A. GALLO AND COMPANY ET AL. *v.* COMMISSIONER OF ENVIRONMENTAL PROTECTION ET AL.
(SC 18764)

Rogers, C. J., and Palmer, Zarella, Eveleigh and Vertefeuille, Js.

Argued January 2—officially released August 20, 2013

Michael K. Skold, assistant attorney general, with whom were *Robert W. Clark*, special counsel, and, on the brief, *George Jepsen*, attorney general, for the appellants (defendants).

James K. Robertson, Jr., with whom, on the brief, were *David S. Hardy* and *Sherwin M. Yoder*, for the appellees (named plaintiff et al.).

Patricia A. Millett, pro hac vice, with whom was *Garrett S. Flynn*, for the appellees (plaintiff Adirondack Beverages Corporation et al.).

R. Bradley Morris filed a brief for the New England Legal Foundation as amicus curiae.

Opinion

ZARELLA, J. The original plaintiffs,[1] twelve beer and soft drink distributors doing business in Connecticut, brought this action against the named defendant, the Commissioner of Environmental Protection (commissioner),[2] seeking a declaratory judgment and damages for the alleged, retroactive taking of their property under certain provisions of Public Acts 2009, No. 09-1, § 15 (P.A. 09-1), in violation of the fifth and fourteenth amendments to the United States constitution, and article first, § 11, of the constitution of Connecticut. The property in question consists of unclaimed beverage container deposits (unclaimed deposits), the disposition of which was considered by the state legislature in 2008, and again in 2009, when Connecticut was facing a significant budget deficit. State legislation signed into law on January 15, 2009, and made applicable for a period of four months prior to its effective date,[3] provided that all unclaimed deposits accruing during the designated four month period, which previously had been retained by the plaintiffs, henceforth must be paid to the state. See P.A. 09-1, § 15, codified at General Statutes (Supp. 2010) § 22a-245a (d). The plaintiffs do not challenge the state's right to the unclaimed deposits from the effective date onward. Instead, they claim that application of the provision to the four month period prior to that date was an unconstitutional taking because they had a vested property interest in the unclaimed deposits. The commissioner responds that the legislation did not effect an unconstitutional taking because they did not have a vested property interest in the unclaimed deposits. The commissioner now appeals from the judgment of the trial court awarding damages and attorney's fees to the original plaintiffs and damages to the intervening plaintiffs following the trial court's granting of the original plaintiffs' motion for summary judgment and denial of the commissioner's motion for summary judgment. We reverse the judgment of the trial court.

The parties stipulated to the following facts,[4] which the trial court set forth in its memorandum of decision. "[The] [c]ommissioner . . . and the [Department of Environmental Protection (DEP)] are charged with administering and enforcing . . . General Statutes § 22a-243 et seq., as amended by [Public Acts, Spec. Sess., November, 2008, No. 08-1 (Spec. Sess. P.A. 08-1), and P.A. 09-1], and [the commissioner] is responsible for depositing the payment appropriated thereby in the state's general fund.

* * *

"[Public Acts 1978, No. 78-16], effective January 1, 1980, codified [at] . . . § 22a-243 et seq., is commonly known as the 'bottle bill.' In an effort to reduce litter and solid waste levels, the bottle bill established a system of

beverage container recycling to be administered, in part, by Connecticut's beer and soft drink distributors such as the plaintiffs. The bottle bill required the plaintiffs to pay a five cent refund value upon the return of empty beer or soft drink containers of the kind, size and brand sold by the distributor.

"Under the provisions of the bottle bill and Connecticut's long-standing and highly regulated three tier alcoholic beverage distribution system (distributor—retailer—consumer), the basic mechanics of the return and refund process function as follows:

"a. Beverage distributors such as the plaintiff[s] 'initiate,' or charge and collect, a five cent refund value on each container sold to a retailer;

"b. Retailers pay the five cent refund value on each container purchased from the distributor, and, in turn, charge and collect a five cent refund value from the end-purchaser/consumer of the beverage;

"c. If a consumer returns the empty container to the retailer (or a redemption center), the retailer (or redemption center) is required to pay the consumer a refund of five cents; and

"d. The retailer (or redemption center), in turn, will return the empty container to the distributor of the product, who must reimburse the retailer (or redemption center) five cents.

"The plaintiffs also incur costs and expense administering portions of the bottle bill, including:

"a. Paying a one and [one]-half cent statutory handling fee to the retailer (or redemption center) for each empty beer container returned. In the case of soft drinks, the statutory handling fee for the return of empty containers is two cents;

"b. Transporting empty containers from the retailer back to the distributor;

"c. Providing dedicated space for processing returns;

"d. Making arrangements for the processing and recycling of the empty containers; and

"e. Incurring the costs of labor, overhead and insurance necessary to perform these functions and to comply with the mandates of the bottle bill.

"After paying the refund value and the handling fee, the distributors own the returned containers, which are recyclable materials, and may dispose of them as they choose. Distributors may sell returns to third parties. The costs of performing the tasks described in the preceding paragraph are born[e] by . . . Connecticut beverage distributors like the plaintiffs.

"Under the bottle bill, distributors do not hold refund values in a manner that makes them identifiable to a specific container or a specific consumer. The plaintiffs

have a statutory obligation to pay retailers five cents when presented with an empty container of the kind, size and brand sold by the plaintiffs, regardless of when the container was actually sold to a retailer or consumer. The bottle bill does not refer to the amounts paid by a distributor to retailers upon the return of an empty container of the kind, size and brand sold by the distributor as a 'deposit.' Instead, the bottle bill defines such payments as 'refund values.'

