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DUNCAN LIQUOR LAW LETTER

April, 2016

A monthly newsletter for the clients of R.E. "Tuck" Duncan, Attorney at Law
Please forward as you deem appropriate.

In this issue:

"I shall drink no wine before it's time! OK, it's time."
-- Groucho Marx

March 30, 2016
POLICY MEMORANDUM 2016-1 Subject: Trade Practice Regulations; Product Displays, Point of Sale Items and Equipment

1. Purpose: The purpose of this memorandum is to provide clarification of the policy regarding the dissemination and use of product display and point of sale items by licensees.
2. Applicability: Supplier permit holders and distributor licensees, in addition to the retail liquor store, drinking establishment and private club licensees to which they provide product display and point of sale items.
3. Discussion:
a. Background and History
Pursuant to K.S.A. 41-703, manufacturer or distributor licensees are prohibited from providing "money or anything of value" to any licensee under the Kansas Liquor Control Act (K.S.A. 41-101 et seq.) or the Kansas Club and Drinking Establishment Act (K.S.A. 41-2601 et seq.). However, K.S.A. 41-703(d)(1) and 41-703(e) allow "things of value" to be furnished to licensees in accordance with rules and regulations adopted by the agency.
K.A.R. 14-10-17 adopts by reference certain portions of the federal trade practice regulations of the Alcohol and Tobacco Tax and Trade Bureau (TTB) contained in 27 C.F.R. Part 6.
27 C.F.R. 6.83 allows an industry member (i.e. a manufacturer or distributor) to provide "product displays," which are defined as "any wine racks, bins, barrels, casks, shelving or similar items the primary function of which is to hold and display consumer products."
o The total cost of such product display items may not exceed $300 per brand at any one time in any one retail establishment, and each item "must bear conspicuous and substantial advertising matter on the product or the industry member which is permanently inscribed or securely affixed."
27 C.F.R. 6.84 allows an industry member to provide "point of sale advertising materials," which are defined as "items designed to be used within a retail establishment to attract consumer attention to the products of the industry member." The regulation goes on to provide a list of examples of items that meet this definition, which includes but is not limited to: posters, placards, designs, inside signs (electric, mechanical or otherwise), window decorations, trays,

coasters, mats, menu cards, meal checks, paper napkins, foam scrapers, back bar mats, thermometers, clocks, calendars and alcoholic beverage lists or menus.
o There is no monetary limit placed on point of sale advertising materials, although it should be noted that the nature of the example items listed in the regulation tends to indicate a focus on less-expensive items.
o Like product displays, point of sale advertising materials "must bear conspicuous and substantial advertising matter about the product or the industry member which is permanently inscribed or securely affixed."
27 C.F.R. 6.88 allows an industry member to sell equipment and supplies to a retailer. Industry members are prohibited from "lending" equipment to a retailer free of charge.
o "Equipment and supplies" means glassware, dispensing accessories, carbon dioxide or ice.
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o "Dispensing accessories" include standards, faucets, cold plates, rods, vents, taps, tap standards, hoses, washers, couplings, gas gauges, vent tongues, shanks and check valves. This term shall also be deemed to include trailers containing kegs, coolers or other materials used in dispensing.
b. Interpretation and Policy
ABC believes the definition of "product display" provided in the federal regulations to be fairly straightforward. With this in mind, an item will be deemed to be a "product display" if its "primary function is to hold and display" alcoholic beverages.
o Therefore, if an item's primary function is to hold or display product, and its cost does not exceed the $300 limit per brand provided by law, it will be deemed to be a permissible item.
In dealing with potential "point of sale (POS)" items, ABC will utilize the following test, to be applied on a case-by-case basis: Does the item in question have a significant secondary value? If so, the item in question will be deemed to be prohibited by law.
o In this setting, "significant" shall mean a market value of approximately $300. In other words, if an item is assessed as having an approximate value of more than $300 outside of the retail setting, it shall be deemed to possess significant secondary value, and shall be prohibited. Conversely, if the item is assessed to have an approximate value of less than $300, it shall not be deemed to possess significant secondary value, and shall be permissible for display.
Display items used in conjunction with contests or sweepstakes: Industry members (distributors, manufacturers, suppliers) may conduct contests or sweepstakes on a retailer's licensed premises. A retailer may not conduct its own contest or sweepstakes. Contests and sweepstakes conducted by industry members must adhere to the following guidelines:

o To participate in a contest or sweepstakes, no charge or alcoholic beverage purchase shall be required.
o No alcoholic beverage shall be awarded as a prize.
o Entry forms may be provided and collected on a retailer's licensed premises or made available on the website of the industry member or its agent.
o The item to be awarded as a prize may be displayed on the licensed premises of the retailer. There must be conspicuous mention of the contest or sweepstakes, which shall include the closing or drawing date of the contest or sweepstakes.
o The selection of a winner and the awarding of the item may occur on the retailer's licensed premises.
o After the contest or sweepstakes, the retailer must maintain for a period of three years from the conclusion of the contest or sweepstakes evidence that the item was awarded to a participant and not taken by an employee or agent of the retailer.
o Industry members shall not conduct any form of advertising that specifically mentions the retailer as the "host" of the contest or sweepstakes. A retailer may advertise the contest or sweepstakes on its own, but the act of doing so by an industry member shall be considered to be providing a prohibited thing of value (advertising) to the retailer.
Equipment or supplies sold to a retailer may not be sold at a cost less than that paid by the industry member for such equipment or supplies. The purchase price charged to the retailer must be collected by the industry member within 30 days of the sale.
An industry member may install any equipment or supplies sold, provided the retailer pays the cost of such installation.
Upon written request to and with the permission of the ABC Director, an industry member may rent equipment and supplies to a licensee. The written request shall include a specific description of the item to be rented, the dates the item will be provided and the cost that will be charged to the licensee.
4. Clarification of Policy: All clarification requests to this policy should be directed in writing to this office via mail, fax, or submitted to the agency's email at abc_mail@kdor.state.ks.us
5. Effective Date of this policy: This policy is effective from March 30, 2016 until further notice.
Original Signed and On File 3
Debbi Beavers, Interim Director
Alcoholic Beverage Control
CC: Assistant Attorney General
Chief of Enforcement
Operations Manager/Licensing Supervisor
Enforcement Agents

Attorney General Derek Schmidt continues to fight Kansas Supreme Court's DUI ruling

Court documents show requests for new hearings and delays

Posted: April 2, 2016 - 5:42pm

In the five weeks since the Kansas Supreme Court ruled criminal punishments for refusal to take blood-alcohol tests are unconstitutional, the Kansas Attorney General's Office has asked it to reconsider and delay the ruling from taking effect, court documents show.

On Feb. 26, the court issued a series of 6-1 opinions in four cases challenging the state's refusal laws.

"In essence, the State's reasons are not good enough, and its law not precise enough, to encroach on the fundamental liberty interest in avoiding an unreasonable search," wrote Justice Marla Luckert in the majority opinion.

One week later, on March 4, deputy solicitor general Kristafer Ailslieger filed two motions. The first asked the court to grant the office of Attorney General Derek Schmidt more time to file a motion for rehearing. The second asked the court to stay the effects of its ruling.

"The State believes a stay of proceedings by this court would be more efficient and economic considering there are cases directly on point already at the (United States) Supreme Court and set to be decided in the next few months," Ailslieger wrote.

Thirteen states criminally punish people for refusing to take sobriety tests, a constitutionally dubious matter to be heard by the nation's high court on April 20. The Supreme Court case, Birchfield v. North Dakota, is a consolidation of three cases from North Dakota and Minnesota, states in which supreme courts upheld the constitutionality of so-called implied consent laws.

"We expect to have definitive guidance from the U.S. Supreme Court on these constitutional questions by the end of June," Schmidt said last week. The court's term ends on June 27.

In the meantime, Schmidt's office is hoping to convince the Kansas Supreme Court to delay the effects of its ruling, a request the justices haven't responded to and defense attorneys oppose.

"The Constitution trumps the statute. If it's unconstitutional, it shouldn't remain law," said Doug Wells, a Topeka defense attorney who specializes in driving under the influence cases.

Patrick Dunn, with the Kansas Appellate Defender Office, said the Kansas Supreme Court knew of the pending U.S. Supreme Court cases and still made its ruling. Furthermore, there is no guarantee the U.S. Supreme Court decision on North Dakota and Minnesota statutes would apply to the Kansas statute, which is

slightly different. The U.S. Supreme Court, which currently has eight justices, also could split four-to-four in a ruling that wouldn't set a clear precedent.
"Given these conditions, a high probability exists that even if this court stays the matter, no guidance from the high court would be forthcoming," Dunn wrote in a response to Ailslieger's motion on March 11.
A week later, on March 18, Ailslieger filed another motion, this time asking the Kansas Supreme Court to "reconsider its decision striking down the criminal refusal statute as unconstitutional." In his motion, he attempted to reargue the case and convince the six-justice majority they had erred. He praised the lone dissent of Justice Caleb Stegall as apt.
Dunn again retorted, writing in a response that the court was right to uphold "the sanctity of one's body" in its Feb. 26 opinion.
"Indeed, the rights afforded individuals under the Constitution often hinder the state's investigatory and prosecutorial functions, such as when a suspect invokes his rights under Miranda v. Arizona," Dunn wrote, referring to the landmark 1966 case. "But that is not sufficient ground to dispense with those rights."
The question before the U.S. Supreme Court is whether, in the absence of a warrant, a state may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood. As their name suggests, implied consent laws state that by driving on public roads all drivers have given consent to be tested for alcohol. Therefore, according to defenders of the implied consent concept, Fourth Amendment protections from unreasonable search and seizure aren't violated because drivers have consented to the search.
Schmidt has joined the attorneys general of 17 other states in urging the U.S. Supreme Court to uphold the laws.
"Implied-consent and test-refusal laws strike a reasonable balance between the states' compelling interest in eradicating the scourge of impaired driving and the individual privacy rights of drivers," they wrote in an amicus brief filed last week.
Birchfield's attorneys, as well as the American Civil Liberties Union, disagree. Because warrantless searches are almost always unconstitutional, implied consent laws criminally punish citizens for exercising their Fourth Amendment rights, they argue.
"It is nonsensical to suggest that (Birchfield) actually consented to a warrantless blood test. State law requires motorists to consent," his attorneys wrote in a brief.

