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DUNCAN LIQUOR LAW LETTER

July, 2016

A monthly newsletter for the clients of R.E. "Tuck" Duncan, Attorney at Law
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This information is not to be considered legal advice.
Consult a competent attorney on specific questions.

In this issue:

Premier Cru lawsuit: Some customers to get refunds

Plethora of Latent Tied-House Violations are Coming to a Head in Texas,
Beverage distributor McLane says
Texas regulator is playing favorites with alcohol licenses

and more....

Politics is the art of looking for trouble, finding it everywhere,
diagnosing it incorrectly and applying the wrong remedies.
-- Groucho Marx

The average IQ in America is -- and this can be proven mathematically -- average.
-- P.J. O'Rourke

When I was a boy I was told that anybody could become President;
I'm beginning to believe it.
-- Clarence Darrow

AG Derek Schmidt asks Kansas Supreme Court to review DUI cases after U.S. Supreme Court ruling

Federal decision contradictory to Kansas court ruling
Posted: June 29, 2016 - 11:04am

Kansas Attorney General Derek Schmidt on Wednesday asked the Kansas Supreme Court to reconsider a group of driving under the influence cases in the wake of a contradictory decision last week from the U.S. Supreme Court.
The nation's high court ruled this past Thursday in a 5-3 opinion that warrantless breath tests are constitutional, but warrantless blood tests are unconstitutional. By extension, criminal penalties for refusing to take a breath test are constitutional, but criminal penalties for refusing to have blood drawn are unconstitutional.
The Kansas Supreme Court, however, determined in February that punishment for refusing a DUI breath test violated Fourth Amendment protections from unreasonable search and seizure.
Schmidt on Monday requested that the Kansas Supreme Court reconsider its case in light of the U.S. Supreme Court ruling.
"We think the Kansas court's conclusion must yield to that of the U.S. Supreme Court, and we have requested clarity on the matter," Schmidt said in a release.
The U.S. Supreme Court case held that a Minnesota man didn't have a right to refuse a breath test for alcohol and his constitutional rights weren't infringed upon when he was criminally punished for his refusal. Because the case involved laws in Minnesota and North Dakota, not Kansas, it falls on the Kansas Supreme Court to sort out the difference between what Schmidt calls "asymmetrical" opinions over whether criminal punishments for refusing to take a breath test in Kansas are constitutional, Schmidt told The Topeka Capital-Journal last week.
The law in question in the Kansas Supreme Court ruling was a 2012 amendment to the state's DUI laws that added a provision stating that refusal to submit to a breath test is a crime with punishments comparable to those for driving under the

influence.
In March, Schmidt joined 17 other attorneys general in asking the U.S. Supreme Court to decide three DUI cases in a way that upheld state laws punishing breath test refusal, calling such laws "critical to the states' ability to eradicate the frightful 'carnage' caused by impaired drivers with 'tragic frequency' across the country."

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U.S. Supreme Court contradicts Kansas Supreme Court on breath test refusal crimes

Schmidt: 'The Kansas Supreme Court has to give us some guidance'

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Contrary to a recent Kansas Supreme Court opinion, the U.S. Supreme Court on Thursday held that a Minnesota man didn't have a right to refuse a breath test for alcohol and his constitutional rights weren't infringed upon when he was criminally punished for his refusal.
"The Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and (William) Bernard had no right to refuse it," wrote Justice Samuel Alito.
The court determined, by a 5-3 majority, that warrantless breath tests are constitutional but warrantless blood tests are unconstitutional. By extension, criminal penalties for refusing to take a breath test are constitutional but criminal penalties for refusing to have blood drawn are unconstitutional, the court ruled.
In 2012, the state of Kansas amended its statutes on driving under the influence, adding a provision stating that refusal to submit to a breath test is a crime with punishments comparable to those for DUI.
On Feb. 26, the Kansas Supreme Court determined the law was an unconstitutional violation of Fourth Amendment protections from unreasonable search and seizure.
"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," Justice Marla Luckert wrote in the majority opinion.
How the U.S. Supreme Court ruling will affect Kansas law remains unclear, according to Attorney General Derek Schmidt, a proponent of criminal punishments for breath test refusal.
"The Kansas Supreme Court has to give us some guidance on where it wants to go from here," he said in an interview Thursday.
In March, Schmidt joined 17 other attorneys general in asking the U.S. Supreme Court to decide three DUI cases in a way that upheld state laws punishing breath test refusal, calling such laws "critical to the states' ability to eradicate the frightful 'carnage' caused by impaired drivers with 'tragic frequency' across the country."
Schmidt was encouraged by Thursday's ruling but acknowledged, "It's not quite as clear as I would have preferred."
Alito's ruling centered on the "search incident to arrest" exception in the Fourth Amendment, which allows law enforcement officers to search a person's body without a warrant after an arrest. This is generally done for two reasons: to protect officers and preserve evidence.
"Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for

drunk driving," Alito wrote.
Four months ago, that exception was dismissed by Luckert and five other Kansas Supreme Court justices as inapplicable.
"Alcohol in the bloodstream poses no threat to officer safety, and when discussing preservation of evidence ... the reasoning is to prevent destruction of evidence within a suspect's control," Luckert wrote, arguing DUI evidence is outside a suspect's control.
Because the U.S. Supreme Court ruling Thursday was on laws in Minnesota and North Dakota, not Kansas, it falls on the Kansas Supreme Court to sort out the difference between what Schmidt calls "asymmetrical" opinions over whether or not criminal punishments for refusing to take a breath test in Kansas are constitutional.
"It looks, at least in the long term, like the answer is going to be 'yes,' " Schmidt said.
The attorney general has two motions pending before the Kansas court on this matter. He has requested it delay implementation of its Feb. 26 ruling and also reconsider that ruling. In the wake of the U.S. Supreme Court opinion, Schmidt expects one or both of those motions to be acted on soon.
Doug Wells, a DUI defense attorney in Topeka, said "there are still a lot of balls in play" after Thursday's ruling.
"It resolved a couple issues as it relates to the federal Constitution but some of it is still up in the air," Wells said. "I think there's still more work ahead."
Patrick Lewis, an Olathe defense attorney, agreed.
"But for the time being, I feel confident that the Kansas refusal statute is unconstitutional and cannot result in punishment for a driver," he said.
Chris Mann, a Kansas prosecutor and state board chair of Mothers Against Drunk Driving, said the organization is pleased with Alito's opinion.
"Breath tests are a critical tool for law enforcement officers who are on the front lines in the battle to eliminate the completely preventable crime of drunk driving," he said. "The Court recognized that breath tests are minimally invasive and confirmed that driving is a privilege, not a right."
Three justices dissented from Alito's majority opinion Thursday. Justices Sonia Sotomayor and Ruth Bader Ginsburg agreed with the majority on the unconstitutionality of blood tests but went a step further, arguing breath tests without a warrant are also unconstitutional.
"I fear that if the (Supreme) Court continues down this road, the Fourth Amendment's warrant requirement will become nothing more than a suggestion," Sotomayor wrote.
Justice Clarence Thomas took the opposite approach. He agreed with the majority that breath tests are constitutional but argued blood tests are, as well.
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NEW KANSAS LAWS EFFECTIVE JULY 1, 2016

Health Care Access

Kansas joined a physician licensure compact that will increase healthcare options in rural areas, and allow doctors from out of state to start practicing in Kansas with less red tape. It expands tele-medicine options for rural areas.

- Doctors and dentists will have the option to earn continuing education credits by delivering charity health care to low-income patients.

- In January, midwives will be able to deliver new babies without the supervision of a physician, which greatly expands their practice options and ability to serve women in rural areas.

Public Safety

Minors who send nude photos of themselves to other minors are now treated differently in the criminal code than pedophiles, a much needed modernization of criminal law.

- It is now a crime to use a drone as a stalking or harassment device.

- There will be 75 new troopers joining the Kansas Highway Patrol.

Education

- Kansans can now choose to donate a portion of their income tax refund to their local school district.

- Beginning in January, teachers, staff, and administrators in school districts will be required to undergo a two-hour suicide prevention training.

- Parents and students now have access to a degree prospectus program that gives an overview of what to expect from their educational investment. Find that here.

- After the legislature worked in special session to prevent the Supreme Court from closing schools, education funding has again set an all new record high, breaking the previous record from last year.

Property Taxes

- Beginning in January, voters will have a direct voice in proposed property tax increases over the rate of inflation.

Transparency

Legislative committee hearings will be streamed online beginning in

January.