"On November 25, 2008, the legislature passed [the 2008 act], entitled 'An Act Concerning Deficit Mitigation.' [The 2008 act] . . . required each of the plaintiff distributors to 'open a special interest-bearing account at a Connecticut branch of a financial institution, as defined in [§] 45a-557a of the General Statutes, to the credit of the deposit initiator.' . . . [The act] further provided that '[e]ach deposit initiator shall deposit in such account an amount equal to the refund values established pursuant to subsection (a) of [§] 22a-244 of the General Statutes, for each beverage container sold by such deposit initiator.' . . . '[F]or any beverage container sold during the period from December 1, 2008, to December 31, 2008, inclusive, such deposit shall be made not later than January 5, 2009.' . . . All interest, dividends and returns earned on the special account were required to be paid into such account, and such moneys were required to 'be kept separate and apart from all other moneys in the possession [of] the deposit initiator.' . . . Lastly, [the 2008 act] provided that '[a]ny reimbursement of the refund value for a redeemed beverage container shall be paid [from] the deposit initiator's special account.' . . .

"One of the purposes of [the 2008 act] was to provide the state and [the] DEP with information concerning the container return rate and the amount of money representing the difference between refund values deposited and paid. The DEP published a document on its website entitled 'Bottle Bill FAQ.' On January 5, 2009, [the] DEP edited the webpage by changing the name of the person at [the] DEP to whom public inquiries could be made about the subject matter of the webpage. The updated information provided in pertinent part:

" 'Who gets the money from bottles that are not returned?

" 'Called unclaimed deposits, these moneys accumulate from containers that are either thrown away or recycled through curbside programs. These fund[s] are kept by the distributors.'

"Beginning on December 1, 2008, the plaintiffs began opening and funding accounts in accordance with the terms of [the 2008 act]. On or before March 15, 2009, the plaintiffs were required to submit reports on their account activity for the period December 1, 2008, through February 28, 2009, to the DEP in accordance

with [the 2008 act].

"On January 15, 2009, the legislature passed, and the governor signed [the 2009 act], entitled 'An Act Concerning Deficit Mitigation for the Fiscal Year Ending June 30, 2009.' . . . [Section 15 of the 2009 act] . . . [was] '[e]ffective April 1, 2009, and applicable to periods commencing on or after December 1, 2008.' [The act] require[d] the plaintiffs to pay to the DEP (for deposit in the state's general fund), not later than April 30, 2009, the balances in the plaintiffs' special accounts that [were] attributable to [the] period December 1, 2008, through March 31, 2009, and further require[d] additional quarterly payments from the special accounts on an ongoing basis.

"In accordance with [the 2009 act], [twenty-four] distributors submitted financial reports to [the] DEP for the period December 1, 2008, to February 28, 2009. Of the [twenty-four] companies that submitted financial reports for the period December 1, 2008, to February 28, 2009, [thirteen] provided information about the statutory 'handling fees' they incurred for that period.

"The bottle bill does not require the plaintiffs to charge retailers a five cent refund value at the time of sale and neither expressly prohibits nor permits the plaintiffs to specifically itemize the five cent refund value on their invoices, and some distributors, including some of the plaintiffs, choose to incorporate this amount into the purchase price of beverages they sell to retailers without itemizing it. The bottle bill neither expressly prohibits nor permits the distributors from including the five cent refund value in the general revenues that they calculate on their financial statements. The plaintiffs have included said refund value amounts in their general revenues for accounting purposes.

"The bottle bill neither expressly prohibits nor permits distributors from including the refund values they collect as revenues for purposes of calculating their income taxes. Nor does the bottle bill expressly prohibit or permit distributors [to deduct] redemption amounts they pay as expenses when calculating their income taxes. Under [the 2008 act], sums deposited in the special accounts are determined by a formula, i.e., number of containers sold [multiplied by five] cents.

"Through March 31, 2009, the plaintiffs maintained in their names special, interest-bearing accounts at Connecticut branches of financial institutions, as defined in [§] 45a-577, to the credit of the plaintiffs, and maintained transactional authority over the accounts. Pursuant to . . . [to the 2008 act], moneys deposited into the special accounts 'shall be kept separate and apart from all other moneys in the possession of the deposit initiator' and '[a]ny reimbursement of the refund value for a redeemed beverage container shall be paid from the deposit initiator's special account.' The bottle bill never

dictated to the plaintiffs what amounts they may charge for their products." (Citations omitted; footnote omitted.)

On April 16, 2009, the original plaintiffs brought an action in the trial court for declaratory and injunctive relief, seeking to prohibit the commissioner from enforcing the "retroactive" taking of the unclaimed deposits attributable to the period from December 1, 2008, through March 31, 2009. Following the trial court's denial on May 5, 2009, of their motion for a temporary injunction, the original plaintiffs paid the unclaimed deposits, with accrued interest, to the state. The total amount of the payments was $2,058,651.67.

Thereafter, on May 21, 2009, the original plaintiffs filed a motion for summary judgment in which they sought a declaration that the retroactive payment requirement of the 2009 act, and the commissioner's enforcement thereof, was an unconstitutional taking of their property for which the state was required to pay just compensation. They also sought a return of the amounts they had paid to the state. On July 17, 2009, the commissioner filed a motion for summary judgment, arguing that the plaintiffs could not show that they had a vested property interest in the unclaimed deposits. In a memorandum of decision dated April 23, 2010, the court found in favor of the plaintiffs. The court concluded that the unclaimed deposits were the property of the plaintiffs, that their property interest in the unclaimed deposits was not affected by the passage of the 2008 act, that the 2009 act extinguished the plaintiffs' right to the unclaimed deposits accruing after April 1, 2009, the effective date of § 15 of the 2009 act, and that the 2009 act's "retroactive" provision requiring the plaintiffs to pay to the state any unclaimed deposits and accrued interest from December 1, 2008, through March 31, 2009, was a taking of their property without just compensation in violation of the federal and state constitutions.