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

No. 112,705
NICOLA PFEIFER,
Appellant,
v.
KANSAS DEPARTMENT OF REVENUE,
Appellee.
SYLLABUS BY THE COURT
Pursuant to K.S.A. 2015 Supp. 8-1002(b), in all proceedings brought under the Kansas Implied Consent Law, K.S.A. 2015 Supp. 8-1001 et seq., a signed and properly completed Officer's Certification and Notice of Suspension, Form DC-27, or a copy or photostatic reproduction thereof, shall be admissible in evidence to prove the statements contained therein without the necessity for testimony by the certifying law enforcement officer.

http://www.kscourts.org/Cases-and-Opinions/opinions/CtApp/2016/20160401/112705.pdf

No. 114,134
IN THE COURT OF APPEALS OF THE STATE OF KANSAS
DEBRA K. RHODENBAUGH,
Appellant,
v.
KANSAS EMPLOYMENT SECURITY BOARD OF REVIEW
and MCPHERSON HOSPITAL,
Appellees.
SYLLABUS BY THE COURT
1.
Venue for proceedings under the Kansas Judicial Review Act (KJRA) is, with exceptions not applicable here, in the county in which the order or agency action is entered or is effective or the rule and regulation is promulgated. K.S.A. 77-609(b).
2.
Venue may be proper in more than one county under the KJRA venue statute. Accordingly, not all KJRA proceedings must be in the county in which the order is entered.
3.
By amendments to the KJRA venue statute in 1986, the Kansas Legislature indicated its intent to expand venue to include counties in which an agency action is effective. 2

4.
The Code of Civil Procedure may be used by the district court to supplement the KJRA if the provision is a logical necessity that is not addressed within the KJRA.
5.
When venue for a KJRA proceeding is proper in more than one county and a party moves to change venue, the district court should give due consideration to the plaintiff's right to choose the place of the action and should determine whether a transfer will serve the convenience of the parties and witnesses and the interests of justice.
6.
Although a party's right to litigate in a proper forum is a valuable one, the law does not require pointless redetermination of legal issues where, as here, the results may be readily foreseen. Accordingly, the improper transfer of venue does not necessarily warrant reversal or remand.
7.
Individuals who are unemployed because they were discharged for misconduct connected with their work are ineligible for unemployment benefits. K.S.A. 2015 Supp. 44-706(b). The employer bears the burden of proving misconduct by a preponderance of the evidence.
8.
A hospital employee whose employment is terminated for refusing to get a flu shot is discharged for misconduct connected with work where that refusal violates a company safety rule, the individual knew about the rule, the rule was lawful and reasonably related to the job, and the rule was fairly and consistently enforced. 3

http://www.kscourts.org/Cases-and-Opinions/opinions/CtApp/2016/20160401/114134.pdf

Supreme Court rules Pender is within tribal boundaries

- NICK HYTREK nhytrek@siouxcityjournal.com
- Mar 22, 2016

PENDER, Neb. | Owners of Pender businesses that sell liquor are now subject to Omaha tribal alcohol taxes after the U.S. Supreme Court ruled Tuesday that the Thurston County town lies within the Omaha Indian Reservation boundaries. But whether those businesses will ever be subjected to that tax remains unclear.

The court ruled unanimously that an 1882 act of Congress that approved the sale of tribal land to white settlers on the western portion of the reservation, where Pender is located, did not diminish the reservation's original boundaries, which included the land on which Pender now sits.

"... it is clear that the 1882 Act falls into another category of surplus land Acts: those that 'merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit.' ... But in doing so, they do not diminish the reservation's boundaries," Justice Clarence Thomas wrote in the court's opinion.

The justices did not address whether the tribe should be able to collect the tax. It cited another federal case in which a New York tribe was not allowed to enforce taxes on non-Indian settlements within its reservation after having exercised no jurisdiction on those areas for decades.

Lawyers for Pender and the state of Nebraska had argued that Pender residents have "justifiable expectations" of not being subject to tribal taxes and ordinances because the tribe had not exercised jurisdiction in Pender, whose population is 98 percent non-Native, for more than 100 years.

Tom Welsh, owner of Welsh's Bar on Pender's Main Street, said it's hard to say how his business will be affected because the ruling didn't address the tax issue.

"We'll just have to wait and see. It'll be too early to say what will happen," Welsh said.

If the tax is enforced, Welsh said he might have to quit selling alcohol, but he could continue selling food.

The court's ruling seemingly leaves open the possibility that Pender businesses could launch another legal challenge to the tax on the grounds that the Omaha tribe has lost its claim to jurisdiction, and the ability to enforce the tax, because it's been decades since it last exercised authority over Pender and the other disputed territory.

"I don't know whether the court's decision gives us a final decision on whether the tribe can collect that tax," said Gene Summerlin Jr., a Lincoln, Nebraska, attorney representing the Village of Pender. "A lot of it's going to depend on what the tribe attempts to do."

In a written statement, Omaha tribal chairman Vernon Miller said the tribe was happy to have the boundary issue settled.

"I am pleased the United States Supreme Court upheld our reservation boundaries and sided on behalf of what is just and right. ... I am thankful to each and every person who has advocated for and participated in ensuring that our treaty rights are upheld. The Umonhon people are strong and resilient and will continue to practice our way of life on our land."

Maurice Williams, Omaha Tribe of Nebraska Attorney General, said the tribe is studying the ruling and doesn't plan to rush into any decision regarding the

alcohol ordinance and tax.
"These fears in Pender that we're going to swoop in are misplaced," Williams said. "We want to be really careful about this. We're weighing our options. We really don't want to go back into litigation again."
The Omaha Tribe in 2006 passed an alcohol ordinance requiring businesses that sell alcohol on the reservation to buy liquor licenses. The ordinance also placed a 10 percent sales tax on all alcohol purchases.
Owners of seven Pender establishments sued the tribe in U.S. District Court in Omaha, saying they were not subject to the ordinance, arguing that Pender was not on the reservation. Business owners have said that the tax would create a financial burden on them, perhaps even forcing them to close.
A federal judge ruled that the sale of 50,000 acres of land to white settlers in the 1880s did not change reservation boundaries. That ruling was later upheld by the 8th Circuit Court of Appeals. Tuesday's Supreme Court ruling upholds that decision.
In a news release, Nebraska Attorney General Doug Peterson said he did not contemplate taking additional legal action "unless the tribe attempts to exercise future governing or taxing authority over the disputed area."

Anheuser-Busch Win In Alcohol Content Suit Affirmed

By Steven Trader
Law360, New York (March 22, 2016, 7:57 PM ET) -- The Sixth Circuit on Tuesday affirmed the dismissal of multidistrict litigation over Anheuser-Busch's alleged policy of watering down its beers and then lying to consumers by overstating their alcohol content, saying federal alcohol regulations allow some labeling variation, even if it's done intentionally.
The three-judge appellate panel in an unpublished opinion upheld an Ohio federal judge's previous dismissal of the consolidated proposed class action, which alleged that Anheuser-Busch Companies LLC intentionally violated consumer protection laws in at least eight states by diluting its malt beverages then misleading drinkers.

On the contrary, the Federal Alcohol Administration Act allows manufacturers a "tolerance" of up to 0.3 percent from the stated percentage of alcohol on the drink's label, and it does nothing to distinguish between whether the practice is intentional or unintentional, contrary to what the consumers claimed, the Sixth Circuit said.

While states on their own can choose to adopt tougher alcohol labeling laws,

each of the eight states in this case had chosen to adopt the federal "tolerance" laid out in Section 7.71 of the FAAA, the appellate panel explained.

Based on that fact, the lower court held that because Anheuser-Busch was in compliance with that 0.3 percent "tolerance" under both state and federal law, it was protected from any proposed state consumer protection law liability.

On Tuesday, the appellate panel agreed that Anheuser-Busch had not violated the state and federal alcohol labeling law, dismissing the consumers' argument on appeal that the term "tolerance" in the FAA was meant only to apply to unintentional variations, not intentional ones, because otherwise it would undercut the FAAA's entire purpose of preventing consumer deception.

"The difficulty with the plaintiffs' argument is that even if the tolerance created by 7.71(c)(1) was designed to allow for 'normal variations in the production' of malt beverages, nothing in that statement of policy evinces an intent to disallow intentional variations," the appellate court wrote.

Having decided that Anheuser-Busch did not violate the terms of the FAAA, the appellate court turned its attention to whether the group's state consumer protection law claims could still survive, despite what the beer maker argued, and the lower court agreed, was "safe harbor" from liability.

On appeal, the consumers argued that in order for Anheuser-Busch to have safe harbor, the state must clearly indicate that it has authorized the particular conduct in question before creating immunity from the state consumer protection laws, which the states in this case had not done, they said. As for the breach of warranty claims, when state legislatures give no indication that one law trumps another, both laws must apply equally, the beer drinkers argued.

But the Sixth Circuit on Tuesday wrote that, while these might be reasonable issues raised by the consumers, the group had failed to argue any of this to the district court and was therefore prohibited from raising these arguments for the first time on appeal.

Throughout the course of the litigation in district court, Anheuser-Busch unambiguously took the position that if the district court concedes that the beer maker was in compliance with the state and federal tolerance regulation, then the consumer protection claims must be dismissed.

"If the plaintiffs felt otherwise, one would have expected them to vigorously

contest Anheuser-Busch's claims by informing the district court of their disagreement," the Sixth Circuit wrote. "But the plaintiffs never did so in any of their written submissions to the district court."

Anheuser-Busch was hit with a barrage of proposed class actions in early 2013 alleging that it added extra water to its finished product in order to cut costs, yet never changed its alcohol content by volume label on its malt beverages such as Budweiser, Michelob and King Cobra. The lawsuits were consolidated by the Judicial Panel on Multidistrict Litigation in an Ohio federal court in June 2013.

A year later, an Ohio federal judge granted Anheuser-Busch's motion to dismiss, agreeing that the state and federal alcohol labeling laws in each of the eight states where the consumers resided allowed the beer maker wiggle room to dodge the claims.

"We are pleased that the Sixth Circuit has affirmed the district court's dismissal of this case," Gemma Hart, vice president of comminications at Anheuser-Busch, told Law360 via email late Tuesday. "We proudly adhere to the highest standards in brewing our beers, which have made them the best-selling in the U.S. and the world."

An attorney for the consumers declined to comment Tuesday.

Anheuser-Busch is represented by Edward M. Crane of Skadden Arps Slate Meagher & Flom LLP and Michael N. Ungar and Brad A. Sobolewski of Ulmer & Berne LLP.

The consumers are represented by John R. Climaco and John A. Peca of Climaco Wilcox Peca Tarantino & Garofoli Co. LPA., Ronald Frederick of Frederick & Berler LLC and Joshua D. Boxer of Bramson Plutzik Mahler & Birkhaeuser.