- The names of lawyers who vote on members of the Supreme Court Nominating Commission will now be open to the public.

- The names of applicants who apply for district court and court of appeals positions will now be available under the Kansas Open Records Act.

- Official government business conducted in private email is now available under the Kansas Open Records Act.

IN THE SUPREME COURT OF THE STATE OF KANSAS
No. 109,397 Opinion filed July 1, 2016:

STATE OF KANSAS, Appellee,
v.
ERIN KRISTENA DARROW, Appellant.
SYLLABUS BY THE COURT
1. Under the driving under the influence (DUI) statute, K.S.A. 2010 Supp. 8-1567, the term "operate" is synonymous with "drive," which requires some movement of the vehicle. Consequently, an "attempt to operate" under the DUI statute means an attempt to move the vehicle. The taking of actual physical control of a vehicle, without an attempt to move the vehicle, is insufficient to meet the attempt to operate element of DUI.

2. When presented with stipulated facts, a court cannot ignore the circumstantial evidence presented in the stipulations because, if such evidence provides a basis from which the factfinder may reasonably infer the existence of the fact in issue, that circumstantial evidence can support a guilty verdict. In other words, a court must consider the stipulated context in which the stipulated facts occurred.

3. The probative values of direct and circumstantial evidence are intrinsically similar, and there is no logically sound reason for drawing a distinction as to the weight to be assigned to each. Consequently, like with direct evidence, an appellate court does not 2 reweigh the circumstantial evidence supporting a conviction against the circumstantial evidence supporting a not-guilty verdict. Instead, the appellate court's function is to determine if the direct and circumstantial evidence, viewed in a light most favorable to the State, could have reasonably supported a rational factfinder's guilty verdict.

Full decision at:
http://www.kscourts.org/Cases-and-Opinions/opinions/SupCt/2016/20160701/109397.pdf

The Saga of Francine Katz Continues

July 8, 2016

From Beer Business Daily:

The last time we reported on Francine Katz, it appeared the high profile case was finally coming to an end. The former A-B executive had lost her gender discrimination suit and the St. Louis Circuit Judge had denied her motion for a new trial. Yet, here we are, more than two years later, watching the brewer and the ex-employee present their sides in the same courtroom to see who should pay for nearly $60,000 in court costs.

Recall, Francine was with the company for two decades and rose to become the company's highest-ranking female. She decided to part ways with A-B after InBev took over in 2008. Upon her departure, Francine alleges that she discovered her "base salary and bonus was 46% lower than her male predecessor and less than every male executive on A-B's strategy committee," per St. Louis Post-Dispatch. After learning of this alleged disparity, Francine filed suit asking for "$9.4 million in missed compensation and $5 million in interest."

The suit went to the Civil Courts in May of 2014 and after a three-week-long trial, the jury panel determined that brewery officials did not discriminate against Francine based on her gender when setting her pay. After the jury sided with A-B, the court ordered that Francine pay a small portion of the brewer's litigation costs. Francine then "challenged the court's directive," bringing us to the hearing yesterday over who's responsible for ponying up the nearly $60,000 in court costs.

So, again, to be clear, this is a Court-ordered, procedural step.
Francine's attorney, John Lynn, argued in yesterday's hearing "that her lawsuit was brought under the Missouri Human Rights Act." This is key for Francine and her team because the act "provides that no costs at all can be awarded against the non-prevailing party unless her claim was without foundation" or "frivolous," John told the Post-Dispatch.

Circuit Judge Rex Burlison, the same judge from 2014, said Francine's lawsuit "wasn't a frivolous case" at yesterday's hearing. The judge has not issue a ruling,however, and will continue to mull over "briefs filed by both parties over the issue of court costs."

SO WHAT DOES ABI HAVE TO SAY ABOUT ALL THIS? A-B sent BBD the following comment on the matter: "At Anheuser-Busch, we believe in and practice equal pay for equal work. The jury found that Francine Katz was always treated and compensated fairly during her 20 years of employment at Anheuser-Busch. We value equality throughout all levels of our organization and our position on equal pay has been very consistent over the years."

"As the prevailing party in this trial, the court ordered that Anheuser-Busch be reimbursed a small portion of its litigation costs. Mrs. Katz challenged that ruling, and this hearing is simply a means of presenting our position to the court with respect to whether and what amount of costs should be awarded under Missouri law."

Proposed New Federal Law Would Do Away With Misleading Texas

Wine Labels

Source: Daily Meal by Andrew Chalk July 5, 2016

These labels are so deceptive that they have fooled Masters of Wine, Costco (the nation's largest wine retailer), and the restaurant critic of the Dallas Morning News (who has written a book about wine), among others.

If the proposed TTB rule goes into effect, it would be the biggest change in the legal framework within which the Texas wine industry operates since the industry was allowed to open tasting rooms for consumers. FSITO wines displace sales of real Texas wines, which hurts Texas wineries and, in turn, Texas grape growers. They also discredit Texas wine in the minds of consumers who are likely to decide to just buy real California wine in the future.

Enter the TTB. It has proposed an amendment to U.S. wine labelling regulations that, while tortuously complicated to read, can be simplified to two key changes. First, a wine made from out-of-state fruit would not be able to use a vintage date on the label. Second, it would not be able to mention a grape variety. In other words, such wine would have to be sold as just generic red or white table wine, the lowest grade on the quality scale. Michael Kaiser, Director of Public Affairs for The National Association of American Wineries, told me that this rule would apply to FSITO wine. FSITO wines currently affect to be varietal, vintage-dated Texas wines, but the label change will force them to declare themselves as all the way down at the bottom of the wine quality scale.

What will FSITO producers do? Many may decide that the jig is up and decide to honestly label their California jug wines as American. Others will decide to go authentic and buy Texas grapes (there is a huge surplus at the present time) and make real Texas wine. Either way, the rules change would be a big win for Texas consumers, Texas wineries making Texas wine, and Texas vineyards.

The TTB rule goes out for discussion and is not a slam dunk to pass. However, one thing in its favor is that the principal instigator of the change is the California wine industry. Every single member of the California congressional delegation backs it. Since California produces over 90 percent of the nation's wine, it is a powerful ally.

In Texas, there has been an articulate lobby in favor of the abolition of FSITO, consisting of media figures, an increasing number of Texas wineries focused on authenticity, and sommeliers. The TTB proposal comes out of left field but is welcome nonetheless. It is the culmination of two years of increased authenticity and transparency in the Texas wine industry. In 2015 we got Go Texan wines up to 75 percent minimum Texas grapes. Now the bigger issue of FSITO is folding as well. It all presages a brighter future for the Texas wine industry.

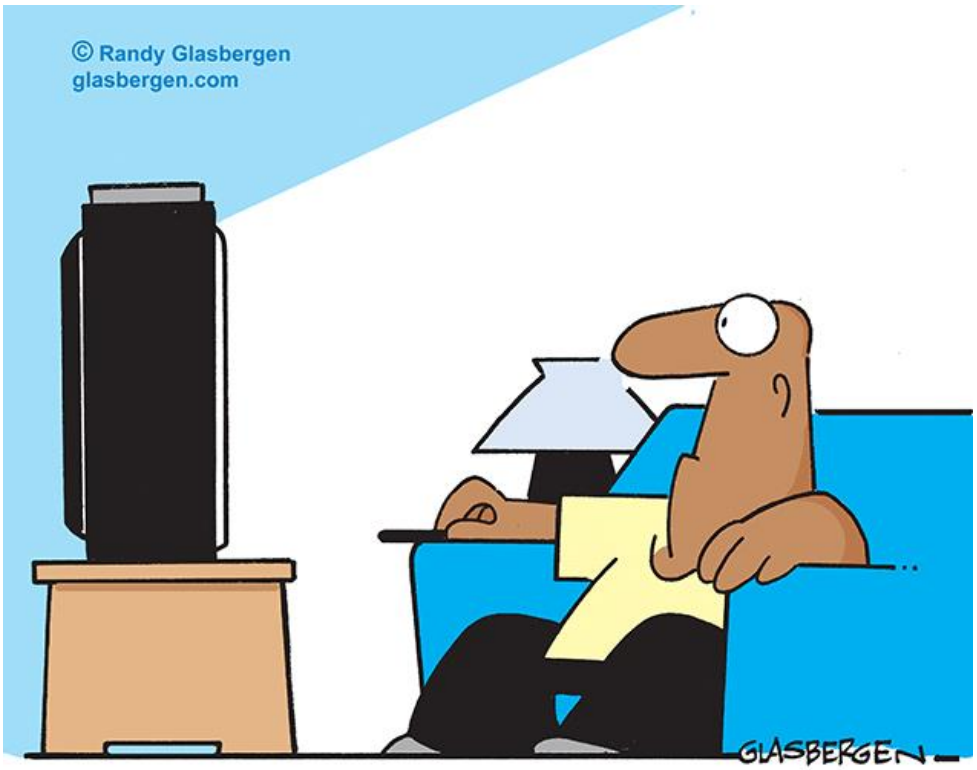
TTB PRESENTATIONS AVAILABLE AT TTB.GOV

We periodically participate in industry conferences and seminars to provide training or relevant TTB-related information. We also occasionally hold our own training events, such as webinars or seminars.
We make presentations available for everyone's benefit at our TTB