The trial court subsequently granted a motion to intervene filed by six additional beverage distributors doing business in Connecticut.[5] After a hearing in damages, the court awarded the plaintiffs compensatory damages in the amount of $5,675,310.44, plus interest. It also awarded attorney's fees to the original plaintiffs in the amount of $120,429.37. The commissioner appealed from the trial court's judgment to the Appellate Court, and the original plaintiffs cross appealed. They later withdrew their cross appeal, and the commissioner's appeal was transferred to this court pursuant to General Statutes § 51-199 (b) and Practice Book § 65-4. On appeal, the commissioner contends that the trial court improperly determined that the retroactive provision of the 2009 act resulted in an unconstitutional taking of the plaintiffs' property.

It is well established that "[s]ummary judgment shall

be rendered forthwith if the pleadings, affidavits and other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Ugrin* v. *Cheshire*, 307 Conn. 364, 389, 54 A.3d 532 (2012). We also exercise plenary review over claims that require the interpretation of a statute, as in the present case. See, e.g., *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 488, 55 A.3d 251 (2012).

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . ." (Footnote omitted; internal quotation marks omitted.) Id., 488–49.

With respect to a statutory challenge on constitutional grounds, "[a] validly enacted statute carries with it a strong presumption of constitutionality, [and] those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . The court will indulge in every presumption in favor of the statute's constitutionality . . . . Therefore, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *Pham* v. *Starkowski*, 300 Conn. 412, 429–30, 16 A.3d 635 (2011). In other words, "we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Internal quotation marks omitted.) *Bozrah* v. *Chmurynski*, 303 Conn. 676, 685 n.5, 36 A.3d 210 (2012).

The constitutional provisions at issue in the present case are the fifth amendment to the United States constitution and article first, § 11, of the Connecticut constitution. The fifth amendment to the United States constitution provides in relevant part: "[P]rivate property [shall not] be taken for public use, without just compensation."[6] Article first, § 11, of the constitution of Connecticut provides: "The property of no person shall be taken for public use, without just compensation therefor."

The commissioner claims that the takings clause does not apply in the present case because the plaintiffs did not have a vested property interest in the unclaimed deposits attributable to the period from December 1, 2008, through March 31, 2009. The commissioner contends that, as a result of the 2008 act, the plaintiffs were required to deposit the refund values, together with all interest, dividends and returns earned thereon, in special, segregated bank accounts beginning on December 1, 2008, and that nothing in the 2008 act permitted the plaintiffs to withdraw the funds that were deposited in those accounts during, or at the end of, the reporting period for any purpose other than reimbursing retailers for the redeemed containers. Thus, the plaintiffs had no right to use or enjoy the funds deposited in the special accounts at any time in the future. According to the commissioner, the most the plaintiffs could possibly claim was a future, contingent interest in potential surpluses in the accounts, which, in turn, depended on the enactment of further legislation permitting them to withdraw the surplus funds and on their availability at the close of the reporting period.

The plaintiffs respond that, although refund values were separately itemized at purchase, "all revenues generated from the sale of beverages [were] the property of the plaintiffs, subject to the plaintiffs' statutory obligation to pay refund values when presented with the empty containers." They further argue that the regulatory scheme has never required distributors and retailers to charge and collect deposits identifiable to a specific container or to a specific consumer and has never required distributors to charge deposits and hold them in trust for consumers, subject to redemption. Rather, for more than thirty years, distributors "comingled 'refund values' with their operating funds and treated container 'deposits' as income and container 'refunds' as expenses for both accounting and tax purposes." The plaintiffs add that their new obligations under the 2008 act to deposit a specified portion of their revenue into the special accounts did not abrogate their property rights in that revenue because they were permitted to use the funds in the special accounts to pay the operating expenses associated with refunding the deposits. They also argue that they were responsible for the payment of taxes on the revenue deposited in

the special accounts and accrued interest,[7] and that there was no legislative direction concerning disposition of the unclaimed deposits. Thus, the refund values were merely a component of the purchase price subject to the distributors' statutory obligation to reimburse the retailers when the empty containers were returned. We agree with the commissioner.

We begin by recognizing that "[m]oney is certainly property . . . ." *Pirie* v. *Chicago Title & Trust Co.*, 182 U.S. 438, 443, 21 S. Ct. 906, 45 L. Ed. 1171 (1901). In order to state a claim under the takings clause, however, a plaintiff first must establish that he or she possesses a constitutionally protected interest in the disputed property. See, e.g., *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1000–1001, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984); see also *184 Windsor Avenue, LLC* v. *State*, 274 Conn. 302, 319, 875 A.2d 498 (2005) ("[i]t is axiomatic that government action cannot constitute a taking when the aggrieved party does not have a property right in the affected property"). Moreover, a party claiming a protected property right must have a "clear entitlement" to the property. (Internal quotation marks omitted.) *Carr* v. *Bridgewater*, 224 Conn. 44, 51, 616 A.2d 257 (1992). "Because the [c]onstitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." (Internal quotation marks omitted.) *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 164, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998); see also *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) ("Property interests, of course, are not created by the [c]onstitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."); *New England Estates, LLC* v. *Branford*, 294 Conn. 817, 834–35, 988 A.2d 229 (2010) ("we look to the laws of our state to determine whether [the alleged] right . . . was a protected property interest under the takings clause"). As a consequence, "[w]hether one's interest or entitlement rises to the level of a protected property right depends upon the extent to which one has been made secure by [s]tate or [f]ederal law in its enjoyment." (Internal quotation marks omitted.) *184 Windsor Avenue, LLC* v. *State*, supra, 319. For a property right to be considered vested, in contrast to one that is expectant or contingent, it must function as a present interest. See, e.g., *Bryant* v. *Hackett*, 118 Conn. 233, 241, 171 A.2d 664 (1934).

