



STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

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BREAKAGE

The purpose of this notice is to clarify the misconceptions regarding the regulation addressing the returns of breakage of product following delivery as set out in N.J.A.C. 13:2-39.1(a). Simply put, a wholesaler cannot accept any returns for breakage that neither existed at delivery nor were caused by it. The only exception to this prohibition is that spoiled products that could not be discovered until after it was opened by the consumer or the licensee may be returned and accepted by the wholesaler. For example, wine or beer that has turned sour and was returned by a consumer may, in turn, be returned to the wholesaler. However, the breadth and interpretation of this exception are not within the scope of this notice.

It is my understanding that confusion has arisen over the application of this rather straightforward rule. Specifically, the question has arisen as to whether breakage discovered after delivery, but allegedly existing at the time of delivery, may be returned. The answer to this question depends on whether the breakage discovered after delivery may reasonably be attributed to breakage existing at the time of delivery or as a result of the delivery process. The regulation is interpreted to permit the wholesaler and retailer to establish reasonable business practices that allow them, in a commercially sensible way, to accommodate their reasonable needs. However, the Division will not approve any process or agreement that raises the inference that breakage is being used as a subterfuge for illegal payments in the form of refunds.

Nonetheless, a wholesaler is not required to accept return of any breakage that is discovered after delivery of the product and acceptance by the retailer. When a wholesaler chooses to accept the return of breakage that is discovered after delivery, such returns must be appropriately documented so that a review by the Division after the fact would clearly establish that the product was broken at the time of delivery and could not be reasonably discovered by the parties at that time. This documentation must be maintained by both the retailer and wholesaler for a period of five years and must be made available when requested to the Director, his agents and all other law enforcement agencies. While permissible, any process that provides for a return following delivery or reflects a breakage rate in excess of normative standards would need to satisfy the Division that such a program is not a subterfuge for illegal payments. Moreover, any policy the wholesaler implements must be done in a nondiscriminatory and objective manner.

JERRY FISCHER
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Dated: October 4, 2010