Presentations page at TTB.gov. We have presentations related to our TTB Online applications, such as Permits Online, Formulas Online, and COLAs Online. Our most recent presentation is from our presentation at the 6th annual CiderCON in in Portland, Oregon:

- CiderCON 2016: Cider Industry Federal Compliance Training (February 2016) This comprehensive presentation covers many topics the U.S. cider industry needs to know about compliance with TTB requirements including permits, recordkeeping, reports, taxes, formulas, and labels.

https://www.ttb.gov/main_pages/ponl-pdfs/cidercon-2016-ttb-compliance-training_masterfinal.pdf



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New policy barring written testimony to Liquor Board raises concern 6.6.16

Critics question fairness of policy - and chairman's authority to issue it

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Alowing people who can't deliver testimony in person to submit it in writing is a long-established practice of boards and commissions in Baltimore and beyond -

from the local City Council to the U.S. Congress.
But it won't be permitted at the Baltimore Liquor Board.
Under an "administrative order" issued last week by Liquor Board chairman Albert J. Matricciani, Jr. - that has raised the hackles of community leaders and their advocates - only testimony delivered with a visit to City Hall will be considered.
This is how "Administrative Order #7, " announced by a late Friday afternoon press release just before the July 4 holiday weekend, reads in full:
"Any individual who wishes to present testimony as part of the evidentiary record for consideration by the Board in its decision concerning a matter in which a public hearing is held, shall be present at the public hearing so that his or her testimony will be presented in person, under oath, and on the record. This regulation is effective as of July 1, 2016."
Would requiring interested parties to attend the Board's daytime City Hall hearings - regardless of job or family obligations, physical disabilities or transportation issues - be unfair?
Asked that question today, Matricciani, essentially, told those parties: tough luck.
"They're going to have to find some representative to give that testimony on their behalf," Matricciani said, in a phone conversation with The Brew.
"Becoming a Problem"
The chairman, appointed to lead the troubled Board in April, said the reason for the administrative order was that some people have been excessively burdening the agency with questions that were inappropriate outside of the weekly hearings.
"I understand in the past there's been some experiences where people have been contacting the commissioners and staff about cases that are ongoing before the board," Matricciani said.
"I don't want there to be an Open Meetings law issue. There shouldn't be all these subterranean conversations," Matricciani said. "I'm told this was becoming a problem and I wanted to stop it before it got out of hand."
Asked if the policy applies to licensees and their lawyers, Matricciani paused and said "the licensee has the right to contact the Board about scheduling and certain issues but generally, yes."
Chrissy Anderson said she thinks she knows the reason for the new policy:
Her barrage of emails about a liquor license that appears to be expired, directed at Liquor Board deputy executive secretary Thomas Akras, who sent out the Friday memo.
"I 100% believe it It was a direct result of my questioning the agency about the Arcos license, and the agency's role, or lack of, in this case, becoming part of a court settlement when the license had been dead for quite awhile," said Anderson, president of the Fells Prospect Community Association.
Tom Akras, deputy executive secretary of the Baltimore Liquor Board, at a February community meeting. (Fern Shen)
Asked about it, Matricianni said he didn't know what particular case had raised staff concerns.
Senator, Watchdog Lawyer Raise Questions
Community Law Center attorney Becky Lundberg Witt, who blogs about liquor issues and sometimes represents communities against licensees, called the order "a huge step backwards."
"Most people cannot afford to take time off of work or get child care to attend a hearing in the middle of the day on a Thursday," Witt said."How can we really expect all testimony to be in-person? It doesn't seem fair."
Sen. Bill Ferguson, in a letter to the Board sent out today, pressed Matricciani sharply about it.
"Many constituents have contacted my office with great concern as to both the

substance of this order and the process by which the Board has issued the order," he wrote.

One of Ferguson's questions was whether the new policy might lead to perjury charges, a query stemming from the recent subpoenas sent to community members that sparked allegations that it was meant to intimidate.

"Given the Board's clear concerns for the authenticity of written communications, will the Board be pursuing perjury cases against individuals who provide willfully inaccurate information to the Board?" the 46th District senator wrote.

Ferguson made a number of objections, including the fact that the Liquor Board's Administrative Order #5 issued last year "expressly permitted license holders not to appear before the board for matters involving a license transfer."

Other questions included:

* Does the Board plan to begin holding extended hearings during evening hours for people with full time careers that take issue with matters requiring a hearing before the Board?
* How will Order #7 apply to written letters of support or opposition from community members/associations or from licensees on matters before the Board?
* How will Order #7 apply to petitions in support or in opposition to a matter before the Board? Will all signatories to a petition now be required to attend Board hearings in person?
* How will Order #7 apply to matters that do not require a hearing before the Board or matters that are handled without being placed on the docket?

"Isn't That the Staff's Job?"

Witt questioned the need for the chairman's order, noting that agency staff is already able to instruct anyone trying to improperly contact the commissioners to use the proper channels.

Meanwhile, communications with staffers, she argued, are appropriate.

"If people are contacting Liquor Board staff - well, isn't that the staff's job? To answer questions from licensees and the public about both general and specific topics?" Witt said.

Emails and letters raising substantive and procedural issues - from community members, as well as licensees and lawyers - are frequently included in the liquor establishments' files, which the commissioners can review.

For cases coming before the Board in upcoming dockets, these communications have been made available online.

Matricciani's order left some wondering whether it means written communications will not be accepted for matters that do not require a hearing.

Witt also questioned Matricciani's right to declare a policy change "by fiat." Administrative orders, which the Liquor Board began issuing under the chairmanship of the late Judge Thomas Ward, are not mentioned in Article 2-B, the state liquor law, Witt said. State law does lay out a procedure for changing the agency's rules and regulations, but it requires a 30-day comment period for the public and review by the city solicitor.

"By what authority does the Board justify the issuance of Administrative Orders that bypass this statutory mandate?" Ferguson asked, in his letter to the board.

"I think we are authorized to adopt these procedures," Matricciani said, adding "anyone who wants to make a case that we are not is certainly welcome to do so in writing and we'll consider it."

MasterCard-Visa Settlement With Retailers Is Overturned

By RACHEL ABRAMS
JUNE 30, 2016

A federal appeals court on Thursday overturned a historic antitrust settlement between retailers and Visa and MasterCard, reviving more than a decade of legal battles over processing fees.

The United States Court of Appeals in Manhattan said that the lawyers represented retailers with competing interests in the settlement, which was once valued at $7.25 billion, one of the largest in antitrust history. The judges pushed the suit back to a lower court.

The settlement stemmed from a 2005 lawsuit in which retailers accused credit card providers of scheming to fix the price of processing fees, the money the card companies charge retailers for each transaction. The sides reached the settlement in 2012.

Under the deal, merchants would give up their rights to sue in the future, regardless of whether they received a piece of the money. Merchants would also be allowed to charge higher prices when consumers paid with credit cards, which are typically more expensive for them to process than debit cards.

But on Thursday, the United States Court of Appeals in Manhattan said that the merchants had been "inadequately" represented when the settlement was reached.

The court said that both groups should not have been represented by the same lawyers, who stood to earn more than a half-billion dollars in fees, because the two groups of merchants' interests conflicted with one another. Some merchants would want to maximize their cash payments, while others would want to "maximize restraints on network rules to prevent harm in the future," the court wrote.

"Class counsel stood to gain enormously if they got the deal done," the court said in one of the opinions from the three-judge panel.

K. Craig Wildfang, a lawyer with Robins Kaplan, who had represented the merchants in the original case, declined to comment on the lawyer fees. Conflict-of-interest issues among groups of plaintiffs is "not uncommon" for these types of cases, according to Scott Wagner, a partner at Bilzin Sumberg who focuses on antitrust and price-fixing issues.

The case involved the processing fees charged by Visa and MasterCard.