The case is In re: Anheuser-Busch Beer Labeling Marketing And Sales Practices Litigation, case number 14-3653, in the U.S. Court of Appeals for the Sixth Circuit.

Ruby Tuesday sued in latest tipped worker case

"Side work" class-action lawsuits show signs of increasing

Source: NRN
Ron Ruggless
Apr 1, 2016

Class-action lawsuits over "side work" by restaurant employees who get tip-credit pay show signs of increasing, one industry legal expert says.

This week, a server at a Ruby Tuesday restaurant in Hixson, Tenn., filed a class-action lawsuit in U.S. District Court in Chattanooga, claiming that the chain underpaid its servers and bartenders for "side work" such as cutting lemons, filling ice bins and rolling silverware.

Maryville, Tenn.-based Ruby Tuesday said in a statement to Nation's Restaurant News Friday: "While we cannot comment on pending litigation, we are committed to our Ruby Tuesday team members, and we will be providing a vigorous defense of the company on this matter in the appropriate forum."

The server, Charlene Craig, said she was required to do the side work, but was paid only the tip-credit wage of $2.13 an hour. Federal regulations say servers and bartenders can spend up to 20 percent of their time doing non-tipped side work, but must be paid at least $7.25 per hour after that, said lawyer Chris Hall of Hall & Lampros LLP in Atlanta, which has set up a website for the Ruby Tuesday case.

"She's doing a whole lot of side work," Hall told the Chattanooga Times Free Press. "It's over 20 percent."

Lawsuits over side work appear to be increasing as some states, such as New York this year, modify the tip-credit pay rules.

"We have seen an increase in these," said Roy P. Salins, a New York-based partner in the employment-services group with Davis Wright Tremaine LLP and a member of the hospitality-industry practice, in an interview Friday. "There is a lot more scrutiny on restaurants that are taking the tip credit that may have been lost in the past."

Some states, such as New York, have more restrictions on side work than the Federal Labor Standard Act's limit of 20 percent of a shift, Salins said.

"In New York, if the side work - or the non-tipped work - is two hours or more,

or more than 20 percent of the shift, then the employer can't take a tip credit for the whole day," he explained, which goes further than the FLSA.

"The problem for restaurants is that it can come down to a 'he-said-she-said' in a credibility determination as to whether the person is engaging in - in New York - two hours or more of non-tipped work, or, under the FLSA, 20 percent or more," Salins said.

FLSA regulations say non-tipped work includes cleaning and setting tables, toasting bread, making coffee and washing dishes.

"If you include prep work before service starts, it can get to 20 percent or two hours fairly quickly," Salins said.

"Restaurants have to be vigilant with respect to their scheduling to make sure . tipped employees that the restaurant is taking a tip credit on are not engaging in too much prep work before service starts," he said.

Other restaurant brands have faced side-work class action lawsuits in the past, including Darden Restaurants Inc. and Applebee's Neighborhood Grill & Bar.

?One thing that restaurant operators can do, Salins said, is "review the schedules and review the tasks that their tipped employees are performing to ensure that they are not performing a significant amount of prep work and ensure the managers are having the employees follow the rules."

"You can have all the rules in the world," he explained, "but if the managers on the site aren't enforcing those rules, you can run into the same kinds of issues."

As of December, Ruby Tuesday had 733 restaurants in 44 states and 12 countries, as well as Guam. The company also had 16 Lime Fresh restaurants in two states.

The Pay-to-Play Scandal In The Beer Biz: How Far It Goes Nobody Knows

Source: Forbes
March 31st

"In the pharma industry we called it 'The Hustle.'

You can call it The Hustle, you can call it The Spin, or you can simply call it pay-to-play. Whatever name you use, the definition is the same: the exchange of favors for product placement. Despite the fact that in many industries it falls somewhere below the line of what's legal or ethical, it's how oh-so-many business-to-business salespeople get their medicine, technology, beer or widgets through the gatekeeper and in front of you, the consumer.

"At the end of the day somebody's trying to gain preferential treatment for their product or ware and they're going to do what they can to make that happen."

That's Mike LaCouture, the same guy who mentioned The Hustle, above. LaCouture is a career salesperson who co-founded Broken Goblet Brewery in suburban Philadelphia almost two years ago. Though Broken Goblet self-distributes, LaCouture is well aware that his beer competes for draught placement against better funded breweries whose wholesalers may be illegally paying cash, building draught towers or supplying concert tickets to bars that carry them.

"Sometimes you'll go into a bar and you'll see one distributor has six (rotating draught) lines and another has two. You go in six months later and it's reversed. How do you police that? I don't know but there's a new 50-inch flat screen on the wall," he says.

In the world of beer sales, pay-to-play is a common yet whispered business practice. A few months ago, a popular craft beer distributor called Craft Brewers Guild got busted in Boston for funneling up to $120,000 worth of payments to sham companies set up by big bar chains. This month CBG, owned by a parent company with a national portfolio of 19 wholesalers, paid a fine of $2.6 million instead of accepting a debilitating 90-day license suspension. That company, Sheehan Family Companies, has since sued the Commonwealth of Massachusetts to appeal the locally unprecedented amount of the fine and has gone on record saying it's instructed all of its properties to comply with the letter of law in every state where it operates.

But in an industry where the practice is so widespread that some greedy bar managers start bidding wars between wholesalers, will the punishment have any effect on distributors across the country? And what, if anything, can be done to rein it in?

"I really can't speculate as to what other distributors are doing," weighs in Tom Schreibel, Sheehan's VP of industry, community and government affairs. "There have been actions taken against other wholesalers. This one's gotten a ton of media attention."

Undoubtedly, the well-publicized case will keep Sheehan companies from misbehaving for the foreseeable future. And their in-market competitors may well take advantage of the powerplay to gain marketshare. But for a while, it's likely that distributors will at least be a little more cautious or stay on the legal side of the line to make deals.

"Instead of handing out checks they'll reduce your beer bill," predicts a brewery sales rep who's sold beer and cider in multiple east coast states for the past five years. "They can do an accumulation credit, which means we'll credit you back a certain amount if you buy something like 50 kegs."

In most states, if not all, that's legal. But for some unscrupulous account managers, it's not enough. And the ever increasing number of SKUs makes it harder for any individual brewery to keep up.

"A lot of bar owners have got their hands out because they know there are too many brands," says Jeffrey House, founder of California's Ace Cider, who distributes through CBG in Massachusetts. "The game's too expensive to play now. When we got in there were only two cideries in the U.S."

House doesn't think his peers in the ownership game would knowingly condone payments made on their behalf, trusting that they, like he, believe in playing fair.

"It's supposed to be a level playing field," he says.

But when the pressure's on wholesaler reps to make their numbers, they sometimes get the go-ahead to bet on their own horses.

"Is it gonna stop? No," House says.

Officially, the National Beer Wholesalers Association (NBWA) takes a stand against these activities but is expending more energy pushing for better enforcement over education or self-policing by its members.

"Recent actions by the (federal Tax and Trade Bureau) and state alcohol regulators concerning trade practices underscore the need for all beer industry

members to ensure they are complying with federal and state trade practice laws. It's essential for the long-term health of the industry that trade practice laws are being enforced," emails Communications Director Kathleen Joyce.

According to the association, the bureau is charged with enforcing laws at 620,000 licensed retailers across the country, on top of regulating 48,000 permitted alcohol producers, wholesalers and importers and approving 100,000 labels and recipes per year. These numbers have increased by half over the past five years, yet funding for the TTB has decreased. Employment at state agencies has dropped precipitously, with two enforcement agents covering the entire state of Minnesota and a reported three in Missouri.

It makes sense, then, that one of the NBWA's top legislative priorities is to get Congress to fully fund the TTB, the third largest revenue-generating agency in the federal government.

But part of the problem is that laws vary from state to state, and too often, no one's really sure how far they go anyway. So until states and the federal government clear up all confusion, the hustle will surely continue.

"What do you define as a pay off?" asks LaCouture, who's thanked one of his loyal accounts by gifting two cases of pint glasses that say "Broken Goblet" on one side and the bar's name on the other.

"Is that bar going to be like, 'Whoa they're paying us off!' Where does it end? I'm a little three-barrel brewery being sold in 10 bars in the United States so if I'm doing it you're trying to tell me the other guys aren't doing it?"

NABCA WHITE PAPERS, a review, my article for the April Kansas Beverage News

NABCA WHITE PAPERS SUPPORT KANSAS MODEL

NCSLA 2016 Annual Conference presents - "A Blueprint To The Future"

Source: NCSLA
April 5, 2016

The National Conference of State Liquor Administrators, Incorporated (NCSLA) will assemble June 26-29th at The Westin Michigan Avenue, Chicago, Illinois for its 2016 annual meeting and conference. Serving as conference host is the Illinois Liquor Control Commission and Executive Director U-Jung Choe. "This year's national conference occurs in Chicago, where NCSLA originated 82 years ago. The Illinois Liquor Control Commission looks forward to an engaging discussion of alcohol beverage issues by experienced State regulators and professionals. In between business discussions, we are excited to showcase Chicago as a world-renown host city offering museums, a dramatic skyline and architecture, eclectic cuisine and a wide array of entertainment options. The Illinois Liquor Control Commission is pleased to be hosting the 2016 annual conference, and we invite you to come to Chicago and enjoy everything the city has to offer," stated Executive Director Choe.

The annual conference will be held at The Westin Michigan Avenue Chicago, 909 North Michigan Avenue, and is perfectly positioned in downtown Chicago to make the most of it. North Michigan Avenue is the upscale hub of downtown Chicago, and the hotel is located within an easy walk of luxury retailers such as Bloomingdale's and Saks, as well as the city's most celebrated restaurants and famous jazz and blues clubs. For outdoor enthusiasts, Lake Michigan and the Oak Street Beach are just blocks away.

The annual conference theme is "A Blueprint To The Future," and the program adeptly reflects NCSLA's mission which is to educate and serve the needs of its members, through open communication, in furtherance of effective alcohol policies within our communities and nation. During the conference a variety of current issues will be discussed, including mergers and acquisitions, consumer diversity and demand, technology and innovation, and public safety concerns. In addition to our cornerstone sessions on ethics and the Legal Update, you'll draw inspiration from keynote speakers Isiah Thomas, NBA All-Star, and Andy Lansing, President & CEO of Levy Restaurants. NCSLA will also introduce a new program titled "Regulator Academy," which focuses on educational topics for state regulators. The conference will culminate with an Awards banquet on Tuesday evening at the Art Institute of Chicago that promises to be a memorable event and a unique cultural experience. All this and more over the course of two and a half days!

