No. 11-2097

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN BEVERAGE ASSOCIATION,

Plaintiff-Appellant

v.

RICK SNYDER, BILL SCHUETTE and ANDREW DILLON,

Defendants-Appellees,

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION (MBWWA),

Intervenor-Appellee.

On Appeal from the United States District Court
for the Western District of Michigan
District Court No. 1:11-CV-195

BRIEF OF INTERVENOR-APPELLEE MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION (MBWWA)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, Michigan Beer & Wine Wholesalers Association (MBWWA) states as follows:

1. MBWWA has no parent corporation. No publicly held corporation owns any portion of MBWWA.

2. MBWWA is neither a subsidiary nor an affiliate of any publicly owned corporation. Pursuant to Sixth Circuit Rule 26.1(b)(2), no publicly owned corporation has a financial interest in the outcome of this appeal by reason of insurance, a franchise agreement or indemnity agreement.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff has requested oral argument pursuant to Sixth Circuit Rule 34(a). If the Court decides to hear oral argument, Appellee Michigan Beer & Wine Wholesalers Association requests oral argument in order to provide a balanced presentation of the legal arguments and to answer any questions the Court may have concerning the factual record or the arguments presented.

STATEMENT OF THE ISSUES

I. Did the District Court correctly hold that M.C.L. 445.572a(10) is not extraterritorial in violation of the Commerce Clause because it focuses on and directly regulates sales in Michigan, does not control economic activity occurring wholly outside the state and does not result in incompatible regulations?

II. Did the District Court correctly hold that M.C.L. 445.572a(10) is not discriminatory in violation of the Commerce Clause because it does not discriminate against interstate commerce or favor in-state economic interests over out-of-state economic interests, but rather, operates evenhandedly to further the State's legitimate interest in preventing fraudulent redemptions in Michigan of containers on which no deposit was paid at the time of sale?

III. If this Court chooses to review the issue, did the District Court act within its discretion in holding that in light of the substantial benefits provided by Michigan's Bottle Bill amendment, and in light of the undeveloped record as to the true nature of any alleged burden of compliance, it is a question of fact whether plaintiff can establish that the burdens on interstate commerce are clearly excessive in relation to the putative local benefits?

STATEMENT OF THE CASE

I.

This case involves a dormant Commerce Clause challenge to a Michigan statute aimed at preventing fraudulent redemption of soft drink and beer containers subject to Michigan's Bottle Bill.

Plaintiff American Beverage Association filed this action against the governor and officials of the State of Michigan. The Michigan Beer and Wine Wholesalers Association (MBWWA) was allowed to intervene as a defendant. R. No. 27, Order Granting Intervention.

The fraudulent redemption of containers on which no deposit was collected at the time of sale had become a substantial problem in Michigan, resulting in three state environmental funds being deprived of millions of dollars per year that they would have received from unclaimed deposits absent the criminal fraud. Michigan had taken an incremental approach to solving the fraudulent redemption problem, including making it a crime to knowingly redeem containers on which no deposit had been paid (M.C.L. 445.574a), requiring retailers to post notices of criminal penalties (M.C.L. 445.574b), as well as substantial law enforcement operations to apprehend perpetrators. However, those efforts proved unsuccessful in substantially curbing the fraudulent activity.

The Bottle Bill amendment, M.C.L. 445.571. *et. seq.*, addressed this problem in a more comprehensive way. M.C.L. 445.572a, provides that for brands exceeding specific high volume thresholds of sales in Michigan, containers sold in Michigan must have a mark, such as an ink jet mark for cans, allowing them to be indentified by a reverse vending machine as having been sold in Michigan or in another state with a substantially similar law. Michigan interprets "substantially similar" laws to refer to all other states having a deposit law, regardless of the amount of the deposit. Thus, a mark need not be unique to Michigan; rather, the same mark can be used on containers sold in Michigan or in any other deposit state. Adding more ease of compliance, manufacturers subject to the Act may, if they prefer, identify containers sold in Michigan by the absence of a mark as the distinguishing characteristic that allows them to be identified by reverse vending machines. M.C.L. 445.572a(10). Because of the high volume thresholds, only a few brands, such as Coca-Cola, Pepsi ,7-Up, Budweiser and MillerCoors are subject to the statute's requirements. M.C.L. 445.572a(1) through (9).

The Bottle Bill amendment was enacted after much study and in close cooperation with the affected industry, such as brewers, retailers, wholesalers, and soft drink representatives including the Michigan Soft Drink Association (many whose members are also members of the plaintiff American Beverage Association). The industry's technological abilities and concerns were taken into

consideration in formulating the statute now being challenged. The statute had extensive lead-in times to accommodate any technical issues that might arise.

Despite plaintiff's claims of burdens, its members who are subject to the law have been complying with the requirements applicable to cans for almost two years and those applicable to bottles for almost one year. Even before the effective date of the statute some of plaintiff's members were voluntarily using a unique mark system. Beer manufacturers, who are not part of this lawsuit but are subject to the same law, have also been complying with the law.

II.

Plaintiff moved for summary judgment arguing that as a matter of law the challenged statute is both extraterritorial and discriminatory in violation of the dormant Commerce Clause. Plaintiff also argued alternatively that the burdens on interstate commerce outweigh the local benefits such that, as a matter of law, plaintiff should prevail under the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test.

The District Court entered an opinion on May 31, 2011, denying plaintiff's motion for summary judgment and ruling as a matter of law that the statute is neither extraterritorial nor discriminatory in violation of the dormant Commerce Clause. R. No. 42. As to the extraterritorial argument, the Court held that the Bottle Bill amendment focuses on sales of containers in Michigan and does not

have the effect of controlling economic activity occurring wholly outside of the state, unlike price affirmation cases such as *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). The Court also found that the Michigan statute does not raise a concern about inconsistent regulations.

As to the claim of discrimination, the District Court found the statue is not protectionist since it does not favor in-state economic interests over out-of-state economic interests. Rather, it operates even-handedly with respect to all manufacturers, wherever they are located and whether or not they are engaged in interstate commerce. The Court noted that while there may be some burden on large manufacturers who meet the brand volume thresholds and operate in multiple states, that is an inherent part of multiple state operations and does not amount to discrimination against interest commerce. The District Court concluded the statute is not discriminatory facially, in effect, or purposefully.

As to the *Pike* balancing test which upholds a state regulation unless the burden it imposes upon interstate commerce is clearly excessive in relation to the putative local benefits, the District Court found the statute benefits Michigan's citizens by reasonably addressing the documented problem of fraudulent redemptions, with the goal and effect of preventing loss of funds that would otherwise be used for environmental cleanup and redevelopment, a public benefit. With respect to the actual level of the burden imposed, the Court held that is a

matter requiring factual development such that summary judgment was inappropriate. As will be discussed, defendants and MBWWA submitted affidavits and other documents showing the burden of complying with the law is slight in light of current technology and existing practices. The District Court noted it "has no concrete idea of the actual costs this has imposed on any individual manufacturer or on the interstate market as a whole." R. No. 42, p. 24. Accordingly, the Court declined to rule as a matter of law with respect to the *Pike* balancing test.

The District Court denied plaintiff's motion for reconsideration. R. Nos. 51 and 52. The Court granted certification regarding the issues whether M.C.L. 445.572a(10) is extraterritorial in violation of the Commerce Clause or whether it is discriminatory against interest commerce in violation of the Commerce Clause. *Id*. This Court accepted the appeal. R. No. 54.

STATEMENT OF FACTS

A. Background regarding Michigan's deposit law

The "Bottle Bill" was approved by the people of Michigan in 1976, Initiated Law of 1976, M.C.L. 445.571 *et. seq*. That law was the result of the "concerns of Michigan's citizens about the environmental damage and financial burdens caused by discarded beverage containers". *Michigan Soft Drink Ass'n. v. Dep't of Treasury*, 522 N.W.2d 643, 645 (1994). Approximately 10 other states have bottle deposit laws.[1]

Initially, manufacturers and distributors were allowed to keep deposits for unredeemed containers. The law was later amended to confirm that the deposits were the property of Michigan consumers who paid the deposits and to provide that unredeemed deposits would escheat to the State. M.C.L. 445.573d. See *Michigan Soft Drink Association, supra*.

Annual reports are made by the manufacturers and distributors regarding the total annual value of deposits collected and refunds paid. If a manufacturer or distributor collected more deposits than were refunded (i.e., they were an "underredeemer"), the excess is remitted to the Department of Treasury for deposit into a revolving fund. M.C.L. 445.573b and 445.573c. The Department of Treasury disburses annually 75% of the unredeemed bottle fund to the Unclaimed

[1] http://www.bottlebill.org/legislation/usa.htm visited 3/16/11.

Bottle Fund, with the remaining 25% apportioned to dealers (retailers) based on the percentage of empty containers handled by the dealers to assist with their handling costs. M.C.L. 445.573c. The balance of the unclaimed deposits is used for environmental purposes, and the Unclaimed Bottle Fund disburses one-third of the proceeds to the Environmental Response Fund, one-third to the Long –Term Maintenance Trust Fund and one-third to the Clean Michigan Fund. M.C.L. 299.609, M.C.L. 299.609c and M.C.L. 299.375.

B. The problem addressed by the 2008 amendment after other remedies were not successful

However, thieves have intruded and millions of dollars have been fraudulently diverted from environmental programs on a yearly basis. Each year millions of containers purchased in states with no deposit law are brought into Michigan and fraudulently redeemed. Without a mark that distinguishes the containers as having been sold in a state having a deposit law, there is no way for a reverse vending machine (or a store employee making a visual inspection) to recognize them as deposit containers versus containers on which no deposit was paid at the time of sale. The 2008 Bottle Bill amendment was meant to address this problem.

As the District Court found, the fraudulent activity has been well documented even though estimates vary as to the amount of losses. R. No. 42, District Court Opinion, p. 24. Even the Michigan Soft Drink Association, many of

whose members are also members of plaintiff, agrees that the problem of fraudulent exemptions results in substantial losses to Michigan. See, Michigan Soft Drink Association web page (last visited on 3/21/2011), which states that, "In recent years, the fraudulent redemption of out-of-state beverage containers has increased" and that unclaimed deposits dropped by more than $10 million. The web page acknowledges that, "it was believed that a large portion of that drop was attributable to increased fraudulent redemption". R. No. 32, MBWWA's Response to Motion for Summary Judgment, Exhibit 5.

A 1998 Michigan Consultants study estimated that fraudulent redemption in Michigan of containers originating from outside of Michigan results in the theft of $15.6 to $30 million dollars every year in Michigan deposits, while a 2000 Michigan Department of Environmental Quality report estimates the amount lost to fraudulent redemptions to be $10 million per year. R. No. 16, Defendants' Response to Motion for Summary Judgment, Exhibits 1A and 1B. See also, August 2006 UBCR audit of a retailer in Niles, Michigan, showing large percentages of containers from non-deposit states being wrongfully redeemed. *Id.*, Exhibit 1C.

Prior to the enactment of the 2008 Bottle Bill amendment, Michigan took various actions to combat these fraudulent redemptions. For example, the Bottle Bill was amended to make it a crime to knowingly redeem a container not

purchased in Michigan and retailers were required to post notices to that effect. M.C.L. 445.574a and M.C.L. 445.574b. Stepped up law enforcement efforts were made, including sting operations in large stores in border cities. For a description of law enforcement efforts to combat the fraud, see affidavit of Berrien County Sheriff Paul Bailey. R. No. 31, MBWWA's Response to Motion for Summary Judgment, Exhibits 3. See, also, affidavit of wholesaler Greg O'Niel, where he describes his observations of beverage containers being sold in Indiana stores and advertised there as containers which can be returned in Michigan. R. No. 32, MBWWA's Response to Motion for Summary Judgment, Exhibit 4, paras. 11 through 14. These earlier attempts failed to stop or significantly reduce the fraud. See, affidavits of Sheriff Bailey and Mr. O'Niel, *supra*.