The National Retail Federation, a trade group representing some of the country's largest retailers, said it welcomed the ruling.

"This 'settlement' was never a settlement on behalf of the retail industry but rather a back-room deal that failed to represent the interests of retailers," said Mallory Duncan, the senior vice president and general counsel for the retail group, which joined in the appeal of the 2012 settlement.

The National Retail Federation was not one of the plaintiffs in the original 2005 lawsuit. But the group grew concerned about how the settlement could affect millions of other merchants, some of whom are its members.

In an interview, Mr. Duncan said that individual merchants would ultimately end up with an insignificant amount of money from the deal. The ban on surcharging customers for credit card payments had not really been lifted for the industry either, he said. Instead, the card networks just "rewrote the rules."

"Ninety percent of merchants still can't surcharge, even if they wanted to," he said.

Processing fees, also known as swipe fees, have long been a point of contention in the retail industry. Merchants say these fees are too high, a result of price-fixing among credit card networks like Visa and MasterCard, which act as electronic information highways between merchants and the banks.

The banks and the card networks have defended themselves for years, saying that the fees, in part, help to cover the costs of fraud.
MasterCard and Mr. Wildfang both said they were "disappointed" by Thursday's decision.
"We believe we presented a clear case to the court that the settlement was fair and appropriate based on more than four years of negotiation and the close involvement of the district court," MasterCard said in a statement, adding that it was reviewing the decision to determine its next steps.
A lower court will now have to decide the terms of a new settlement, or whether to push the case to trial.
Representatives for Visa did not respond to a request for comment.

Washington Distribs Go to Court over Failed Partnership

FROM W&S DAILY 7.5.16

Two distributors in Washington are battling it out in state and federal courts over an alleged breach of contract. The two parties are American Northwest Distributors (ANW) on one side, and its former distribution partner Crush & Cooper of Washington, its owners Chad McGee and Hallie McGee, (CSI), as well as former ANW sales representative Tim Crowther, on the other.

The catalyst for the dispute is a short-lived partnership a few years back. ANW and CSI inked a "services agreement" in 2013, but it didn't work out, so they decided to part ways in 2014. When they parted, CSI signed a non-compete clause that prevented it from competing with ANW for three years after ANW finished a series of four payments totaling $140,000 (scheduled to be finished April 15, 2015).

CSI claims ANW made "several" of the payments, but before the final one was made, ANW filed suit in Washington state court against the Crush & Cooper owners for breach of contract and conspiracy. Furthermore, in April 2015, the state court granted a preliminary injunction against CSI, preventing them from contacting any wine, spirits or beer suppliers or any prospective customer to discuss the opportunity to distribute alcohol products or contacting any ANW customers, according to ANW.

Shortly thereafter in May 2015, Crush & Cooper owners Chad and Hallie McGee filed suit in federal court requesting declaratory judgement on: whether an "actual ripe and justiciable controversy exists," so they could assume or reject the non-compete clause. ANW would not respond for nearly a year as things played out at the state level.

The state court held CSI in contempt in October of 2015 for "willfully and intentionally disobeying and violating" the preliminary injunction by contacting and entering into distribution contracts with suppliers. As a result, the court sanctioned the Debtors a $2,000 deposit for each day they continued to fail to follow the preliminary injunction, and in addition, awarded ANW over $31,000 in attorney fees. ANW claims CSI continued to violate the preliminary injunction though, which puts them in breach of their breakup contract.

CRUSH & COOPER OWNERS FILE FOR BANKRUPTCY. To add another layer of complexity, the lawsuit in state court was stayed after Chad and Hallie McGee, and Tim Crowther, filed Chapter 7 bankruptcy in December 2015. Though ANW says Crush & Cooper's other part owners Elizabeth and John Doe Corbett have not filed bankruptcy.

Chipotle exec placed on leave amid drug allegations

Source: NRN Lisa Jennings Jun 30, 2016

Chipotle Mexican Grill Inc. said its chief creative and development officer Mark Crumpacker has been placed on administrative leave Thursday after reports said he had been indicted on charges related to a cocaine ring bust. The New York Daily News published a report that said Crumpacker was among 18 people who faced charges after police indicted three drug traffickers who allegedly sold cocaine in bars and clubs across Manhattan's Lower East Side.

Alleged buyers of the drugs were also charged. The New York District Attorney's office could not confirm whether Crumpacker was among those who face charges because some of the alleged buyers had not yet been arraigned or were not in custody. The New York Daily News said "papers showed" the Chipotle executive was a customer.

Chris Arnold, Chipotle's communications director, said the company knew very little about the charges, but that Crumpacker had been placed on administrative leave. "We made this decision in order to remain focused on the operation of our business, and to allow Mark to focus on these personal matters. Mark's responsibilities have been assigned to other senior managers in his absence," Arnold said in an email.

Crumpacker has been with Chipotle since 2009 when he was appointed chief marketing officer. He became chief development officer in 2013 and, in 2015, his title changed to chief creative and development officer, according to Chipotle's website. Before joining Chipotle, he was creative director for Sequence LLC, a strategic design and marketing consulting firm he co-founded in 2002.

According to The Daily News, Crumpacker was indicted along with a Fox Business producer and Merrill Lynch employee.

Courtwatch: Ram's Gate Sues Real Estate Attorney Involved in Purchase of Site

According to the complaint, alleged omissions forced Ram's Gate to conduct costly additional seismic work

by Kerana Todorov

July 01, 2016

A Carneros winery in Sonoma County has filed a $2 million lawsuit against a real estate attorney involved in the purchase of the site, home to the former Roche Winery.

Ram's Gate Winery LLC alleges attorney and real estate broker Lester F. Hardy of St. Helena failed to fully disclose information on the earthquake zone when

Ram's Gate backers purchased the at the Arnold Drive property near Sonoma Raceway, according to the complaint. Joseph and Genevieve Roche, former owners of Roche Winery, filed for Chapter 11 bankruptcy in 2005.

The partnership purchased the 137-acre property in 2006 for about $7 million to build the new winery, according to court records. The Ram's Gate Winery partnership, which includes Jeffrey O'Neill of O'Neill Vintners and Distillers and a past chairman of the California Wine Institute, opened the new facility designed by award-winning architect Howard Backen in 2011.

Ram's Gate Winery is seeking $2 million in damages and unspecified additional amounts from Hardy, according to the five-page complaint filed in Napa County Superior Court on June 10. According to the complaint filed in Napa, Hardy's alleged omissions forced Ram's Gate to conduct costly additional seismic work.

"Plaintiff planned to construct improvements on the Property on the site of the existing winery and/or on the engineered building pad." This plan was disclosed to Hardy "before he negotiated the purchase agreement," the filing continued. "Nonetheless, Hardy failed to fully and/or properly disclose to Ram's Gate information that had a material effect on Ram's Gate plans," the complaint alleges.

Sonoma County then "required Ram's Gate to extensively trench and excavate the site to determine the nature and extent of any earthquake faults," according to the lawsuit. Hardy declined to comment on the case as did a Ram's Gate Winery representative. An attorney for Joseph Roche, Peter Simon, of Santa Rosa, this week said Ram's Gate knew there were earthquake faults; the value of the land was not affected.

"I would be surprised if the case against Hardy is not dismissed very soon," Simon said. Simon plans to file a malicious prosecution against Ram's Gate on behalf of Joseph Roche, he said.

In another development, Ram's Gate Winery earlier this year agreed to pay $600,000 to Joseph Roche in attorney fees and other costs, according to court records. Genevieve Roche died in 2012. That ended a 2010 lawsuit Ram's Gate filed in Sonoma County against Joseph and Genevieve Roche, Hardy and others over the Roche Winery sale. The lawsuit alleged the defendants failed to provide information on the earthquake issues before escrow closed in December 2006, according to court records.

A Sonoma County Superior Court Judge signed the $600,000 judgment in April a year after the First Appellate District Court reversed a lower court decision awarding attorney fees and cost to the Roches. The case was then remanded to Sonoma County. In court documents, Ram's Gate and Roche representatives stated they agreed on the stipulation in favor of Roche "rather than spend more money and time litigating over the entitlement and amount of fees and costs."

A case management hearing in Ram's Gate's lawsuit filed against Hardy in Napa County Superior Court is set for Nov. 17.