"It has been an honor to serve as President of NCSLA this year, and I invite all our members to join me in Chicago for this educational and informative conference," said Jerry W. Waters, Sr., of Pennsylvania. "I know of no other

organization that provides a forum where so many regulators and industry members have an opportunity to learn about the pressing issues of the day. So come and experience firsthand the many benefits of NCSLA as you learn from industry experts and regulators alike."

Start making your plans NOW to come to Chicago, Illinois from June 26-29, 2016 for this year's annual meeting of the NCSLA! Registration is now open so visit www.ncsla.org today for details. Not a member of NCSLA? Joining is easy - just complete the online application form on the NCSLA website. You won't want to miss a minute of these beneficial business sessions in addition to the valuable networking opportunities with colleagues and friends!

About National Conference of State Liquor Administrators, Incorporated:
A national organization of state alcohol beverage regulators, founded June 19, 1934, in Chicago, Illinois exclusively for charitable and educational purposes, including the following such purposes: to present, compare and discuss effective and equitable types of state alcoholic beverage control laws; to devise and evaluate the use of methods which provide the best enforcement of the particular alcoholic beverage control laws in each state; to identify and encourage uniform laws insofar as they may be practicable; to promote harmony with the federal government in its administration of the Federal Alcohol Administration Act; and to strive for harmony in the administration of the alcoholic beverage control laws among the several states. Visit www.ncsla.org for more information.

Stoli Vodka Trademark Fight Heads To Supreme Court

Source: Law360
By Bill Donahue
April 5, 2016

A long-running legal battle over the trademark rights to Stolichnaya vodka is heading for the U.S. Supreme Court, according to court papers filed Monday.

SPI Group, which sells Stoli in the U.S., filed a request for a stay of the litigation pending a "planned petition for a writ of certiorari" from a Second Circuit ruling in January that a Russian state-owned company had standing to sue over the famous brand in U.S. court.

The trip to the high court will be the latest chapter in a 12-year-old dispute over who rightfully inherited the vodka brand when the Soviet Union collapsed: The Russian Federation and its state-owned Federal Treasury Enterprise Sojuzplodoimport or SPI Group, a privatized "successor" to the Soviet firm that sold Stoli during the Cold War.

FTE sued SPI Group and its U.S. distributors in 2004, but a trial judge ruled in 2014 that the company lacked standing to sue in U.S. court. The judge said the Russian government's transfer of the Stoli trademark rights to FTE was invalid under Russian law. In a January decision reversing that ruling, a panel of Second Circuit judges said it wasn't a decision that a U.S. court was allowed to make, reviving the case against SPI.

"The declaration of a United States court that the executive branch of the Russian government violated its own law by transferring its own rights to its own quasi-governmental entity (FTE) would be an affront to the government of a foreign sovereign," U.S. Circuit Judge Dennis Jacobs wrote for the panel.

Monday's notice that a petition would be forthcoming did not hint at SPI's plan for how it would appeal to the high court. The Soviet Union began branding vodka "Stolichnaya" - which means "from the capital" in Russian - in the 1940s. A Soviet state-owned entity called V/O-SPI registered the Stoli trademarks in the U.S. in 1969, and the brand grew in popularity in the U.S. market during the 1970s and 1980s.

With the collapse of communism in the 1990s, V/O-SPI became "privatized" and was eventually bought up by SPI Group, but a Russian court ruled in 2000 that V/O-SPI privatization had been invalid. That meant the Russian Federation was the true owner of the brand, and FTE sued SPI and its U.S. distributors a few years later for infringing those rights.

SPI is represented by Keith R. Hummel and Teena-Ann V. Sankoorikal of Cravath Swaine & Moore LLP FTE is represented by Daniel Bromberg, Kathleen Sullivan, Marc Greenwald, Robert Raskopf and Jessica Rose of Quinn Emanuel Urquhart & Sullivan LLP. The case is Federal Treasury Enterprise Sojuzplodoimport et al. v. Spirits International BV et al., case number 14-4721, in the U.S. Court of Appeals for the Second Circuit.

Soccer Group Asks 7th Circ. To Kick Out Tequila Ad Ruling

Source: Law360
By Jessica Corso
March 31, 2016

A dispute over a tequila ad set to run before the 2014 World Cup made its way to the Seventh Circuit Thursday, with the U.S. Soccer Federation arguing that an arbitrator acted improperly in ruling that the ad couldn't run without player approval.

The federation is hoping to convince a three-judge panel that arbitrator Thomas F. Gibbons was wrong when he ruled in 2014 that the decade-long practice of asking for players' authorization before running print ads that contained their likenesses meant the federation was required to do so under the collective bargaining agreement.

"It is clear he exceeded the scope of authority when handing down his ruling," Melissa Sherry of Latham & Watkins, speaking on behalf of the federation, told the Seventh Circuit Wednesday.

Sherry said the only authority given to Gibbons was to interpret the collective bargaining agreement with the U.S. Men's National Team, which prevents the federation from running video advertisements without player permission but is silent on any approval process for print ads.

"Silence generally does not equal ambiguity," Sherry said, arguing that Gibbons himself noted the lack of a print authorization requirement but said that the past practice of seeking approval meant the players should be allowed to reject a 2013 ad for El Jimador Tequila.

The players say el Jimador didn't make it clear that the liquor company was sponsoring the federation and not the individual players. They claim that el Jimador was trying to use their likeness without their permission.

A copy of the ad couldn't immediately be obtained by Law360 Thursday. None of the parties would answer questions about which players appeared in the ad.

Sherry said it was important that the Seventh Circuit overturn Gibbons' decision and the subsequent ruling of a district court judge in September because the players' association has adopted a position of "inconsistency and unreasonableness" leading up to the 2014 World Cup.

The attorney said the federation was losing sponsors due to the players' stance. Allison Jones of Williams & Connolly LLP, who represents the players' association, told the panel that its review of Gibbons' decision should be narrow in scope. It is up to the arbitrator to interpret contracts, and appellate courts can only determine if the arbitrator violated his interpretative powers, she said.

The contract was ambiguous so Gibbons turned to past practice to decide the issue, something Jones says the U.S. Supreme Court allows. U.S. District Judge Pamela

Pepper, sitting on the Seventh Circuit panel Thursday, questioned Jones' ambiguity standard, however.

"He [Gibbons] doesn't say it's ambiguous. He says it's not there," Judge Pepper said. Judge Pepper sat on the panel with Circuit Judges Daniel Manion and Michael Kanne. The federation is represented by Melissa Arbus Sherry, Benjamin W. Snyder, Russell F. Sauer Jr. and Noah Fischer of Latham & Watkins LLP. The players group is represented by Mark S. Levinstein, Allison B. Jones and David K. Baumgarten of Williams & Connolly LLP.

The case is United States Soccer Federation Inc. v. United States National Soccer Team Players Association, case number 15-3402, in the U.S. Court of Appeals for the Seventh Circuit.

.7th Circ. Weighs Beer Wholesaler's Challenge To Ind. Law

By Jessica Corso

Law360, Chicago (March 29, 2016, 3:29 PM ET) -- A beer wholesaler operating in the state of Indiana argued before the Seventh Circuit on Tuesday that a state law prohibiting wholesalers from dealing in both beer and liquor was unconstitutionally discriminatory, a claim rejected by a lower court last fall. Monarch Beverage Co., which distributes both wine and beer to retailers in Indiana, is hoping to convince a three-judge appellate panel to overturn a decision by U.S. District Judge Sarah Evans Barker that a state law prohibiting wholesalers from selling both beer and liquor does not violate the Equal Protection Clause of the U.S. Constitution.

Monarch attorney Kannon Shanmugam of Williams & Connolly LLP told the Seventh Circuit judges that the 1935 law is unconstitutional on its face because the state has no rational interest in preventing wholesalers from holding both a beer and liquor license.

He called that state's claims that the law prevents the monopolization of the alcohol distribution industry "dubious," saying Monarch's entrance into the liquor market would only increase competition and lower prices.

"This prohibition, unique to the state of Indiana, was adopted on the least rational basis," Shanmugam told the court. He was referencing arguments made in the company's January brief that the Indiana Legislature enacted the law to protect the "politically favored" liquor industry from competition.

Indiana Solicitor General Thomas Fisher responded that Monarch's arguments have nothing to do with equal protection and that the state's interest in upholding

the law dates back to post-Prohibition concerns that the alcohol industry be as diversified as possible to prevent the type of anticompetitive nature seen in the pre-Prohibition era.

"This is all about trying to reach out and demand the right to sell all kinds of alcohol in the state of Indiana," Fisher told the panel. That right does not exist, he said.

The judges largely remained silent as the attorneys for both sides presented their arguments, but Judge Frank Easterbrook at one point questioned Shanmugam on an Indiana law that favors beer wholesalers.

Under a state statute, a wholesaler that takes the supply of a particular brand of beer away from that product's previous distributor must pay the original wholesaler to make up for the loss. Easterbrook says the protection calls into question Monarch's argument that beer wholesalers are being discriminated against by the state.

Shanmugam responded that the regulation has "nothing to do" with Monarch's arguments against the wholesaler prohibition and that the law pointed to by Easterbrook doesn't really give beer wholesalers a "leg up," but merely "protects from predatory behavior."

The case was brought before the appellate court after Judge Barker granted summary judgment to the state of Indiana. In her September opinion, Barker said that Monarch couldn't prove an equal protection violation absent the existence of a similarly situated class that was given preferential treatment over beer wholesalers.

Liquor wholesalers, she noted, are also prevented from selling beer under the 1935 law.

Judges Easterbrook, Joel Flaum and Diane Sykes sat on the panel for the circuit court.

Monarch is represented by Kannon Shanmugam, Amy Saharia, Allison Jones and Katherine Meeks of Williams & Connolly LLP and Richard Smikle and Derek Molter of Ice Miller LLP.

Indiana is represented by Thomas Fisher, Heather McVeigh, Lara Langeneckert and Jonathan Sichtermann of the state's attorney general office.

The case is Monarch Beverage Co. Inc. v. Dale Grubb et al, case number 15-3440, in the U.S. Court of Appeals for the Seventh Circuit.

Bill to cap Tennessee liquor store ownership headed to Gov. Haslam's desk
March 28th, 2016 by Associated Press in Politics State Read Time: < 1 min.

