DUNCAN LIQUOR LAW LETTER

January, 2017

A monthly newsletter for the clients of R.E. "Tuck" Duncan, Attorney at Law

Please forward as you deem appropriate.

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This information is not to be considered legal advice.
Consult a competent attorney on specific questions.

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"Wine is the most healthful and most hygienic of beverages." Louis Pasteur

REHEARING TODAY IN SAN FRANCISCO:

California's Tied-House Law

Business and Professions Code Section 25503(f)-(h) forbids alcoholic beverage manufacturers and wholesalers from compensating retailers for advertising their products. For example, you cannot pay a liquor retailer to hang your sign in a window instead of a competitor's sign. Enacted in the wake of prohibition, this "tied-house" statute is designed to prevent large liquor manufacturers from controlling saloons and other retail outlets, because such control was thought to foster monopolies, encourage commercial bribery and lead to an unwanted proliferation of drinking establishments. A previous First Amendment challenge was rejected in 1986 on the grounds that the statute directly advanced legitimate government interests.

In 2011, the Retail Digital Network brought a new challenge to the statute following the U.S. Supreme Court's decision in Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011), which held that heightened scrutiny should be applied to the review of regulations prohibiting nonmisleading commercial speech regarding lawful products. The district court rejected this challenge, but in January 2016 the Ninth Circuit reversed, holding that the heightened standard did indeed apply and that, on remand, the government would have to show that the statute is a reasonable and proportional "fit" with the interest being advanced. In November, the court granted the government's petition for an en banc rehearing. Retail Digital Network v. Appelsmith, 810 F. 3d 638 (9th Cir. 2016).

2017-01-19 1:00 pm Courtroom 1, 3rd Floor Rm 338, James R. Browning U.S. Courthouse, San Francisco - En Banc

Case No.	Title Nature Origin Time / Side
13-56069	Retail Digital Network v. Ramona Prieto - Retail Digital Network, LLC., appeals from the district court's summary judgment in its action seeking to declare California Business and Professions Code Section 25503, subdivisions (f), (g), and (h) unconstitutional on First Amendment grounds. [2:11-cv-09065-CBM-PJW]

Winery sues company over apple cider labels

King Estate Winery is seeking $100,000 in damages from Oregon Honey Products, which does business as Nectar Creek.

Published on December 30, 2016 8:53AM

EUGENE, Ore. (AP) - A Lane County winery has filed a lawsuit over nearly 800 gallons of apple cider it says it can't sell because the Corvallis company that bottled it didn't seek the proper label approval from federal regulators.

The Register-Guard reports King Estate Winery is seeking $100,000 in damages from Oregon Honey Products, which does business as Nectar Creek.

The suit, filed Dec. 19, alleges the winery paid $7,000 to Nectar Creek as part of an agreement requiring the company to bottle cider and obtain federal "certificate of label approval." The approval allows an alcoholic beverage to be sold in interstate commerce.

The winery claims Nectar Creek never submitted the application for label approval, leaving the bottles of cider unable to be sold.

Nectar Creek co-founder Nick Lorenz declined to comment on the lawsuit

January 4, 2017

Charles Banks Claims Lack of Jurisdiction Over Wire Fraud Charges

Charles Banks, founder of Terroir Capital, was indicted for wire fraud in September as a result of his business with former NBA player Tim Duncan [see WSD 09-12-2016]. While we were busy covering acquisitions, the Feds heaped on two additional counts of wire fraud last month, and Charles filed a motion to dismiss.

BACKGROUND. Charles Banks is the founder, managing partner and majority interest holder in Terroir Capital, which manages about $200 million worth of assets in hospitality and wine. The trouble lies with Charles' business with NBA star Tim Duncan. Tim, who remains an investor in Terroir Capital, sued Charles for allegedly urging him to invest in multiple hotels, wineries, and most importantly, a company called Gameday Entertainment, without making him aware of Charles' own interests in those businesses. Though the indictment and SEC lawsuit are solely focused on Charles' actions at Gameday Entertainment, a sports business where Charles was chairman.

ADDITIONAL FRAUD COUNTS. The superseding indictment--which, as its name suggests, trumps the original indictment--was filed after the feds discovered further communication between Charles and Tim about Gameday, namely text message exchanges and faxes. As a result, Charles is now being charged on four counts of wire fraud.

MOTION TO DISMISS. Charles then filed a motion to dismiss three of the four fraud counts on the grounds that the Western District of Texas--where the indictment was filed--lacks jurisdiction because that's not where the alleged wire frauds took place. The motion to dismiss states: "...there is no factual allegation, nor could there be, that any of these wire communications came from, to or through the district." The motion contends that prosecuting in the district violates the Constitution and the federal venue statute.

The wire fraud statute does not distinguish between proper and improper venues for prosecution. However, Charles argues that wire fraud and mail fraud are "virtually identical" and thus should be treated the same.

Charles has also entered a plea of not guilty, and his court date is currently set for April 17. Recall, Charles faces up to 20 years in prison for each count if convicted. Thus, a dismissal of the majority of the counts would considerably reduce his potential sentencing.

Store owner to challenge decision

- By Russ Corey Staff Writer
  January 2017

TUSCUMBIA -- The owner of Spring Valley Market said she will speak to the Alabama Alcoholic Beverage Control board after Colbert County commissioners denied her request for a license to sell beer.
But if Rhonda Salazar decides to challenge the decision, she will have to take the case to Colbert County Circuit Court.
The County Commission voted unanimously Tuesday to deny Salazar's request for a beer license after several ministers spoke against it.
Salazar said she acquired the store, which is known for its barbecue pork and chicken, last month. The store is at the intersection of Spring Valley Road and Ricks Lane in eastern Colbert County.
In her brief comments on Wednesday, Salazar told commissioners she wanted the license to help increase business.
"That's the reason I bought the business, because Colbert County is wet," she said.
Salazar said she would check with the Alcohol Beverage Control Board to determine what options she has.
Dean Argo, government relations manager for the ABC, said the state agency would likely not overturn a decision by a local government.

"Once she petitions the local government and the local government says 'no,' she has the right to take the local government to circuit court," Argo said.
County attorney Edgar Black said the ABC Board sends the applications to the commission. He said the ABC could approve Salazar's request if it wanted to.
Argo said that is true, but ABC "rarely if ever" overturns a decision by a local government.
Ministers from at least five churches in the Spring Valley area spoke against the license.
Sonny Owens, of Spring Valley Church of Christ, said Spring Valley Road has a tremendous amount of traffic, and the sale of alcoholic beverages at the market would increase the danger on that road.

Some of the ministers spoke of the Bible's prohibition of alcohol consumption.

"I oppose it because the community doesn't want it," Ricks Lane resident Larry Pounders said. "The tax money that comes from it is not worth it ... and the Bible speaks out against it."
District 5 Commissioner Darol Bendall, who lives near Spring Valley Market, said he had a total of 160 signatures of residents who oppose the license.
"There are four more churches that have not shown up," Bendall said. "I cannot support this application. I do wish you success, but my vote would be no."
County Administrator Kathy Polk called for a voice vote by district. Each commissioner voted against the requested application.
"All the best of luck to you, and I hope all these people will come and support you because I know you do have some great barbecue," said Commissioner Jimmy Gardiner.
Black, who has been county attorney for just over a year, said he's seen the commission approve three or four liquor licenses, but he added he hasn't seen such strong opposition to a liquor license application.
Polk said the commission has not voted against a liquor license since she has been county administrator, which is about 4 1/2 years.
"Normally, there are fewer people," Polk said. "In fact, usually only the applicant shows up."
Salazar, who said she does not drink, said she understands some of the points made by those who opposed the license.
"They're going to get it (alcohol) either way," she said.
Salazar said she owns a store in Athens that sells alcoholic beverages.
"We're still going to do the barbecue; we'll still be a convenience store," she said. "We want to help build the community and help build a business. We want to be friends. We don't want to be enemies."

APPEALS COURT UPHOLDS DECISION IN HEIDELBERG DISPUTE

When last we reported on the power struggle for control of the Heidelberg Distributing Co., co-owner Carol Miller had filed an appeal in December 2015. Now more than a year later, an Ohio state appeals court has upheld most of the trial court's decision, per a local publication.

BACKGROUND. The family legal troubles began in 2014 when negotiations to buy out co-owner Albert Vontz III, Carol's brother, broke down. Albert filed a civil lawsuit against his sister along with her husband and children, claiming that she "seized control" of the company "oppressing the third and fourth generations" of his family. Carol's side of the family fills five of the six board positions, the sixth belonging to Albert.

In late 2015 a judge ruled mostly in favor of Albert, ordering the two sides to sit down to a full shareholder's meeting and to allow Albert to maintain control of half of the company's board seats. Carol filed an appeal immediately after the ruling.

APPEALS COURT RULING. The appeals court upheld the majority of the trial court's ruling, including an injunction preventing the Millers from seizing control of the board, according to the local publication. "In a well-reasoned and very thoughtful decision, the Court clarified certain aspects of the trial court's decision but unanimously affirmed the essential findings of Judge Martin and the relief granted to Mr Vontz. We look forward to bringing this matter to a long overdue conclusion," says Albert Vontz's attorney James Burke.

Miller family attorney Dan Buckley says the ruling "struck the trial court's orders compelling Mrs. Miller to attend a shareholder meeting and requiring an equalized board. At the same time, it imposed a new quorum requirement that we are evaluating."

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A Cincinnati-based state appeals court has upheld key components of a trial judge's ruling in a bitter family dispute over control of Moraine-based Heidelberg Distributing Co.