C. The legislative response and participation of the beverage industry

Because of the ongoing problem, the Bottle Bill was amended in 2008 with input from industry members including beer manufacturers, soft drink representatives such as the Michigan Soft Drink Association, whose members include Coca Cola, Pepsi and 7-Up and other interested parties. See affidavit of former Michigan Senator Ronald Jelinek. R. No. 17, Defendants' Response to Motion for Summary Judgment, Exhibit 5, paras. 4-7. With industry input, the Michigan law developed a system that would remedy the ongoing criminal

activity, but at the same time take the concerns and technologies of the affected industries into account. See Jelinek affidavit, *supra* at paragraphs 4 through 7:

> "4. I sponsored Senate Bill 1532 which became 2008 Public Act No. 389.
>
> "5. The purpose behind Senate Bill 1532 was to amend the Michigan Bottle Deposit Law to stop the fraudulent redemption of containers that were not purchased in Michigan. . . . The 2008 Amendment to the Bottle Deposit Law was intend to address and stop this fraud, and maintain support for the Bottle Deposit Law.
>
> "6. . . . I participated in Senate Committee hearings and numerous meetings and discussions with members of the public and members of the industries involved in the manufacture and distribution of beverage containers subject to the Michigan Bottle deposit law. Among those who were consulted and had ongoing involvement in the development of what became Senate Bill 1532 were soft drink companies such as Coca Cola and Pepsi-Cola, individually or through their trade association. The various feasible methods to accomplish the identification of containers subject to Michigan's Bottle Deposit Law were developed with industry input. I do not recall being told that these methods were overly burdensome.
>
> "7. Prior to enactment of Senate Bill 1532 there had been almost two years of ongoing discussions with industry and affected parties about how to stop the fraudulent redemption problem. Elected officials, including myself, sought input from the involved industries (such as Miller Coors and the Michigan Soft Drink Association, whose members included producers of brands like Coke, Pepsi and 7-Up) in an attempt to arrive at a solution that would be fair to those industries, yet solve the problem of fraudulent redemption. In this regard, numerous meetings were held and numerous alternatives were considered over this approximately two-year period before enactment of the statute. This included experimental marking of containers."

See also, affidavit of Senator Rebekah Warren, referring to her involvement in discussions with soft drink industry representatives leading up to enactment of

the 2008 Bottle Bill amendment, and the attachment A to that affidavit, a submission made by the Michigan Soft Drink Association during those discussions, stating that the Association supported "strengthening penalties under the deposit law to further deter the fraudulent redemption of beverage containers" and, "We also support efforts to assure that the state provides full funding to retrofit reverse vending machines in order to incorporate the newly developing technology to identify foreign containers", but arguing that a legislative mandate was not necessary because "we are already marking our can bottoms in order to accommodate the new [reverse vending machine] technology." R. No. 17, Defendants' Response to Motion for Summary Judgment, Exhibit 7. That same attachment A to Senator Warren's affidavit indicates the chairperson and vice-chairperson of the Michigan Soft Drink Association were, respectively, representatives of Coca-Cola of Michigan and Pepsi-Cola of Michigan.

Terry Staed, a former employee of brewer Anheuser-Busch, specializes in package design, technology and innovation, labeling (including deposit markings), package manufacturing and distribution processes. His affidavit (R. No. 31, MBWWA's Response to Motion for Summary Disposition, Exhibit 1), describes the process by which manufacturers comply with the distinctive mark requirement of the amended Bottle Bill. Mr. Staed participated in reviewing and making recommendations regarding the proposed legislation (*id.,* para. 5) and was involved

in discussions that included the Michigan Soft Drink Association and its members, including Coca-Cola and Pepsi (*id.*, para. 7). The affidavit indicates that beer manufacturers accepted the legislation because it took into consideration industry concerns, allowed for flexibility as to the manner and types of designations used, and allowed Michigan containers to be sold in other deposit law states. *Id.*, para. 13.

With respect to the alleged burden of compliance, Mr. Staed's affidavit, *supra*, at para. 13, also avers that some Michigan Soft Drink Association members represented during the deliberations that they were *already* marking containers so they could be identified as deposit containers by reverse vending machines, and representatives assured Senator Jelinek that their companies would not include deposit markings on containers shipped to states surrounding Michigan that do not have deposit laws.

The Staed affidavit also describes how manufacturers mark cans and bottles, and the minimal burden involved given current technology. R. No. 31, Exhibit 1. As to cans, the affidavit notes in paragraphs 13-14 that "the period of time necessary to change a canned beverage production line from 'deposit' lids to 'non-deposit lids' and to segregate them for secondary packaging is a few minutes at most. This process has been done for many years by beer manufacturers. . . Other than the inclusion of the ink jet code within the production code date, the 2008

Bottle Bill amendment does not substantially change this process. . . Based on my review of beverage cans, there is already inkjet code on the bottom of the cans. The new mark required by Michigan law would result in modification to the inkjet marking."

As to bottles, the mark is placed on pre-prepared labels which are affixed to the containers. Mr. Staed indicates that, as with cans, the production time needed to change from deposit labels to non-deposit labels is a few minutes at most, and that the process has been successfully used for years by beer manufacturers. Para. 16. Mr. Staed further notes that affected beer manufacturers "are including a unique mark on their containers for the purpose of complying with the 2008 Bottle Bill amendment. I am not aware that this has resulted in any substantial interference with production or distribution." Para. 19.

The relative ease with which current technology allows manufacturers to comply with the law is also described in detail in the affidavit of Robert Clarke, an associate professor of packaging at Michigan State University who has, throughout his career, conducted research and worked with manufacturing companies in areas involving package design and automatic identification (coding) of products. R. No. 31, MBWWA's Response to Motion for Summary Judgment, Exhibit 2. Both Mr. Clarke and Mr. Staed note that it is common for beer and soft drink manufacturers to produce unique containers for sale in a specific geographic

market. Clarke affidavit, para. 13; Staed affidavit, para. 20. See also, R. No. 18, Defendants' Response to Motion for Summary Judgment, Exhibit 15, a photograph of a Coca-Cola University of Michigan football can.[2]

Michigan has also demonstrated its commitment to solving the fraud problem by making State funds available for reverse vending machine (RVM) upgrades and technology (and the State has appropriated $1.5 million and has spent over $1 million thus far). Jelinek affidavit, R. No. 17, Exhibit 5, para. 9.

The challenged law had a long lead-in time for implementation (approximately 18 months) to help accommodate any technological issues that might be encountered. *Id.*, para. 8.

D. The operation of the Bottle Bill amendment

Consistent with arguments made by the beverage industry, the law exempts low sales volume brands (wherever manufactured) since those brands were not contributing in any major way to the fraudulent redemption of containers in Michigan. See, R. No. 17, Defendants' Response to Motion for Summary Judgment, Exhibit 6, p. 3, where representatives of the soft drink industry and plaintiff's affected members stated before the passage of the 2008 Bottle Bill amendment that:

[2] Plaintiff submitted generalized affidavits and other documents in support of some aspects of the claimed burden, without providing specific evidence establishing the actual extent of any burden. R. No. 7, Plaintiff's Summary Judgment Brief.

> "Lower volume brands would not need to be included in the new marking, because not only is the incremental unit cost to implement the marking on lower volume brands significantly higher than for major brands, but it is also highly doubtful that the would be criminal could find it financially worthwhile to sort through a mass of non-redeemable major brand containers just to find a few redeemable ones to bring over the border".

The statute provides that if evidence of significant overredemption of below-threshold brands develops in the future, those containers would then have to meet the requirements. See M.C.L. 445.572a(1) through (9).

The statute treats all manufacturers the same whether located in Michigan or outside of Michigan.

It also gives manufacturers flexibility as to how they will meet the requirements. See M.C.L. 445.572a(10), which requires a "symbol, mark or other distinguishing characteristic". This includes the ability to choose from a number of options as to how the containers sold in Michigan or other deposit states are identified. Options include use of a "UPC" code identifier, use of some other identifier put on containers sold only in Michigan or in another deposit state (e.g., ink jet dot matrix), or using a distinguishing *absence* of a mark on containers sold in Michigan or other deposit states (should manufacturers choose to use a mark in non-deposit states). Flexibility is given to manufacturers in that whatever option/mark they choose, it can also be used in any other state that has a bottle deposit law, regardless of the amount of the deposit.

While ignored by Plaintiff, affected beer and soft drink companies have been complying with the statute (by certifying they are using Michigan identifying marks) since March 2010 for cans and since March 2011 for bottles. See manufacturers' certifications, R. No. 17, Defendants' Response to Motion for Summary Judgment, Exhibits 8 and 10. Beer manufacturers are also complying with the law by having the required mark. R. No. 32, MBWWA's Response to Motion for Summary Judgment, Exhibit 6. See also, Staed affidavit, R. No. 31, Exhibit 1, para. 13. Despite the fact of compliance with the law for almost two years as to cans, commerce in containers has not ground to a halt. Michigan has not been "walled off".

E. Procedural posture

Plaintiff moved for summary judgment on its claims that M.C.L. 445.572a(10) violates the Commerce Clause based on alleged extraterritoriality and alleged discrimination against interstate commerce. Alternatively, plaintiff moved for summary judgment claiming that under the *Pike v. Bruce Church* balancing test plaintiff should prevail as a matter of law because the burdens on interstate commerce outweigh the local benefits. The District Court denied the motion, ruling as a matter of law that the statute is neither extraterritorial nor discriminatory in violation of the Commerce Clause. As to the balancing test, the

Court found that genuine issues of material fact exist regarding the true extent of the burdens imposed on interstate commerce. R. Nos. 42 and 43.

Plaintiff filed a motion for reconsideration which was denied. R. Nos. 51 and 52. The District Court granted plaintiff's motion for certification as to the extraterritoriality and discrimination claims. *Id.* This Court accepted the appeal. R. No. 54.

SUMMARY OF ARGUMENT

I.

The challenged amendment to the Bottle Bill addresses the problem of fraudulent redemptions of containers in Michigan that results in Michigan being deprived of millions of dollars each year which would fund programs to help the environment. The statute was enacted only after incremental remedies were tried, including criminalizing the activity involved, public education and law enforcement, including sting operations in border areas where abuse was known to be high. None of those incremental efforts provided an acceptable solution.

The challenged statute provides a reasonable system of using existing technology to indentify containers on which no deposit was paid so that they will be rejected by reverse vending machines in Michigan. The challenged statute is narrowly drawn with input from members of the soft drink and beer industries.

The statute did not require that any change be made to any container then being sold in another state. Containers being sold in other states the day before the amendment passed could continue to be sold in those states the day after; of course, for affected brands in Michigan there then had to be developed a Michigan identifying mark within the long lead in time provided by the statute.

The statute applies only to brands meeting high volume thresholds, thus lessening the overall burden and focusing on the brand containers that are most closely tied to the problem of fraudulent redemptions in Michigan.

The distinguishing mark need not be unique to Michigan, but can be used in any state with a deposit law, regardless of the amount of the deposit. The law does not control the appearance or content of labels in other states, other than incidentally in that a container sold in Michigan has to have a mark (or the distinguishing absence of a mark) so that it can be identified as having been sold in Michigan (and other deposit states if the manufacturer so chooses). Despite the hyperbole of plaintiff and its *amici* as to claimed burdens, soft drink manufacturers and beer manufacturers have been complying with the law for approximately two years (as to cans) and one year (as to bottles). Even before the effective date of the amendment, some soft drink manufacturers were voluntarily using an identifying mark system.

II.

With respect to the claim of extraterritoriality, the District Court correctly ruled that the statue does not violate the dormant Commerce Clause. As the Supreme Court held in price affirmation cases such as *Brown-Forman, supra,* and *Healy v. The Beer Institute*, 491 U.S. 324 (1989), a statute may be found extraterritorial in violation of the Commerce Clause only where its effect is to directly control economic activity occurring wholly outside the state.

As the District Court noted, extraterritoriality is sparingly applied. Given the statute's legitimate focus on Michigan sales, Michigan redemptions, and on the harm occurring in Michigan which the statute seeks to remedy, this is not a case in which the doctrine should be applied. Many state laws have some effect outside the enacting state's borders, but mere effects cannot support a Commerce Clause violation, as the Supreme Court has held. Whatever effects may indirectly exist outside the state, they are unobtrusive and are closely connected to the Michigan activity being directly regulated.