NASHVILLE, Tenn. (AP) - The House passed a bill Monday to impose a cap on liquor store ownership in Tennessee, sending the measure that some Republicans derided as contrary to free market principles to Gov. Bill Haslam's desk.

The chamber voted 72-16 to pass the measure sponsored by Republican Rep. Curry Todd of Collierville after extensive debate about why the state should protect package store owners from competition.

House Majority Leader Gerald McCormick argued that the measure is aimed at preventing out-of-state liquor store chains from setting up shop in Tennessee and tried to dissuade members from the claim that limiting ownership would restrict the flow of alcohol in the state.

"We're not stopping one drop of liquor from pouring," said McCormick, R-Chattanooga. "What we're doing is we're deciding who makes the money off of it."

Rep. Jon Lundberg was the main House sponsor of the 2014 law allowing wine to be sold in supermarkets that also included a provision eliminating what had been a one-license limit on liquor store ownership. The Bristol Republican urged members not to return to those limits.

"Placing a cap on business in Tennessee is an absolutely horrible policy idea," Lundberg said.

Haslam has said he opposes the limits on competition among liquor stores, but he is unlikely to veto the measure because his policy has been to defer to the Legislature on the supermarket wine law and its related provisions.

Todd, who pleaded guilty to drunken driving with a loaded handgun in his car after a 2011 traffic stop in a Nashville neighborhood, said his bill was necessary to control what he called a dangerous product.

"As I was in the business of law enforcement, I've seen many lives ruined with alcohol and drugs," he said. "I've seen many in jail; I put many in jail myself. I've had families that have dealt with this issue - I have, and others. So I know what it does to you."

Todd also denounced unspecified news accounts for suggesting that he was beholden to special interests.

"I'm not in anybody's pocket, won't never be in anybody's pocket," Todd declared

from the well of the House chamber. "No amount of money can buy me.
"I take that back: I'm only in one person's pocket," he said. "And guess who that is? Jesus Christ, my lord and savior, is the only pocket I'll ever be in. And that's it."
Retailer Total Wine & More has said the legislation is aimed at thwarting the Bethesda, Maryland-based company's plans to open eight stores in the state.
"Customers of ours told us we should come to Tennessee because the business and government environment was free market and embracing of competition between retailers," Edward Cooper, vice president and spokesman for the company, said in an email after the vote.
"What we've found in Tennessee is the exact opposite, a concerted and conspiratorial effort by liquor store retailers, wholesalers and legislators to keep us out," he said.
Republican Rep. Tilman Goins of Morristown said supporting the measure would be difficult to explain come election season.
"We run every year as Republicans on trying to remove regulation and allow small businesses and the free market to thrive and grow in Tennessee," Goins said. "This bill and this cap is no different than limiting the number of tire stores that a person can own in this state."
Rep. William Lamberth of Portland rejected free market arguments made by some of his GOP colleagues. Having local ownership of businesses helps guard against abuse, he said.
"The small little family liquor stores in my district, they know their customers," Lamberth said. "They are able to monitor their customers and ensure it's not some underage kid."
Republican Rep. Andy Holt of Dresden argued that the Tennessee alcohol laws are "absolutely ridiculous," and the fact that liquor wholesalers and retailers supported the bill decided his position on the measure.
"That's enough for me to vote 'no,'" he said.
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NASHVILLE - The House has passed a bill to impose a cap on liquor store ownership in Tennessee, sending the measure to Gov. Bill Haslam's desk.
The chamber voted 72-16 to pass the measure sponsored by Republican Rep. Curry Todd of Collierville on Monday after extensive debate about why the state should protect package store owners from competition.
Todd, who pleaded guilty to drunken driving with a loaded handgun in his car after a 2011 traffic stop in a Nashville neighborhood, said his bill was necessary to control what he called a dangerous product.
Todd invoked Jesus in a House floor statement in support of the bill, denied he was "in the pocket" of special interests and cited his law enforcement experience

in dealing with lives ruined by drugs and alcohol.

Oklahoma: Owners of Oklahoma liquor stores fight measure

Source: NewsOK
by Brianna Bailey
March 26, 2016

Oklahoma liquor-store owners have filed a court challenge to the proposed ballot measure on wine in grocery stores filed by the group Oklahomans for Consumer Freedom.

In court documents filed Thursday at the Oklahoma Supreme Court, the Oklahoma Retail Liquor Association claims the initiative petition is unconstitutional.

"Our opinion is basically that it creates an uneven playing field and puts retail package stores at a seriously unfair advantage," said Bryan Kerr, president of the Oklahoma Retail Liquor Association.

The group claims Oklahomans for Consumer Freedom's initiative petition violates the 14th Amendment of the U.S. Constitution, which guarantees equal protection for all under the law.

Statewide vote eyed

Oklahomans for Consumer Freedom, whose backers include several large retailers including Walmart and the convenience store chain QuickTrip, is seeking a statewide vote in November on an initiative petition that would allow for wine and full-strength beer sales in grocery and convenience stores.

Tyler Moore, a spokesman for Oklahomans for Consumer Freedom, said its attorneys are reviewing the challenge.

"The liquor-store owners are a group with a vested interest in keeping the status quo," Moore said. "We just see that as limiting to consumer choices."

The package store group claims the initiative petition proposes different standards of treatment under the law for liquor-store owners, who can sell spirits,

wine and beer, and grocery and convenience store owners, who would be able to sell wine and beer.

For example, while liquor-store owners are able to operate only one store in the state, there would be no limits on how many outlets a grocer or convenience store with wine and beer sales would be able to open under Oklahomans for Consumer Freedom's proposal, according to the package-store group.

"This distinction gives the wine-and-beer licensees a real and unfair competitive advantage and places retail spirit licensees at an enormous economic disadvantage," the Retail Liquor Association said in its challenge.

The proposal would render many smaller retail package stores unable to compete and force them to close, the group argues.

The liquor-store owners' group and Oklahomans for Consumer Freedom are set to appear May 3 at the Oklahoma Supreme Court for oral presentations on the issue.

If the initiative petition survives the challenge, its proponents would still have to collect about 127,000 signatures to get it on the November ballot.

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Oklahoma: Retail Liquor Association's petition faces legal challenge from grocers

Source: News OK
by Brianna Bailey
March 22, 2016

The Oklahoma Grocers Association is fighting to keep the Oklahoma Retail Liquor Association's initiative petition on wine in grocery stores off the November ballot.

In court documents filed with the Oklahoma Supreme Court, the grocers trade group says the language of the Retail Liquor Association's initiative petition is "misleading" and "deceptive."

Under the Retail Liquor Association's proposed state question, there would be a required distance of at least 2,500 feet between two outlets to sell spirits or wine,

but existing stores would be grandfathered in under the proposal.

The Retail Liquor Association's proposal offers no notice that licenses for grocery stores to sell wine cannot be issued with "just less of half a mile from an existing package store," the Grocers Association claims in its petition.

Bryan Kerr, president of the Oklahoma Retail Liquor association, said he believes the group's initiative petition is constitutional and not misleading to the public.

"Why not let the people of Oklahoma decide and give them a chance to vote? Why do they feel the need to take away the voice of the people?" Kerr said.

The proposal also does not disclose that "all beer, including 3.2 percent beer, will be taxed as alcohol. This will have the effect of raising taxes on the beer sold at grocery stores and convenience stores," the grocers group said in its legal challenge.

The proposed measure would also allow retail package store owners the ability to sell their wine license to a grocer. The proposal would effectively give liquor store owners the same licensing power as the Oklahoma ABLE Commission, which now is solely responsible for administering alcohol licenses.

"A change of this magnitude simply cannot be omitted from the gist of the petition if it is to pass constitutional muster," the grocers group said in court documents. "When the gist of the petition is insufficient and misleading, the only appropriate remedy is to strike the measure from the ballot."

Kerr said allowing liquor store owners to sell their licenses to grocers will not take away ABLE's regulatory authority.

"Nobody is usurping anybody's power. We are just asking for a little capitalism to be involved," he said.

Attorney and former Oklahoma Secretary of State Glenn Coffee is representing the Oklahoma Grocers Association in its legal challenge.

Coffee and Ron Edgmon, president and CEO of the Oklahoma Grocers Association, did not respond Tuesday to requests for comment.

The Oklahoma Supreme Court has set oral presentations on the case before a

referee of the court on April 14.

If the Retail Liquor Association's proposal survives the grocers' challenge, the group will still have to gather about 127,000 signatures to get on the November statewide ballot.

The proposal is one of several possible state questions on wine in grocery stores aiming for the November ballot.

Senate Joint Resolution 68, principally authored by Sen. Clark Jolley, R-Edmond, is the legislative effort underway to get a state question on the ballot that would include wine and strong beer in groceries and convenience stores. The proposal has cleared the Senate, but still must be approved by the House of Representatives.

The group Oklahomans for Consumer Freedom, backed by several large retailers including Walmart, is also pursuing an initiative petition effort that would allow wine and strong beer in grocery and convenience stores. The Oklahoma Grocers Association is also backing that effort.

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Colorado: Colorado liquor stores could ask voters to block beer, wine in grocery stores

Source: 9NEWS
03/26/16

Members of Keep Colorado Local went on the offensive Friday, filing two ballot initiatives that could block beer and wine from being sold in Colorado grocery stores.

The initiatives filed by supporters of Keep Colorado Local - a coalition of liquor stores, breweries and other small businesses - are the latest chapters in the fight over the future of Colorado's alcohol laws. Other groups are pushing for beer, wine and most recently liquor to be sold on supermarket shelves.

"There's eight or nine potential ballot languages out there that are detrimental to the safety of our community as well as our unique culture of craft breweries, craft distilleries and small businesses statewide. We wanted to put something out there that can keep people safe and remind people we do sell a controlled

substance, not like eggs and toilet paper," said Mat Dinsmore, a Fort Collins liquor store owner and member of Keep Colorado Local.

One of the initiatives filed to the state Friday would ask voters to prevent supermarkets and other food stores from selling marijuana, distilled spirits, wines and beers. The other initiative filed would ask to restrict anyone younger than 21 from working at a retail store that sells alcohol. Under Colorado's current laws, liquor stores already have to hire workers at least 21 years old to sell alcohol.

Winery accuses rival firms of trademark infringement

Source: Penn Record
Robert Hadley
Mar. 25, 2016

A California winery is suing two Pennsylvania companies for the alleged unauthorized use of its federally trademarked name on their own products.