A branch of the family that is most involved in the day-to-day operations of Heidelberg had promptly appealed a Hamilton County Common Pleas judge's decision in the fall of 2015 that in part favored a branch of the family that is not directly involved in the company's daily operations. A three-judge panel of the Ohio 1st District Court of Appeals refused to overturn most of the trial judge's ruling, including an injunction. The judges did, however, overturn portions of the trial judge's decision, and returned the case to the trial judge for further rulings in line with the appeals court's decision.

The lawsuit began more than two years ago, on Dec. 5, 2014, when Albert Vontz III, president and co-chairman of Heidelberg Distributing, sued his sister, Carol Miller, and several of her family members whom Vontz claimed have "seized control" of the company and were "oppressing the third and fourth generations" of his family. Vontz and Miller are the grandchildren of Albert W. Vontz, who came to Cincinnati in 1907 as a 22-year-old German immigrant and went on to launch a company that became Heidelberg Distributing.

Carol Miller's family has been involved in the day-to-day operations of the beer and wine distributor. Her husband Vail Miller Sr. led the company for more than 40 years and serves as co-chairman, and son Vail Miller Jr. is currently serving as CEO. Vontz is owner of 50 percent of the voting shares of Heidelberg, and serves as its president and co-chairman of its board.

The appeals court judges said in their ruling that the Miller family's "tactics to thwart corporate democracy were not fair to Vontz as a shareholder with 50 percent of the voting rights."

RELATED: Heidelberg lawsuit still rages despite judge's plea for reconciliation

An attorney for Vontz welcomed the appeals court's ruling, which was filed Friday.
James Burke sent this news outlet the following statement: "On behalf of our client, Mr. Vontz, we are very pleased at the decision by the Court of Appeals. In a well-reasoned and very thoughtful decision, the Court clarified certain aspects of the trial court's decision but unanimously affirmed the essential findings of Judge Martin and the relief granted to Mr. Vontz.
"We look forward to bringing this matter to a long overdue conclusion."
Dan Buckley, attorney for the Miller family, released a statement late Tuesday that said, "In its lengthy and complex opinion, the Court of Appeals gave all of the parties a lot to think about. It struck the trial court's orders compelling Mrs. Miller to attend a shareholder meeting and requiring an equalized board. At the same time, it imposed a new quorum requirement that we are evaluating.
"Meanwhile, in 2016, the company's number of employees, brand portfolio and revenue reached historically high levels."
At stake in the lawsuit is control over one of the largest beer distributorships in the country and a significant source of philanthropy in Dayton and southwest Ohio. Heidelberg, which traces its roots to 1938, was ranked by Beverage Executive magazine five years ago as the nation's 14th largest beer distributor by volume. The company delivers Anheuser-Busch InBev products, including Budweiser beers, in Dayton and Cincinnati, and it also distributes a wide variety of wine and spirits to restaurants, bars, grocery stores and other retailers throughout Ohio and northern Kentucky.
Heidelberg spent $20 million to renovate the former Cooper Tire & Rubber Co. warehouse on Dryden Road along Interstate 75 in Moraine before moving its Dayton-area operations into that facility in 2013. The facility employs more than 300. The company operates nine warehouse and office facilities in Moraine, Cincinnati, Cleveland, Columbus, Lorain, Toledo, Youngstown and northern Kentucky. In all, as of a year ago, Heidelberg employed more than 1,600 and served more than 26,000 retail accounts.
On Nov. 20, 2015 - three weeks after sending the letter urging both sides to negotiate a settlement - Hamilton County Common Pleas Judge Martin filed a decision in the case that mostly sided with Vontz on the legal issues in the lawsuit, but declined to award any monetary damages to him. The decision stopped short of dictating specific terms of a resolution, and instead ordered both sides to sit down for a full shareholders' meeting before the end of 2015. But the Miller side of the family submitted a notice of appeal with the Ohio 1st District Court of Appeals on the same day the judge's decision was filed.
In a letter to each faction, later entered into the court's docket, Judge Martin wrote: "Mr. Vontz is clearly and legitimately concerned about the direction of the company and would like his equal representation on the board. He is concerned that the current board is, without his consent, putting him and the company further in debt. Apart from this, the company owes (Vontz) millions of dollars. He has a legitimate business purpose to his pursuit on his corporate rights."

Three Boston bars absolved in state 'pay-to-play' case

By Dan Adams GLOBE STAFF DECEMBER 29, 2016
Three prominent Boston bars whose corporate owners accepted payments from a beer distributor to stock certain brews over others will not be penalized, a

frustrating setback for state investigators trying to stamp out the banned practice of "pay-to-play" in the Massachusetts beer industry.

There was never any doubt about the conduct - the restaurant groups that own the bars admitted to state investigators they received inducements from the beer distributor. But commissioners of the Alcoholic Beverages Control Commission said Thursday there was no proof the "kickbacks," as the commissioners termed the payment, were passed on from the corporate parents to their bars.

The three bars, Game On, Gather, and Coogan's Bluff, last year were accused by ABCC investigators of taking a combined $79,400 from the distributor, Craft Brewers Guild, to place its brews on tap. Such inducements are banned under a state regulation that seeks to limit anti-competitive practices in the alcohol market.

But in their ruling Thursday, the ABCC's three commissioners said the evidence showed only that the payments went to the parent restaurant groups, which could not be charged because, unlike the bars, they do not hold liquor licenses overseen by the agency.

- Distributor to pay record fine

"By the tenor and tone of the decisions, the commissioners seemed to express their displeasure that there was nothing they could do," said Kris Foster, the ABCC's general counsel. "The commission is constrained by the Legislature in that it can only regulate licensees," not their corporate parents.

Game On is a sports bar near Fenway Park that's owned by Lyons Group; Gather, a Seaport District restaurant, is owned by Briar Group. Coogan's Bluff is a downtown pub that's run by Glynn Hospitality Group.

Stephen Miller, an attorney for the Briar and Lyons groups, said his clients were "thrilled" to be absolved. An attorney for Glynn Hospitality Group did not return a call seeking comment.

However, the ABCC did find that a fourth bar, Jerry Remy's in the Seaport District, violated the pay-to-play ban.

The commissioners said the bar, owned by Cronin Group, accepted $8,420 from Craft Brewers Guild, while disguising the bribes on invoices under code phrases such as "menu support."

The charge stuck only because the same Cronin subsidiary that accepted the payments also owns Jerry Remy's and its liquor license.

The company "actively participated in this unlawful scheme, by accepting and depositing the checks," the ABCC commissioners said, "while knowing that the billing was a ruse for the payment of a $20-per-keg kickback from Craft."

The agency suspended the Jerry Remy's liquor license for 18 days, but the bar has to serve only three days unless it commits another alcohol violation within two years.

Jerry Remy's can ask to pay a fine instead - a figure based on the bar's sales.

Thomas Kiley, the attorney for Cronin Group, decried the sanction, noting the company took less money than the other restaurant groups and did not have the payments go to other entities.

"If you want to make an example of somebody, we're the wrong example," Kiley said. "My client was offered a rebate that was available to everybody, and he took advantage of it. The customers end up getting the benefit of that. I don't think there's anything remotely wrong with it."

Cronin Group has not decided whether to challenge the license suspension in court, Kiley added.

The ABCC did leave open another possible action against the three absolved bar owners. The commissioners said the agency never authorized Lyons, Briar, or

Glynn to manage the bars that were charged, and it directed investigators to determine whether those relationships were illegal.

Miller said the Briar and Lyons groups would cooperate with investigators regarding the potential management issue. But he suggested the ABCC should clarify the rules, since many alcohol retailers use similar corporate structures.

As evidence in the three unsuccessful cases, ABCC investigators had submitted invoices and checks detailing the pay-to-play deals between Craft Brewers Guild and the bar owners. The documents note the precise amounts of the payments, the beer brands involved, and which of the restaurant groups' bars would sell those beers.

But the commissioners said even these records - plus the admissions by three companies - did not prove that the inducements ended up at the bars charged by investigators.

For example, Lyons Group admitted receiving $22,345 from Craft Brewers Guild in 2013 and 2014. In exchange, the firm stocked Yuengling, Lagunitas, and other beers at its Boston bars, which in addition to Game On include Bleacher Bar, Bill's Bar, and Kings.

Investigators charged only Game On Fenway LLC, a Lyons-controlled entity that owns the sports bar and its alcohol license. But the checks from Craft Brewers Guild were made out to "Bank On It, Inc.," a marketing entity of the Lyons Group that had no employees or payroll.

"It is clear . . . that Bank On It and/or Lyons received $22,345 as bribes for dedicated tap lines in Lyons-managed restaurants," the ABCC commissioners wrote. "However, this is inadequate to show that Game On, as opposed to one of Lyons's other [licensed] establishments (if any of them), actually received any money from the arrangement."

The commissioners made similar determinations for Briar Group and Glynn Hospitality Group.

Craft brewers have blasted retailers and wholesalers for such schemes, saying they limit consumer choice by awarding tap handles to the highest bidder instead of to the best beer maker. But Miller defended the arrangements, saying inducements help unproven beers get to market and should be permitted.

"Some products, no one would see them if the supplier and wholesaler weren't supporting them," he argued. "For a consumer to think it's scummy or sleazy - it's the exact opposite. You're getting more products and much better products for a better price."

The ABCC commissioners on Thursday did rebuff a key legal argument from the restaurant groups: that state regulations ban only distributors from offering inducements, and do not prohibit retailers from accepting or even demanding them.

The commissioners called that a "convoluted" reading of the rule and insisted the pay-to-play ban applies to bars and restaurants.