Further, the Michigan statute does not involve protectionism or discriminatory treatment, contrary to the price affirmation regulation involved in *Brown-Forman*. In fact, the present case involves none of the indicia of an extraterritorial statue: The statute focuses on remedying Michigan criminal activity and the harm it causes. There is no concern that adoption of the same

scheme by other states would create inconsistent regulations. Plaintiff has failed to establish that the statute controls activity occurring wholly outside this state.

III.

As to the claim of discrimination against interstate commerce, the District Court correctly rejected that claim because the statute treats all manufacturers the same, whether located in-state or out-of-state, and whether or not engaged in interstate commerce. The discrimination argument is, in effect, a claim that the statute imposes a greater burden on large, multi-state manufacturers who meet the volume thresholds versus smaller companies whose brands do not meet the thresholds. As this Court held in *International Dairy Foods, Inc. v. Boggs*, 622 F.3d 628 (6th Cir. 2010), and as the District Court found, that is not sufficient to establish discrimination against interstate commerce. Negatively affecting interstate commerce does not amount to discrimination in violation of the Commerce Clause.

IV.

If this Court wishes to consider the *Pike v. Bruce Church* balancing issue even though the District Court did not identify that ruling as part of its certification order, the District Court did not abuse its discretion in finding that a genuine issue of material fact exists. The record establishes legitimate anti-fraud benefits sought to be achieved by the statute, including preservation of public support for the bottle

deposit law and avoiding theft of millions of dollars yearly which otherwise will be available for environmental uses. But the true extent of the burdens imposed by the law is in dispute, as defendants and MBWWA submitted affidavits and other evidence showing that manufacturers have been, and are, able to comply with the challenged law. The District Court did not abuse its discretion in holding that factual development is needed to determine whether plaintiff can meet its burden of proof under the *Pike* balancing test.

ARGUMENT

A. Standard of review

The grant of a motion for summary judgment is reviewed *de novo*. *International Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 635. The denial of a motion for summary judgment based on a finding of a genuine issue of material fact is reviewed for an abuse of discretion. *Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 395-396 (2005).

B. The District Court correctly held that M.C.L. 445.572a(10) is not extraterritorial in violation of the Commerce Clause because it does not regulate economic activity occurring wholly outside Michigan. The statute only regulates sales and redemptions of containers in Michigan, with minimal effects outside the state.

1. Introduction

Plaintiff argues that M.C.L. 445.572a(10) violates the Commerce Clause because it is extraterritorial. Plaintiff seeks to persuade the Court through broad

hyperbole having little or no relation to the present facts, without ever acknowledging what the statute actually does. See, e.g., plaintiff's assertions that the statute requires "creation of a state-specific commodity for a state-exclusive market", "destroy[s] [interstate commerce] by outlawing commerce across state lines in packaged beverages", "halts interstate commerce in covered beverages in its tracks at Michigan's borders", and "shatter[s] the interstate economy into 50 isolated economic units" with "economically catastrophic results". Plaintiff's brief, pp. 20, 22, 35 and 37. As will be shown, M.C.L. 445.572a does none of those things, but rather, directly regulates sales and redemptions in Michigan, with minimal effects outside the state, in a way that is consistent with Supreme Court authority as well as authority from this and other circuits.

As the District Court noted, the doctrine of extraterritoriality has been sparingly used (R. No. 42, p. 19), and this is not the type of scenario in which it should be applied. In the Supreme Court price affirmation cases plaintiff relies on, *Brown-Forman, supra,* and *Healy, supra,* there was economic protectionism and formal discrimination against interstate commerce, as well as a real and present concern that a state would be subject to multiple inconsistent regulations from other states. Those concerns are not present here.

The challenged statute does not Balkanize the nation or wall off the state from interstate commerce. It was enacted in close cooperation with the affected

industry to remedy fraudulent, criminal activity in Michigan, after other incremental efforts to address the problem were unsuccessful. The statue establishes a reasonable system based on technology to allow RVMs in Michigan to identify returned containers as ones on which a deposit was paid at the time of sale.

2. Principles governing extraterritoriality

A state regulation may be virtually *per se* invalid if "it has the practical effect of controlling commerce that occurs entirely outside of the state in question". *International Dairy Foods*, 622 F.3d 628, 645, quoting *Healy,* 491 U.S. 324, 336. (Emphasis added). "A state statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." *Healy, supra.* (Emphasis added.)

The focus of the doctrine is on the events the state is directly regulating, and mere effects beyond the state's borders are insufficient to render a statute unconstitutionally extraterritorial. See, *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), upholding an Indiana statute that regulated hostile takeovers, holding that an Indiana corporation with a substantial number of Indiana shareholders provided a sufficient connection to the state, even though the statute affected economic activity elsewhere.

A relevant inquiry is whether there is a nexus between the out-of-state effects and the activities being directly regulated in the enacting state. See, *IMS Health Inc. v. Mills*, 616 F.3d 7, 30-31(1st Cir. 2010), vacated on other grounds, *sub nom IMS Health Inc. v. Schneider,* ____ U.S. ___ ; 131 S. Ct. 3091 (2011)[3], holding that a statute is not invalid as extraterritorial where it affects out-of-state transactions with a significant connection to the enacting state, citing *CTS Corp.*, *supra.*

It is important to focus on the state law's actual effect rather than on generalized labels. As with any Commerce Clause analysis, "'the critical consideration . . . is the overall effect of the statute on both local and interstate activity.'" *International Dairy Foods*, 622 F3d 628, 646, quoting *Brown-Forman,* 476 U.S. 573, 579 (1986). The actual nature of the regulation's effect in the enacting state and beyond its borders must be highlighted because "there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause and the category subject to the *Pike v. Bruce Church* balancing approach." *Brown-Forman*, *supra*. See also, *International Dairy Foods,* *supra*.

[3] The First Circuit's opinion was vacated on the basis of the First Amendment analysis, with direction to reconsider in light of *Sorrell v. IMS Health Inc.*, 564 U.S. ____; 131 S. Ct. 2653 (2011).

3. M.C.L. 445.572a(10) does not control economic activity occurring wholly outside Michigan. It focuses on Michigan sales and Michigan redemptions, and only incidentally affects some manufacturers' activities in non-deposit states and only in a way that has an inherent connection to the efforts to prevent fraud in Michigan.

I.

The challenged statute is narrowly drawn and has not, despite plaintiff's claims, had "catastrophic results". Plaintiff's brief, p. 37. Containers continue to be sold in Michigan, just as containers continue to be sold outside of Michigan. Only beverage containers sold in Michigan (and limited to those brands meeting the high volume thresholds) are required to have a mark or other distinguishing characteristic that allows them to be identified by RVMs as deposit containers. M.C.L. 445.572a(1) through (9).

Plaintiff asserts at least 13 times in its brief that the Michigan statute criminalizes sales occurring in other states. Pp. 2, 3, 17, 18, 20, 23, 25, 28, 33. For example, plaintiff says at page 28 of its brief that "A sale that would trigger criminal penalties need have no connection to Michigan for the law to apply" and "Wherever the sale occurs, Michigan criminalizes it unless the beverage packaging satisfies Michigan requirements".

Plaintiff is incorrect. Only sales in Michigan that violate the statute's requirements are subject to criminal penalties. Subsections (1) through (9) of M.C.L. 445.572a dictate what is required for sales in Michigan, depending on the

type of container, the type of beverage (soft drink versus alcoholic) and specific volume thresholds. Each of those subsections addresses sales in Michigan: "[A] manufacturer. . . shall not sell, offer for sale or give a. . . beverage to a consumer, dealer, or distributor in this state. . . in a beverage container that is not a 'designated' container." (Emphasis added.) A "designated" container is one that contains a symbol, mark or other distinguishing characteristic that allows a reverse vending machine to determine if the beverage container is or is not a returnable container. M.C.L. 445.572a(12)(c), (d), and (e). The statutory mandate, and the applicable penalty for violation (see M.C.L. 445a.572a(11)), apply only to sales in Michigan.

If a manufacturer subject to the statute is using a particular distinguishing mark on containers sold in Michigan, it could decide to discontinue to sell those containers in Michigan and to start using the mark that had been used to comply with Michigan law in a non-deposit state. The statute does not prohibit that and as long as the manufacturer does not thereafter sell containers with that mark in Michigan (since the mark would then no longer comply with M.C.L. 445.572a as to sales in Michigan), there would be no violation. Of course, a manufacturer who chooses to do so would incur costs associated with that decision including having to certify a different mark for use on containers it wants to thereafter sell in Michigan.

There may be an indirect effect in non-deposit states in order to provide a mark or other distinguishing characteristic that can allow the containers sold in Michigan to be identified as Michigan or other deposit state containers, but the statute imposes no penalty, criminal or civil, on activity in other states. The law focuses on activities in Michigan, not other states, and provides a reasonable system to allow RVMs in Michigan to identify and reject attempts to "return" containers on which no deposit was paid.

As the affidavits of Terry Staed and Robert Clarke describe in detail, the actual burden of complying with the statute is quite minimal given current packaging and distribution technologies. R. No. 31, MBWWA's Response to Motion for Summary Judgment, Exhibits 1 and 2, respectively, discussed in the Statement of Facts. The statute directly regulates and focuses on activities in Michigan, and whatever incidental effects may exist elsewhere, the statute clearly does not control economic activity occurring wholly outside Michigan's borders.

II.

The Michigan statute bears little resemblance to state laws that have been struck down as true extraterritorial legislation. Throughout this case plaintiff has relied primarily on two Supreme Court decisions, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., supra*, and *Healy v. The Beer Institute, supra*, both involving price affirmation statutes. Unlike the instant case, *Brown-Forman* and

Healy involved protectionist regulations as well as a real and existing danger of exposing manufacturers to multiple, inconsistent price regulations.

In *Brown-Forman*, the New York law provided that distillers who posted wholesale prices in New York could not charge a lower price for the product in any other state during the month of posting. The law prevented the distillers from offering promotional allowances to wholesalers in other states, because the allowances lowered the effective price below the New York posted price.

The Supreme Court found that the price affirmation scheme amounted to New York regulating the price at which liquor could be sold in other states. In striking down the regulation, the Court relied in part on its protectionist nature: "While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." 476 U.S. 573, 580. The Court agreed with the Second Circuit's opinion in *United States Brewers Ass'n. v. Healy*, 692 F.2d 275, 279 (2nd Cir. 1982), summarily aff'd, 464 U.S. 909 (1983) (involving a prior version of a Connecticut price affirmation statute that was later addressed by the Supreme Court in *Healy v. The Beer Institute, supra*):

> "[The Connecticut price affirmation statute] made it impossible for a brewer to lower its price in a bordering State in response to market conditions so long as it had a higher posted price in effect in Connecticut. By so doing, the statute '[regulated] conduct occurring wholly outside the state,' 692 F.2d at 279, and thereby violated the

> *Commerce Clause*." *Brown-Forman,* 476 U.S. 573, 581-582. (Emphasis added).

Three years later, the Supreme Court in *Healy* used a similar analysis to strike down a Connecticut price affirmation statute, finding it impermissibly extraterritorial because:

> "The Connecticut statute, like the New York law struck down in *Brown-Forman*, requires out-of-state shippers to forgo the implementation of competitive-pricing schemes in out-of-state markets because those pricing decisions are imported by statute into the Connecticut market regardless of local competitive conditions. As we specifically reaffirmed in *Brown-Forman*, States may not deprive businesses and consumers in other States of 'whatever competitive advantages they may possess' based on the conditions of the local market. 476 U.S., at 580." *Healy*, 491 U.S. 324, 339.

The court also said, "A state may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states.'" 491 U.S. 324, 336, quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

The price affirmations regulations sought to and did obtain a competitive price advantage. *Healy,* 491 U.S. 324, 341. Price manipulation, of course, goes to the heart of competition and economic protectionism.