Premier Cru lawsuit: Some customers to get refunds

Source: Berkeleyside Frances Dinkelspiel June 23rd

Six months after the wine store Premier Cru abruptly shut it doors, leaving thousands of customers without access to the wine they had purchased, relief may be on the way. The bankruptcy trustee appointed to liquidate the wine company's assets recently reached a settlement with a disgruntled patron that will allow many customers to recoup a portion of their investment - but only for pennies on the dollar. The settlement affects about 4,800 customers but excludes another 2,300 or so who may not see any refunds.

Michael D. Podolsky, who had $383,000 in wine stuck in Premier Cru's warehouse, filed a class action lawsuit in April against the trustee, Michael Kasolas, challenging his contention that most of the 79,000 bottles of wine in the warehouse at 1011 University Ave. belonged to the estate and not to the people who purchased the bottles. Podolsky believed the bottles belonged to those who had paid for them.

Kasolas' attorney, Mark Bostick, had argued in court that a 2009 bankruptcy case involving the Carolina Wine. Co. had determined that an estate owned the wine until it was actually shipped to a client. The trustee had planned to liquidate most of the bottles and use the proceeds to pay back secured creditors.

But the bankruptcy judge overseeing the case, William Lafferty, indicated from the bench in mid-May that he didn't agree with the trustee's basic legal argument. He said it was not "a matter of law." That meant that Kasolas and Bostick would have had to have mounted a lengthy and expensive legal defense to prove their point.

Spending months in court could have drained the estate of all its funds, leaving it without enough money to continue renting the air-conditioned warehouse where the wines are stored. So the two sides settled in early June.

"The legal arguments and disputes between the Trustee and the plaintiff . are extremely complicated, numerous and difficult to resolve," according to the settlement documents filed in court. "In all likelihood, nonconsensual resolution of those disputes would consume many months or years of litigation, at much greater expense and at significant risk of loss. In addition, the bottles of wine in question would need to be stored and preserved at substantial cost throughout the litigation, and the Trustee's limited funds and other resources, and lack of long-term warehouse occupancy, would make such storage and preservation highly problematic and unlikely. As a result, at the end of the litigation, there might be nothing left of value to recover, despite prevailing on the issues."

Judge Lafferty will hold a hearing July 27 to rule on the settlement, although he gave tentative approval from the bench in early June. The people who will benefit most from the settlement are those whose wine had been boxed and addressed and were in a special section of the warehouse awaiting shipping. They will be able to get their wine back after they pay 20 cents on each dollar of cost plus tax, shipping, and handling. This group only makes up a small percentage of the creditors, as there were only 2,674 segregated bottles, about 3.4% of the total collection.

The customers who had general bottles stored in the warehouse and the ones whose wines John Fox, the owner of Premier Cru, had sold multiple times will get a small fraction of what they paid for their wines. They will not have the ability to get back the actual bottles. They can recover anywhere from five cents to 30 cents on the dollar, according to court documents.

The most unlucky customers are the ones who had paid for wine "futures," or wines that were still aging in casks around the world and had not yet been delivered to Premier Cru. There are about 2,319 customers who paid $45 million for wine that has not been delivered, according to Wine Spectator. It is unlikely this group will see any money.

Now that a settlement has been reached, the trustee plans to auction off the entire collection. Kasolas expects the bottles of wine will fetch at least $5 million, or about $63 per bottle. They may sell for more. Kasolas said the customers should get around $2 million of the proceeds with the rest going to secured creditors and legal fees.

The two law firms that brought the class action suit, Meyer Law Group and Chavez & Gertler of Mill Valley, are seeking 25% of the sale up to $650,000, according to court documents. The trustee's expenses of at least $155,000 will also come from the settlement, according to court documents.

The fate of the building at 1011 University Ave.is still unknown. While Fox's LLC owns the property, it has numerous liens against it. The Taylor Family trust lent Fox $3.8 million and filed notice in court that it planned to foreclose on the property. That action has been postponed until November, said William King, the attorney for the trust.

The LLC also owes more than $130,000 in back taxes on the building. The 29,610-square foot property with three buildings is for sale for $6.8 million. The settlement is a major step in resolving Premier Cru's problems but not Fox's. The FBI is still investigating him for possibly running a Ponzi scheme. He has

also filed for personal bankruptcy.

6.29.16

YET ANOTHER DOJ A-B PROBE: THIS TIME OF CRAFT ACQUISITIONS Yesterday the Capitol Forum reported (and CBD covered) that sources indicate the DOJ is launching yet another investigation into A-B, this time into their craft acquisition activity. We understand it focuses on the recent transaction for Virginia's Devils Backbone. This is a separate probe from the one Reuters reported in May, on distributor incentive programs. That too involved craft brewers. According to Capitol sources, the DOJ "has contacted brewers and is sympathetic to concerns that AB InBev's craft acquisitions, newly aggressive incentive programs, and distributor acquisitions are all part of a broad strategy to close off craft brewers' ability to compete in the U.S. beer market." The Capitol Forum also believes "the latest investigation may provide political cover for the DOJ to clear the AB InBev/SAB transaction without behavioral conditions to address complaints from craft brewers and distributors," though they suggest investigations could also be delaying the merger temporarily. And in the longer run, "the DOJ's investigations, at a minimum, are likely to curb AB InBev's ability to acquire more craft breweries and distributors."

Plethora of Latent Tied-House Violations are Coming to a Head in Texas

6.29.16

The Texas Alcoholic Beverage Commission (TABC) enforces a "One Share Rule," which means a single overlapping share of stock ownership between tiers, whether direct or indirect, is in violation of the state's tied-house laws.

Our WSD team brought this law and the story that follows to light last month with their coverage on Warren Buffett's food distribution business, McLane Company, and its determination to distribute alcohol in Texas. McLane tried to secure an alcohol distribution permit from the TABC back in 2012, but was subsequently denied for its violation of the One Share Rule. The TABC rejected the permit because McLane's parent company, Berkshire Hathaway, owns a small (less than 5%) interest in a retailer: Wal-Mart.

McLane smelled something fishy and it's been investigating the rule and TABC licensing practices ever since. McLane's conclusion: there are plenty of companies in violation, but the agency only enforces it when they choose to.

On Monday, the Texas Association of Business (TAB) and McLane (a member of the TAB) filed suit against the TABC in federal court in attempt to eliminate the One Share Rule and create a "level playing field" amongst Texas businesses.

TABC FACES SUITS FROM TRIO OF MAJOR CORPORATIONS. McLane isn't the first company looking to remove the law, they join two other major corporations - Mexican c-store operator OXXO and Wal-Mart -also challenging the rule and TABC's arbitrary enforcement.

OXXO STARTED THE SHOWDOWN. In 2011, the TABC denied OXXO's request to sell beer in its Texas c-stores because its parent company, FEMSA, had a 20% stake in Heineken. OXXO fought the decision in various courts for three years, but to no avail. In 2014, the company asked the Texas Supreme Court to review its case, it agreed to do so last month.

MORE ON MCLANE'S RUN-IN; TAB STEPS IN. Following McLane's denial in 2012, the company sent the TABC a series of Public Information Act requests hoping to better understand its rationale, but the TABC failed to aid them in that endeavor, alleges McLane. As a result, McLane filed two separate lawsuits against the TABC in January and April 2016. After TABC chairman Jose Cuevas declined to meet up with McLane this month, the TAB said it had "no choice" but to ask the Court to declare the One Share Rule and its licensing practices unconstitutional.

"VIRTUALLY EVERY LICENSEE" IS AT RISK; THE TABC ITSELF IS IN VIOLATION. If the TABC really wanted to play by their own rules, "virtually every TABC licensee" would be at risk, per TAB and McLane complaint filed yesterday. In fact, all TABC employees themselves are in violation of the rule through their retirement investments. "The TABC cannot seriously maintain and defend a legal theory that is violated by every single employee and officer of its own agency," writes TAB.

The TAB and McLane label the One Share Rule as an "absurd extreme," but what's worse is the TABC does not apply the rule "equally" amongst industry participants, per complaint. According to the TAB, roughly 40 manufacturers, distributors and retailers with overlapping ownership had more than 2,500 permits approved or renewed by the TABC.

TAB claims the TABC has attempted to defend its selective application of the One Share Rule by invoking the principle of prosecutorial discretion. "But this is not a case of prosecutorial discretion," writes TAB, "It is a case of licensing. And selective licensing is fundamentally different from selective prosecution or enforcement."

FINAL THOUGHT: TABC FAVORING IN-STATE COMPANIES? Last, is Wal-Mart's case with the TABC. The agency denied the retailer's attempt to secure a package store permit because it's a publicly owned company. Wal-Mart sued the agency last year over the denial, contending that the state makes an arbitrary exception for publicly traded hotels. That case is still playing out. The common thread in all three cases? The Texas Alcoholic Beverage Commission's alleged discrimination against out-of-state corporations. McLane may be Texas-based, but the TABC's gripe is with its parent company Nebraska-based Berkshire Hathaway.