The charges adjudicated Thursday emerged from the first-ever crackdown on pay-to-play in the Massachusetts alcohol industry.

In March, the ABCC fined Everett-based Craft Brewers Guild a record $2.6 million for making $120,000 in illegal payments to bars.

The company, part of the multistate beer wholesaling empire controlled by Sheehan Family Cos., is contesting the fine in state court.

Investigators subsequently brought charges against some of the bars that received the payments. In July, the ABCC commissioners absolved a now-defunct bar, Estelle's in the South End of Boston, on the same grounds - that the payments went to its owner, the Wilcox Group restaurant company, instead of the bar itself.

State Asks Judge To Dismiss Liquor Association Lawsuit

By MOLLY FLEMING * JAN 17, 2017

The state of Oklahoma has asked for dismissal of a lawsuit that challenges the constitutionality of a liquor law reform measure that was passed by voters in November.

State Question 792 passed with 65 percent of the vote, and amends the state constitution to allow wine and strong beer sales in grocery and convenience stores, permits package liquor stores to refrigerate their products and makes changes to the state's alcohol distribution system, among other changes. Retail package stores will continue to be the only place to buy spirits.

The lawsuit, filed by the Retail Liquor Association of Oklahoma on behalf of liquor store owner Joseph P. Richard, claims the changes violate the Oklahoma constitution and the Equal Protection Clause of the U.S. Constitution, according to an article by the Journal Record's Molly Fleming.

> Oklahoma Deputy Solicitor General Mithun Mansinghani prepared the state's response.
>
> Attorney General Scott Pruitt, the Alcoholic Beverage Laws Enforcement Commission, and ABLE Commission Director Keith Burt were also named in the lawsuit.
>
> "The public interest is clearly in favor of implementing Article 28A (which SQ 792 becomes as law)," said Mansinghani. "There is no harm to plaintiffs for violation of their rights since the Constitution has not been violated."

The RLAO is represented by attorney Ann G. Richard-Farinha. She told the Journal Record she will file her response to the state's motion to dismiss in a couple weeks.

> "When you look at this as a whole, there's an overriding decision by the Legislature to pick winners and losers," she said. "I've spent some time on (the state's response) thus far and looked through their argument. I feel we have strong arguments in opposition to theirs."

Judge Aleita Haynes Timmons will hear the motion of dismissal on Feb. 14.

FDA ISSUES DRAFT GUIDANCE FOR INDUSTRY: QUESTIONS AND ANSWERS REGARDING FOOD FACILITY REGISTRATION (SEVENTH EDITION) - REVISED

If you are the owner, operator, or agent in charge of either a domestic or foreign facility that is engaged in manufacturing/processing, packing, or holding of food (including alcohol beverages) for consumption in the United States, you must register with FDA, unless you are exempt under 21 CFR 1.226. You must register your facility whether or not the food from the facility enters interstate commerce.

Source: Federal Register / Vol. 81, No. 248 / Tuesday, December 27, 2016 / Proposed Rules

The Food and Drug Administration (FDA) is announcing the availability of a revised draft guidance for industry entitled "Questions and Answers Regarding Food Facility Registration (Seventh Edition): Guidance for Industry." The revised draft guidance supersedes the version of the food facility registration draft guidance that was announced on November 8, 2016. When finalized, this guidance is intended to provide updated information relating to the food facility registration requirements in the Federal Food, Drug, and Cosmetic Act (the FD&C Act).
Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that your comment on the revised draft guidance is considered before FDA begins work on the final version of the guidance, submit either electronic or written comments on the revised draft guidance by March 27, 2017.
Resources

WAUGH WINE CO. TAKES BRONCO WINE CO. TO COURT.

Napa-based Waugh Wine Co. filed suit against Bronco Wine Co. for trademark infringement and unfair competition over Bronco Wine's Six Degrees brand. The complaint alleges the defendant's Six Degrees trademark is "confusingly similar" to Waugh Wine's Six Degrees and is "identical in appearance, sound and connotation to Plaintiff's" and that both brands are California wines, per court docs. The winery also cites specific instances of confusion in the marketplace, such as mislabeling Ryan Waugh as winemaker of Bronco's Six Degrees and consumer inquiries. Waugh Wine Co. is seeking permanent injunctive relief, monetary damages, attorneys' fees and related relief.

CALIFORNIA ABC CITES STRAUB 20 TIMES FOR COOLER PAYOLA

In other regulatory news: Late last year the California ABC filed 20 counts against Anaheim-based Straub Distributing. The wholesaler has been accused of giving things of value - mainly, coffin, slimline and countertop coolers themed with various A-B brands (Bud Light/Lime, Goose Island, Mich Ultra, the Rita's family and more) - to various retailers.

Citation dates go as far back as January 2014. Many off-premise retailers were named, some recurring; a Primo Food Stores was named 11 times. Only one count included an on-trade retailer.

A hearing has been requested, as we understand.

Retail Liquor Association Of Oklahoma Files Lawsuit Against ABLE Commission

By Kelly Roliard, ReporterCONNECT

LAWTON, OK (KSWO) -Some local liquor stores are standing behind a lawsuit against the Alcoholic Beverages Law Enforcement Commission...and it's all over the passage of State question 792.

The Retail Liquor Association filed the lawsuit Monday in Oklahoma County against the ABLE Commission, saying State question 792 is unconstitutional. It's passage will allow the sale of full strength beer and wine in grocery and convenience stores. Those who are opposed to the plan say it will give these stores an unfair advantage. But those who support state question 792 say Oklahoma's current alcohol and liquor laws are outdated. Currently, grocery and convenience stores can sell beer and wine with only 3.2 percent or less alcohol content.

Equal protection--That's what JP Richard, owner of Cache liquor store says they're fighting for in the lawsuit against Alcoholic Beverages Law Enforcement Commission. He say's there's a lot more to the issue surrounding state question 792 than meets the eye.

"It's an unequal playing field," said Richard. "They treat us as if liquor is something that's different than wine in terms of alcohol and that's not true. Wine and beer is just as dangerous as vodka and bourbon."

Starting in 2018, grocery stores and convenient stores would not have the same restrictions as liquor stores. And, while Liquor store owners are only licensed to sell in two different locations. The new plan will allow convenience stores and grocery stores to get as many licenses as they wish.

Richard says this isn't fair and gives favor to convenient stores and out-of-state businesses over locally-owned package stores. "We think there's a better way to do it," said Richard. "We think that we can give Oklahomans wine in grocery stores, give them single strength beer, which they demand, but we think it should be incremental to give us a chance to adjust. We're the Oklahomans, not Wal-mart, not Quik Trip. We are. We're the ones that have been here."

Lynn Mason, Owner of Fluffys liquor store says he's concerned about the number of customers he'll lose to the big retailers because of convenience. He says he will try to make up for the money lost in adding products within the 20 percent of sales being non-alcoholic items.

"Some will go to grocery stores to buy their boxed wines and things like that, but there is a certain amount of loyalty to your local retail store. It's very hard to have a whole lot of loyalty to Walmart or Costco. They're just big boxes and that's where this business will be going."

More than 900,000 people voted in favor of state question 792 on the November ballot, but Richard says they still have time make a change before it goes into effect in October 2018.

Butterball files trademark lawsuit against wine company

Source: Triangle Business Journal
Jennifer Henderson
Dec 19, 2016

Garner-based turkey titan Butterball has brought a trademark infringement lawsuit against an Australian wine company over its chardonnay of the same name.

According to a complaint filed Dec. 12 in the U.S. District Court for the Eastern District of North Carolina, Butterball states that McWilliam's Wines Group Ltd. "produces, sells, distributes, and imports into the United States a variety of Evans & Tate branded wines, including a type of chardonnay named 'BUTTERBALL.'" The complaint alleges that the wine company's import and distribution in the U.S. occurs "through brick and mortar and online retailers that allow North Carolina residents to make and receive direct purchases of its wines ." and that the company's "acts of unfair competition and infringement ... are causing harm to Butterball in North Carolina and in this judicial district."

Butterball states that its trademarked goods and services range from turkeys and marinades to fat fryers and mobile device software. The complaint goes on to say, "The consumer goodwill associated with the BUTTERBALL Marks is one of Butterball's most valuable assets. Accordingly, the integrity of the BUTTERBALL Marks is extremely important to Butterball and crucial to the continued vitality and growth of Butterball's business."

Womble Carlyle Sandridge & Rice is representing Butterball through the firm's Raleigh and Winston-Salem offices. Attorneys for McWilliam's have not yet filed an appearance in the case. Butterball declined to comment on the case. McWilliam's did not immediately return a request for comme

A Trademark Year In Wine And Beer 2016

Source: Law360
By David Kluft, Foley Hoag LLP
December 13, 2016

Category Beer

In February 2016, Florida-based Big Storm Brewery launched a new line of Belgian beers, with the alcohol by volume (ABV) of each product described using a facsimile of the Saffir-Simpson Hurricane Wind Scale, including Category 1 (Belgian Single - ABV 6.0), Category 2 (Belgian Dubbel - 6.6 ABV), Category 3 (Belgian Tripel - 9.2 ABV), Category 4 (Quadrupel - 10.6 ABV) and the upcoming Category 5 (Belgian Quintupel - ABV to be decided). After receiving a cease and desist letter from Due South Brewing (which sells Category 3, Category 4 and Category 5 India pale ales), Big Storm brought a declaratory judgment action of noninfringement in the Middle District of Florida. Big Storm alleged that it is not using the "Category" designations as trademarks, and that many other brewers use hurricane "Category" designations to describe beer strength, including Zea Rotisserie's "Category 5 Ale," Anheuser-Busch's "Hurricane Category 5" malt liquor, and Holy City Brewery's "Category 2 IPA." Due South has moved to dismiss, and that motion is pending while the parties pursue mediation. Big Storm Brewery LLC v. Due South Brewing Co. Inc., Case. No. 8:16-cv-02405 (M.D. Fla.).