In Regan, *Siamese Essays (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1896 (1987), the author notes that the Court in *CTS Corp., supra*, treated the extraterritoriality principle as "focus[ing] on the location of the events the state is directly regulating", and "recognized implicitly that

extraterritoriality review is not triggered by the mere fact of extraterritorial effects." See also, *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994), where the Court noted, "it is inevitable that a state's law, whether statutory or common law, will have extraterritorial effects. The Supreme Court has never suggested that the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border. See [Regan, *supra* at 1878] ('prohibiting [of all state laws that have substantial extraterritorial effects] would invalidate much too much legislation')" and; *IMH Health, Inc. v. Mills*, 616 F.3d 7, stating that, "Whatever the present scope of the extraterritoriality doctrine, it clearly does not require per se invalidation of *all* extraterritorial applications contained within state statutes regulating commerce" (at 29, emphasis in original), "the doctrine has never meant that states are powerless to regulate all transactions beyond their borders" (at 30, n.29), and that a statute is not invalid as extraterritorial where it regulates "transactions with a significant inherent connection to the regulating state." (at 30).

There is no economic protectionism here. There is no projecting of Michigan's law beyond its borders. Rather, the law focuses on sales and redemptions in Michigan in order to remedy a harm that occurs in Michigan. The indirect effect outside the state on a few multi-state manufacturers who sell

containers in both Michigan and in non-deposit states, is incidental to and has a close connection to the activities being directly regulated in Michigan.

4. Plaintiff has not established a danger of inconsistent regulations.

Concerns of extraterritorial legislation may arise when state laws are enacted that are likely to subject companies engaged in interstate commerce to "incompatible cross-state regulatory regimes." *IMS Health,* 616 F.3d 7, 28. See, *Healy*, 491 U.S. 324, 336 ("what effect would arise if not one, but many or every, State adopted similar legislation.") However, " '[i]t is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be a conflict between the challenged regulation and those in place in other states.'" R. No. 42, District Court's Opinion, pp. 20-21, quoting *National Electric Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 112 (2d Cir. 2001). Mere inconsistent regulations in different states that manufacturers operating in more than one state must comply with does not raise a constitutional concern. A company that chooses to operate in more than one state must be prepared to conform to various regulations. See, Regan, 85 Mich. L. Rev. 1865, 1881, discussing *CTS Corp., supra*, and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), and noting that, in general, there is no constitutional interest in uniformity of commercial regulation.

"[S]tate laws which merely create additional, but not irreconcilable, obligations are not considered to be 'inconsistent' for this purpose", i.e., to raise a

concern of extraterritoriality. *Instructional Systems, Inc.*, 35 F.3d 813, 826, citing *Buzzard v. Roadrunner Trucking*, 966 F.2d 777, 784 n.9 (3d Cir. 1992).

As the District Court pointed out, the inquiry is not a hypothetical one. In *Brown-Forman* and *Healy,* the potential of inconsistent price affirmation statutes among states was a real and existing concern. At the time of the decision in *Brown-Forman*, 39 states had adopted price affirmation laws. *Healy*, 491 U.S. 324, 334, n10. See *Brown-Forman*, 476 U.S. 573, 583 ("Moreover, the proliferation of state affirmation laws following this Court's decision in [*Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966)] has greatly multiplied the likelihood that a seller will be subjected to inconsistent obligations in different States.") That type of concern is nonexistent here.

Although plaintiff contends there is a danger of 50 states requiring 50 unique marks, that assertion has no relation to the facts of this case. As has been shown, the Michigan statute does not require that containers sold in Michigan have a unique mark useable only in Michigan. Rather, the same mark or distinguishing characteristic may be used in Michigan and in all other states having a deposit law. That is how the State of Michigan has interpreted and applied the phrase "other states that have laws substantially similar to this act" in M.C.L. 445.572a(10). The State has thus recognized that the primary source of the fraud problem is not illegal

redemptions of deposit containers sold in other deposit states, but rather, illegal redemptions of containers sold in non-deposits states.

Plaintiff now apparently seeks to challenge Michigan's interpretation of "substantially similar" as including other deposit states where the deposit amount is less than Michigan's 10 cents. However, plaintiff cannot possibly claim an injury from the State's treatment of all deposit-state containers the same (that provision was included to make compliance easier, see affidavit of Terry Staed, R. No. 31, Exhibit 1, paras. 11-13), so it has no standing to contest the State's interpretation.

More important, plaintiff's arguments fail because the State of Michigan, charged with enforcement of the statute, has adopted the interpretation that other state deposit laws are "substantially similar" without regard to deposit amounts, and federal courts, "are entitled to rely on the State's plausible interpretation of the law it is charged with enforcing." *Sorrell v. IMS Health Inc.*, 564 U.S. ___; 131 S. Ct. 2653, 2662 (2011). Therefore, while plaintiff tries to make a case for the danger of inconsistent regulations, the argument concerns a different, hypothetical regulation, not the Michigan statute before the Court.

Under the Michigan statute there could not be incompatible regulations in different states. No matter how many states passed a deposit law like Michigan's, any unique mark container required by Michigan could still be sold in all deposit

states, just as another deposit state's container could be sold in Michigan. As noted, the Michigan law was developed with industry input to make it workable and to lessen the burden as much as reasonably possible. See also, Stated affidavit, *supra,* para. 13, noting that beer manufacturers "found the 2008 Bottle Bill amendment acceptable because it took into consideration industry concerns, allowed for flexibility as to the manner and types of designations used and allows Michigan containers to be sold in other deposit states."

Plaintiff seeks to bolster its claim regarding inconsistent regulations by saying, "New York and Vermont have already attempted to enact similar state-specific packaging requirements, but have failed." Plaintiff's brief, p. 35. In the District Court the cited New York case, *International Bottled Water Ass'n v. Patterson,* No. 09-cv-4672 (S.D.N.Y. May 29, 2009 and October 29, 2009), R. No. 7, plaintiff's Summary Judgment Brief, Exhibits G and H, was asserted as a primary reason for striking down the Michigan statute, although on appeal it is relegated to a footnote. The New York law (which was not defended by the State in that case) is very different from Michigan's statute, in part because it mandated that beverage containers have only one type of state-specific mark, a UPC code, and that such containers be offered for sale exclusively in New York. As has been shown, the Michigan statute offers far more flexibility and does not require any mark (or any absence of a mark) exclusive to Michigan, but allows the same

distinguishing characteristic to be used in all deposit law states. For a further discussion of why the New York law is not analogous to Michigan's, please See R. No. 31, MBWWA's Response to Motion for Summary Judgment, pp. 20-22. As to the Vermont statute, Plaintiff concedes it has no relevant effect. Plaintiff's brief, at pages 35-36, n. 6. Plaintiff's citation to the New York and Vermont statutes does not establish a real and present concern for incompatible state regulations, contrary to the situation addressed in *Brown-Forman.*

Plaintiff's effort to characterize Michigan's "substantially similar" provision as an illegal reciprocity requirement is likewise to no avail. Plaintiff relies on *Hardage v. Adkins,* 619 F.2d 871 (10th Cir. 1980). That case involved an Oklahoma statute that precluded any controlled industrial waste from being shipped into Oklahoma (even if it complied with Oklahoma standards) unless the state of origin had enacted substantially similar standards for such waste as existed in Oklahoma. The Court found the statute violated the Commerce Clause because, "It imposes an economic embargo on all incoming shipments unless and until the state of origin enacts a law prescribing standards which are substantially similar to those of Oklahoma. . . . Entry of the shipment even if conforming to Oklahoma standards would be denied until the provision was enacted." 619 F.2d 871, 873.

The Michigan statute does not create any embargo. It does not make the enactment of a deposit law in any other state a condition to a manufacturer's sale

of containers in Michigan. Rather, as has been shown, the "substantially similar" provision makes compliance easier, as it eliminates any Michigan-specific mark, and allows the same distinguishing feature to be used in Michigan and all other deposit states, thus assuring that there can be only one distinction between deposit and non-deposit containers, and thus eliminating any concern of inconsistent regulations should other states pass laws like Michigan's.

The District Court correctly rejected plaintiff's claim that the "substantially similar" provision makes the statute an invalid reciprocity law:

> "Finally, the Court disagrees with Plaintiff's contention that the 'substantially similar' language in the challenged provision creates a constitutional problem. The case on which Plaintiff relies, *National Solid Wastes Management Association v. Meyer,* 165 F.3d 1151 (7th Cir. 1999), is readily distinguishable. The statute challenged in that case prohibited the importation of solid waste from any other states unless the community from which the waste originated enacted an ordinance meeting Wisconsin's specifications for recycling. *Id.* at 1152. The unique-mark requirement, in contrast, does not condition entry into the Michigan market on a state's having enacted a Bottle Bill. All brands that meet the specified thresholds must have the mark sec. 572a(10) requires, regardless of whether the bottle originates out-of-state or in-state and regardless of whether the state from which it originates has a Bottle Bill. The 'substantially similar' language was simply designed to lessen the burden on interstate manufacturers in that a bottle marked in accordance with sec. 572a(10), can also be used in other states with 'substantially similar' laws (i.e., other Bottle Bill States). Michigan's borders, however, are not closed to non-Bottle Bill states. Furthermore, unlike the Wisconsin statute, the Michigan statute in no way attempts to regulate the actual product (i.e., soft drink beverages) in any other state." R. No. 42, pp. 21-22.

The District Court was correct in holding that M.C.L. 445.572a(10) is not extraterritorial in violation of the Commerce Clause because it does not control economic activity occurring wholly outside the state, any effects that occur outside the state have a clear in-state nexus and impact, the statute is not protectionist in nature, and the statute does not result in inconsistent regulations.

C. The District Court correctly held that M.C.L. 445.572a(10) is not discriminatory in violation of the Commerce Clause.

"The Dormant Commerce Clause doctrine focuses on 'economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Northville Downs v. State of Michigan*, 622 F.3d 579, 588 (6th Cir. 2010), quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

In *International Dairy Foods, supra,* the Court rejected claims brought by dairy-processor organizations that Ohio regulations restricting milk labeling statements about the non-use of a hormone, rbST, were discriminatory in violation of the dormant Commerce Clause. The Court said with regard to the discrimination test: "The first inquiry requires a court to determine whether 'a state statute directly regulates or discriminates against interstate commerce, or [whether] its effect is to favor in-state economic interests over out-of-state interests.'" *Id.*, at 644, quoting *Brown-Forman,* 476 U.S. 573, 579. If so, the statute is virtually *per se* invalid. "But if the 'statute has only indirect effects on

interstate commerce and regulates evenhandedly,' *Brown-Forman*, 466 U.S. at 579, a court then moves on to the second inquiry, which requires the application of the balancing test set forth in *Pike v. Bruce Church, Inc.*."

The Court went on to note that the *Brown-Forman* test of direct versus incidental has proven difficult to apply and has fallen out of use in dormant Commerce Clause analysis. *Id.*, at 644. The core of the discrimination test is whether the challenged statute is protectionist, i.e., whether it creates differential treatment that benefits in-state economic interests and burdens out-of-state economic interests:

> " 'The first prong targets the core concern of the dormant commerce clause, protectionism – that is, differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Protectionist laws are generally struck down without further inquiry because absent an extraordinary showing the burden they impose on interstate commerce will always outweigh their local benefits. However, if the court determines that the law is not protectionist, it goes on to analyze the law under the deferential *Pike* balancing test.'" *International dairy Foods,* 622 F.3d 628, 644-645, quoting *Tenn. Scrap Recyclers Ass'n. v. Bredesen*, 556 F.3d 442, 448-449 (6th Cir. 2009).

See also, *IMH Health Inc. v. Mills*, 616 F3d 7, 27-28, quoting *Dep't of Revenue v. Davis* 553 U.S. 328, 337-338 (2008) (The " 'dormant Commerce Clause is driven by concern about economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" (Internal quotation omitted.))