Beverage distributor McLane says Texas regulator is playing favorites with alcohol licenses

McLane Co. was founded in Texas in 1894. The Temple-based wholesale distributor to retailers has annual sales of $48 billion and employs 20,000 people, including 3,900 in Texas.

By Maria Halkias Follow @MariaHalkias mhalkias@dallasnews.com
Retail writer
Published: 27 June 2016 09:57 AM

Texas' image of being a business-friendly state is being challenged in federal court by one of its oldest continuously operating companies and the 85-year-old business association that acts as a statewide chamber of commerce.

Temple-based McLane Co., a $48 billion-a-year wholesale distributor of food and beverages, and the Texas Association of Business on Monday filed a lawsuit in Austin against the Texas Alcoholic Beverage Commission and its four commissioners.

McLane, which was founded in 1894 in Cameron, has been trying to get a permit to sell wine and liquor to stores in Texas since 2011 but has been told it violates cross-ownership rules. The state commission operates under a three-tier rule saying companies can't have even one-share ownership that overlaps alcoholic beverage makers, distributors and retailers.

McLane and the business group called the TABC's rules "absurd and irrational" and said the TABC is applying its rules arbitrarily. The state commission is also violating the equal protection clause of the U.S. Constitution, the lawsuit said, which. it said, "forbids government officials from treating similarly situated persons differently for no rational reason."

The lawsuit was filed this morning. Chris Porter, a spokesman for the TABC, said the Commission can't comment on pending litigation.

Here's why the state is denying McLane permits, according to the lawsuit:

-- McLane, a distributor, has been a subsidiary of Warren Buffett's Berkshire Hathaway Inc. since 2003.

-- Berkshire Hathaway's broad-based stock holdings include a 2-percent stake in Wal-Mart, a retailer of alcoholic beverages.

-- Texas regulates alcoholic beverage business under a "three-tier system" that is set up to forbid one entity from controlling or influencing businesses that operate in different tiers of the industry: manufacturing, wholesale distribution and retailing.

-- Even one share of ownership in a publicly traded company across tiers is considered a conflict, according to the TABC.

But the lawsuit said TABC has recently taken the three-tier system to "an absurd and unlawful extreme" and if applied consistently would put every licensee to an unreasonable test based on mutual funds owned by companies and through investments in pension funds for their employees.

The TABC is out-of-step with other states that operate under a three-tier system, said Bill Hammond, CEO of the Texas Association for Business.

Other states that prohibit companies from having interests across more than one tier apply it only if they control or influence the activities of businesses in more than one tier, not as investments, Hammond said. "Anyone who owns a mutual fund would be in violation."

Texas has been successful because "we make it easier, not harder, to do business here," Hammond said. "Regrettably, the TABC's policies do not reflect the vision and philosophy of the state, and through its absurd interpretation of the Alcoholic

Beverage Code, it is discouraging business expansion."
"We want to keep the three-tier system in place," said Neftali Garcia, vice president of government affairs at McLane. "But we believe the state agency is applying the rules inconsistently, without accountability, and is selecting winners and losers."
The plaintiffs said that in the last year, over 40 manufacturers, distributors and retailers with overlapping ownership had over 2,500 permits approved or renewed by the TABC.
Even TABC's own employees, the lawsuit said, would violate the rule since Texas public pensions invest in companies that operate in the three tiers of the alcoholic beverage business.
The complaint quotes a report by University of Texas finance professor William Charlton that said the state's public pension funds own shares in alcoholic beverage manufacturers and retailers. So the state is violating TABC rules, he said, since the state of Texas is an alcoholic retailer through the sale of beer at UT football games and mixed beverages at other university events.
San Francisco-based Core-Mark, a major competitor of McLane's, violates the rules that the TABC uses to reject McLane, the lawsuit said, since Core-Mark has several investors that also own shares in alcoholic retailers and manufacturers. In May, McLane submitted a protest to the TABC relating to the renewal of two permits held by Core-Mark. In February, McLane submitted another protest about the renewal of four permits held by Cost Plus World Market, saying shareholders in its parent company, Bed Bath & Beyond, own shares across three tiers of alcoholic makers, distributors and retailers.
After meeting with the TABC about its protests, McLane said in the lawsuit, it was told by the commission that an investigation "might take six months or even longer."
"The TABC has offered no rationale to support its selective licensing practice, and none is apparent other than naked economic protectionism," the complaint said. "The conclusion is unavoidable: the TABC wants to pick winners and losers in the Texas market for alcoholic beverages."
McLane is already distributing alcoholic beverages to retailers in Colorado, Florida, Georgia, North Carolina and Tennessee.
"The only difference between McLane and those many similarly situated companies that have been granted licenses is that McLane is a would-be new entrant and competitor, rather than a favored incumbent," the lawsuit said.
Besides Core-Mark and others, McLane would go up against the biggest wine and liquor distributor in the state, Dallas-based Glazer's, which merged in January with Miami-based Southern Wine & Spirits of America. That merger formed the largest wine and spirits distributor in North America. Families of both Glazer's and Southern continue to be shareholders of the new company.
McLane's Garcia said the wholesale distributor is pushing the issue because many of its retail customers are asking it to also deliver alcoholic beverages.
The wholesale company supplies groceries and other merchandise to almost 90,000 stores across the U.S. from 80 distribution centers. In Texas, it employs 3,900 people and has facilities across the state.
McLane and the Texas Association of Business have asked for a jury trial.
McLane and the Texas Association of Business are represented by two Dallas law firms: Charhon, Callahan, Robson & Garza and Gibson, Dunn & Crutcher.
Wal-Mart sues the state of Texas, seeks chance to sell liquor

2016 06 27 [1] Complaint @
https://www.scribd.com/doc/316886117/2016-06-27-1-Complaint?_ga=1.98830619.484380716.1468017328

More on the Corporations Challenging TABC's Unchecked Power

If you've ever done business in Texas, you know the Texas Alcoholic Beverage Commission (TABC) has long operated with little involvement from the government. But change is afoot in the Lone Star State as three major corporations--Mexican c-store chain OXXO, McLane Company and Wal-mart--are taking the agency to task for protectionist behavior in enforcing its tied-house laws.

Yesterday, we broke the news that the Texas Association of Businesses (TAB) and McLane Company have filed a federal lawsuit against the TABC for "arbitrarily" enforcing the state's "One Share Rule." We will get into the details of that suit, but to understand the much bigger picture of the allegations against TABC, we need to take a look at a couple of other related cases first.

TABC BLOCKS MEXICAN C-STORE CHAIN FROM SELLING ALCOHOL. This tied-house dispute began with Mexican c-store operator OXXO wanting to sell beer in its Texas stores. The TABC denied its application for a permit in 2011 because its parent company, FEMSA, had a 20% stake in Heineken, thus violating the TABC's One Share Rule. In December 2012, Travis County Judge Samuel Biscoe reviewed the case made against Cadena Commercial USA (d.b.a OXXO) and determined the TABC was correct in denying the permit.

In September 2014, the company attempted to appeal the Judge's decision. Unfortunately for OXXO, the Texas Court of Appeals affirmed the lower court's decision [see BBD 09-10-2014]. That wasn't the end of it though. OXXO then asked the Texas Supreme Court to review its case in December 2014, which it agreed to do just last month.

[Note, TAB and McLane have filed two letters, one in January and one in June 2015, in support of OXXO's appeal.]

HOW MCLANE GOT INVOLVED. McLane is a Texas-based subsidiary of Berkshire Hathaway that provides grocery and foodservice solutions to many of the nation's largest c-stores, mass merchants and chain restaurants. In 2011, the distributor decided it wanted to try its hand at distributing alcohol as well. But the TABC denied it a permit because parent company Berkshire Hathaway owns "less than 5%" interest in a retailer that sells alcohol, which violates the One Share Rule.

The decision really lit a fire under McLane, which began investigating the One Share Rule and other licensing practices "in order to better understand its rationale... and to assist in determining whether [they] should re-apply," Neftali Garcia, McLane Co.'s vp of government affairs and corporate comms, told WSD last month [see WSD 05-24-2016].

During its research process, McLane sent the TABC Public Information Act (PIA) requests, which are now central to ongoing lawsuits between the two

entities. Basically, McLane tried to get its hands on any and all information it could relating to tied-house laws, the One Share Rule, how those laws are implemented, recent violations etc., but it says the TABC was unhelpful.