Champleasure

A Nevada resident's application to register Champleasure for sparkling wines was opposed by the Institut National de L'Origine et de la Qualite, the French government entity charged with protection of the Champagne brand. An opposition by the Institut, a frequent TTAB litigant, is often enough to cause applicants to abandon their marks, but this applicant lawyered up and filed an answer, perhaps buoyed by the recent ruling of an English court allowing a local brewer to use the Champale mark for a beer "produced using the traditional method for the production of sparkling wines." Institut National de L'Origine et de la Qualite v. Burden, Opposition No. 91229292 (Trademark Trial & App. Bd.).

Chapman Crafted Beer Company

A trademark examiner refused registration of the mark Chapman Crafted Beer Community for beer on the grounds that "Chapman" is primarily merely a surname and there was no showing of acquired distinctiveness. The applicant argued that the mark did not refer to a surname (none of its employees had the name "Chapman") but rather to an old-fashioned term for a merchant or a peddler. The TTAB held that although this definition of "Chapman" was accurate, it was too archaic to be useful in establishing what the average consumer would recognize it to be. For the same reason, the TTAB was not persuaded by evidence that "Chapman" was also the name of a type of bird, a musical instrument, a mathematical formula and an automobile suspension device. The refusal to register was a affirmed. In re Chapman CBC LLC, 2016 TTAB LEXIS 501 (Trademark Trial & App. Bd. Sept. 30, 2016)

Chapoutier Wines

The French Chapoutier family has been making Rhone Valley wines since the 1800's, including Côte-Rôtie, L'Hermitage and Côtes du Rhône. Maison Chapoutier, the entity currently running the family business, has secured most of the important top level domain names related to its name (e.g. chapoutier.com, chapoutier.fr, etc.), but it was inevitable that a few slipped through. In August, Chapoutier filed a UDRP complaint requesting transfer of chapoutier.club and several other "chapoutier" domains recently created by a

Chinese registrant. The registrant responded: "first-registered, first-served," but the panel determined that the registrant did not have any legitimate interest in the mark, and ordered that the domains be transferred. M. Chapoutier v. Lan Quin Tian, 2016 UDRP LEXIS 1265 (WIPO Oct. 24, 2016).

Chateau Margaux

Back in November 2015, concerns arose about the authenticity of certain wines about to be offered at an auction organized by Gil Lempert-Schwarz, a wine consultant and head of the Las Vegas-based Wine Institute. The wines in question included a 1945 Chateau Margaux (which Winsearcher reports can fetch over $6,000 a bottle) and a 1937 Cheval Blanc that supposedly had been sitting in an unnamed Swiss nobleman's cellar. Lempert-Schwarz removed the items from the auction, but wine fraud consultant Maureen Downey, who operates winefraud.com, wrote that Lempert-Schwarz "only removed them because he is busted. Gil has been caught in a blatant lie about the provenance" of the wines. According to the complaint, the parties have been involved in a long-running feud, often via Twitter, involving Downey's challenges to the integrity of wine authentications made by Lempert-Schwarz. Lempert-Schwarz filed a defamation lawsuit against Downey in Clark County, Nevada, and Downey removed the matter to the District of Nevada. Days later, Lempert-Schwarz voluntarily dismissed the claim on the purported grounds that Downey was judgment-proof so the suit was not worthwhile. However, Downey has claimed that she is ready to support her accusations and has called the short-lived lawsuit a "PR Stunt." Lempert-Schwarz v. Downey, Case. No. 2:16-cv-00075 (D. Nev.).

Chillavino

Purely Driven Products' application to register Chillavino for its wine bottle display system was opposed by Chillovino LLC, which owns the Chill'O mark for wine racks. The parties have been fighting it out before the TTAB since 2015, but this year Purely Driven upped the ante by filing a declaratory judgment complaint in the Central District of California. Purely Driven alleges that it has been selling its products under the Chillavino mark since March 2014 and that Chillovino didn't come into existence until June 2014. Chillovino moved to dismiss, arguing that the mere filing of an opposition with the TTAB does not give rise to standing to bring a declaratory judgment action. The court agreed, and dismissed on the ground that it lacked subject matter jurisdiction. Purely Driven Products LLC v. Chillovino LLC, Case No. 15-00982 (C.D. Cal. March 22, 2016). The TTAB matter has been resumed and is scheduled for trial in 2017. Chillovino LLC v. Iavarone, Opposition No. 91221017 (Trademark Trial & App. Bd.).

Church Beer

Beer Church Brewing Company's application to register the Beer Church Brewing mark for beer was met with an opposition filed by The Church Brew Works. The applicant is a brewery located inside a Civil War era church in New Buffalo, Michigan, where you can take away a 32 oz. Pontius Pilate IPA, among other selections. The opposer is a picturesque Pittsburgh restaurant located inside an old Catholic church building (with a microbrewery located where the altar used to be). The matter is pending, although reportedly the parties have been meeting to work out a settlement. Lawrenceville Brewery Inc. v. Big Brother

Holding Company LLC, Opposition No. 91230102 (Trademark Trial & App. Bd.).

Coast Guard City Beer

In July, Michigan's Grand Armory Brewing Company announced on Twitter and Facebook that it was selling cans of its Coast Guard City Pale Ale. Shortly after that, the U.S. Department of Homeland Security filed an opposition to Grand Armory's pending trademark application for Coast Guard City. The beer's name derives from the fact that Grand Haven, home of the brewery, was the first "Coast Guard City, USA," an honorary designation that the Coast Guard started conferring in 1998. However, the department claimed that the registration would cause confusion with its registered marks, including United States Coast Guard 1790. Grand Armory didn't respond to the opposition, and the application has been refused. Department of Homeland Security v. Armory Brewing Company, Opposition No. 86899300(Trademark Trial & App. Bd.).

Cohn Wine

In 2015, Vintage Wine Estates acquired the Sonoma County-based B.R. Cohn Winery brand, which had been owned by father and son Bruce and Daniel Cohn. Daniel Cohn assisted with the transition to new ownership, but after that he started competing with B.R. Cohn by offering a Daniel Cohn Cabernet Sauvignon. Vintage filed a complaint in the Northern District of California, asserting trademark infringement and other counts, based on Daniel Cohn's use of the Cohn mark and the alleged false statement that the new wine was made in Sonoma (when in fact it is made in Healdsburg). The court ordered mediation in August, and the parties stipulated to dismissal of all claims in October. Vintage Wine Estates Inc. v. Cohn, Case No. 5:16-cv-00988 (N.D. Cal.).

Cognac

In October, the Institut National de l'Origine filed oppositions to prevent Celeb LLC from registering the name and logo Cognac Quarts Caramel Blond as a trademark for soaps and hair coloring, alleging that "Cognac" is an appellation of origin referring specifically to the brandy made in the Cognac region of France. The Institut further alleged that the Celeb mark is therefore geographically deceptive and would dilute its Cognac certification mark. The matter is pending. Institut National de l'Origine v. Celeb LLC, Case No. 91230697 (Trademark Trial & App. Bd.).

Columbus Brewing

In 1995, the owner of the Columbus Brewing Company leased space in his Columbus Brewery District building to a new restaurant. As a condition of its lease, the restaurant adopted the name "Columbus Brewing Company Restaurant" and was required to buy a certain amount of beer from its brewery building-mate. By about 2007, the individuals who agreed to this arrangement were out of the picture, but the two business continued to coexist under the same roof for nearly another decade. In 2015, when the brewery made plans to move out of the building and open up its own food services operation elsewhere, it filed a complaint in the Southern District of Ohio, seeking to stop the restaurant from continuing use of its similar name and logo. The court agreed with the restaurant's argument that the brewery had acquiesced to its use of the mark, but it found that this acquiescence was overcome by voluminous proof of actual confusion. The court granted preliminary relief in April, and the restaurant is currently operating under the name "CBC Restaurant," but the matter is still scheduled for trial in 2017. Dist. Brewing Co. v. CBC Rest. LLC, 2016 U.S. Dist. LEXIS 46539 (S.D. Ohio Apr. 6, 2016).

Coors

In February, Joaquin Lorenzo of Miami filed a putative class action lawsuit against MillerCoors for false advertising. Lorenzo alleged that Coors has advertised its beers over the years as "brewed with pure Rocky Mountain spring water" and that, even though this may have been the case at one point, the beer is now brewed at multiple locations. Nevertheless, the complaint alleges, MillerCoors falsely states or implies that Rocky Mountain water is still an ingredient through such taglines as "Proudly Brewed in our Rocky Mountain Tradition," "What Would We Be Without Our Mountains?" and "Born in the Rockies." MillerCoors removed the matter to the Southern District of Florida and moved to dismiss, arguing that the complaint failed to plausibly allege a deceptive statement. In September, the court agreed and dismissed the action with leave to amend. Lorenzo has appealed. Lorenzo v. MillerCoors LLC, Case No. 1:16-cv-20851 (S.D. Fla. Sept. 22, 2016).