Wilson Vineyards Inc. filed a lawsuit March 15 in U.S. District Court for the Eastern District of Pennsylvania against Wilson Vineyard LLC and Wilson Winery LLC, doing business as Wilson Vineyard, and Zachary Wilson, alleging trademark infringement, cybersquatting and unfair competition.

According to the complaint, Wilson Vineyards produces premium grapes used in wines distributed across the county. The suit says two wineries Zachary Wilson launched in 2010 have used the Wilson Vineyards trademarked name without authorization, relying on a reputation of quality the plaintiff has built over the past 35 years. In addition, Wilson Vineyards says the defendants have registered Internet domain wilsonvineyard.com for their own use and have impersonated them on social media.

Wilson Vineyards seeks injunctions banning the infringement and unfair competition, as well as monetary damages to be established at trial. It is represented by attorneys Paul J. Kennedy, Noah S. Robbins of Pepper Hamilton LP in Philadelphia.

U.S. District Court for the Eastern District of Pennsylvania Case number 2:16-cv-01198-PD

Alcoholic root beer served to 3 kids at Johnson City Applebee's; employee suspended

Source: WJHL March 10, 2016

Johnson City Police Department officers were called to a restaurant on North Roan Street after alcoholic beverages were served to three children Thursday evening. According to a JCPD Chief Mark Sirois, officers responded to Applebee's, 2100 N. Roan St., around 5 p.m. where they spoke to a parent who said alcoholic root beers - Not Your Father's Root Beer - were served to his three children ages 9, 10 and 11.

The father of the children, Scottie Barnett of Johnson City, said his children ordered root beer at the restaurant and when they were served the bottled drinks by an Applebee's employee, his 9-year-old son and 11-year-old daughter drank some of the beverage.

"We walked in, we got seated, we asked for something to drink," Barnett said. "My kids said they wanted root beer, so she said 'Ok, fine.' She brought them what appeared to me as root beer."

Barnett said he then saw the bottle, which read the drink contained 5.9 percent alcohol, and immediately told his children to put the drinks down. He said he brought the alcoholic beverages to the employee's attention, who reportedly insisted the drinks were root beer. He told her it was not root beer.

Barnett then called the police and the restaurant's corporate office to report the incident. According to Barnett, his 10-year-old daughter was also served the alcoholic root beer, but did not drink any of the beverage. Barnett's 9-year-old son was taken to a nearby hospital to be checked out because he complained of stomach pains, but was later released. His son is expected to be ok.

"This is a 5.9 percent alcoholic drink," he said. "They don't even serve root beer here at this establishment." An Applebee's spokesperson Patrick Lenow confirmed the incident happened Thursday. "Sincere apologies were made, the family accepted dinner as our guests and immediate re-training of all team members on duty took place," Lenow said. "Re-training of all team members of

all the restaurants operated by this owner will be completed tomorrow."

Lenow added that this was "an isolated mistake in one restaurant owned by an independent franchise operator. Strict requirement are in place to prevent this type of error and this mistake should not have happened." According to Lenow, a regional manager with Applebee's from Knoxville drove down to the Johnson City restaurant to address the incident and to speak with employees.

Lenow said the employee that served the beverages has been suspended pending an internal investigation. Sirois said the incident was not criminal in nature and no report was filed.

Austin brewer settles trademark dispute with craft beer giant

Source: Houston Chronicle
By Mike D. Smith
March 17, 2016

An Austin brewery has settled its trademark fight with a Colorado craft beer giant, winning sole rights to market its brand-name brew in Texas' lucrative beer market.

Oasis Texas and Colorado-based craft beer giant New Belgium Brewing, Co., agreed Thursday that Oasis Texas can sell its "Slow Ride" beer across the Lone Star State but must use a different name when selling the product elsewhere, said Max Schleder, general manager for Oasis.

"We're thrilled with the win, and we can't wait to get back to making great beer," Schleder said. Representatives with New Belgium, which also produces the Fat Tire label, said in a statement that they are comfortable with the settlement.

"We had high hopes that we could work together and coexist, but the team from Oasis was opposed to that and so we had to seek clarification through the court," Christine Perich, CEO of New Belgium Brewing, said in a statement on the company's website. "In an effort to put this behind us and move forward with the business of running our business, we're agreeing to Oasis' use of the mark in Texas, and we retain exclusive rights for the rest of the U.S."

The sparring match between the two companies began in 2014 when Oasis Texas began selling its Slow Ride beer, a pale ale. New Belgium filed for a trademark,

as it planned to begin selling a lower-calorie India pale ale, or IPA, with the same name. Its trademark request was granted.

Late in 2014, New Belgium notified Oasis Texas that it had the trademark. Oasis fired back with a cease and desist letter asserting "common law" rights to the Slow Ride name because its beer was available for sale days before New Belgium's application.

Schleder said Oasis Texas made offers to New Belgium, but the two sides didn't reach an out-of-court agreement. New Belgium in 2015 filed suit against Oasis Texas in federal court in Colorado. A judge there later ruled Colorado wasn't the proper venue, so New Belgium filed again in a Texas federal court.

At the heart of the battle was who would get to exclusively sell Slow Ride beer in Texas' flourishing beer market. Shipment data compiled by the Beer Institute, a national trade organization, shows Texas' was second only to California in shipment volume in 2015.

Texas accounted for 20.1 million of the 205.4 million barrels of beer shipments nationally, eclipsing Colorado's 3.6 million barrels, said Bart Watson, chief economist with the Brewers Association, a national group that promotes independent breweries.

Candace L. Moon, an attorney specializing in the craft beer industry, said naming conflicts can be common in the rapidly growing industry but typically are worked out between brewers. "When some of these guys get bigger, there's more at stake," Moon said. "There's a certain level when your trademarks have more and more value, and you've really got to back them up, stand behind them and police them."

In the U.S., whoever is first to use a product name takes priority over whoever files first for a trademark, which Moon said can generate territorial issues. Since Oasis didn't have a federal trademark, its rights only extend where its market exists: Texas. That's something that will be a lingering issue for the craft beer industry, Schleder said.

Oasis Texas was able to prove first use of the Slow Ride name, but it was being sold in major metro markets only in Texas. Therefore, the agreement limits Oasis' sales under the Slow Ride name to within Texas, and if the beer is sold in other states, Oasis must do so under a different name.

"It won best new beer in Austin the year it came out because of the way it tasted, not because of its name," Schleder said. Schleder added that the conflict with New Belgium provides a cautionary tale for other young breweries to avoid costly legal battles - Oasis spent "hundreds of thousands" of dollars - by researching names and trademarking their creations.

The Arsenic in Wine Class Action Dismissal - what it means

Source: Hinman & Carmichael, LLP
John W. Edwards II
March 25, 2016

On March 23, 2016, the Superior Court for Los Angeles County entered an order dismissing Charles, et al. v. The Wine Group, et al., the last remaining class action lawsuit based upon the presence of minute quantities of arsenic in wine. (For a discussion of arsenic in wine, see our earlier blog post "A Layperson Looks At Arsenic in Wine"). Several other class actions in other states had earlier been dismissed voluntarily by the plaintiffs.

The dismissal was at the pleading stage of the case, which means that there was no discovery and no trial. The Court essentially said that even if everything the plaintiff's claimed was true they didn't have a case. That is what the appeal (already announced by the plaintiffs) is going to be all about. This case will be important to establishing the parameters of the safe harbor that compliance with Proposition 65 is supposed to provide to the wine industry.*

The Charles plaintiff's claimed that the defendant wineries violated Proposition 65. That is, of course, the law that gave rise to the proliferation of signs at every cash register at every store in the state stating: "This product contains [or---This facility uses] chemicals known to the State of California to cause cancer and birth defects or other reproductive harm." Plaintiffs claimed that Prop 65 required the defendant wineries to disclose specifically that their wines contain small quantities of arsenic.

Those claims were rejected because plaintiffs did not allege any physical injury resulting from arsenic. Further, the plaintiffs conceded that "the danger of arsenic varies with the level of concentration (as it does with every toxin) and that arsenic can be present in safe drinking water, so long as the concentration level is low." In other words, these lawyer-driven claims didn't show that any real harm

existed from the low levels of arsenic that exist in almost all wines.

The court then said that Proposition 65 doesn't require disclosure of the specific chemicals that give rise to the duty to post the general warning. This is important because there are over 800 compounds "known to the State of California" to be potential carcinogens or teratogens, and the list is available on-line. Can you imagine what a label listing 800 chemical compounds would look like?

Turning to specifics, the Judge noted that the list "includes, for instance 'Aloe Vera, non-decolorized whole leaf extract," "Aspirin," "Oral Contraceptives, sequential," 'Salted fish, Chinese-style," "Unleaded gasoline (wholly vaporized),' 'and "Wood dust.'" The point the Judge made was that California law requires only the general warning. At that point the consumer is the one responsible or obtaining information about minute (and here the parts per billion is truly minute) specific compounds "from the party responsible for the exposure after the warning, rather than through the warning."

The Judge then made the obvious point that requiring disclosure of specific compounds would make the warnings "too congested and cumbersome to read and understand." That was an understated observation by the Judge.

Wine does not include the "known to the State of California" warning. Instead, all bottles carry the warning prescribed by both federal and California law:

WARNING: Drinking Distilled Spirits, Beer, Coolers, Wine and Other Alcoholic Beverages May Increase Cancer Risk, and, During Pregnancy, Can Cause Birth Defects.

The Court then held that the warning given is "a designated safe harbor provision that specifically applies to 'wine'" and is sufficient by itself. This is important to every producer in the wine industry because it is a guide to lawful conduct. Everyone wants to know how they can be complaint. The Judge here answered that question: make sure that the Proposition 65 warning requirements are observed.

For those reasons the Judge dismissed the complaint and told the plaintiff's that there was no way they could amend it to actually prove a case. That order can be appealed (and the plaintiff's said that they will appeal it), but, in our view, the dismissal should be affirmed. Keep in mind that an appeal that results in the Judge's order being affirmed would not be a bad thing because then the decision would have a broader precedential effect. The message to the plaintiff's here is be

careful what you ask for.

The bottom line is that the decision both terminates a meritless claim and provides an important precedent for the industry. There are undoubtedly traces of some of the 800-plus compounds on the "known to California" list, other than arsenic, in many products, including wine. Putting the prescribed warning on the bottle protects producers from having to disclose specific compounds and from future frivolous lawsuits. So make sure your labels are compliant!

Finally, when you raise your next glass, please remember to toast the Superior Court and this Judge for a sound, well-reasoned rejection of what is hopefully the last lawsuit based upon the presence of minute quantities of arsenic (or anything else) in wine. Salut!

