cmclarke@gw.dec.state.ny.us)



# Questions?

Questions may also be emailed to:

[nybottle@gw.dec.state.ny.us](mailto:nybottle@gw.dec.state.ny.us)