Coppola Wine

In August, GMYL, the company behind Francis Ford Coppola's winery, filed a trademark infringement action in the Central District of California against Copa Di Vino, an Oregon company. GMYL alleged that Copa Di Vino's "Copa" wine and packaging infringed GMYL's COPPOLA mark for wine and its "Black Label Trade Dress," including the same color combination on the label, a similar gold netting over the bottle, and similar depictions of golden grapes and grape vines. Copa Di Vino has answered and moved for judgment on the pleadings. According to Copa Di Vino's motion, GMYL included in its complaint poor quality photographs of the respective goods. If the court simply looks at the higher quality images included with Copa Di Vino's motion, Copa Di Vino argues, it will see that many of GMYL's allegations about the similarity of the marks are bunk. For example, the complaint alleged that both bottles use a vertical rectangular label, but the high quality images attached to the motion show that Copa Di Vino bears a label in the shape of wristwatch. Copa Di Vino also claims that, contrary to the allegations of the complaint, the Copa Di Vino bottle simply does not depict grapes. The matter is pending. GMYL L.P. v. Martin, Case No. 2:16-cv-06518 (C.D. Cal.).

GMYL also resolved a matter brought in the Northern District of California against Peter Coppola Beauty and its line of COPPOLA beauty products. Peter Coppola allegedly had taken to dropping the "Peter" and using the standalone Coppola mark for various products. GMYL alleged that this would cause confusion with the Coppola brand, which includes other luxury goods besides wine, such as soaps and personal care products. In May, Peter Coppola's representative left a settlement conference with the judge before it was over, but Peter Coppola's counsel remained and purportedly had been given full settlement authority. A deal was reached that day, but it turned out that Peter Coppola's counsel may not have had full settlement authority after all, and the company refused to sign the agreement. The court ordered sanctions in the amount of a couple of thousand dollars for the wasted time. Nevertheless, the parties appear to have ultimately reached terms and the case was dismissed. GMYL LP v. Copomon Enterprises LLC, Case No. 3:15-cv-03724 (N.D. Cal. Aug. 10, 2016).

In March, another case brought by GMYL ended in a stipulated injunction. GMYL alleged that Cinema Wines, a Spanish winemaker, was infringing its rights by using the name Cinema (which GMYL has registered for wines) and a similar "wraparound label" (also registered) resembling a strip of 35mm film. The terms of the injunction prevent further importation of the Spanish wine into the United States. GMYL LP v. Cinema Wines, Case No. 7:15-cv-07023 (S.D.N.Y. 2016).

Craft Beer Attorney

The Craft Beer Attorney, a boutique law firm, applied to register the mark Craft Beer Attorney and was opposed by no less than ten competing law firms on various grounds, including the argument that Craft Beer Attorney is a generic term for an attorney who provides services to craft beer makers. The proceedings have been consolidated and the matter is pending before the TTAB. The firm already owns the mark C.B.A. for legal services. The Craft Beer Attorney v. Martin, Frost & Hill PC et al, Serial No. 86504533(TTAB).

Crown Royal & Crown Club Whiskey

This long-running dispute is the only case to make every edition of our annual posting. Two years ago, a jury found that Mexcor, the maker of Texas Crown Club (and other state-themed whiskey) had infringed Diageo's Crown Royal velvet drawstring bag trade dress, and awarded over four hundred thousand dollars in damages. The court subsequently issued a permanent injunction. Mexcor appealed the denial of its motion for judgment as a matter of law and motion to amend the judgment. In September, the Fifth Circuit Court of Appeals affirmed the outcome, but held that the scope of the injunction was too broad, including because it forbade Mexcor from activities that even Diageo had conceded were not infringing, such as using an unlabeled drawstring bag depicting the Texas flag. Diageo North America Inc. v. Mexcor Inc., 2016 U.S. App. LEXIS 16297 (5th Cir. Sept. 2, 2016).

Crush Wines

A New York wine distributor, which registered its Crush Wine Co. mark in 2006, brought suit in the District of Massachusetts against a New Bedford wine store and tasting bar, alleging that the defendant had recently adopted the infringing Crush Fine Wine mark and logo. Apparently, the New Bedford company originally agreed to change its name without legal intervention, but it wasn't moving fast enough for the New York company's tastes. The parties filed a stipulated permanent injunction in May, and the New Bedford company has changed its name and logo (the new name appears to be Crush New Bedford). 336 Liquor Store Inc. v. Crush Wine Beverage Company, Case No. 1:16-cv-10093 (D. Mass.).

Crystal Head & Kah Vodka

Comedy legend Dan Aykroyd's Crystal Head vodka comes in a skull-shaped glass bottle, while Elements Spirts sells Kah tequila in ceramic skull-shaped bottles. Back in 2010, Crystal Head began a long-running dispute with Elements in the Central District of California, in which it argued that two heads were not better than one, and alleged that the skulls would be confused for one another. During closing arguments at trial in 2013, Elements' counsel referred to a document not in evidence (which contained information about a Mexican trademark dispute), and implied that Crystal Head had hidden that document from the jury. The jury subsequently issued a verdict in favor of Elements, finding that there was no infringement. The district court rejected Crystal Head's argument that the verdict should be disregarded because of Elements' counsel's misconduct during closing arguments, but in February of this year the Ninth Circuit reversed in part and affirmed in part. The Ninth Circuit found that this was a "close case" on the merits with substantial evidence supporting the verdict. However, the Ninth Circuit also felt the that verdict was tainted by the misconduct. The parties are preparing for a new trial as of this writing. Globefill Inc. v. Elements Spirits Inc., 640 Fed. Appx. 682 (9th Cir. 2016).

Diesel Spirits

Since 1984, Sazerac has marketed Diesel spirits, a pure grain clear alcohol also known as a "grain neutral spirit," which comes in varieties up to 190 proof. This year, Sazerac opposed Boundary Oak Distillery's application to register Armored Diesel in connection with its "American Spirits Collection" of moonshine, specifically a Kentucky Amber honoring General George S. Patton. Shortly after Sazerac's opposition was filed, Boundary Oak decided to withdraw its application and file a new one, this time for Patton Armored Diesel. It has not yet been opposed. Sazerac Brands LLC v. Hinton, Opposition No. 91230171(Trademark Trial & App. Bd.).

Domaine de la Romanée-Conti

In 2011, 78 bottles of Domaine de la Romanée-Conti, valued at $736,500 and supplied by wine dealer Rudy Kurniawan, were withdrawn from auction after experts questioned their authenticity. These and other incidents led to an FBI investigation which, among other things, revealed email correspondence in which Kurniawan was allegedly making arrangements for another collector to ship to him empty bottles of Domaine de la Romanée-Conti (the same wine he later tried to sell at auction) after a particularly expensive dinner party. There was also evidence that Kurniawan had been acquiring other empty bottles and purchasing the glue, ink and paper necessary to make fake wine labels. On March 5, 2012, the FBI executed an arrest warrant for Kurniawan at his California home. During the arrest, an agent spotted a box of wine bottles in plain view just inside the front door, and subsequently obtained a search warrant. Kurniawan moved to suppress the fruits of the search on the grounds that no nexus between his home and his alleged illegal activity was shown. The Southern District of New York denied the motion, ruling that there was sufficient probable cause for the warrant even without the plain view evidence (for example, the aforementioned empty wine bottles were shipped to his home). Kurniawan was convicted and sentenced to 120 months imprisonment. Late last year, the Second Circuit Court of Appeals affirmed. United States v. Kurniawan, 627 Fed. Appx. 24 (2d Cir. 2015).

Don't Worry. Drink Naked.

The TTAB affirmed the refusal to register "Drink It Naked" for tequila, on the grounds that it was too similar to Diageo's registered "Don't Worry, Drink It

Naked" mark for distilled spirits, which Diageo uses in conjunction with The Naked Turtle white rum. The applicant argued that, in contrast to the registered mark, "Drink It Naked" referred not to nudity but to a lack of added ingredients. The TTAB rejected this argument, reasoning that "while the phrase 'drink naked' may suggest an image of someone consuming an alcoholic beverage unclothed, we see no reason why the phrase 'drink it naked' could not also evoke such an image." In re Castaneda & Anderson, 2016 TTAB LEXIS 13 (Trademark Trial & App. Bd. Jan. 13, 2016).

Double Barreled Bourbon

Last year, Prichard's Distillery of Nashville picked a fight with the Sazerac Company over Sazerac's "A. Smith Bowman Limited Edition Double Barrel Bourbon Whiskey," which Prichard's claimed was likely to be confused with its Benjamin Prichard's Double Barreled Bourbon and Double Barreled marks for bourbon. Sazerac counterclaimed to cancel Prichard's mark and for a declaratory judgment that the term "Double Barreled" is a generic description of the bourbon production process. In March, the court granted Sazerac leave to amend its counterclaims to allege that at least one of the registered marks was void ab initio because it was defectively registered by an individual who never used or intended to use the mark in an individual capacity before assigning it to the plaintiff. The parties' cross-motions for summary judgment are pending. Prichard's Distillery Inc. v. Sazerac Co., 2016 U.S. Dist. LEXIS 42304 (M.D. Tenn. Mar. 30, 2016).

Drambuie

Drambuie, manufactured by the Glenfiddich Distillery in Dufftown, Scotland, traces its origins back to about 1746, when the fugitive Bonnie Prince Charlie supposedly gave clan chief John MacKinnon the secret recipe to his favorite liqueur as a thank you gift for helping him escape from the Isle of Skye. The name derives from the Gaelic "an dram buidheach," for "a drink that satisfies." In January 2016, Glenfiddich sent a cease and desist letter to the Australian man who had registered www.drambuie.click. The registrant demanded £300 to transfer the domain, then he quickly registered www.drambuie.xyz and demanded a total of £600 to transfer both domains. After Glenfiddich offered to pay only the registrant's out of pocket costs (about £6), the registrant registered a third domain, www.houseofdrambuie.com, and offered to transfer that too for a fee. Glenfiddich filed a UDRP complaint and the arbitration panel found that the request for payment and the registration of domains after the demand letter made it "abundantly clear" that the respondent was acting in bad faith. The panel ordered that the domains be transferred. William Grant & Sons v. Jackson, 2016 UDRP LEXIS 148 (WIPO March 24, 2016).