As a result, McLane filed two separate lawsuits against the TABC in January and April 2016 after the agency failed to comply with the majority of its PIA requests. For each suit, McLane is seeking a writ of mandamus (to order TABC to fulfill its requests); a jury trial for all issues triable; and monetary relief of $100,000 or less, plus the requested documents.

TAB FILES SUIT OVER ONE SHARE RULE. On June 10,McLane says it requested to meet with TABC chairman Jose Cuevas, Jr., but on June 21 the chairman declined to meet him. As result, TAB (which McLane is a member of) said it had "no choice" but to ask the Court to declare the One Share Rule and its licensing practices unconstitutional under the Equal Protection Clause, the Due Process Clause, and the Dormant Commerce Clause of the United States Constitution. The organization's ceo Bill Hammond tells WSD this is a rare scenario for TAB.

In its complaint filed yesterday to the US District Court for Western Texas, TAB claims if the TABC followed the letter of the law exactly, it would endanger "virtually every TABC licensee." If you want to get technical, companies in violation would include any licensees whose shares are publicly owned by a mutual fund or pension fund, and licensees that are not publicly traded, but provide pension funds for their own employees, are also likely in violation.

In fact, all TABC employees themselves are in violation of the rule through their retirement investments. "The TABC cannot seriously maintain and defend a legal theory that is violated by every single employee and officer of its own agency," writes TAB.

But those are drastically different ownership scenarios compared to McLane's. Two similarly situated scenarios include Vanguard Group Inc., which owns 7.2% of Core-Mark (wholesaler), 8.4% of Bed Bath & Beyond (retailer), and 9.3% of Molson Coors (manufacturer); and JP Morgan Chase, which owns 0.9% of Core-Mark (wholesaler), 5% of Bed Bath & Beyond (retailer), and 8.8% of Molson Coors (manufacturer). Interestingly, Vanguard owns more share of Wal-mart than McLane does, which McLane has pointed out to the TABC to no avail.

AN UNEQUAL STANDARD. But the real problem according to TAB is not the law, but that TABC does not apply its One Share Rule "equally" amongst industry participants, per the complaint. You will recall, TABC will not approve McLane's application for an alcohol wholesaler permit because Berkshire Hathaway Inc. owns stock in major retailers despite the exemptions provided to the aforementioned companies.

TAB claims the TABC has attempted to defend its selective application of the One Share Rule by invoking the principle of prosecutorial discretion. "But this is not a case of prosecutorial discretion," writes TAB, "It is a case of licensing. And selective licensing is fundamentally different from selective prosecution or enforcement."

TAB continues: "The TABC is engaged in a blatant policy of selective licensing, favoring incumbents that demonstrably violate the One Share Rule, while

rejecting new entrants under that same rule. The TABC has offered no rationale to support its selective licensing practice, and none is apparent, other than naked economic protectionism."

IN STATE VS. OUT OF STATE ARGUMENT. There is also Wal-mart's case against the TABC to consider. Recall, Wal-mart sued the agency in 2015 for denying it a package store permit. The reason for the denial was because Wal-mart is a publicly owned company, but the retailer has argued in court that the state makes an arbitrary exception for publicly traded hotels [see WSD 01-22-2016]. That case is still ongoing as well.

Wal-mart's case is worth mentioning because it calls attention to a bigger issue that all three of these cases are fighting against: the Texas Alcoholic Beverage Commission's alleged discrimination against out-of-state corporations. (Yes, McLane is based in Texas, but the TABC's sticking point is with its parent company Nebraska-based Berkshire Hathaway.) These cases will likely be coming to a head soon as the Courts sort through them. And let's not count out the possibility that the state legislature could weigh in on the matter when its next session begins in six months.

Eleventh Circuit (Savannah, GA) court allows Tiger Paw to manufacture Purple Haze liqueur brand

Source: DBR
7 July 2016

The Eleventh Circuit (Savannah, GA) court has ordered Tiger Paw Beverages that it may continue to manufacture, distribute and promote its popular brand, "Purple Haze" liqueur.

The order comes after a lawsuit was filed against Tiger Paw Beverages LLC, co-owned by Leon Hendrix (Jimi Hendrix's biological brother) and Joe Wallace.

The action was filed by the Jimi Hendrix Family Companies, operated by step-sister, Janie Hendrix (Plaintiffs) stating that Tiger Paw allegedly infringed upon and diluted their trademarks.

Tiger Paw sells and distributes a premium beverage under the brand, Purple Haze Liqueur. The Plaintiffs do not sell or distribute any products in this class and have stated on the record that "they choose not to sell" and "do not own and wish not to be involved in" the sales of such products.

Eleventh Circuit court said: "to succeed on the merits of a trademark claim, a plaintiff must show (1) that it has trademark rights in the mark or name at issue and (2) that the defendant adopted a mark or name that was the same, or confusingly similar to the plaintiffs' mark, such that there was a likelihood of confusion for consumers as to the proposer origin of the goods (or services) created by the defendant's use of the name." Ferrellagas Partners, L.P. V Barrow, 143 F. App'x 180, 186 (11th Cir. 2005).

In regards to the similarities of the alleged infringement, the court concluded: "When considering the text "Purple Haze Liqueur" and its accompanying

formatting, that the mark is not similar to any of Plaintiff's registered trademarks. Second, the stylized "PH," which could arguably be viewed as a "JH" is different in both style and in text from Plaintiff's trademarks. As such, there are not enough similarities in the style of the logo to move forward on this claim."

The courts also weighed in the favor of Tiger Paw stating that there are no similarities in sales methods because the plaintiffs sell their products online, whereas Tiger Paw uses third parties to distribute its products to retail stores that sell "Purple Haze" Liqueur and other liquor to the public.

The plaintiffs' also failed to prove their dilution claim.

The courts stated: "in the Eleventh Circuit, (i) it is well established that (a) preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establish(s) the burden of persuasion."

To do this, the plaintiffs "must provide sufficient evidence that (1) the mark is famous, (2) the alleged infringer, adopted the mark after the mark became famous; (3) the alleged infringer diluted the mark; and (4) the defendant's use is commercial and in commerce." None of which can be achieved without a trademark to dilute.

In conclusion, the Courts found: "the plaintiffs have not produced any evidence indicating that members of the public have confused Tiger Paw's product with Plaintiffs or their trademarks, and the plaintiffs' have not demonstrated actual confusion with respect to their marks."

Additionally, the Courts agreed that "while the Plaintiffs' trademarks are strong, Tiger Paw marks are not sufficiently similar; Tiger Paw's marks have not actually been confused with Plaintiff's; and Tiger Paw has not acted in bad faith with respect to Plaintiffs' marks", and "as for the Plaintiffs' marks and the marks found on Tiger Paw's product labeling, no substantial likelihood of confusion exists to prevent Tiger Paw from distributing their product" as the Plaintiffs sought.

Really???

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Oklahoma: Arrest Over Bacon Vodka Prompts Questions From Oklahoma's Alcohol Commission

Source: KGOU Brian Hardzinski June 23, 2016

The manager of The Pump Bar near the Paseo Arts District in Oklahoma City was recently arrested for infusing the bar's liquors with other flavors, including bacon, jalapeños, and garlic. The bar's owner, Ian McDermid, is fighting the criminal charge against his employee, but he's also asked the state to determine whether establishments like his can add fruit, vegetable, spices, and cured meats to alcohol, The Journal Record's Dale Denwalt reports:

At The Pump Bar, brunch-time bloody marys are served with vodka enhanced with either bacon slices or a jalapeno-garlic combo. Or they were until a local police officer stepped in. "You should see the look on people's faces, the laughs, when you say my manager went to county lockup for three days because we put strips of bacon inside a bottle of vodka," McDermid said.

Because an Oklahoma City police officer made the arrest, and because state regulations don't explicitly mention infusion, McDermid hired a lawyer to ask the Alcoholic Beverage Laws Enforcement Commission for a declaratory ruling. He wants to know if it's legal, and if so, which method of infusion is legal. The manager's criminal case is pending.

During June's ABLE Commission meeting, director Keith Burt said he hadn't received a notice from the Oklahoma City Police Department about the arrest. John Maisch, a former ABLE attorney, presented the declaration to commissioners, who seemed supportive of the infusion process. But they decided to hold off on answering questions, Denwalt writes:

"If the restaurants are doing something unlawful, then they need to be notified that it's unlawful," Maisch said. "There are dozens of restaurants throughout the state of Oklahoma that are infusing drinks, so if it's illegal then someone has neglected to tell them." The ABLE Commission could present its ruling at the next meeting on July 15.