1. There is no facial discrimination.

Plaintiff's principal complaint as to both its facial and "in effect" discrimination claims is that only manufacturers engaged in interstate commerce are affected by the statute. Plaintiff contends that must mean the statute discriminates against interstate commerce. But, it is the high volume thresholds in the statute – lobbied for by the beverage industry – which result in a few large, multistate manufacturers such as Coca-Cola being affected. Differential treatment that does not favor in-state interests over out-of-state interests is not invalid. See *International Dairy Foods*, 622 F.3d 628, 649, holding that favorable treatment of processors who use rbST as opposed to those who do not was insufficient. The fact that the burden of a state regulation falls on some companies does not, by itself, establish a claim of discrimination against interstate commerce. *Northville Downs*, 622 F.3d 579, 589. See also, *Exxon Corp. v. Maryland,* 437 U.S. 117, 124-127 (1978), holding that the commerce clause does not operate to protect individual market participants or to preserve their business models, and *Minnesota v. Clover Leaf Creamery,* 449 U.S. 456, 474 (same).

As pointed out by the District Court, companies engaged in sales in multiple states may incur more business-related burdens than those who choose to market only single-state sales, but that does not prove a dormant Commerce Clause

violation. If it did, the logical result would require invalidating all state labeling requirements:

> "But more importantly, Plaintiff's rationale would by extension bar all state labeling requirements. That is, any manufacturer who deals solely intrastate has an advantage over interstate manufacturers because it need comply with only one state's labeling requirements. To hold that the unique-mark requirement is facially discriminatory, and therefore *per se* invalid, simply because it imposes a greater burden on those engaged in interstate commerce than those who do not would, in effect, mean that every state labeling restriction is unconstitutional. However, '[n]egatively affecting interstate commerce is not the same as discriminating against interstate commerce.' *Cotto Waxco Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995). In a Commerce Clause context, 'discrimination' is defined as the 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' *Id.* [Additional citations omitted.] The unique-mark requirement does not favor in-state manufacturers or disfavor out-of-state manufacturers; regardless of the bottle's point of origin, it must contain a 'symbol, mark, or other distinguishing characteristic' that is unique to Michigan. M.C.L. sec. 445.572a(10)." R. No. 42. p. 13.

As further proof of the lack of differential treatment, the District Court noted that not only does the statute not favor in-state interests over out-of-sate interests (R. No. 42, pp. 12-13), companies engaged in multiple state sales are treated the same as in-state companies, since, "Even if the threshold levels that trigger coverage implicate only high-volume, national companies like Coca Cola, small-volume out-of-state companies, just like small-volume in-state companies, are exempt." R. No. 42, p. 15. The District Court was correct in holding the statute does not facially discriminate against interstate commerce.

2. The statute is not discriminatory in effect.

This Court stated the relevant test in *International Dairy Foods,* 622 F.3d 628, 648, quoting *E. Ky. Res. v. Fiscal Court of Magoffin County,* 127 F.3d 532, 543 (6th Cir. 2007):

> " '[T]here are two complementary components to a claim that a statute has discriminatory effect on interstate commerce: the claimant must show both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation.' "

Plaintiff's claim that M.C.L. 445.572a(10) is discriminatory in effect mirrors its claim of facial discrimination. Both arguments are based primarily on the assertion that the statute affects only manufacturers engaged in interstate commerce. The law exempts manufacturers of small volume brands (wherever located) because they are not major factors in the fraudulent redemption problem. As indicated in the publication, "Fraudulent Redemption in Michigan, a Comprehensive Voluntary Industry Solution, R. No. 17, Defendants' Response to Motion for Summary Judgment, Exhibit 6, p. 3, representatives of plaintiff's affected members stated before the passage of the 2008 Bottle Bill amendment that:

> "Lower volume brands would not need to be included in the new marking, because not only is the incremental unit cost to implement the marking on lower volume brands significantly higher than for major brands, but it is also highly doubtful that the would be criminal could find it financially worthwhile to sort through a mass of non-

redeemable major brand containers just to find a few redeemable ones to bring over the border".

The volume threshold exemption applies to all container manufacturers selling in Michigan whether they are Michigan entities or out-of-state entities and, therefore, does not violate the dormant Commerce Clause. See *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1231-1234 (9th Cir. 2010) (upholding volume exemption to wine law against a commerce clause challenge).

There are many out-of-state brands that are exempt. Plaintiff asserts that it represents 187 soft drink companies. See, R. No. 26, Plaintiff's Reply Brief in Support of Motion for Summary Judgment, Exhibit E, McManus Declaration, para. 3. But, apparently the vast majority of those members (most of whom presumably are not located in Michigan) are not affected by M.C.L. 445.572a(10) because of the volume threshold requirements which Plaintiff criticizes.[4]

The claimed disparate treatment is not in-state versus out-of-state, and it is not even intrastate versus interstate, since many manufacturers selling beverages in multiple states do not meet the volume thresholds and therefore are not affected. Plaintiff's real claim is that the law provides for disparate treatment of large-volume manufacturers. That is similar to the claim rejected by this Court in *International Dairy Foods*, 622 F.3d 628, 649:

[4] At paragraphs 51-52 of the complaint (R. No. 1), plaintiff identifies the brands of its members that it claims are affected by the 2008 Bottle Bill amendment. These brands are produced by only a few of Plaintiff's members. These few affected brands were represented by the Michigan Soft Drink Association and participated in the process leading up to the 2008 Bottle Bill amendment.

> "The processors argue that the Rule favors those Ohio dairy farmers who wish to continue treating their cows with rbST, and harms out-of-state farmers and processors who have committed to discontinuing the use of the hormone. But the Rule burdens Ohio dairy farmers and processors who do not use rbST in their production of milk products to the same extent as it burdens out-of-state farmers and processors not using rbST. Conversely, the Rule favors out-of-state farmers and processors who *do* use rbST in the same way that if favors Ohio farmers who use rbST." (Emphasis by Court.)

This Court further noted that the processors' "'argument is more akin to stating that the law discriminates against dairy producers that do not use rbST as opposed to dairy producers that do use rbST'", which was "of no help in meeting their burden of demonstrating how Ohio economic actors are favored by the Rule at the expense of out-of-state actors." *Id.,* quoting the District Court.

Similarly, plaintiff's argument boils down to a claim that manufacturers of large-volume brands are discriminated against in favor of smaller volume manufacturers, but that is of no help in establishing discrimination in violation of the Commerce Clause. The current complaint is particularly ironic given that the high volume thresholds benefit the vast majority of plaintiff's members and were lobbied for by various members of plaintiff at the time the statute was enacted.

In any event, Michigan's judgment that the fraudulent redemption problem could best be addressed by focusing on large volume brands is well within its police powers. States retain "authority under their general police powers to regulate matters of legitimate local concern event though interstate commerce may

be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986), quoting *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980). (Internal quotations omitted.) In fields traditionally subject to state regulation, federal courts "should be particularly hesitant to interfere with [states'] efforts under the guise of the Commerce Clause." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007). States "are vested with the responsibility of protecting the health, safety, and welfare of [their] citizens. *Id.*, 550 U.S. 330, 342.

In rejecting the claim of discrimination in effect, the District Court correctly applied the law as set out in *International Dairy Foods.* R. No. 42, pp. 13-15. The District Court contrasted the Michigan statute with the North Carolina statute involved in *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977), which had the effect of stripping Washington growers of their competitive advantages while benefitting North Carolina growers. After analyzing *Hunt, supra*, and *International Dairy Foods, supra*, Court held:

> "Michigan's unique-mark statute, on the other hand, does not strip out-of-state actors of any competitive advantage to the benefit of in-state actors. And like *Boggs*, the unique-mark requirement burdens in-state beverage manufacturers who meet the designated thresholds to the same extent it burdens out-of-state manufacturers who meet the designated thresholds. Even if the threshold levels that trigger coverage implicate only high-volume, national companies like Coca Cola, small-volume out-of-state companies, just like small-volume in-state companies, are exempt.

> In short, Plaintiff has not shown how 'local actors are favored by the legislation, and how out-of-state actors are burdened by the legislation.' *Boggs*, 622 F.3d at 648." R. No. 42, p. 15.

The District Court properly found that there is no differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter, and hence the statute is not discriminatory in effect. If, as plaintiff claims, there is some burden on interstate commerce, that is properly addressed as part of the *Pike* balancing test after relevant discovery is done to establish the true extent, if any, of the claimed burden.

3. There is no discriminatory purpose.

As has been shown, the purpose of the statute is to stop illegal, fraudulent redemptions in Michigan. Plaintiff argues that the statute has the purpose of raising revenue, but cites no authority that a statute designed to fight criminal fraud, which applies even-handedly to in-state and out-of-state businesses, is somehow discriminatory because a by-product is to reduce losses suffered by the State as a result of reducing criminal activity. The District Court was correct in holding "there is nothing that indicates that Michigan is attempting to benefit local economic actors at the expense of out-of-state actors. See *Boggs*, 622 F.3d at 648." R. No. 42, p. 15.

D. The District Court did not abuse its discretion in denying summary judgment with respect to the *Pike* balancing test since discovery is needed to assess the true nature of the claimed burden, and in any event plaintiff has failed to establish that the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

A statute "'that has only indirect effects on interstate commerce and regulates evenhandedly is not *per se* invalid, and whether it violates the dormant Commerce Clause is to be determined according to the *Pike* balancing test." *International Dairy Foods*, 622 F.3d 628, 644, quoting *Brown-Forman*, *supra,* 476 U.S. at 579. "That test upholds a state regulation unless the burden it imposes upon interstate commerce is 'clearly excessive in relation to the putative local benefits.'" *Id.*, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike*, *supra.*

The District Court did not abuse its discretion in holding that factual development is needed before a ruling on the balancing test can be made. With respect to the local benefit, the District Court noted that, "although it has never been stated with precision how many bottles are fraudulently redeemed each year, Plaintiff does not deny that the problem exists, and Defendants have presented sufficient evidence that estimates the scope of fraud to be, conservatively, 10

million dollars per year." R. No. 42, p. 24. The Court also noted it is undisputed that "the majority of the funds lost to fraudulent redemptions each year would otherwise go into a cleanup and redevelopment trust fund. Protecting the environment is a legitimate public benefit." *Id.*

As to plaintiff's claim that the statute has the purpose of generating escheat revenue, the Court noted that revenue generation "is a cognizable benefit for purposes of the *Pike* balancing test. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007)", and there is no authority "that a state does not have a legitimate interest in preventing an illegal activity simply because that illegal activity is one which has the primary effect of decreasing state revenue." *Id.*

These are recognized benefits from the Michigan legislation, established by the record in the District Court. Plaintiff claims to be applying the balancing test from *Pike*, but it eschews any true balancing of interests. Instead, plaintiff lists the claimed burdens and asserts that these prove discrimination under the *Pike* balancing test as a matter of law, without even addressing the significant benefits. But even here plaintiff speaks in generalities, not specifics that are required to support a motion for summary judgment. Allegations in affidavits that are generalized, conclusory or vague, are insufficient evidence to support a motion for

summary judgment. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), and *Martin v. Allied International, Inc.*, 16 F.R.D. 385 (S. D. N.Y. 1954).

The claimed burden is not credible given the fact that manufacturers (who use cans and bottles similar to what plaintiff's members use) are complying with the law. The District Court found a genuine issue of material fact exists as to the balancing test, and particularly with respect to the claimed burdens, stating:

> "Although several of Plaintiff's members have been complying with the law for approximately a year, <u>the Court has no concrete idea of the actual costs this has imposed on any individual manufacturer or on the interstate market as a whole</u>. * * * In attempting to weigh the burdens and benefits, therefore, it is not clear whether the burden on interstate commerce is 'clearly excessive' in relation to the local benefits. The Court does not doubt that the unique mark requirement places some burden on Plaintiff's members, but the scope of that burden remains unclear." R. No. 42, pp. 24-25. (Emphasis added.)

Discovery is needed to develop the factual information relevant to the balancing test. The facts already developed show that affected manufacturers already comply with the law and have the capability to do so without onerous burdens. For example:

> 1. Even before the passage of M.C.L. 445.572a(10), soft drink manufacturers were representing to Michigan that they were already doing what M.C.L. 445.572a(10) requires of them. In this regard, representatives of the soft drink industry stated, "We [i.e., soft drink companies] are already marking our can bottoms in order to accommodate the new [reverse vending machine] technology", and "It [the proposed 2008 Bottle Bill amendment] is a mandate* * *which is insisting that we do what we are already doing* * *."[5]

[5] R. No. 17, Defendants' Response to Motion for Summary Judgment, Exhibit 7A.