Due South Brewing

Due South Brewing sought to register its name in standard characters for "bar services." Due South Brewing was able to register the same mark for beer earlier this year, but the "bar services" mark was refused on the grounds that it too closely resembled Virginia's Due South Pit Cooked BBQ pig logo design mark for restaurant services. Due South Brewing argued that there was little likelihood of confusion because it didn't sell food and the BBQ restaurant didn't serve alcohol. However, a majority of the TTAB panel determined that bar and restaurant services were related, and that evidence of what the two business were actually selling was irrelevant because the registration and application were not similarly limited. Due South Brewing further argued that the most distinctive portion of the registrant's mark was the pig, but the majority held that since the pig logo was descriptive (of a restaurant serving pork), the only distinct element of either mark were the identical words, "Due South," and thus consumers were likely to see the respective services as emanating from the same source. The refusal to register was affirmed, but a dissenting TTAB panel member pointed out that the marks were not similar when viewed in their entireties, particularly as one was a the name of a brewery in standard characters and the other was, you know, a great big pig. In re Due South Brewing Co., Serial No. 86183992(Trademark Trial & App. Bd. Nov. 23, 2016).

Duo Wine and Beer

Uinta Brewing Company's application to register Duo for beer was rejected on the grounds that it too closely resembled Franciscan Vineyards' Duo mark for wine. The TTAB affirmed, noting the identical nature of the marks and similarity of the goods. In re Uinta Brewing Company, Serial No. 86333439(Trademark Trial & App. Bd. June 29, 2016).

El Toro and Toro Alteno Tequila

Productos Finos De Agave of Mexico owns the mark Toro Alteno (or "Heights Bull") for tequila, registration for which was issued in 2009. Last year, Sazerac petitioned to cancel the mark, arguing that it is confusingly similar to its own El Toro mark for tequila, which has been registered since 1960. The matter is now pending before the TTAB, and the docket indicates that the parties have been engaged in prolonged settlement discussions. Sazerac North America Inc. v. Productos Finos De Agave, S.A. DE C.V., Cancellation No. 92061331 (Trademark Trial & App. Bd.).

The Empire State Building

Michael Liang sought to register a logo for NYC Beer, featuring an architectural silhouette resembling the Empire State Building. The company that owns and operates the actual Empire State Building opposed the registration on the grounds that it would cause dilution by blurring of its registered design marks in the exterior of the structure. The TTAB affirmed the refusal to register the mark, determining that the design of the building was indeed famous and that Liang's use was likely to cause dilution. ESRT Empire State Bldg., LLC. v. Liang, 2016 TTAB LEXIS 270 (Trademark Trial & App. Bd. June 17, 2016)

Ferragamo Wine

In May, the Salvatore Ferragamo company filed a trademark infringement action in the Southern District of New York against former NFL quarterback Vince Ferragamo, who opened up the Ferragamo Winery in about 2010. The fashion company takes issue with the winery's prominent use of the same name, especially since the fashion company actually owns the mark Ferragamo for wines, which it registered in 2006. A premotion letter filed by the winery's attorneys alleged that, although the fashion company may have registered the mark for wine, it has never sold wine in the United States and has not demonstrated an intent to do so. The letter also argued that there was no personal jurisdiction in New York because the only sale made by the defendant into the jurisdiction was to the plaintiff, who allegedly purchased a bottle just to set up the lawsuit. The docket indicates that the parties were engaged in settlement discussions as of August, but there has been no activity since then. Ferragamo S.p.A. v. Ferragamo, Case No. 1:16-cv-03313 (S.D.N.Y.).

Fireman and Fireman's Beer

The most popular beer made by Real Ale Brewing of Texas is its Firemans #4, named after the bicycle company with which Real Ale co-sponsors promotional races. Real Ale has sold the beer since 2002, but in June of this year it learned that a brewery in California had been selling beer under the Fireman's Brew mark since 2004, and was starting to make inroads into Texas markets. In fact, the makers of Fireman's Brew are real former Los Angeles firefighters and the only brewery licensed to display the logo of the National Fallen Firefighters Foundation. However, the Texas brewery apparently had priority rights and, when it filed a trademark infringement complaint to stop the sale of Fireman's Brew in Texas, the California brewery didn't put up much of a fight. In November, the parties filed a consent judgment and stipulated injunction barring the California brewery from the continued sale of Fireman's Brew in the Lone Star state. Humulus Lupulus Enterprises Inc. v. Fireman's Brew Inc., Case No. 1:16-cv-00963 (W.D. Tex.).

Folino and Folin Wines

The Folino Estate winery applied to register its name and logo for wine, wedding and catering services. The application was refused on the ground of likely confusion with the registered mark for Folin Cellars, an Oregon winery. The TTAB reversed, holding that the designs were distinct, and that although the words "Folino" and "Folin" were similar, the former projects an "Italian look and sound" which the latter lacks. In re Folino Estate LLC, 2016 TTAB LEXIS 461 (Trademark Trial & App. Bd. Aug. 19, 2016)

Foster's, Australian For Beer

Last December, Leif Nelson filed a putative class action in the Eastern District of New York against MillerCoors, asserting false advertising claims in connection with Foster's Beer. William and Ralph Foster began brewing the beverage in Australia in 1887, and it was first imported into the United Stated in those iconic 25.4 ounce cans in 1972. Since 2011, the Foster's beer on the U.S. market has been brewed at a MillerCoors facility in Fort Worth, Texas, but the complaint alleges that the company nevertheless deceptively continues to market the product as if it were imported, including by using slogans such as "Australian for Beer" and by depicting Australian national symbols on the can (like the kangaroo and the Southern Cross constellation from the nation's flag). The parties are currently engaged in discovery, and MillerCoors' motion to dismiss is pending. Nelson v. MillerCoors LLC, Case No. 1:15-cv-07082 (E.D.N.Y.).

Gee Williquors

G Wiliquors of North Dakota applied to register Gee Williquors for retail liquor services. G-Will Liquors, a chain of liquor stores in Minnesota, opposed the application, claiming priority common law rights and likelihood of confusion. The TTAB found that the Minnesota chain did have priority dating back to 1982, and rejected the North Dakota store's argument that its mark is pronounced as a cluster (i.e., "geewilliquors") whereas the Minnesota mark is pronounced with pauses (i.e., "g-will-liquors), thus creating a different commercial impression. The refusal to register was affirmed. WCR Liquors Inc. v. Gee Williquors Inc., 2016 TTAB LEXIS 77 (Trademark Trial & App. Bd. Feb. 24, 2016). A few months after the refusal, G-Will Liquors filed a trademark infringement action in the District of Minnesota against the North Dakota store. That matter is pending. WCR Liquors Inc. v. Gee Williquors Inc., Case No. 0:16-cv-02536 (D. Minn.).

Anheuser-Busch Hit With Rest Break Class Action In Calif.

Source: Law360
By Kat Greene
January 11, 2017

Anheuser-Busch allegedly fails to give its delivery and store merchandise employees proper rest breaks and doesn't compensate them with overtime pay, according to a proposed class action filed in California state court this week.

Jose Hernandez, who worked for the company as a temporary employee last year, said in his complaint on Monday that the company didn't label on his wage statements which amounts he'd been paid as regular pay and which were overtime, and that his total pay didn't take into account the overtime he had worked.

The company also systematically denied its delivery and store merchandising workers their breaks and didn't pay them for that time, according to the suit.

"Defendants ... have acted intentionally and with deliberate indifference and conscious disregard to the rights of all employees in defendants' failure to pay premium pay for missed meal and rest periods, failure to pay overtime and double time, and failure to provide accurate itemized wage statements," the complaint said.

Hernandez seeks to represent a class of delivery and merchandising employees for Anheuser-Busch's California business who received itemized wage statements, worked more than 3.5 hours without a break, or worked more than eight hours in a day from January 2013 to the present, according to the complaint.

Hernandez worked as a temporary employee doing merchandising - setting up retail displays - for the Missouri-based beverage company from August to October 2016, earning $10.50 per hour, according to the suit.

But during his time at Anheuser-Busch, the company required him to work through what was supposed to have been state-mandated break time, Hernandez claims. And it didn't always pay him properly for the overtime and double time he was supposed to have earned, he said in the suit.

The hours worked in each pay period as listed on his wage statements didn't add up to the total hours he had actually put in, and the company didn't always compensate him for the overtime he worked, Hernandez said.

The company is no stranger to wage-and-hour litigation.

Drivers for Anheuser-Busch parent Anheuser-Busch InBev Worldwide Inc. in 2014 launched a proposed class action making similar claims, court records show. That suit was voluntarily dismissed just a few months later in federal court, according to the docket.

A representative for Anheuser-Busch didn't immediately respond to a request for comment on the instant case Wednesday.

Hernandez is represented by Larry W. Lee and Kristen M. Agnew of Diversity Law Group and Dennis S. Hyun of Hyun Legal APC.

Counsel information for the defendant couldn't be immediately determined Wednesday.

The case is Jose Hernandez v. Anheuser-Busch LLC et al., case number BC646330, in the Superior Court for the State of Los Angeles, County of Los Angeles.

Texas Tackling Trade Practices

What's legal, what's not? It seems as though many states are asking that question these days, (we're looking at you, Massachusetts). In the midst of an ongoing court battle about the so-called "one share rule" (whether anybody in each of the three tiers can own as little as one share of a company in another tier), last week the Texas Alcoholic Beverages Commission held a meeting to address trade practices.