We first consider whether the plaintiffs have established that they have a protected property interest in the refund values deposited in the special accounts following passage of the 2008 act, which made signifi-

cant changes in the regulatory scheme beginning on December 1, 2008. The plaintiffs concede that the bottle bill law, in its original form and as amended by the 2008 act, did not grant them a property interest in the unclaimed deposits. We agree. Accordingly, insofar as "the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law"; (internal quotation marks omitted) *Phillips* v. *Washington Legal Foundation*, supra, 524 U.S. 164; it is undisputed that none of the provisions in the regulatory scheme expressly supports the plaintiffs' assertion that they have a property interest in the unclaimed deposits. We thus consider certain provisions of the regulatory scheme pertaining to the refund values, the amendments to the regulatory scheme enacted by the legislature in 2008, and the legislative history of the 2008 and 2009 acts to determine whether they provide *implicit* support for the plaintiffs' claim that the refund values are nothing more than a component of the purchase price in which they have a vested property interest.

With respect to the provisions concerning refund values, § 22a-244 provides in relevant part: "(a) (1) Every beverage container containing a carbonated beverage sold or offered for sale in this state, [with certain exceptions], shall have a refund value. Such refund value shall not be less than five cents and shall be a uniform amount throughout the distribution process in this state. (2) Every beverage container containing a noncarbonated beverage sold or offered for sale in this state shall have a refund value, [with certain exceptions] . . . . Such refund value shall not be less than five cents and shall be a uniform amount throughout the distribution process in this state. . . ." Section 22a-244 (b) further provides in relevant part: "Every beverage container sold or offered for sale in this state, that has a refund value . . . shall clearly indicate by embossing or by a stamp or by a label or other method securely affixed to the beverage container (1) either the refund value of the container or the words 'return for deposit' or 'return for refund' or other words as approved by the [state] . . . ." There is nothing in these provisions suggesting that the distributors have a property interest in the refund values attached to the beverage containers covered by the regulatory scheme. Rather, use of the terms "refund," "return for deposit," and "return for refund" in the foregoing provisions indicates that the refund values are to be paid to consumers upon return of the empty containers.

With respect to the 2008 act, regardless of the status of the refund values before passage of the act, which we are not asked to determine, it is undisputed that the act established strict controls over management of the funds charged and collected by the distributors pursuant to the regulatory scheme. Although the act, which was signed into law by the governor on Novem-

ber 25, 2008, did not contain a provision directing the state to collect the unclaimed deposits, it contained a provision requiring each "deposit initiator," which it defined as "the first distributor to collect the deposit on a beverage container sold to any person within this state";[8] Spec. Sess. P.A. 08-1, § 10; to (1) "open a special interest-bearing account at a Connecticut branch of a financial institution . . . to the credit of the deposit initiator," (2) "deposit into such account an amount equal to the refund value established pursuant to subsection (a) of [§] 22a-244 . . . for each beverage container sold by such deposit initiator," (3) pay directly into such account "[a]ll interest, dividends and returns earned on the special account," (4) keep moneys in the special account "separate and apart from all other moneys in the possession of the deposit initiator," and (5) pay "[a]ny reimbursement of the refund value for a redeemed beverage container" as well as "all service charges and overdraft charges on the account . . . ." Spec. Sess. P.A. 08-1, § 11, codified at General Statutes (Rev. to 2009) § 22a-245 (a) through (c). In addition, the 2008 act required that any reimbursement by the deposit initiator must be paid to the retailer in the manner prescribed by the policies and procedures adopted by the commissioner in establishing an accounting system for that purpose, and that each deposit initiator must submit detailed reports to the commissioner on a quarterly basis describing activity in the special account during the reporting period, including the balance in the account at the beginning and the close of the quarter for which the report was prepared.[9] Spec. Sess. P.A. 08-1, codified at General Statutes (Rev. to 2009) § 22a-245a (b) and (c). The 2008 act further provided that the state treasurer could examine the accounts and records maintained by the deposit initiator pursuant to the act at any time, and that the attorney general could institute an action or proceeding to enforce any requirement of the act or corresponding regulation adopted to implement its provisions. Spec. Sess. P.A. 08-1, codified at General Statutes (Rev. to 2009) § 22a-245a (d) and (e). As previously stated, the 2008 act contained no provision allowing distributors to withdraw funds from the special accounts for any purpose other than to reimburse retailers for the redeemed beverage containers in an amount equal to the refund value and to pay service and overdraft charges on the special accounts. Accordingly, there is no suggestion in the 2008 act that the funds placed in the special accounts were merely a component of the purchase price in which the distributors had a vested property interest. The 2008 act specifically refers to the funds as "deposit[s]" collected on the beverage containers, which, in the absence of a provision pertaining to the disposition of the unclaimed deposits at the end of a reporting period, remained available to reimburse retailers should the empty containers be returned. See *Bryant* v. *Hackett*, supra, 118 Conn. 241 (property inter-

est is vested interest if it functions as present interest).

