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Honorable John D. Chapman
Honorable Robert S. Howe
Chairmen, Business Legislation Committee
State House
Augusta, Maine 04333

Dear Senator Chapman and Representative Howe:

You have inquired as to our interpretation of the language in art. IV, pt. 3, § 18 of the Maine Constitution which provides that when an initiated bill is not enacted without change by the Legislature, it "shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both." More specifically, your inquiry concerns the meaning of "amended form" and "substitute," as those terms are used in § 18.

The problem stems from the fact that there is presently pending before the Committee on Business Legislation a measure proposed by the electors which would repeal 32 M.R.S.A. c. 28 (the "bottle law"). The Legislature has also referred to the Committee ten legislative documents which would make various amendments to that law.1/ Assuming the initiated bill is not enacted without change by the Legislature, and thus must be submitted to the electorate, the question arises as to which, if any, of the ten legislative documents would constitute an amended form or substitute so that, if passed by the Legislature, it would have to be placed on the ballot as a competing measure.

1/ The numbers and titles of those legislative documents are set out in Appendix A to this opinion.

Based upon Maine case law, we are compelled to conclude that the passage of any of the ten bills would result in an amended form of, or substitute for, the initiated bill under art. IV, pt. 3, § 18. Accordingly, that amended form or substitute would have to be included on the ballot as a competing measure. We should add that if more than one of the bills were adopted by the Legislature, it is our view that they would collectively constitute a single competing measure. In other words, the alternatives available to the electorate would be: 1) acceptance of the initiated bill; 2) acceptance of the bottle bill as amended (regardless of the number of amendments); or 3) rejection of both (resulting in the preservation of the existing law). We shall proceed to explain the reasons for our conclusion.

The principal case on this question is Farris, ex rel. Dorsky v. Goss, 143 Me. 227 (1948). In Dorsky, the Legislature failed to enact an initiated measure (the "Barlow bill") which would have placed certain restrictions on organized labor. Instead, it passed the "Tabb bill" which treated some, but not all, of the subjects included in the "Barlow bill." The Law Court held that the Legislature's version was a substitute for the measure proposed by the electors, and thus the Secretary of State was required to place both versions on the initiative ballot.

In construing art. IV, pt. 3, § 18, the Court initially observed that it is irrelevant whether the Legislature intends or perceives a particular bill to be a competing measure. Rather, that determination must be made in accordance with the test articulated by the Court.

> "A bill which deals broadly with the same general subject matter, particularly if it deals with it in a manner inconsistent with the initiated measure so that the two cannot stand together, is such a substitute as was referred to in. . . [art. IV, pt. 3, § 18]."
> Dorsky, supra, at 232.

Close analysis of the Dorsky opinion reveals that the Court's test turns primarily on whether the various bills are inconsistent with each other. In dealing with this issue, the Court expressly analogizes a competing measure to the repeal or amendment of a statute by implication. Invoking the law on repeal by implication,

Dorsky focuses on whether the bill introduced through the customary legislative process would be inconsistent with, or repugnant to, the measure initiated by the electors, so that the two could not coexist.2/

The only modification to Dorsky has been on the subject of emergency legislation. Relying on the Legislature's constitutional power to enact such legislation, art. IV, pt. 3, § 16, the Law Court in McCaffrey v. Gartley, 377 A.2d 1367 (Me., 1977), held that an emergency amendment to the uniform property tax law would not be a competing measure with an initiated bill to repeal that law.3/ The McCaffrey opinion strongly suggests, however, that the Dorsky holding remains the law of Maine with respect to nonemergency measures.

> "We decided in Dorsky that merely enacting inconsistent legislation could be sufficient and, in that case, was sufficient [to create a competing measure]." McCaffrey, supra, at 1371.
>
> "If the Legislature desires that a proposal be offered as an amended form of an initiated bill, it may invoke the Dorsky rule by passing a nonemergency measure, inconsistent with the initiated bill, that will be treated like an amended form of, or substitute for, the initiated bill." Id.

In short, the "inconsistency test" still governs nonemergency legislation.

2/ One commentator has explained the Dorsky standard in the following language:

> "Do the two measures deal with the same subject; and are they measures which cannot stand side-by-side as law consistently and harmoniously? If so, one is a substitute for the other." Steward, The Law of Initiative Referendum in Massachusetts, 12 N. Eng. L. Rev. 455, 495 (1977).

3/ The Court noted "how important it is that the Legislature have the authority to pass an emergency bill amending legislation that falls within the scope of an initiative and thereby make the amending measure effective immediately." 377 A.2d 1371. See also Opinion of the Justices, 370 A.2d 654 (1977).

Applying the above analysis to the ten legislative documents pending before the Committee on Business Legislation, it is our opinion that the passage of any of those bills would create a competing measure. Since the initiated bill seeks to repeal the bottle law, it is clear that it cannot coexist with legislation which would result in an amended version of that law.