UNDER CONSIDERATION IN MICHIGAN, PASSED HOUSE

House Bill 5257 (as reported without amendment)
Sponsor: Representative Klint Kesto
House Committee: Regulatory Reform
Senate Committee: Regulatory Reform

CONTENT
The bill would add Section 610 to the Michigan Liquor Control Code to allow a wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, vendor of spirits, broker, or retailer to use unpaid social media to advertise any of the following in accordance with all applicable laws and regulations:
-- An on-premises brand promotion.
-- Beer, wine, or spirits tastings.
-- A product location communication.

Section 610 would apply notwithstanding Section 609, which contains requirements regarding branding and advertising, among other provisions.
The bill would define "on-premises brand promotion" as a promotion in the manner provided by the order of the Liquor Control Commission issued on October 27, 1999. The bill states that the order's prohibition against advertising an on-premises promotion by a party off the licensed premises would not apply to Section 610. (The order issued on October 27, 1999, permits licensed suppliers and wholesalers to conduct on-premises brand promotion events under

the provisions of an administrative rule that governs advertising (R 436.1321) and in compliance with a number of conditions.)

"Product location communication" would mean a listing or program that allows an individual to determine the availability of a specific product at licensed retailers in a certain geographic area.

"Social media" would mean a service, platform, or website where users communicate with one another and share media, such as pictures, videos, music, and blogs, with other users free of charge. The term would include the website of a wholesaler, manufacturer, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, vendor of spirits, broker, or retailer. Proposed MCL 436.1610

Anheuser-Modelo $20B Deal Harmed Consumers, 9th Circ. Told

Source: Law360
By Daniel Siegal
March 15, 2016

Beer drinkers on Tuesday urged the Ninth Circuit to revive their antitrust case alleging Anheuser-Busch InBev's $20.1 billion acquisition of Group Modelo jacked up prices for the Mexican company's beer brands, arguing a set of oft-ignored but still valid Supreme Court decisions support their case.

During oral arguments in San Francisco, Joseph Alioto of Alioto Law Firm, representing a group of nine beer drinkers from California and Missouri, urged a three-judge panel to revive the plaintiffs' suit alleging that although the U.S. Department of Justice had ordered AB InBev to sell Modelo's U.S. distribution rights to competitor Constellation Brand Inc., Constellation would not serve as a competitive restraint against AB InBev and the companies would collude to raise prices on Modelo brands Corona, Pacifico and Modelo.

Alioto argued that U.S. District Judge Maxine Chesney had erred in ignoring a slew of U.S. Supreme Court rulings from the 1960s and 1970s that clearly set a standard against highly concentrated markets like the U.S. beer market. Alioto argued that a series of rulings running from 1963 to 1973 - U.S. v. Vons Grocery Co., U.S. v. Philadelphia National Bank, U.S. v. Alcoa, U.S. v. Pabst Brewing and U.S. v. Falstaff Brewing - all clearly set standards broken by the AB InBev-Grupo Modelo merger.

"No court seems to want to face them, the only court that has faced them in the last 30 to 40 years is the Seventh Circuit, Judge [Richard] Posner, and he made it very clear those cases have not been overruled, and they are the governing factor in merger cases," he said. "We are asking this court to please confront those Supreme Court decisions."

Alioto added that AB InBev knew Constellation, which shared an interest in Grupo Modelo's U.S. distribution before the merger, had long wanted the company to increase its prices and set up the divestiture in its merger as a way of getting the higher prices it wanted while slipping under federal regulators' noses.

U.S.- and Belgian-based AB InBev first announced its plans to acquire Mexico-based Modelo in June 2012, but the DOJ balked and sued in January 2013 to block the combination, saying removing Modelo from the competitive landscape would make it easier for the remaining brewers to engage in "coordinated leader-follower pricing strategies in the future."

To appease the DOJ, AB InBev agreed to sell off Modelo's U.S. assets - its Piedras Negras brewery, its stake in the sole U.S. importer of Modelo's brands, licenses for Modelo trademarks and other assets - to Constellation, as well as grant Constellation perpetual rights to Modelo's brands. The companies reached a tentative agreement to settle the DOJ suit in April 2013.

The beer consumers filed the private antitrust suit in March 2013 and submitted an amended complaint the next month, alleging that, under the revised terms of the acquisition, Constellation would be controlled by AB InBev and the two companies would conspire to fix beer prices.

In September 2013, Judge Chesney dismissed the suit for lack of facts backing up the plaintiffs claims.

On Tuesday, Karen Lent of Skadden Arps Slate Meagher & Flom LLP, representing AB InBev, urged the appellate court to affirm that ruling, arguing that the brewing giant clearly did not have any control of Grupo Modelo given its extensive divestiture of all the U.S.-facing Grupo Modelo assets to Constellation.

"There was no change in concentration in the U.S. market," she said.

Lent added that Constellation's decision to increase prices on Grupo Modelo brands shortly after the merger was just an independent judgment by the company and had nothing to do with the merger.

Circuit Judges Kim McLane Wardlaw, Richard C. Tallman and M. Margaret McKeown sat on the panel that heard Tuesday's arguments. The plaintiffs are represented by Joseph M. Alioto, Theresa D. Moore, Thomas P. Pier and Jamie L. Miller of Alioto Law Firm. Anheuser-Busch InBev and Grupo Modelo are represented by Steven C. Sunshine, James A. Keyte, Karen Hoffman Lent and Allen Ruby of Skadden Arps Slate Meagher & Flom LLP. Constellation is represented by Daniel E. Alberti, Raymond A. Jacobsen Jr., Jon B. Dubrow, Margaret H. Warner, M. Miller Baker, Cerissa Cafasso and Clint A. Carpenter of McDermott Will & Emery LLP The case is Steven Edstrom et al. v. Anheuser Busch InBev SA/NV et al., case number 14-15337, in the U.S. Court of Appeals for the Ninth Circuit.

NABCA
NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION

LEGAL SYMPOSIUM 2016

23rd NABCA Legal Symposium - Day One

Source: NABCA
March 14, 2016

NABCA's two-day Annual Symposium on Alcohol Beverage Law and Regulation provided participants with timely information and dialogue about crucial issues and challenges facing state regulators, industry officials and others impacted by alcohol beverage regulation. To follow are summaries of several of the presentations from day one of the event. Timely issues highlighted this year's installment.

Government Liabilities and Immunities
NABCA General Counsel J. Neal Insley moderated this opening session with fellow panelists and attorneys Kevin E. Martingayle of Bischoff Martingayle and

Walter D. Kelley, Jr., of Hausfeld.

Mr. Insley discussed the doctrine of sovereign immunity, where the government cannot be sued in court. He also discussed qualified immunity, the protection of government officials from liability with exceptions for violations of the law. Mr. Kelley noted that facts are usually disputed in qualified immunity cases which a judge, not a jury, will decide on. He further commented that lawyers should push for a qualified immunity decision by a court as quickly as possible.

Judicial and quasi-judicial immunity was also discussed. Judicial immunity protects judges from being sued while quasi-judicial immunity relates to officials acting in a manner of a judge. Members of alcohol control boards may receive quasi-judicial immunity based on their responsibilities.

Mr. Martingayle presented information on the 11th amendment. He noted that sovereign immunity is "alive and well" and will continue to protect state agencies. He also discussed Section 1983 cases where government officials are sued as individuals for violating a party's rights.

The session concluded with a review of relevant immunities and liabilities cases and questions from attendees.

Trademark Litigation
What constitutes a "craft" product, labeling language, marketing claims, and other factors have led to a significant amount of Trademark Litigation in the alcohol arena.

Moderator Alva Mather of Griesing Law noted in her opening that the panel had "a lot of ground to cover" in such a wide area of legal jurisprudence.

Eugene Pak of Wendel, Rosen, Black & Dean commented that an increase in trademark cases comes as the number of wineries, distilleries, and particularly breweries have increased. Currently, there is a 159% increase in breweries from 2011 to 2015. The rise of social media has also played a major role in the increase of alcohol industry trademark cases.

Speaking on marketing litigation, Marc E. Sorini, a partner at McDermott Will & Emery, reviewed false advertising law in the class setting.

Mr. Sorini pointed out that most decisions on these cases have been decided as a matter of law at the "Motion to Dismiss" stage. There have been no final trials

based on the merits of the case and no appeals heard on a case.

At the end of session, the panel was asked about what consumer is being protected in these cases. The reply was that a reasonable consumer is.

Government Graft: Ethics
During this morning session Alan D. Albert of LeClairRyan and Paul Nick, executive director of the Ohio Ethics Commission, presented on the topic of "Government Graft: Ethics." Mr. Albert, a nationally-honored trial lawyer, explained how "federal legal overlay" exists that could result in state and local officials of government agencies being prosecuted for ethics violations. He continued to point out federal prosecution can occur "even if you are complying with state law".

Mr. Albert reviewed the different federal statutes that government officials must follow, otherwise violations are considered crimes of corruption. These acts involve mail fraud, obtaining money under the color of official right (Hobbs Act), wire fraud, money laundering, income tax evasion and false statements and entries.

Mr. Nick followed up with a presentation on conflict of interest laws, which most states have, and rules for public officials and agencies to be aware of. He said that in determining if a receipt of a gift or loan is considered improper or a bribe, the determination is heavily based on "the intention of the person who is providing the gift" to the public official.

Mr. Nick further defined who would be considered potential "improper sources" for public officials to be wary of. Improper sources can be those who are looking to do business with a public official, are regulated by the government, and have specific interests before the public official or agency.

In conclusion, both Mr. Nick and Mr. Albert offered advice on how to avoid these types of violations. Both presenters stated public officials and agencies should be cautious and avoid receipt of gifts to ensure there is no violation of ethics laws. The session was moderated by J. Neal Insley of NABCA.

Granholm: 10 Years Later & 10 Years from Now
Deborah Skakel of Dickstein Shapiro, LLP and Tracey Genesen of the Wine Institute spoke about the U.S. Supreme Court's decision in the Granholm versus Heal case, which shaped the landscape for alcohol distribution and regulation throughout the U.S.

Ms. Skakel asked if Granholm was a revolution or not, then explained how the alcohol arena has moved from Granholm to more trade practice, state-specific tide house laws, and unique business practices. Ms. Genesen said Granholm was a revolution for medium sized companies and explained Granholm's evolution when dealing with constitutional theories.
Maps and charts of direct shipping to consumers and pricing before and after the case were shown. Also discussed were Granholm's impact on retail and airline cases, craft suppliers, third-party providers, online/app delivery, and the three-tier system.