Moreover, insofar as the statutory scheme may be deemed ambiguous because of its silence on the question of ownership, there is no implied support in the legislative history of the 2008 and 2009 acts for the plaintiffs' claim that they had a vested property interest in the unclaimed deposits. Instead, there is support for the opposite conclusion. The legislature enacted the bottle bill amendments in response to a plan put forward by Governor M. Jodi Rell on October 21, 2008. See 51 H.R. Proc., Pt. 23, November 24, 2008 Spec. Sess., pp. 7411–12, remarks of Representative Denise Merrill; M. Rell, Deficit Mitigation Plan for Fiscal Year 2008–2009 (October 21, 2008) pp. 2–16; see also House Bill No. 7601, November 24, 2008 Spec. Sess. In her plan, Governor Rell proposed modifications and revenue adjustments to the state budget for the fiscal year 2008–2009 in order to address the anticipated general fund budget deficit for that year. See M. Rell, supra, pp. 7–16. One of the revenue initiatives in Governor Rell's plan that required legislative approval was the collection of unclaimed deposits beginning on December 1, 2008, which were expected to yield $13.8 million in fiscal year 2008–2009 and $24.4 million in fiscal year 2009–2010. Id., p. 7; see also 51 H.R. Proc., supra, pp. 7412, 7417, remarks of Representatives Merrill and Cameron C. Staples. As Representative Staples explained during a special session of the General Assembly that was convened on November 24, 2008, to consider Governor Rell's plan, one of the difficulties in determining whether the unclaimed deposits should be collected by the state was that there was no way of measuring how much revenue the unclaimed deposits would yield. 51 H.R. Proc., supra, p. 7417. Representative Staples observed that estimates prepared by the Office of Fiscal Analysis were merely guesses based on out-of-state receipts, there having been no registered records in Connecticut of the uncollected deposits. Id. Accordingly, the 2008 act established a reporting system to obtain such information, which would be available to the legislature by March 15, 2009, in time to evaluate for the 2009 legislative session how much revenue was being collected by the distributors and "whether or not [the state] ought to recapture some or all of the revenue on an ongoing basis." Id., pp. 7417–18, remarks of Representative Staples.

Although the legislature did not enact a provision in 2008 allowing the state to collect the unclaimed deposits, the legislative history of the 2008 act strongly supports the view that the legislature did not consider such deposits to be the property of the distributors and thus unavailable for collection by the state. Various members of the Senate repeatedly referred to the unclaimed deposits as "escheats." 51 S. Proc., Pt. 20, November 24, 2008 Spec. Sess., pp. 6214, 6218, 6221–22, 6228, 6235. The term "escheat" is defined as "the preferable right

of the state to an estate left vacant, and without there being any one in existence able to make claim thereto." Black's Law Dictionary (6th Ed. 1990); see also The American Heritage Dictionary of the English Language (5th Ed. 2011) (defining "escheat" as "[r]eversion of property to the state in the absence of legal heirs or claimants"). The term thus describes property to which no other person or entity has any legal claim. See, e.g., *Pavlick* v. *Meriden Trust & Safe Deposit Co.*, 141 Conn. 471, 482, 107 A.2d 262 (1954) ("[i]t is fundamental that escheat to the state operates only when there is no person who can take title"). Although we are not required to decide whether the unclaimed deposits are escheats, it is nonetheless clear that the legislature, by characterizing such deposits as escheats, viewed them as property abandoned by the unidentified consumers, or, at the very least, as property that did not belong to the distributors. Indeed, the concept of escheats, which requires that no claim has been made to the property in question, could not have been intended to describe the unclaimed deposits as property abandoned by the distributors because the distributors who placed the funds in the special accounts asserted their right to the unclaimed deposits and were therefore identifiable. The legislature thus put the public on notice that it did not recognize a property interest in the distributors to the unclaimed deposits, that the state most likely would collect such deposits in the very near future, and that the only reason it was not ready to do so at that time was because it did not know exactly how much revenue the unclaimed deposits would generate. This understanding was expressed again when the legislature reconsidered disposition of the unclaimed deposits several weeks later in the legislative session that commenced in January, 2009.

Having failed to close the budget gap in the November 24, 2008 special session and feeling the weight of the continuing budget crisis, the legislature revisited the issue of whether the state should collect the unclaimed deposits on January 14, 2009, and passed a bill on that date[10] requiring distributors to pay to the state the outstanding balance in the special accounts attributable to the period from December 1, 2008, to March 31, 2009, and thereafter. See House Bill No. 5095, 2009 Sess. The effective date of § 15 of the 2009 act was April 1, 2009. The provision was identical to a proposed amendment to the 2008 act that had been rejected by the Senate; see House Bill No. 7601, Senate Amendment A, November 24, 2008 Spec. Sess.; 51 S. Proc., supra, pp. 6215–39; and members of the legislature continued to refer to the unclaimed deposits as escheats. 52 H.R. Proc., Pt. 2, 2009 Sess., p. 322, remarks of Representative Staples (referring specifically to "the bottle deposit amounts" as "escheats"); see also 52 S. Proc., Pt. 2, 2009 Sess., p. 426; 52 H.R. Proc., supra, pp. 320–21. Similarly, in discussing whether the state should collect all or only

a part of the unclaimed deposits, Representative Staples stated that it was the legislature's intent to make "sure that we're keeping whatever revenue is rightfully ours and paying the actual costs of the entities involved in implementing the recycling bill." 52 H.R. Proc., supra, p. 321. Accordingly, there is no indication in the legislative history that the distributors previously had a property interest in the unclaimed deposits.