We would add that if more than one of the legislative documents were approved by the Legislature, the approved bills would constitute a single competing measure. As indicated in a prior Opinion of the Attorney General (Opinion issued to Secretary of State Gartley on July 8, 1977 - copy enclosed), "the term 'amended form' can encompass the sum of all legislative alterations of the initiated bill."

Having expressed our legal opinion on this subject, we would acknowledge that the result may create certain problems for the Legislature. Although the Court in Dorsky pointed out that § 18 "places no curb on the enactment of legislation," 143 Me. at 232, it can be argued that the prevailing interpretation of that section may operate to deter legislative action. Under that interpretation, the Legislature can make minor amendments to the law only at the cost of complicating the initiative question[4/] put before the voters.[5/]

Given the relative clarity of the case law, we cannot advise you that Dorsky can be interpreted to be inapplicable to the present problem. Such advice would be tantamount to the creation by the Office of the Attorney General of an exception to a judicially-established rule.[6/] We would point

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4/ This is no small cost, as evidenced by the fact that art. IV, pt. 3, § 20 requires that the question be presented "concisely and intelligibly."

5/ The gravity of this problem was significantly mitigated by McCaffrey v. Gartley, supra, which allows the Legislature to enact immediately effective emergency measures.

6/ We might be inclined to advise that the rule does not reach a truly de minimus amendment to a law which the electors are seeking to repeal. In our view, to be truly de minimus, the amendment could in no way alter either the purpose of the law or the means used to effectuate that purpose. Since none of the bills before the Committee satisfies this criterion, we need not consider the wisdom of creating such an exception in an Opinion of the Attorney General.

out, however, that the Dorsky decision arose out of a significantly different factual situation, insofar as it involved two inconsistent pieces of affirmative legislation, one proposed by the electors and the other passed by the Legislature. By contrast, the present situation stems from the Legislature's desire to amend a law which the initiative bill would repeal. In light of these differences, and in light of the problem referenced above, it is possible, although by no means certain,7/ that the Court would interpret § 18 in a manner which would produce a different result under the facts as they exist in this case.8/ If the Legislature deems this possibility to be of sufficient importance, the appropriate course of action would be for the Senate or House to request an advisory opinion of the Supreme Judicial Court pursuant to art. VI, § 3 of the Maine Constitution.

Please feel free to contact me if I can be of any further service.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/ec
Enclosure

7/ The appellants in McCaffrey v. Gartley, supra, strenuously argued that Dorsky should either be overruled or held inapplicable to repealer initiatives. See Brief of Appellants, pp. 16-24 and Reply Brief of Appellants, pp. 10-16. The Court did not address either of those arguments, preferring instead to hold that the Dorsky rule does not apply to emergency legislation.

8/ The problem with modifying Dorsky, other than by saying that the Legislature has the complete authority to determine what it wishes placed on the ballot as a competing measure, lies in formulating a workable test. While it might be tempting to exclude all bills which are not relevant to the purpose behind the initiated bill, in that they do not offer the electors either an alternative means of accomplishing the same purpose or an alternative approach to the overall problem, such a test would require a determination of the "purpose behind the initiated bill." Clearly, the signatories to the initiative petition might have a myriad of purposes for repealing the law. While some might consider the bills before the Committee as alternative ways of satisfying their purposes, others might not. In short, any test requiring a determination of the underlying purpose of the initiative bill, in order to decide what is truly an "amended form" or "substitute," is fraught with problems.

APPENDIX A

The following list sets out the legislative documents, pending before the Committee on Business Legislation, which would amend various provisions in 32 M.R.S.A. c. 28 (the "bottle law").

L.D. 74 - AN ACT to Permit Store Owners to Limit the Hours During which they will Accept Returnable Beverage Containers and to Permit them to Limit the Number of Containers they will Accept from a Single Person or Group at One Time.

L.D. 75 - AN ACT to Allow Dealers to Restrict the Hours during which they will Accept Returnable Beverage Containers.

L.D. 469 - An ACT to improve the Efficiency and Operation of Redemption Centers for Returnable Containers.

L.D. 699 - AN ACT to Increase the Handling Charge for Returnable Beverage Containers from 1¢ to 3¢ and to Provide for Prompt Reimbursement of this Charge to Dealers and Redemption Centers.

L.D. 765 - AN ACT Relating to Determination of Refund Values on Beverage Containers.

L.D. 793 - AN ACT to Amend Returnable Beverage Container Statutes to Require Distributor Operation of Redemption Centers and to Require Refillable Containers.

L.D. 986 - AN ACT to Encourage the Acceptance by Distributors of Beverage Containers.

L.D. 993 - AN ACT to Provide Recycling and Conservation Use of Unredeemed Refunds on Beverage Containers.

L.D. 1141- AN ACT to Improve the Efficiency and Operation of Redemption Centers for Returnable Containers.

L.D. 1267- AN ACT to Amend the Returnable Beverage Container Statute to Provide for a 2¢ Handling Charge for Returnable Bottles.