Technology Tomorrow
As technology impacts commerce across the board, the alcohol industry is not immune to its effect on alcohol sales and marketing.

Wine and Spirits Wholesalers of America's Senior Vice President and General Counsel Jo Moak moderated a panel of stakeholders on modern alcohol technology issues. She spoke in her introduction about what technology is doing for society, including the convenience and personalization aspects of it.

Cory Rellas of Drizly discussed his company's model and noted it does not actually deliver or touch alcoholic products. Consumers are linked with an alcohol retailer, and the concept is similar to Uber and other app services. Drizly makes its money through advertising and licensing agreements with retailers. The company speaks to government officials in each city to receive their blessing before providing delivery service in a jurisdiction.

Aaron Sherman, co-founder and CEO of SevenFifty, presented about how his company works within parties of the alcohol three tier system and has no consumer component. Wholesalers have the ability to work with retailers to develop their relationships. Manufacturers can communicate with wholesalers and create consistent brand marketing for alcohol products.

Promotional Pitfalls
During an afternoon session of the 2016 NABCA Legal Symposium, Kelly Routt of the Oregon Liquor Control Commission (OLCC) and Jason H. Barker of Holland & Knight LLP presented on the topic of "Promotional Pitfalls".

Ms. Routt, a compliance specialist with the OLCC, explained that the definition of promotion of alcohol "can take many shapes". Primarily, a promotion is advertising supplier's products, offering retail discounts from states or licensees,

and offering sample tasting events. She highlighted the various promotional mediums for digital advertising, which include social media outlets such as Facebook, Twitter, Eventbrite, and Groupon. While these mediums are popular, she said "digital venues have greatly expanded".

Mr. Barker, who practices law extensively in the areas of alcohol beverage regulation and strategic corporate transactions, stated while promotions are regulated at the federal level by the U.S. Alcohol Tobacco Tax and Trade Bureau (TTB), there are various state regulations to be aware of.

He admitted state laws on promotional regulations "are a bit of a mixed bag", and when surveying all 50 states, only 22 states responded affirmatively that digital promotions of alcohol sales are permissible in connection with a supplier-sponsored event in their states. Mr. Barker highlighted states like Virginia, Pennsylvania, Illinois, New York and Texas to show the difference between each state in regulations around promotions.
Ms. Routt explained some of the "pitfalls" of promotional advertising, specifically from her state in Oregon. For example, if a retail licensee pushes content on a mobile application that offers discounts on cocktails for a limited time, that act is restricted. It is "a pitfall" because "happy hour advertising by a retailer is prohibited" by the state of Oregon.

FDA/TTB
Michael B. Newman of Holland & Knight, LLP gave an overview of the Food and Drug Administration (FDA) and the Alcohol and Tobacco Tax and Trade Bureau (TTB), and how they work together. For example, while the TTB may test to conclude the extent to which a product may be impure, the FDA provides laboratory assistance. Also, the TTB is primarily responsible for issuing recall notices and monitoring voluntary recalls of alcohol beverages that are adulterated, and will advise the FDA on how it intends to proceed. Mr. Newman also gave an overview of how state regulators or industry compliance personnel create regulations.

Nicole Candelora of the TTB discussed products that are in the market, such as cider, kombucha, sake and mead, and how the agency regulates alcohol beverage product labels. The TTB uses the Alcoholic Beverage Labeling Act of 1988, the Federal Alcohol Administration Act, and the Internal Revenue Code to have authority over alcohol beverage labeling. Ms. Candelora detailed the process of a Certificate of Label Approval as well.
Janet Scalese, also from the TTB, covered how the agency regulates and defines nonalcoholic products. She said the Nonbeverage Products Lab defines a

nonbeverage product as a food, flavor or perfume that is unfit for beverage use. Examples of this type of product are rum cakes and bitters, which needs to have a food product formula and label approval.

The Feds are in Charge Here

James M. Goldberg of Goldberg & Associates, PLLC former general counsel to NABCA, stated there are "three areas where sales of alcohol" are controlled by the federal government. They are military establishments, Indian tribal land and duty-free stores.

He further highlighted how the federal government controls sales in military establishments. On these lands, he said the military buys alcohol from what is called Class 6 stores, "which is what we would call liquor stores". The federal government is in charge of these outlets. Mr. Goldberg used the example of how states do not collect state sales tax on purchases from Class 6 stores on federal military lands.

Laurel Iron Cloud, the chief of the Division of Tribal Government Services in the Bureau of Indian Affairs, outlined the laws around alcohol sales on Indian tribal land. She reviewed the Tribal Liquor Control Ordinance, which has a general prohibition of spirituous liquor, beer, wine or other intoxicating liquors in Indian Country.

She stated that there are exemptions to the general prohibition, but it is "a sticky situation" due to the criteria the tribe must meet to be approved for the exemption. Among the criteria, the exemption ordinance must conform to state law and the ordinance must be duly adopted by the tribe.

Mr. Goldberg concluded by explaining how the federal government controls sales in "duty-free stores". He stated that duty-free stores are a $65 billion business worldwide, and in the United States, the U.S. Customs and Border Protection Bureau are responsible for the operation of the duty-free stores. He finished with detailing how duty-free stores "cannot buy from local sources, they buy directly from the supplier" to ensure state and local jurisdictions are not involved in duty-free store operation.

Trade Practice Case Study

States filing trade practice violation complaints against alcohol wholesalers and retailers have come after lengthy investigations. Massachusetts Alcoholic Beverages Control Commission Enforcement Division Chief Ted Mahony discussed trade investigations in his state. He asserted that his state, like most,

focuses on public safety issues. A year-long investigation into "pay to play" allegations against alcohol outlets in Massachusetts led to substantial fines and license suspensions.

David Bateman, currently with Gray Robinson and a retired TTB official, reviewed the elements of a federal trade practice violation. There are four major areas under the Federal Alcohol Administration Act that are considered unlawful practices: exclusive outlet, tied house, commercial bribery, and consignment sales. Within those areas, are specific acts such as inducement and exclusion of competitors.

Panel moderator Steve Schmidt, NABCA senior vice president of public policy and communications, closed the session by providing information about the 2015 NABCA/NCSLA trade practice survey report available to NABCA members.

23rd NABCA Legal Symposium - Day Two

Source: NABCA March 15, 2016

NABCA's 23rd Annual Symposium on Alcohol Beverage Law & Regulation successfully concluded on day two with positive comments and more than 260 people attending. Below are summaries of Tuesday's presentations.

Marijuana Malpractice: Ethics
During this opening morning session Brannon Denning of Cumberland School of Law, Samford University and John Hinman, partner, with Hinman & Carmichael LLP presented on ethics and marijuana malpractice. Robert Tobiassen, who is an independent consultant, moderated the session.

Mr. Tobiassen, who had also served 34 years with the Alcohol and Tobacco Tax and Trade Bureau, said while movement towards medicinal marijuana and legalization of marijuana is taking place in many states, there are still "challenges of balancing personal freedom and social stability."

Mr. Hinman, outlined different questions that must be asked of those who want to regulate and conduct business of marijuana sales and usage. He reminded participants that marijuana is still an illegal product at the federal level, so "state and local laws must be followed" by those conducting business.

Mr. Denning referenced the Cole Memorandum as a document that provides guidance on marijuana regulation for those wanting to conduct business in the

industry. As an associate dean for academic affairs at the Cumberland School of Law at Samford University, he described the "bizarre legal landscape" of balancing marijuana regulation between federal and state laws. He reviewed the Control Substances Act, the Cole Memorandum, the legal status of state legalization regimes and constitutional issues such as preemption.

Mr. Denning explained the complexity of practicing marijuana ethics law for lawyers, who he said must "tread very carefully" with clients due to varying state ethics opinions. Some states such as Connecticut and Maine have restrictive ethics opinions on marijuana regulation, while Arizona and Washington have more permissive opinions on the product.

Coping with Craft

Craft products have become a major segment in the alcohol industry but several questions remain about craft stakeholders. States and even craft product associations provide different or no definition of "craft." Other issues persist.

Thomas Lisk, a partner at Eckert Seamans Cherin & Mellott and moderator for the session, introduced the panelists and talked about the explosion of craft products. He reviewed some of the issues with craft products particular to the state of Virginia.

Margie A.S. Lehrman, executive director of the American Craft Spirits Association, reiterated the point that craft products are "huge" both in the United States and internationally. She reviewed the definition of craft beer as defined by the Brewers Association and craft spirits as defined by the American Craft Spirits Association and American Distilling Institute. Ms. Lehrman also discussed the challenges facing craft producers including getting timely TTB approval to operate a distilled spirits plant.

Virginia State Delegate David Albo discussed his experience as a legislator dealing with craft products and other alcohol topics. He noted the evolution of laws pertaining to Virginia wineries and breweries and the impact those laws had on the Virginia distillers that wanted those same considerations.

In conclusion, the panel agreed that craft products are only growing and that growth will not stop anytime soon.

Category Management: Beyond the Schematics

In February 2016, the TTB ruled that the only exception to the federal tied-house laws regarding category management programs, some of which raise questions

about "things of value," are for shelf plans or shelf schematics.

Nina McDermott, director of licensing and compliance with the Utah Department of Alcoholic Beverage Control, moderated a diverse panel of experts on this subject.

Richard Blau, chair of the Alcohol Beverage & Food Law Department at GrayRobinson, noted his belief that a lack of regulation has caused issues. Inadequate funding and an increase in alcohol industry activity leads to limited enforcement and a disconnect. He reviewed the history of enforcement cases pertaining to schematics matters.

J. Wesley Geiselman, assistant attorney general with the New Jersey Division of Alcoholic Beverage Control, said that his state was not directly impacted by the TTB ruling based on its licensing platform. He commended TTB for providing a balance on trade practice issues.

Vicki McDowell, president/CEO of the Presidents' Forum of the Distilled Spirits Industry, believes that this TTB ruling isn't just for the particular facts of this case but provides guidance on other trade practice areas. She noted that the industry has been "put on notice" by this ruling and should consider what it's doing in light of this ruling.

With the TTB clarifying acceptable category management practices and continuing to provide additional information on this topic, the issue will remain at the forefront for regulators and alcohol industry stakeholders.

The 2017 Annual Symposium on Alcohol Beverage Law & Regulation will be held March 12 - 14, at a new location, the Crystal Gateway Marriott in Arlington, VA. *Yours truly attended this year's NABCA symposium and I recommend it as a great learning experience....t.d.*

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