The plaintiffs argue that information in the fact sheet published on the DEP website after passage of the 2008 act,[11] which noted that the unclaimed deposits "are kept by the distributors," is evidence that they had a property interest in the deposits. We disagree. The fact sheet did not refer to the unclaimed deposits as the property of the distributors, nor did its use of the word "kept" suggest that they were the property of the distributors. The word "keep" means "[t]o have or retain in one's power or possession; not to lose or part with; to preserve or retain"; Black's Law Dictionary, supra; but possession in that sense, without more, is not equivalent to ownership of, or to having legal or rightful title to, the unclaimed deposits. Accordingly, the fact sheet sheds no light on whether the plaintiffs had a property interest in the unclaimed deposits following passage of the 2008 act.

The plaintiffs further argue that it is uncontested that they had a vested property interest in the unclaimed deposits before passage of the 2008 act and that the act did nothing to divest them of that revenue. We disagree. The commissioner's decision not to address the status of the funds before passage of the act does not mean that the issue would have been uncontested if the commissioner had addressed it. Moreover, the commissioner did not need to discuss that issue because it had nothing to do with the issue in dispute. The issue before this court is whether the state's collection of the unclaimed deposits accruing during the four month period prior to the effective date of the 2009 act resulted in an unconstitutional taking of the plaintiffs' property, which does not require consideration of whether the unclaimed deposits were the plaintiffs' property prior to passage of the 2008 act in November, 2008. Furthermore, even if the plaintiffs arguably had a property interest in the unclaimed deposits before the act was passed, they clearly had no such interest following its passage for the reasons previously described and because the funds deposited in the special accounts beginning on December 1, 2008, were derived from the sale of beverage containers after, not before, that date. Accordingly, all of the funds deposited in the special accounts were new funds received by the distributors following passage of the 2008 act and were clearly subject to its provisions.

The principal legal authority on which the plaintiffs rely in claiming that they had a vested property interest

in the unclaimed deposits is *Massachusetts Wholesalers of Malt Beverages, Inc.* v. *Attorney General*, 409 Mass. 336, 567 N.E.2d 183 (1991) (*Massachusetts Wholesalers*). In that case, the Supreme Judicial Court of Massachusetts concluded that unclaimed bottle deposits were the property of the distributors. Id., 342–43. The issue before the court was whether the deposits and handling charges to which the Massachusetts bottle bill provisions[12] referred became the property of the bottlers and distributors upon their receipt, or whether the bottlers and distributors held them in trust for consumers such that any unclaimed deposits ultimately escheated to the commonwealth as abandoned property. Id., 337. In concluding that the unclaimed deposits were the property of the bottlers and distributors, the court observed that there was no connection between the deposits paid by consumers and the deposits received by the bottlers and distributors. See id., 341–42. Moreover, the statutory provision was silent on the issue of the ownership of the unclaimed deposits, thus giving rise to an inference by the court that they belonged to the bottlers and distributors. Id., 342.

In addition, the court observed that "the only transaction which the bottle law expressly identifie[d] as involving a 'deposit' [was] the consumer's purchase of a beverage container from a dealer," and that "the law [did] not require dealers to pass those deposits along to bottlers or distributors or in any way to 'deposit' refund values with bottlers or distributors. The dealer's only obligation [was] to pay consumers for empties." Id., 341. The court noted that the apparent practice was for the bottlers and distributors to receive payment for the beverage containers sold before the dealers received the consumers' deposits in conjunction with consumer purchases. Id. Accordingly, the payments received under the statutory scheme could not be viewed as identified with, or originating from, the deposits made by consumers but, rather, were more properly viewed as "a portion of the purchase price of filled containers paid by dealers to distributors and by distributors to bottlers." Id. In other words, the money that consumers paid was merely a percentage of the purchase price sufficient to allow the bottlers and distributors to meet their statutory obligation to pay the refund values of the beverage containers upon their return. Id., 341–42.

The court also concluded that "[t]he absence of legislative direction, express or implied, leads to the fair inference that the unclaimed deposits belong to the bottlers and distributors"; (internal quotation marks omitted) id., 342; and that "the unclaimed deposits [did] not escheat to the [c]ommonwealth as property abandoned by consumers" because there was no fiduciary relationship between the distributors, as fiduciaries, and the consumers, as beneficiaries. Id., 343.

We conclude that the regulatory scheme at issue in *Massachusetts Wholesalers* is distinguishable from the regulatory scheme in Connecticut, as amended in 2008. In determining that the deposits belonged to the bottlers and distributors, the Massachusetts court relied on the lack of legislative direction, the lack of a connection between the deposit paid by the consumer and the funds received by the bottlers and distributors, and the lack of a fiduciary relationship between the bottlers and distributors, on the one hand, and the consumers, on the other. Moreover, the provision at issue in *Massachusetts Wholesalers* was an accounting provision that merely required the distributors to segregate the deposits and handling charges in a separately identified account from which the refund amounts were subtracted. See id., 337.

In contrast, the legislative history of the 2008 act, which the court is permitted to examine if the statutory scheme is deemed ambiguous; cf. General Statutes § 1-2z; clearly indicated that the Connecticut legislature did not view the unclaimed deposits as the property of the distributors and thus unavailable for collection by the state. Furthermore, unlike the regulatory scheme in Massachusetts, the regulatory scheme in Connecticut, as amended in 2008, established a well-defined transactional chain linking distributors, retailers and consumers. The scheme requires that distributors, or deposit initiators, charge and collect a deposit on each beverage container sold to a retailer and place an amount equal to the refund value into a special interest bearing account in a Connecticut branch of a financial institution. See General Statutes (Rev. to 2009) §§ 22a-244 and 22a-245a (a). Thereafter, retailers are required to accept from a consumer any empty beverage container covered by the scheme and to pay to the consumer the refund value. See General Statutes (Rev. to 2009) § 22a-245 (b). In turn, distributors are required to accept from retailers any empty beverage container covered by the scheme and to pay such retailers the refund value from the moneys set aside for that purpose in the special accounts. See General Statutes (Rev. to 2009) § 22a-245 (c). Accordingly, any refunds received by consumers under the Connecticut statutory scheme are ultimately paid from the funds collected and placed in the special accounts for that purpose.