> 2. Since the passage of M.C.L. 445.572a(10), affected manufacturers (both beer and soft drink) have been able to comply with the requirements of M.C.L. 445.572a(10) and have so certified to the State without any collapse of the beverage container industry. For example, since March 1, 2010, for cans, (and since March 1, 2011 for glass and plastic containers) manufacturers have certified to the State that they are in compliance with the requirements of M.C.L. 445.572a(10).[6]
>
> 3. The affidavits of Terry Staed and Robert Clarke, R. No. 31, MBWWA's Response to Motion for Summary Disposition, Exhibits 1 and 2, respectively, demonstrate that the requirements are not overly burdensome to the beverage industry. Please see discussion in Statement of Facts, *supra*.

The prevention of illegal activity has been ruled to be a valid regulation of interstate commerce. *See Allied Artists Picture Corp. v. Rhodes*, 679 F.2d 656 (6th Cir. 1982), citing *Baldwin v. G.A.F. Selig, Inc.*, 294 U.S. 511 (1935); and *International Dairy Foods*, *supra* at 649. Plaintiff fails to explain why deposit money should be left to thieves rather than returned to the State where it can be used to further the purposes of the Bottle Bill, which include protecting the environment and preventing littering.

As part of the balancing test, courts may examine whether less restrictive alternatives have been attempted to limit the burden on interstate commerce. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-474. Michigan has criminalized smuggling, increased enforcement activities and required retailers to

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[6] See R. No. 17, Exhibits 8-10. Beer manufacturers have made similar certifications and are in compliance with the law. See R. No. 32, MBWWA's Response to Motion for Summary Judgment, Exhibit 6.

post signs stating that the return of non-Michigan containers constitutes criminal activity. The State's incremental actions leading up to enactment of the Bottle Bill amendment had not stopped the problem of fraudulent redemptions.[7]

Plaintiff has not shown that the District Court abused its discretion in finding genuine issue of material fact as to the extent of the claimed burden to be considered in the *Pike* balancing test.

CONCLUSION

For all of the above reasons, Intervenor-Appellee Michigan Beer & Wine Wholesalers Association requests this Court to affirm the decision of the District Court.

Respectfully submitted,

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Dated: February 7, 2012

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[7] See affidavits of Sheriff Bailey and Greg O'Neil, R. No. 31, Exhibit 3, and R.32, Exhibit 4, respectively.

CERTIFICATE OF COMPLIANCE

The foregoing brief is in 14-point Times New Roman proportional font and contains 11,954 words, and thus complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

WILLINGHAM & COTÉ, P.C.

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I hereby certify that, on February 7, 2012, I served the foregoing brief upon the following counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R. No.	Description	Date
1	Complaint	2-25-11
7	Plaintiff's Summary Judgment Brief and Exhibits	3-10-11
16	Defendants' Response to Motion for Summary Judgment and Exhibits	4-7-11
17	Additional Exhibits to Defendants' Response to Motion for Summary Judgment	4-7-11
18	Additional Exhibits to Defendants' Response to Motion for Summary Judgment	4-7-11
27	Order Granting MBWWA's Motion to Intervene as a Defendant	4-26-11
31	MBWWA's Response to Motion for Summary Judgment and Exhibits	5-10-11
32	Additional Exhibits to MBWWA's Response to Motion for Summary Judgment	5-10-11
42	Opinion on Motion for Summary Judgment	5-31-11
43	Order on Motion for Summary Judgment	5-31-11
51	Memorandum Regarding Motion for Reconsideration and for Certification for Interlocutory Appeal	7-20-11
52	Order Denying Motion for Reconsideration and Granting Certification for Interlocutory Appeal	7-20-11

ADDENDUM

ADDENDUM TABLE OF CONTENTS

Commerce Clause, U.S. Const., Art. I, § 8, cl. 3……………………Add. 1

M.C.L. § 445.571 *et seq*……………………………………………Add. 2

Commerce Clause, U.S. Const., Art. I, § 8, cl. 3

Article I, Section. 8. The congress shall have Power

***

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

***

BEVERAGE CONTAINERS
Initiated Law 1 of 1976

A petition to initiate legislation to provide for the use of returnable containers for soft drinks, soda water, carbonated natural or mineral water, other nonalcoholic carbonated drink, and for beer, ale, or other malt drink of whatever alcoholic content, and for certain other beverage containers; to provide for the use of unredeemed bottle deposits; to prescribe the powers and duties of certain state agencies and officials; and to prescribe penalties and provide remedies.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978;—Am. 1996, Act 384, Imd. Eff. July 24, 1996.

Compiler's note: This initiated law was submitted to and approved by the people at the general election held on November 2, 1976, and took effect on December 3, 1976, pursuant to Mich. Const., Art. 2, § 9. But see MCL 445.576.

The petition to initiate this legislation was headed by the following statement:

"A petition to initiate legislation to provide for the use of returnable containers for soft drinks, soda water, carbonated natural or mineral water or other non-alcoholic carbonated drink; beer, ale or other malt drink of whatever alcoholic content." See Newsome v Board of State Canvassers, 69 Mich App 725 (1976).

Popular name: Bottle Bill

The People of the State of Michigan enact:

445.571 Definitions.

Sec. 1. As used in this act:

(a) "Beverage" means a soft drink, soda water, carbonated natural or mineral water, or other nonalcoholic carbonated drink; beer, ale, or other malt drink of whatever alcoholic content; or a mixed wine drink or a mixed spirit drink.

(b) "Beverage container" means an airtight metal, glass, paper, or plastic container, or a container composed of a combination of these materials, which, at the time of sale, contains 1 gallon or less of a beverage.

(c) "Empty returnable container" means a beverage container which contains nothing except the residue of its original contents.

(d) "Returnable container" means a beverage container upon which a deposit of at least 10 cents has been paid, or is required to be paid upon the removal of the container from the sale or consumption area, and for which a refund of at least 10 cents in cash is payable by every dealer or distributor in this state of that beverage in beverage containers, as further provided in section 2.

(e) "Nonreturnable container" means a beverage container upon which no deposit or a deposit of less than 10 cents has been paid, or is required to be paid upon the removal of the container from the sale or consumption area, or for which no cash refund or a refund of less than 10 cents is payable by a dealer or distributor in this state of that beverage in beverage containers, as further provided in section 2.

(f) "Person" means an individual, partnership, corporation, association, or other legal entity.

(g) "Dealer" means a person who sells or offers for sale to consumers within this state a beverage in a beverage container, including an operator of a vending machine containing a beverage in a beverage container.

(h) "Operator of a vending machine" means equally its owner, the person who refills it, and the owner or lessee of the property upon which it is located.

(i) "Distributor" means a person who sells beverages in beverage containers to a dealer within this state, and includes a manufacturer who engages in such sales.

(j) "Manufacturer" means a person who bottles, cans, or otherwise places beverages in beverage containers for sale to distributors, dealers, or consumers.

(k) "Within this state" means within the exterior limits of the state of Michigan, and includes the territory within these limits owned by or ceded to the United States of America.

(*l*) "Commission" means the Michigan liquor control commission.

(m) "Sale or consumption area" means the premises within the property of the dealer or of the dealer's lessor where the sale is made, within which beverages in returnable containers may be consumed without payment of a deposit, and, upon removing a beverage container from which, the customer is required by the dealer to pay the deposit.

(n) "Nonrefillable container" means a returnable container which is not intended to be refilled for sale by a manufacturer.

(o) "Mixed wine drink" means a drink or similar product marketed as a wine cooler and containing less than 7% alcohol by volume, consisting of wine and plain, sparkling, or carbonated water and containing any 1

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or more of the following:

(*i*) Nonalcoholic beverages.

(*ii*) Flavoring.

(*iii*) Coloring materials.

(*iv*) Fruit juices.

(*v*) Fruit adjuncts.

(*vi*) Sugar.

(*vii*) Carbon dioxide.

(*viii*) Preservatives.

(p) "Mixed spirit drink" means a drink containing 10% or less alcohol by volume consisting of distilled spirits mixed with nonalcoholic beverages or flavoring or coloring materials and which may also contain water, fruit juices, fruit adjuncts, sugar, carbon dioxide, or preservatives; or any spirits based beverage, regardless of the percent of alcohol by volume, that is manufactured for sale in a metal container.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978;—Am. 1982, Act 39, Imd. Eff. Mar. 16, 1982;—Am. 1982, Act 266, Imd. Eff. Oct. 5, 1982;—Am. 1986, Act 235, Eff. June 1, 1989;—Am. 1989, Act 93, Imd. Eff. June 20, 1989.

Popular name: Bottle Bill

445.572 Nonreturnable containers; prohibitions; means for return and refund; regional redemption centers; acceptance of containers and payment of refunds; indicating refund value and name of state on container; exception; metal containers with detachable parts prohibited; deposit previously refunded; refund upon reuse; maximum daily refund; agreement on deposit; refund by manufacturer.

Sec. 2. (1) A dealer within this state shall not sell, offer for sale, or give to a consumer a nonreturnable container or a beverage in a nonreturnable container.

(2) A dealer who regularly sells beverages for consumption off the dealer's premises shall provide on the premises, or within 100 yards of the premises on which the dealer sells or offers for sale a beverage in a returnable container, a convenient means whereby the containers of any kind, size, and brand sold or offered for sale by the dealer may be returned by, and the deposit refunded in cash to, a person whether or not the person is the original customer of that dealer, and whether or not the container was sold by that dealer.

(3) Regional centers for the redemption of returnable containers may be established, in addition to but not as substitutes for, the means established for refunds of deposits prescribed in subsection (2).

(4) Except as provided in subsections (5) and (7), a dealer shall accept from a person an empty returnable container of any kind, size, and brand sold or offered for sale by that dealer and pay to that person its full refund value in cash.

(5) A dealer who does not require a deposit on a returnable container when the contents are consumed in the dealer's sale or consumption area is not required to pay a refund for accepting that empty container.

(6) Except as provided in subsection (7), a distributor shall accept from a dealer an empty returnable container of any kind, size, and brand sold or offered for sale by that distributor and pay to the dealer its full refund value in cash.

(7) Each beverage container sold or offered for sale by a dealer within this state shall clearly indicate by embossing or by a stamp, a label, or other method securely affixed to the beverage container, the refund value of the container and the name of this state. A dealer or distributor may, but is not required to, refuse to accept from a person an empty returnable container which does not state on the container the refund value of the container and the name of this state. This subsection does not apply to a refillable container having a refund value of not less than 10 cents, having a brand name permanently marked on it, and having a securely affixed method of indicating that it is a returnable container.

(8) A dealer within this state shall not sell, offer for sale, or give to consumers a metal beverage container, any part of which becomes detached when opened.

(9) A person, dealer, distributor, or manufacturer shall not return an empty container to a dealer for a refund of the deposit if a dealer has already refunded the deposit on that returnable container. This subsection does not prohibit a dealer from refunding the deposit on an empty returnable container each time the returnable container is sanitized by the manufacturer and reused as a beverage container.

(10) A dealer may accept, but is not required to accept, from a person, empty returnable containers for a refund in excess of $25.00 on any given day.

(11) A manufacturer licensed by the commission shall not require a distributor licensed by the commission to pay a deposit to the manufacturer on a nonrefillable container. However, a manufacturer licensed by the commission and a distributor licensed by the commission may enter into an agreement providing that either or

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both may originate a deposit or any portion of a deposit on a nonrefillable container if the agreement is entered into freely and without coercion.

(12) A manufacturer shall refund the deposit paid on any container returned by a distributor for which a deposit has been paid by a distributor to the manufacturer.

(13) Subsections (4), (6), and (7) apply only to a returnable container that was originally sold in this state as a filled returnable container.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978;—Am. 1977, Act 270, Eff. Mar. 30, 1978;—Am. 1982, Act 39, Imd. Eff. Mar. 16, 1982;—Am. 1982, Act 266, Imd. Eff. Oct. 5, 1982;—Am. 1986, Act 235, Eff. June 1, 1989;—Am. 1998, Act 473, Eff. Apr. 1, 1999.