According to the TABC, meeting was in response to "numerous requests from the industry over time for clarification of the sort of practices that are not allowed because they are prohibited by the Alcoholic Beverage Code and the Commission's rules."

To help clarify what exactly is prohibited, the agency drafted a Marketing Practices Advisory on prohibited relationships in the three-tier system. It was the subject of last week's meeting. (The advisory may or may not be disseminated. More on that in a bit.)

THERE HAVE BEEN VIOLATIONS ALREADY. Anyway, the advisory draft cites prohibited scenarios based on actual violations."Some were settled cases. We didn't publicize who was involved," TABC Assistant General Counsel Martin Wilson told BBD. "But they were based on actual cases. As you look at the text, under each scenario, [there are cited] code provisions." People have been charged. But there are also "ongoing investigations based on the code provisions."

SO THEY ARE SEEKING TO CLARIFY, SORT OF. As we've been saying, with the proliferation of brewers, and new people entering the industry, many of these violations of state bev-alc codes are likely due to ignorance of the code.

So, as the Commission sees it, "facing market pressure to get their product on the shelf, members of the manufacturing tier, directly or indirectly, may be reimbursing retailers for advertising costs and compensating retail employees with bonuses for promoting the retail sale of the manufacturer's brands," draft reads.

But though its stated purpose is to "clarify" prohibited trade practices, the draft revealed potential trade practice audits.

DRAFT: AUDITING TEAM VETTING VIOLATIONS. The draft says TABC promotes voluntary compliance with (apparently unclarified) trade practices.

Regardless, the notice claims to have "dedicated a specialized audit team to focus exclusively on investigating marketing schemes that may be in violation of provisions of the Code.

"...the agency will fulfill its mission and investigate and pursue administrative charges against industry members found to be in violation," draft says.

We asked TABC's Martin: Are those audits ongoing? And are there potential penalties?

"Yes, the answer to both of those things is yes," he said.

ENUMERATED NO NOs. Advisory draft also, of course, clarified potential violations. As in, things that are probably going on.

"Wholesalers and distributors may face pressure from manufacturers and large chain retailers to engage in unlawful activities such as agreeing to lower price margins, or to act as a pass-through for advertising and marketing fund dollars," note said. "In addition, these wholesalers and distributors may be asked to unlawfully serve as a conduit for control or private label brands,which can result in product exclusivity" and illegal under Texas law.

They noted some "common examples of prohibited relationships" unearthed by agency investigations:

-Retailer cash and credit incentive programs

-Control/Associate/Private Brand: Controlling product distribution through pricing schemes which may be based on volume discounts, using just-in-time warehouse product stocking, and/or executing unlawful agreements

-Consignment: "When either the retailer does not pay the upper tier member until the product is sold or the product is returned to the upper tier member for credit if it is not sold."

-Advertising

-Unlawful Agreements and more.

TABC EXPLAINS AIM. Would the agency use the "draft" to help offenders rectify practices voluntarily? Or what exactly is its aim? TABC's Martin explains:

"We have a provision in [the] Code, that says we're supposed to communicate marketing practice decisions to the industry ... and there's a process by which we formalize them by putting them in a marketing practice advisory. That's what this was." The Code requires input before they "promulgate" one.

"We convened this meeting [for input] from all segments of industry. We invited all segments, and all segments showed up."

THIS IS PRELIMINARY. THE NEXT STEP IS, WELL... According to Martin there was "quite a bit of discussion at the meeting. The ultimate stage would be for us to actually put a marketing advisory out. This was not that. It was just a draft to get input. Where we go from here is not quite clear." There are a few possibilities.

"One is, we regroup and even break up into smaller groups." Why? Because apparently some segments of the industry (ahem, wholesalers) were uncomfortable talking while other segments of the industry were in the room (retailers and suppliers).

And the TABC got some more feedback. There were people who thought it would be [helpful] if the TABC said exactly what the industry could do as opposed to what they couldn't (crazy, right?). But that would be a rulemaking more likely than not. But that's "another possible outcome; rules, instead of putting out an advisory... [are] all possibilities."

NO CHANGES NEEDED TO PROPOSED FINAL JUDGMENT, SAYS DOJ

After the DOJ seemed to greenlight transaction after transaction in the wake of ABI-SABMiller tie up, save some limits on A-B's wholesaler incentives and a more solid wholly owned distributor cap, many thought there was still another shoe to drop in the matter.

Well, it fell pretty lightly.

Twelve different groups sent comments in response to their proposed final judgment (PFJ) on the ABI-SABMiller tie-up and not a single one swayed the DOJ to make an edit.

PFJ IS "EFFECTIVE AND APPROPRIATE," SAYS DOJ. "After careful consideration of the public comments, the Department continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest," writes the DOJ. "The Department will move this Court to enter the proposed Final Judgment after the comments and this response are published."

WHO SENT IN THE COMMENTS? The DOJ received twelve comments during the 60-day comment period. Four of these comments came from wholesaler associations (Beer Distributors of Oklahoma, Virginia Beer Wholesalers Association, Wholesale Beer Association Executives, and National Beer Wholesalers Association). A couple came from brewers (Yuengling and Ninkasi). The remaining six came from: the Brewers Association; American Beverage Licensees; Consumer Watchdog - a consumer advocacy organization; the North Carolina DOJ; the International Brotherhood of Teamsters; and professor of law at Wayne State University, Stephen Calkins.

WHAT DID THESE COMMENTS SAY? The majority of the comments fell into "one of three broad categories," writes the DOJ. These three categories are: 1) comments related to the restrictions imposed by the PFJ on ABI's distribution practices and ownership of distributors; 2) comments related to ABI's ownership of craft breweries; and 3) comments related to MillerCoors' Eden brewery.
The DOJ's response to all these comments is essentially 55 pages of either A) we already took care of it in the PFJ or B) that is beyond the scope of ABI buying SABMiller.

Despite all their recommendations being turned down, "many commenters acknowledged the meaningful protections for consumers and competition that the Department achieved through the proposed Final Judgment," per document.

Thursday, December 15, 2016

Empire-Breakthru Battle Heats Up As Retailers Reveal Details Of Alleged Smuggling Scheme

The court battle between Empire Merchants and Breakthru Beverage-two of the U.S. market's biggest spirits and wine distributors-continues to heat up.
Late last week, Empire amended its complaint against Breakthru and two of its top executives-co-chairman Charlie Merinoff and CEO Greg Baird. In the original complaint, filed in U.S. District Court in September, the Brooklyn-based Empire accused Merinoff and Baird of taking part in an interstate liquor smuggling scheme while they were executives at Charmer Sunbelt Group, which merged with Wirtz Beverage Group to form Breakthru earlier this year.
"We have amended our RICO lawsuit to include the testimony of Maryland retailers now cooperating with us who have provided direct evidence substantiating our claims against Reliable Churchill (formerly a division of Charmer Sunbelt and now part of Breakthru)," Empire attorney Randy Mastro told SND. "And we have added new claims against Reliable Churchill's ultimate parent, Breakthru, for retaliating against Empire Merchants and its affiliate, Empire North, over the filing of this lawsuit by threatening to terminate service contracts, among other things."
In the amended complaint, Empire includes affidavits from two Maryland retailers-Vlamis Liquors and Northeast Liquors-that describe how the alleged smuggling activity was carried out. According to the complaint, these and other Maryland retailers illicitly shipped liquor to New York retailers (where liquor taxes are some five times as high as Maryland's) to sell in New York. The complaint states that New York retailers would purchase the liquor in large cash sums-as much as $20,000 at a time-and that the Maryland retailers would then launder the cash through their bank accounts, from which they would then pay the Maryland wholesalers.

Both Reliable Churchill and fellow Maryland wholesaler Republic National Distributing Co. (RNDC) are named in the complaint. Earlier this year, federal prosecutors in Maryland indicted RNDC on interstate smuggling charges. However, in October, they fully dismissed the indictment.

Breakthru attorneys told SND that Empire's amended complaint lacks merit. In a letter to the court sent earlier this week, Breakthru attorney Sean O'Shea questions the veracity of the affidavits from the Maryland retailer employees, maintaining they are "chockful of hearsay and double hearsay" and "rest on pure conjecture by third parties as to what Reliable 'must have known.'"

"In response to a sanctions warning and a chance to correct its legally and factually deficient complaint, Empire has filed an amendment which is as flawed and misguided as its initial complaint," O'Shea told SND. "Breakthru and Reliable will shortly move to dismiss it in its entirety."

BREAKTHRU AND EMPIRE EMBROILED IN BID ROW

15th November, 2016 by Annie Hayes

Breakthru Beverage Group has made an offer to acquire Empire Merchants for an undisclosed amount - a move the latter's attorney has branded "an outrageous publicity stunt".

Breakthru Beverage Group has made an offer to acquire Empire Merchants

In an internal memo issued to employees, Breakthru co-chairmen Rocky Wirtz and Charles Merinoff, vice chairman Danny Wirtz and CEO Greg Baird said the acquisition "makes sense".

"As you know, Empire fits perfectly with our current supplier alignment, our expertise and our institutional knowledge of the New York market," the memo read.

"Our investment in New York would provide tremendous value to suppliers as they consolidate among fewer partners and look for multi-state sales and marketing synergies. It makes sense for us, and our suppliers, as we believe it would for Empire as well."

Empire Merchants is currently suing several Breakthru executives for involvement in an alleged smuggling scheme that saw wine and spirits worth "millions of dollars" smuggled into New York and sold illegally.