We recognize that federal courts have applied a takings analysis to situations in which legislatures have confiscated money in specifically targeted private accounts. See, e.g., *Brown* v. *Legal Foundation of Washington*, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003); *Phillips* v. *Washington Legal Foundation*, supra, 524 U.S. 156; *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980). The property interest at stake, however, was the interest earned on the funds in the accounts,

where ownership of the funds was undisputed and there was no permissible regulatory purpose or cost imposed on the government. See *Brown* v. *Legal Foundation of Washington*, supra, 220, 235 (transfer to state of interest generated by funds held in lawyers' trust accounts to pay for legal services for underprivileged deemed taking that requires just compensation); *Phillips* v. *Washington Legal Foundation*, supra, 172 (interest earned on client funds held in lawyer's trust accounts deemed private property for purposes of takings clause); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, supra, 157, 162–64 (taking of interest accruing on interpleader fund that county conceded to be private deemed violation of takings clause because earnings of fund are incidents of property ownership and, like fund itself, are considered property).

In *Brown*, for example, the petitioners challenged the state law requirement that client funds be placed in a lawyer's trust account (account) and that the interest earned on the funds in the account be used to pay for legal services for the underprivileged. *Brown* v. *Legal Foundation of Washington*, supra, 538 U.S. 220, 227–28. Before considering whether the transfer of interest earned on the account constituted a taking of the petitioners' property without just compensation, however, the United States Supreme Court observed that the requirement that the funds be placed in such an account was "merely a transfer of principal and therefore [did] not effect a confiscation of any interest." Id., 234. It thus was undisputed in that case that the funds placed in the accounts were owned by the petitioners. The same was true in *Phillips* and *Webb's Fabulous Pharmacies, Inc.* See *Phillips* v. *Washington Legal Foundation*, supra, 524 U.S. 160, 164; *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, supra, 449 U.S. 157, 161–62.

Our analysis, however, does not end here. We also look for incidents of ownership to determine whether the plaintiffs had a property interest in the unclaimed deposits that warranted constitutional protection. Incidents of ownership include (1) the right to use the property; see *Smith* v. *Planning & Zoning Board*, 203 Conn. 317, 323, 524 A.2d 1128 (1987) (life tenant had sufficient ownership interest in real property to entitle her to recognition as person owning land with right to appeal); (2) the right to earn income from the property and to contract over its terms with other individuals; see *Phillips* v. *Washington Legal Foundation*, supra, 524 U.S. 160–61 (right to earn income); and (3) the right to dispose of, or transfer, ownership rights permanently to another party. *Romme* v. *Ostheimer*, 128 Conn. 31, 34–35, 20 A.2d 406 (1941) (owner of property has right to convey whole or any part thereof, free from restrictions). See generally 63C Am. Jur. 2d 104, Property § 27 (2009) ("[t]he primary incidents of [property] ownership include the right to possession, the use and enjoy-

ment of the property, the right to change or improve the property, and the right to alienate the property at will"); Ronald Coase Institute, Glossary for New Institutional Economics, available at http://www.coase.org/nieglossary.htm#Property rights (last visited July 30, 2013) (property rights "include [1] the right to use [property], [2] the right to earn income from [property] and contract over the terms with other individuals, and [3] the right to transfer ownership rights permanently to another party").

Viewing the issue through this lens, we conclude that the plaintiffs had no property interest in the unclaimed deposits because their right to use and control the deposits was severely limited following passage of the 2008 act. As previously discussed, although the act did not address disposition of the unclaimed deposits, it stated in specific terms how such funds were to be managed, including that they were to be deposited in a special interest bearing account at the Connecticut branch of a financial institution. Even more significant, the 2008 act contained no provision allowing the unclaimed deposits to be withdrawn by the distributors. In short, the 2008 act did not allow the distributors to withdraw or control the funds placed in the special accounts beyond the parameters established by the act's provisions. Thus, the distributors had no property interest in the unclaimed deposits because they possessed none of the normal incidents of ownership.

We therefore conclude that, because the plaintiffs failed to prove that they had a clear entitlement to the unclaimed deposits attributable to the period from December 1, 2008, to April 1, 2009, the trial court improperly determined that the 2009 act resulted in an unconstitutional taking. See, e.g., *Cohen* v. *Hartford*, 244 Conn. 206, 223 n.23, 710 A.2d 746 (1998). Although the plaintiffs may have demonstrated that the special accounts in which the funds were deposited were opened in their names, that fact, without more, does not establish that they had a property interest in the unclaimed deposits. This is in part because the practice will continue after the April 1, 2009 effective date of the 2009 act, and the plaintiffs have made no claim that they have a property interest in the unclaimed deposits after that date. Consequently, although the existence of such an account might be considered an incident of property ownership in some cases, the plaintiffs cannot rely on the fact that the accounts were opened in their names to satisfy their burden of proof in the unique circumstances of this case.