Popular name: Bottle Bill

445.572a Designated metal, glass, or plastic containers; sale or offer of sale of certain beverages; requirements; violations; definitions.

Sec. 2a. (1) Except as provided in subsection (2), beginning 90 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in this state in a 12-ounce metal beverage container that is not a designated metal container if either of the following is met:

(a) Sales of that brand of beverage in 12-ounce metal beverage containers in this state in the preceding calendar year were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 12-ounce metal beverage containers in this state in the preceding calendar year were fewer than 500,000 cases, and 12-ounce metal beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(2) Beginning 90 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in the Upper Peninsula in a 12-ounce metal beverage container that is not a designated metal container if either of the following is met:

(a) Sales of that brand of beverage in 12-ounce metal beverage containers in the Upper Peninsula were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 12-ounce metal beverage containers in the Upper Peninsula in the preceding calendar year were fewer than 500,000 cases, and 12-ounce metal beverage containers of that brand of beverage were overredeemed in the Upper Peninsula by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(3) Except as provided in subsection (4), beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in this state in a 12-ounce glass beverage container that is not a designated glass container if either of the following is met:

(a) Sales of that brand of beverage in 12-ounce glass beverage containers in this state in the preceding calendar year were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 12-ounce glass beverage containers in this state in the preceding calendar year were fewer than 500,000 cases, and 12-ounce glass beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(4) Beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in the Upper Peninsula in a 12-ounce glass beverage container that is not a designated glass container if either of the following is met:

(a) Sales of that brand of beverage in 12-ounce glass beverage containers in the Upper Peninsula were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 12-ounce glass beverage containers in the Upper Peninsula in the preceding calendar year were fewer than 500,000 cases, and 12-ounce glass beverage containers of that brand of beverage were overredeemed in the Upper Peninsula by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(5) Except as provided in subsection (6), beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in this state in a 20-ounce plastic beverage container that is not a designated plastic container if either of the following is met:

(a) Sales of that brand of beverage in 20-ounce plastic beverage containers in this state in the preceding calendar year were at least 500,000 cases, as determined by the department of treasury.

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(b) Sales of that brand of beverage in 20-ounce plastic beverage containers in this state in the preceding calendar year were fewer than 500,000 cases, and 20-ounce plastic beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(6) Beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of nonalcoholic beverages shall not sell, offer for sale, or give a nonalcoholic beverage to a consumer, dealer, or distributor in the Upper Peninsula in a 20-ounce plastic beverage container that is not a designated plastic container if either of the following is met:

(a) Sales of that brand of beverage in 20-ounce plastic beverage containers in the Upper Peninsula were at least 500,000 cases, as determined by the department of treasury.

(b) Sales of that brand of beverage in 20-ounce plastic beverage containers in the Upper Peninsula in the preceding calendar year were fewer than 500,000 cases, and 20-ounce plastic beverage containers of that brand of beverage were overredeemed in the Upper Peninsula by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(7) Beginning 90 days after the effective date of the amendatory act that added this section, a manufacturer of alcoholic beverages shall not sell, offer for sale, or give an alcoholic beverage to a consumer, dealer, or distributor in this state in a 12-ounce metal beverage container that is not a designated metal container if either of the following is met:

(a) Sales of that brand of beverage in this state in the preceding calendar year were at least 500,000 case equivalents, as determined by the department of treasury.

(b) Sales of that brand of beverage in this state in the preceding calendar year were fewer than 500,000 case equivalents, and beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(8) Beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of alcoholic beverages shall not sell, offer for sale, or give an alcoholic beverage to a consumer, dealer, or distributor in this state in a 12-ounce glass beverage container that is not a designated glass container if either of the following is met:

(a) Sales of that brand of beverage in this state in the preceding calendar year were at least 500,000 case equivalents, as determined by the department of treasury.

(b) Sales of that brand of beverage in this state in the preceding calendar year were fewer than 500,000 case equivalents, and beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(9) Beginning 450 days after the effective date of the amendatory act that added this section, a manufacturer of alcoholic beverages shall not sell, offer for sale, or give an alcoholic beverage to a consumer, dealer, or distributor in this state in a 20-ounce plastic beverage container that is not a designated plastic container if either of the following is met:

(a) Sales of that brand of beverage in this state in the preceding calendar year were at least 500,000 case equivalents, as determined by the department of treasury.

(b) Sales of that brand of beverage in this state in the preceding calendar year were fewer than 500,000 case equivalents, and beverage containers of that brand of beverage were overredeemed by more than 600,000 containers in the preceding calendar year, as determined by the department of treasury.

(10) A symbol, mark, or other distinguishing characteristic that is placed on a designated metal container, designated glass container, or designated plastic container by a manufacturer to allow a reverse vending machine to determine if that container is a returnable container must be unique to this state, or used only in this state and 1 or more other states that have laws substantially similar to this act.

(11) A person that violates this section is guilty of a misdemeanor punishable by imprisonment for not more than 180 days or a fine of not more than $2,000.00, or both. Section 4 does not apply to a violation described in this subsection.

(12) As used in this section:

(a) "Alcoholic beverage" means beer, ale, any other malt drink of whatever alcoholic content, a mixed wine drink, or a mixed spirit drink.

(b) "Brand" means any word, name, group of letters, symbol, or trademark, or any combination of them, adopted and used by a manufacturer to identify a specific flavor or type of beverage and to distinguish that flavor or type of beverage from another beverage produced or marketed by that manufacturer or another manufacturer.

(c) "Designated glass container" means a 12-ounce glass beverage container that contains a symbol, mark, or other distinguishing characteristic that allows a reverse vending machine to determine if the beverage container is or is not a returnable container.

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(d) "Designated metal container" means a 12-ounce metal beverage container that contains a symbol, mark, or other distinguishing characteristic that allows a reverse vending machine to determine if the beverage container is or is not a returnable container.

(e) "Designated plastic container" means a 20-ounce plastic beverage container that contains a symbol, mark, or other distinguishing characteristic that allows a reverse vending machine to determine if the beverage container is or is not a returnable container.

(f) "Glass beverage container" means a beverage container composed primarily of glass.

(g) "Metal beverage container" means a beverage container composed primarily of metal.

(h) "Nonalcoholic beverage" means a soft drink, soda water, carbonated natural or mineral water, or other nonalcoholic carbonated drink.

(i) "Plastic beverage container" means a beverage container composed primarily of plastic.

(j) "Reverse vending machine" means a device designed to properly identify and process empty beverage containers and provide a means for a deposit refund on returnable containers.

History: Add. 2008, Act 389, Eff. Dec. 1, 2009.

Compiler's note: Enacting section 1 of Act 389 of 2008 provides:
"Enacting section 1. This amendatory act takes effect on the date that deposits into the beverage container redemption antifraud fund created in the beverage container redemption antifraud act from money appropriated by the legislature equal or exceed $1,000,000.00."

445.573 Certification of beverage containers.

Sec. 3. (1) To promote the use in this state of reusable beverage containers of uniform design, and to facilitate the return of containers to manufacturers for reuse as a beverage container, the commission shall certify beverage containers which satisfy the requirements of this section.

(2) A beverage container shall be certified if:

(a) It is reusable as a beverage container by more than 1 manufacturer in the ordinary course of business.

(b) More than 1 manufacturer will in the ordinary course of business accept the beverage container for reuse as a beverage container and pay the refund value of the container.

(3) The commission shall not certify more than 1 beverage container of a particular manufacturer in each size classification. The commission shall by rule establish appropriate size classifications in accordance with the purposes set forth in subsection (1), each of which shall include a size range of at least 3 liquid ounces.

(4) A beverage container shall not be certified under this section:

(a) If by reason of its shape or design, or by reason of words or symbols permanently inscribed thereon, whether by engraving, embossing, painting, or other permanent method, it is reusable as a beverage container in the ordinary course of business only by a manufacturer of a beverage sold under a specific brand name.

(b) If the commission finds that its use by more than 1 manufacturer is not of sufficient volume to promote the purposes set forth in subsection (1).

(5) Unless an application for certification under this section is denied by the commission within 60 days after the application is filed, the beverage container shall be deemed certified.

(6) The commission may at any time review certification of a beverage container. If, upon the review, after written notice and hearing afforded to the person who filed the original application for certification of the beverage container under this section, the commission determines that the beverage container is no longer qualified for certification, it shall withdraw certification. Withdrawal of certification shall be effective on a date specified by the commission, but not less than 30 days after written notice to the person who filed the original application for certification of the beverage container under this section, and to the manufacturer referred to in subsection (2).

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978.

Popular name: Bottle Bill

Administrative rules: R 445.1 et seq. of the Michigan Administrative Code.

445.573a Report; filing; form and contents.

Sec. 3a. (1) Not later than March 1, 1991 and not later than March 1 of each year thereafter, a distributor or manufacturer who originates a deposit on a beverage container shall file a report with the department of treasury containing the information required by subsection (2).

(2) The report required to be filed pursuant to subsection (1) shall indicate for the period of January 1, 1990 to December 31, 1990, and for the time period of January 1 to December 31 of each year thereafter, the dollar value of both the total deposits collected by the distributor or manufacturer on beverage containers sold within this state and total refunds made upon beverage containers redeemed by the distributor or manufacturer within this state.

(3) The reports required to be filed pursuant to subsection (1) shall be similar to the following and contain

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the following information:

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                     REPORT
   DEPOSITS ORIGINATED AND REFUNDS GRANTED
           ON BEVERAGE CONTAINERS
                Reporting Period: ___________
Company Name: ____________________________
Company Address: _________________________
            Number and Street
          _________________________
            City, State, Zip
$______________ - $_________________ = $__________
 (Value of Deposits  (Value of Refunds Made)  (Difference)
    Originated)
$___________ - $__________________ = $_____________
 (Difference)   (Overredemption Credit,   (Amount Owed to
                   if Applicable)           Department of
                                              Treasury)
The undersigned states that the above information is true and
accurate.
                          ___________________________
                          Signature - Owner or President
                          ___________________________
                          Date
```

History: Add. 1989, Act 148, Eff. July 27, 1989.

Popular name: Bottle Bill

445.573b Unclaimed bottle deposits; audit, assessment, and collection by department of treasury; payment by underredeemer; overredemption credit; applying credit against prior years; definitions; report.

Sec. 3b. (1) The department of treasury may audit, assess, and collect the amount of money reflecting unclaimed bottle deposits owed to this state, and enforce the obligation to pay the amount of money reflecting unclaimed bottle deposits owed to this state, in the same manner as revenues and according to the provisions of 1941 PA 122, MCL 205.1 to 205.31.

(2) Not later than March 1, 1991 and not later than March 1 of each year thereafter, an underredeemer shall pay to the department of treasury that amount of money by which its annual total value of deposits exceeds its annual total value of refunds made on redeemed beverage containers, subject to the overredemption credit contained in this section.

(3) After March 1, 1991, an underredeemer who becomes an overredeemer in a subsequent year may credit the value of the overredemption in order to reduce the amount of money owed to the department of treasury under this section in 1 or more subsequent years as a result of that person again becoming an underredeemer. The value of the overredemption may be carried forward for not more than 3 years or until the credit granted in this section is completely depleted, whichever occurs first.

(4) A manufacturer who no longer originates deposits may carry the value of an overredemption back for prior years in order to utilize its credit, and reduce the amount of underredemption owed to the department of treasury under this section on a 1-time basis only. Utilization of this 1-time credit may be applied against underredemption amounts owed for reporting years commencing in 1990.

(5) As used in this section:

(a) "Overredeemer" means a distributor or manufacturer whose annual total value of deposits collected on beverage containers sold within this state is less than the annual total value of refunds made upon beverage containers redeemed within this state.

(b) "Underredeemer" means a distributor or manufacturer whose annual total value of deposits collected on beverage containers sold within this state exceeds annual total value of refunds made upon beverage containers redeemed within this state.

(6) In addition to the report prescribed in section 3a, if an underredeemer purchases empty returnable containers from an overredeemer, that purchase shall be reported by the underredeemer as a "refund made" and shall be reported by the overredeemer as a "deposit originated" in the report prescribed by section 3a. The report made by an underredeemer shall include the name and address of each overredeemer and the refund value of the empty returnable beverage containers purchased from each overredeemer. The report made by an overredeemer shall include the name and address of each underredeemer who purchased the returnable

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containers from that overredeemer and the refund value of the empty returnable beverage containers sold. The total consideration paid by an underredeemer to an overredeemer as authorized by this subsection shall equal the redemption value of the container.

(7) A purchase or sale made under subsection (6) during January of each year shall be included in the report for the previous calendar year only.

History: Add. 1989, Act 148, Eff. July 27, 1989;—Am. 1996, Act 384, Imd. Eff. July 24, 1996;—Am. 1998, Act 473, Eff. Apr. 1, 1999.

Popular name: Bottle Bill

445.573c Bottle deposit fund; creation; administration; deposits; annual disbursement; report of information; rules.

Sec. 3c. (1) There is created in the department of treasury a bottle deposit fund which is a revolving fund administered by the department of treasury. The money in the bottle deposit fund shall not revert to the general fund.

(2) The amount paid to the department of treasury by underredeemers shall be deposited by the department of treasury in the bottle deposit fund created in subsection (1) for annual disbursement by the department of treasury in the following manner:

(a) Seventy-five percent to the cleanup and redevelopment trust fund created in section 3e.

(b) Twenty-five percent to dealers to be apportioned to each dealer on the basis of the number of empty returnable containers handled by a dealer as determined by the department of treasury.

(3) Not later than June 1 of each year, the department of treasury shall publish and make available to the public information related to section 3b(1) and send a report of that information to the legislature.

(4) The department of treasury may promulgate rules to implement sections 3a to 3d pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws, if the department of treasury determines that rules are needed to properly implement and administer sections 3a to 3d.

History: Add. 1989, Act 148, Eff. July 27, 1989;—Am. 1996, Act 73, Imd. Eff. Feb. 26, 1996;—Am. 1996, Act 384, Imd. Eff. July 24, 1996.

Popular name: Bottle Bill

445.573d Unclaimed deposits.

Sec. 3d. Unclaimed deposits on returnable containers are considered to be the property of the person purchasing the returnable container and are not the property of the distributor or manufacturer who originated the deposit.

History: Add. 1989, Act 148, Eff. July 27, 1989.

Popular name: Bottle Bill

445.573e Cleanup and redevelopment trust fund.

Sec. 3e. (1) The cleanup and redevelopment trust fund is created within the state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the trust fund. The state treasurer shall direct the investment of the trust fund. The state treasur er shall credit to the trust fund interest and earnings from fund investments.

(3) Money in the trust fund at the close of the fiscal year shall remain in the trust fund and shall not lapse to the general fund.

(4) The state treasurer shall annually disburse the following amounts from the trust fund:

(a) For each of the state fiscal years 1996-1997, 1997-1998, and 1998-1999, up to $15,000,000.00 each year of money in the trust fund to the cleanup and redevelopment fund created in section 20108 of part 201 (environmental remediation) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.20108 of the Michigan Compiled Laws.

(b) In addition to the disbursements under subdivision (a), each state fiscal year, 80% of the revenues received by the trust fund from disbursements under section 3c to the cleanup and redevelopment fund and 10% to the community pollution prevention fund created in section 3f.

(5) All money in the trust fund that is not disbursed pursuant to subsection (4) shall remain in the trust fund until the trust fund reaches an accumulated principal of $200,000,000.00. After the trust fund reaches an accumulated principal of $200,000,000.00, interest and earnings of the trust fund only shall be expended, upon appropriation, for the purposes specified in section 20113(4) of part 201 (environmental remediation) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.20113 of the Michigan Compiled Laws.

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(6) As used in this section, "trust fund" means the cleanup and redevelopment trust fund created in subsection (1).

History: Add. 1996, Act 384, Imd. Eff. July 24, 1996.

Popular name: Bottle Bill

445.573f Community pollution prevention fund.

Sec. 3f. (1) The community pollution prevention fund is created within the state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the community pollution prevention fund. The state treasurer shall direct the investment of the community pollution prevention fund. The state treasurer shall credit to the community pollution prevention fund interest and earnings from fund investments.

(3) Money in the community pollution prevention fund at the close of the fiscal year shall remain in the community pollution prevention fund and shall not lapse to the general fund.

(4) The department of environmental quality shall expend interest and earnings of the community pollution prevention fund only, upon appropriation, for grants for the purpose of preventing pollution, with an emphasis on the prevention of groundwater contamination and resulting risks to the public health, ecological risks, and public and private cleanup costs. The department of environmental quality shall enter into contractual agreements with grant recipients, who shall include county governments, local health departments, municipalities, and regional planning agencies. Activities to be performed by grant recipients and program objectives and deliverables shall be specified in the contractual agreements. Grant recipients shall provide a financial match of not less than 25% nor more than 50%. Not more than $100,000.00 may be granted in any fiscal year to a single recipient. Eligible pollution prevention activities include all of the following:

(a) Drinking water wellhead protection, including the delineation of wellhead protection areas and implementation of wellhead protection plans pursuant to the safe drinking water act, Act No. 399 of the Public Acts of 1976, being sections 325.1001 to 325.1023 of the Michigan Compiled Laws.

(b) The review of pollution incident prevention plans prepared by, and the inspection of, facilities whose storage or handling of hazardous materials may pose a risk to the groundwater.

(c) The identification and plugging of abandoned wells other than oil and gas wells.

(d) Programs to educate the general public and businesses that use or handle hazardous materials on pollution prevention methods, technologies, and processes, with an emphasis on the direct reduction of toxic material releases or disposal at the source.

(5) The department of environmental quality shall annually prepare a report summarizing the grants made under this section, contractual commitments made and achieved, and a preliminary evaluation of the effectiveness of this section not later than September 30, 1997, and September 30 of each year thereafter, and shall provide a copy of this report to the chairs of the house and senate appropriations subcommittees for the department of environmental quality.

History: Add. 1996, Act 384, Imd. Eff. July 24, 1996.

Popular name: Bottle Bill

445.574 Violation; penalty; separate offense.

Sec. 4. Except as provided in sections 4a and 4b, a person, dealer, distributor, or manufacturer who violates this act is subject to a fine of not less than $100.00 or more than $1,000.00 and is liable for the costs of prosecution. Each day a violation occurs, a separate offense is committed.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978;—Am. 1982, Act 39, Imd. Eff. Mar. 16, 1982;—Am. 1998, Act 473, Eff. Apr. 1, 1999.

Popular name: Bottle Bill

445.574a Prohibited return to dealer, distributor, or manufacturer; violation; penalty; exceptions; restitution; action brought by attorney general or county prosecutor.

Sec. 4a. (1) A person shall not return or attempt to return to a dealer for a refund 1 or more of the following:

(a) A beverage container that the person knows or should know was not purchased in this state as a filled returnable container.

(b) A beverage container that the person knows or should know did not have a deposit paid for it at the time of purchase.

(2) A person who violates subsection (1) is subject to 1 of the following:

(a) If the person returns 25 or more but not more than 100 nonreturnable containers, the person may be ordered to pay a civil fine of not more than $100.00.

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(b) If the person returns more than 100 but fewer than 10,000 nonreturnable containers, or violates subdivision (a) for a second or subsequent time, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.

(c) If the person returns more than 100 but fewer than 10,000 nonreturnable containers for a second or subsequent time, the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.

(d) If the person returns 10,000 or more nonreturnable containers, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both.

(3) A dealer shall not knowingly accept from and pay a deposit to a person for a nonreturnable container or knowingly deliver a nonreturnable container to a distributor for a refund. A dealer that violates this subsection is subject to 1 of the following:

(a) If the dealer knowingly accepts from and pays a deposit on 25 or more but not more than 100 nonreturnable containers to a person, or knowingly delivers 25 or more but not more than 100 nonreturnable containers to a distributor for a refund, the dealer may be ordered to pay a civil fine of not more than $100.00.

(b) If the dealer knowingly accepts from and pays a deposit on more than 100 but fewer than 10,000 nonreturnable containers to a person, or knowingly delivers more than 100 but fewer than 10,000 nonreturnable containers to a distributor for a refund, the dealer is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.

(c) If the dealer knowingly accepts from and pays a deposit on more than 100 but fewer than 10,000 nonreturnable containers to a person, or knowingly delivers more than 100 but fewer than 10,000 nonreturnable containers to a distributor for a refund, for a second or subsequent time, the dealer is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.

(d) If the dealer knowingly accepts from and pays a deposit on 10,000 or more nonreturnable containers to a person, or knowingly delivers 10,000 or more nonreturnable containers to a distributor for a refund, the dealer is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both.

(4) A distributor shall not knowingly accept from and pay a deposit to a dealer for a nonreturnable container or knowingly deliver a nonreturnable container to a manufacturer for a refund. A distributor that violates this subsection is subject to 1 of the following:

(a) If the distributor knowingly accepts from and pays a deposit on 25 or more but not more than 100 nonreturnable containers to a dealer, or knowingly delivers 25 or more but not more than 100 nonreturnable containers to a manufacturer for a refund, the distributor may be ordered to pay a civil fine of not more than $100.00.

(b) If the distributor knowingly accepts from and pays a deposit on more than 100 but fewer than 10,000 nonreturnable containers to a dealer, or knowingly delivers more than 100 but fewer than 10,000 nonreturnable containers to a manufacturer for a refund, the distributor is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $1,000.00, or both.

(c) If the distributor knowingly accepts from and pays a deposit on more than 100 but fewer than 10,000 nonreturnable containers to a dealer, or knowingly delivers more than 100 but fewer than 10,000 nonreturnable containers to a manufacturer for a refund, for a second or subsequent time, the distributor is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $2,000.00, or both.

(d) If the distributor knowingly accepts from and pays a deposit on 10,000 or more nonreturnable containers to a dealer, or knowingly delivers 10,000 or more nonreturnable containers to a manufacturer for a refund, the distributor is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $5,000.00, or both.

(5) A dealer or distributor does not violate subsection (3) or (4) if all of the following conditions are met:

(a) An employee of the dealer or distributor commits an act that violates subsection (3) or (4).

(b) At the time the employee commits the act that violates subsection (3) or (4), the dealer or distributor had in force a written policy prohibiting its employees from knowingly redeeming nonreturnable containers.

(c) The dealer or distributor did not or should not have known of the employee's act in violation of subsection (3) or (4).

(6) In addition to the penalty described in this section, the court shall order a person found guilty of a misdemeanor or felony under this section to pay restitution equal to the amount of loss caused by the violation.

(7) The attorney general or a county prosecutor may bring an action to recover a civil fine under this section. A civil fine imposed under this section is payable to this state and shall be credited to the general

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fund.

History: Add. 1998, Act 473, Eff. Apr. 1, 1999;—Am. 2008, Act 384, Eff. Mar. 31, 2009.

Popular name: Bottle Bill

445.574b Posting notice on dealer's premises; failure to comply; penalty.

Sec. 4b. (1) In that portion of the dealer's premises where returnable containers are redeemed, a dealer shall post a notice that says substantially the following: "A person who returns out-of-state nonreturnable containers for a refund is subject to penalties of up to 5 years in jail, a fine of $5,000.00, and restitution.".

(2) A dealer who fails to comply with this section is subject to a civil fine of not more than $50.00.

History: Add. 1998, Act 473, Eff. Apr. 1, 1999;—Am. 2008, Act 385, Eff. Mar. 31, 2009.

Popular name: Bottle Bill

445.575 Repeal of MCL 445.191.

Sec. 5. Act No. 142 of the Public Acts of 1971, being section 445.191 of the Compiled Laws of 1970, is repealed.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978.

Popular name: Bottle Bill

445.576 Effective date.

Sec. 6. This act shall take effect two years after it becomes law.

History: 1976, Initiated Law 1, Eff. Dec. 3, 1978.

Popular name: Bottle Bill

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