Until he gets a favorable ruling, McDermid told The Journal Record that he's missing part of his brunch crowd who've gone to other restaurants - places who haven't been cited for infused drinks: In just the second half of 2015, when he first started selling the drink, sales of bloody marys topped $16,000. "(Customers) ask for it every brunch, and they're always disappointed," he said.

AND...

California: Party bus with 33 teens, alcohol and drugs stopped by police in Marin County

Source: Marin Independent Journal
By Gary Klien
06/23/2016

A bus driver was arrested in Larkspur after police stopped him driving an alleged party shuttle carrying 33 Marin teenagers and a supply of alcohol and drugs. James Frederick Greene, a 63-year-old San Francisco resident, was booked into Marin County Jail on suspicion of child endangerment, possession of narcotics, possession of a switchblade and other violations. His bail is set at $10,000.

Greene was arrested at about 5:40 p.m. Monday after police received an anonymous tip about a charter bus at Larkspur Landing with juveniles drinking alcohol. Central Marin police intercepted the shuttle as it was turning out of the ferry terminal parking lot, its main door swinging open, said police spokeswoman Margo Rohrbacher.

Greene initially told police he was taking the teens home to their parents and that he was unaware of any alcohol on board, Rohrbacher said. But police could

smell alcohol and marijuana, and they searched the tour bus. The search revealed 30 separate containers of hard alcohol, a case of spiked lemonade and a jar of marijuana hidden under a seat. Police also found empty or partially empty containers of alcohol in trash cans, and a purse containing a mix of prescription drugs.

In addition, police found bags allegedly belonging to Greene that contained suspected narcotics, drug paraphernalia, prescription drugs and alcohol. The boys and girls in the shuttle ranged from 15 to 17 years old. They live in Kentfield, Larkspur, Mill Valley, San Anselmo, San Rafael and Tiburon. The organizer of the party was identified as a 16-year-old Tiburon boy. He told police he booked the bus online for a six-hour excursion around San Francisco and Marin. He said he paid $900 cash and did not have to show identification.

The teens' plan was to meet at the ferry terminal, leave by 6 p.m. and get dropped off at the ferry terminal at midnight, Rohrbacher said. Police stopped the bus at the beginning of the trip, and the money never changed hands. The 16-year-old girl who had the medications in her purse was cited for possession of narcotics, marijuana and three types of false identification. Police left the discipline of the remaining teens to their parents, who were called to pick up the children.

Police contacted the bus company to come and retrieve the shuttle. Central Marin police referred the case to the California Public Utilities Commission Transportation Enforcement Section for potential regulatory action. Police said the bus is owned by Fantastic Voyage Express Transportation of Richmond, but the Tiburon boy booked the charter through the website of a company called Galactic Transporter.

A spokeswoman for the California Public Utilities Commission said it had no listing for a company called Fantastic Voyage Express Transportation. And a woman whose name is listed as a principal of Galactic Transporter said the company belongs to her ex-husband and that he sold the charter bus previously. Greene remained in custody Tuesday afternoon pending further review by the Marin County District Attorney's Office. An initial court appearance is tentatively scheduled for Wednesday.

Judge tosses Kentucky Mist moonshine trademark case against UK

Ruling said there is no actual controversy
Kentucky Mist attorney said he won't give up
University of Kentucky's claim of sovereign immunity is upheld

Source: Lexington Herald Leader
By Cheryl Truman
June 23rd

A U.S. district court judge delivered a victory Thursday to the University of Kentucky in its legal battle with a Whitesburg moonshine company over trademarks.

Kentucky Mist Moonshine filed suit in November against UK in a federal trademark-registration case involving Kentucky Mist Moonshine's registration in

a trademark category that includes hats, hooded sweatshirts, jackets, pants, shirts, shoes and socks.

The category is one in which UK has long been registered and in which it claims use of the word "Kentucky" to identify its athletic uniforms and articles of clothing sold to fans.

UK had wanted Kentucky Mist to stop trying to register its products in that category; Kentucky Mist had sought a court ruling that there is no infringement by Kentucky Mist Moonshine's use of the word "Kentucky."

The court ruling by U.S. District Judge Danny Reeves said that that case "was not ripe ... and is still not ripe" in that there was no "actual controversy."

"The plaintiff here misstated UK's intentions early on, attempting to create a controversy," the ruling said.

UK spokesman Jay Blanton said the university is "pleased that the court dismissed the lawsuit in a strongly worded opinion which recognizes the University's sovereign immunity and its interest in protecting its trademark interests.

"We are also pleased the court recognized the University tried in good faith to reach an agreement that would allow Kentucky Mist to sell its merchandise while fully respecting the University's trademarks."

Attorney Jim Francis, who represents Kentucky Mist, described the ruling as "a setback."

"The case isn't over," Francis said. "It's a very narrow ruling by the judge in this case."

He said three options remain for the plaintiffs: appeal the decision based on the misinterpretation of Kentucky law; file a separate lawsuit alleging that UK, without due process, has taken a property right away from Kentucky Mist; or continue to pursue the case as it is still pending before the U.S. Trademark Trial and Appeal Board, where UK does not have sovereign immunity.

Kentucky Mist Case Not Exactly What It Seems

Source: The Chuck Cowdery Blog
June 25th

There is something wrong with the way the Kentucky Mist v. University of Kentucky (UK) case is being reported and it is embodied in these two photographs from the Lexington Herald Leader (Kentucky's best news source, by the way). http://chuckcowdery.blogspot.com/

From most of the reports about this case it is easy to arrive at the following conclusions: (1) Kentucky Mist is a tiny, fledgling company being stomped on by a giant university. (2) UK wants to 'own' the word 'Kentucky' and prevent anyone else from using it. (3) The U.S. District Court for the Eastern District of

Kentucky has sided with the big, bad university.

The proof that things are not exactly as they seem is in these pictures. The sign on the building says 'Kentucky Mist Moonshine.' The hats and other apparel they sell inside say 'Kentucky Mist Moonshine.' The name 'Kentucky Mist Moonshine' appears on all of the company's products.

Has UK made any effort to stop Kentucky Mist from using the name for any of those purposes? The evidence shows that it has not. UK merely objected to Kentucky Mist's effort to trademark its name for purposes such as use on apparel. The University of Kentucky already has a trademark for those purposes. UK is not objecting to Kentucky Mist trademarking its name for distilled spirits products and no one is objecting to Kentucky Mist actually using the name on apparel.

"The plaintiff here misstated UK's intentions early on, attempting to create a controversy," wrote Judge Danny Reeves in his decision. According to the New York Times, UK objected to Kentucky Mist's filing originally because they wanted to get an agreement from Kentucky Mist that it wouldn't use Royal Blue and White for its apparel, which are UK's colors. Instead of negotiating, Kentucky Mist filed suit. The result has been a lot of press coverage, millions of dollars worth of free publicity for Kentucky Mist.

So what about Kentucky Mist Moonshine itself? Well, 'moonshine,' first of all, is not a type of distilled spirit. It is any distilled spirit made illegally. So 'Legal Moonshine' is an oxymoron. Distillers and marketers use it to tap into the term's romantic outlaw connotations, especially in Kentucky's eastern mountain region where Kentucky Mist is located. Since moonshine isn't a type of distilled spirit, the product's actual type must be shown on the label. Kentucky Mist is 'spirits distilled from cane,' so sugar shine, a mash made from sugar (the same stuff you put in your coffee) that is fermented and distilled, at some alcohol concentration below neutrality (i.e., less than 95% ABV).

That is pretty authentic. Table sugar is what most 'real' (i.e., illegal) moonshiners use because it is readily available, cheap, and easy to ferment. According to their web site, Kentucky Mist actually distills its product, unlike some well-known moonshine marketers who use commercially produced GNS. That's a good thing. Not so good is their attempt to link the founder's moonshining ancestor to Al Capone when both were in Atlanta Federal Prison. Capone was there only from 1932 until 1934 and already suffering from the syphilis that destroyed his mind. That the progenitor of Kentucky Mist "formed a good friendship" with Capone as claimed is highly unlikely.

Legal alcohol producers should think twice before associating themselves with criminals and criminal activities.

The web site writer also doesn't understand the difference between a moonshiner (a maker of illegal spirits) and a bootlegger (a person who sells spirits illegally).

Kentucky Mist seems to feel it has been done a great injustice but the facts say otherwise.

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