In sum, the regulatory scheme contains no provision expressly granting the distributors a property interest in the unclaimed deposits, a fact the plaintiffs have conceded, and the plaintiffs have demonstrated no clear incidents of property ownership following passage of the 2008 act, which placed strict controls over the man-

agement and disposition of the funds and allowed the distributors to withdraw the funds for certain enumerated purposes that did not include retention of the unclaimed deposits. The 2009 act did not disturb this regulatory scheme. It simply added a provision directing the state to collect the unclaimed deposits at the end of each reporting period and made the new provisions applicable to the four month period preceding the act's effective date of April 1, 2009. We therefore conclude that the plaintiffs did not have a vested property interest in the unclaimed deposits attributable to the period from December 1, 2008, through March 31, 2009, and, accordingly, the provision in the 2009 act that all unclaimed deposits accruing during that period must be paid to the state does not rise to the level of an unconstitutional taking of their property.[13]

The judgment is reversed and the case is remanded with direction to render judgment for the commissioner.

In this opinion the other justices concurred.

[1] We distinguish between the "original plaintiffs," who initiated the present action, and the "intervening plaintiffs," who subsequently intervened in the action after it was brought. See footnote 5 of this opinion. We refer to the original plaintiffs and the intervening plaintiffs collectively as the plaintiffs.

The original plaintiffs A. Gallo and Company, Allan S. Goodman, Inc., Dichello Distributors, Inc., Dwan and Company, Inc., F and F Distributors, Inc., Franklin Distributors, Inc., G and G Beverage Distributors, Inc., Hartford Distributors, Inc., Levine Distributing Company, Inc., Northeast Beverage Corporation of Connecticut, and Star Distributors, Inc., are Connecticut corporations and at all relevant times were distributors of beer in the state of Connecticut. The original plaintiff Pepsi Cola Newburgh Bottling Company, Inc., is a New York corporation and at all relevant times was a distributor of soft drinks in the state of Connecticut.

[2] In July, 2011, the newly created Department of Energy and Environmental Protection replaced the former Department of Environmental Protection. See Public Acts 2011, No. 11-80, § 1.

The other defendants are former Governor M. Jodi Rell and former Attorney General Richard Blumenthal, neither of whom is directly involved in the appeal.

[3] The effective date of the legislation at issue was April 1, 2009. See P.A. 09-1, § 15.

[4] The original plaintiffs initially sought a temporary injunction prohibiting the enforcement of certain portions of the 2009 act. At the hearing on the temporary injunction, the parties jointly submitted a proposed finding of undisputed facts. After the trial court denied the application for a temporary injunction, the parties requested the court in subsequent proceedings to rely on the facts to which they had agreed for purposes of the ruling on the temporary injunction. Accordingly, the trial court relied on the stipulated facts contained in the prior ruling on injunctive relief in deciding the parties' summary judgment motions, as we do here.

[5] The intervening plaintiffs, all of whom are members of the American Beverage Association, which appeared as amicus curiae at the summary judgment stage, include Adirondack Beverages Corporation, Bottling Group, LLC, Coca-Cola Bottling Company of Northern New England, Inc., Coca-Cola Enterprises, Inc., Polar Beverages, and Windham Pepsi-Cola Bottling Company, Inc. See footnote 1 of this opinion.

We note that the intervening plaintiffs incorporated into their June 22, 2010 intervening complaint the stipulated facts set forth in the original plaintiffs' May 18, 2009 amended complaint.

[6] The takings clause of the fifth amendment is made applicable to the states through the due process clause of the fourteenth amendment. E.g., *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 160, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980).

[7] We note that there is no evidence in the record of which we are aware and

nothing in the parties' stipulation of facts that would support this assertion.

[8] This definition was codified at General Statutes (Rev. to 2009) § 22a-243 (11). That statute further defines "distributor" as "every person who engages in the sale of beverages in beverage containers to a dealer in this state including any manufacturer who engages in such sale and includes a dealer who engages in the sale of beverages in beverage containers on which no deposit has been collected prior to retail sale . . . ." General Statutes (Rev. to 2009) § 22a-243 (5).

[9] The information to be provided in each report included "(1) [t]he balance in the special account at the beginning of the quarter for which the report is prepared; (2) a list of all deposits credited to such account during such quarter, including all refund values paid to the deposit initiator and all interest, dividends or returns received on the account; (3) a list of all withdrawals from such account during such quarter, and all service charges and overdraft charges on the account; and (4) the balance in the account at the close of the quarter for which the report is prepared." Spec. Sess. P.A. 08-1, § 11, codified at General Statutes (Rev. to 2009) § 22a-245a (c). The 2008 act also provided that the first report must be submitted "on March 15, 2009, for the period from December 1, 2008, to February 28, 2009, inclusive," and that the next report must be submitted "on July 31, 2009, for the period from March 1, 2009, to June 30, 2009, inclusive," and that quarterly reports must be submitted thereafter. Id.

[10] The governor signed the bill on January 15, 2009.

[11] The fact sheet, entitled "Bottle Bill FAQ," consisted of a series of questions and answers regarding the program and provided in relevant part: "Who gets the money from bottles that are not returned?

"Called unclaimed deposits, these [moneys] accumulate from containers that are either thrown away, or recycled through curbside programs. These funds are kept by the distributors."

[12] The disputed Massachusetts bottle law provided: "Any bottler or distributor who receives deposits and/or handling charges under this chapter shall segregate said deposits or handling charges in a fund which shall be maintained separately from all other revenues. Said bottler or distributor shall report on a monthly basis to the alcoholic beverage control commission in a manner prescribed by said commission, the amount of said deposits or handling charges received and the amount refunded." Mass. Ann. Laws c. 94, § 323 (g) (Law. Co-op. 1985).

[13] We thus need not address the plaintiffs' remaining claims, which are premised on the fact that the plaintiffs had a property interest in the unclaimed deposits.