Terms of the offer - which is "unrelated to ongoing litigation" - were not disclosed.

Speaking to The Spirits Business, Randy Mastro, an attorney for Empire Merchants, slammed the "bogus" bid.

"This is an outrageous publicity stunt by Breakthru. Empire Merchants isn't for sale, and Breakthru is up to no good misbehaving in this ham-handed manner and suckering the press into reporting its bogus bid.

"Such diversionary tactics cannot obscure the serious RICO and fraud charges Breakthru's Maryland affiliate is now facing in Empire Merchants' pending New York civil lawsuit. Meanwhile, Empire Merchants intends to continue to be the best distributor of wine and spirits in New York and, indeed, the entire country."

While Breakthru Beverage itself is not named in any court documents, the legal action alleges that Breakthru's Maryland operation, Reliable Churchill LLLP, and Republic National Distributing Company (RNDC) conspired with retailers in rural Maryland and New York to secretly ship alcohol products between the states.

Breakthru Beverages has no further comment at this time.

The offer comes just over a week after Lloyd Nobel - who was dismissed as CEO and president of Empire Merchants - joined Breakthru Beverage Group as an executive vice president.

Trademark due diligence - USPTO registration is a key to craft brewery success

By Dolores R. Kelley, Esq. and Craig S. Hilliard, Esq.

According to the Brewer's Association, the number of craft breweries has been growing by double digits for several years and in 2015 accounted for $22.3 billion of all beer sales in the United States. As of 2015 there were 4,269 breweries in the United States: 2,397 were microbreweries, 1,650 brewpubsand 178 regional craft breweries. This "craft beer" growth has led to a bigger share of the alcoholic beverage market. As a result of the increase, two trends are causing concern in the industry and a significant rise in the number of trademark lawsuits involving craft breweries. One trend is that of branding each particular style of beer that is offered, and the second is the position taken by the U.S. Patent and Trademark Office (USPTO) of including all alcoholic beverages as related goods.

Trademarks are symbols, words, or designs that identify products or services of a particular company. They help generate recognition and interest in a company and can symbolize the value and quality of products and services. Trademark rights generally arise upon first "use" of the trademark to advertise or sell products to the public. Beyond mere "use," the best way to protect a trademark is by registering the mark with the USPTO, but only after securing a comprehensive analysis from an experienced attorney. Recent cases have shown that trademarks for alcoholic beverages involve complex interpretations of what constitutes a competing product and what can be considered confusing. These court decisions have ruled infringements occur across beverage classes, i.e., crossing from beer to wine to hard liquor and even to soft drinks.

When reviewing an application for registration of a trademark, the USPTO will evaluate whether the proposed trademark conflicts with a registered mark or a pending application for registration. The USPTO will evaluate the similarity of the marks and the relationship between the goods and services identified by the marks. This includes whether the goods and or services represented by the marks are related such that consumers would mistakenly believe they come from the same source.

Trademark infringement occurs when the infringing party uses the trademark (or a substantially similar mark) on competing or related goods or services without authorization from the trademark owner. If the use of the trademark would cause a likelihood of confusion in the average consumer, the use will likely be ruled as infringement. A trademark infringement case is brought by the holder of the trademark against the infringing party, and can result in significant damages against the defendant.

If a brewery does not conduct due diligence with respect to trademark rights, it could get slapped with a lawsuit, lose money already spent on branding, and pay hefty damages for the mistake. Even if a brewery does not face an infringement suit, a brewery that does not properly conduct due diligence with respect to the universe of potentially conflicting marks will limit its ability to protect its brand if a conflict precludes registration of the trademark with the USPTO.

Savvy businesses aggressively protect their trademarks and that may account for a rise in the number of lawsuits involving craft breweries. In a competitive market, alcohol brands can't afford to lose sales and market share and therefore zealously protect their brands. The damage to a brewery's reputation from infringement can be devastating, particularly in the social media age where a company or product can be destroyed in an instant when a rant or bad review goes viral.

For example, in 2015 a microbrewery in California started operating under the name Black Ops Brewing. Within months it was in a trademark dispute with Brooklyn Black Ops, a company that had been using the "Black Ops" name since 2007, and sought protection of its trademark in 2008. Due to the ongoing litigation, Black Ops Brewing had to eventually change its name to Tactical Ops Brewing, Inc. This type of litigation seems to be a rising problem with craft breweries that jump into the lucrative beer market without a full understanding of the legal issues to be considered, especially related to trademark protection.

One complication for new breweries is that trademarks can be enforced across different types of alcohol products or other beverages. One might not think craft beer has anything to do with wine, but the USPTO sees a connection - ruling that a winery might branch out into selling beer using the same established name.

For example, in a recent appeal, the judicial branch of the USPTO - the Trademark Trial & Appeal Board (TTAB) - upheld a rejection of a trademark application for The Bruery, LLC (See The Bruery, LLC, Ser. No. 85656671 (Sept. 24, 2014); not precedential) for the beer "5 Golden Rings" because it was too confusingly similar to the registered mark "Gold Ring" for wines. One New York court has taken this position even further with respect to infringement, ruling that Moose Wizz root beer violated Moosehead Beer's trademark.

These are just a few examples of litigated trademark conflict cases affecting breweries. Craft breweries must be diligent if they intend to avoid lawsuits that could stifle or stop growth. A craft brewery that launches in the right market, advertises to the right people, and develops a loyal following could become a major success overnight. However, if the brewery did not conduct the due diligence necessary to secure a non-infringing mark, it risks being sued by others in the beverage industry. Losing an infringement case can harm a brewery's reputation. If the company also has to change the product name because of that loss, it can lose hard-fought market share, ongoing sales, or even go out of business.

With complex cross-class interpretations coming down from the USPTO and in the courts, the risk of infringement is even higher than in the past. Craft breweries need to conduct a thorough trademark search before spending money on packaging, advertising, and branding activities. Moreover, a USPTO registered trademark is not only recommended, it is the best way to protect the brand's name in the future. The trademark registration process should not be taken lightly. The safest route is to find an experienced attorney to maneuver through the legal challenges of confirming trademark availability and obtaining trademark protection.

United States: Texas Court Of Appeals Hands Down Instructive Administrative Law Opinion

Last Updated: January 6 2017

Article by Marc E. Sorini
McDermott Will & Emery

A recent Texas Court of Appeals decision, EATX Coffee, LLC v. Texas Alcoholic Beverage Commission, provides an important reminder of how principles of administrative law may check the current trend towards "regulation by Internet." Ct. of App of Texas, 4th Dist., No. 04-16-00213-CV (Dec. 7, 2016). Like TTB and many other state alcohol beverage authorities, the Texas Alcoholic Beverage Commission (TABC) periodically publishes "Question and Answer" (Q&A) documents purporting to interpret the Texas Alcoholic Beverage Code.

The EATX opinion arose from a challenge of two particular Q&A's that, in effect, banned the filling of "crowlers" by Texas beer and wine retailers. A crowler is an aluminum can that a retailer can fill with beer and seal for consumers to take away from the retail premises. While TABC has declared that retailers may fill and sell "growlers" of beer (large bottles filled and sealed by retailers), the TABC's Q&A's declared the filling of crowlers to constitute manufacturing - an activity that a retailer cannot engage in without a manufacturing license. (And, of course, under state tied house laws a retailer generally cannot lawfully obtain a manufacturing license).

EATX, having invested in crowler equipment and facing disciplinary action over its filling and sale of crowlers, filed a lawsuit against the TABC seeking a declaration that TABC's Q&A's were wrong because the filling of a crowler does not constitute manufacturing. EATX also sought an injunction against enforcement. In response, TABC asserted that the Q&A's were not a "rule" and therefore the trial court lacked jurisdiction to hear a challenge to the Q&A's, and also asserted that EATX failed to exhaust the administrative remedies it could raise in defense of a TABC disciplinary action against EATX's retail license.

The Texas Court of Appeals, 4th District, reversed. Reviewing the Q&A's, the Court of Appeals concluded that: (1) they are of general applicably as they purport to apply to all retail permit holders; (2) they interpret the law and do not simply re-state it; (3) they do not affect only TABC's internal management or organization. As such, the Q&A's constitutes a "rule" within the meaning of Texas' Administrative Procedures Act and the trial court had jurisdiction to hear the case and grant relief. Turning to exhaustion, the Court of Appeals found no authority for the proposition that a litigant aggrieved by the promulgation of a rule must instead wait and raise its arguments in an action brought to cancel, suspend or refuse to renew its license. In short, EATX can have its day in court.

Given the declining use of notice-and-comment rulemaking by TTB and most state alcohol regulatory agencies, the use of Q&A's, "FAQs," "advisory bulletins," "industry memoranda," and similar informal policy documents has been rising for decades. While such expedients may help move policy forward in a quicker, less resource-intensive (for the agency) manner, the EATX opinion stands as a useful reminder to regulators that this approach has limits.

Indiana Retailer Challenges Illinois Law Banning Out of State Retailer Shipping

Admin 21st Amendment Supreme Court

Professor Alex Tanford has returned to the alcohol litigation wars. This time he and others are representing an Indiana retailer, owner and Illinois resident challenging laws in Illinois that permit Illinois residents to ship to consumers but prohibit out of state retailers. In the Complaint, the plaintiffs seek to invalidate the Illinois laws on dormant Commerce Clause and Privileges & Immunities grounds.

Similar lawsuits seeking the same relief have failed in the 2nd Circuit (Arnold v. Buy Rite) and the 5th Circuit (Siesta Village v. Steen). Missouri also has successfully defended wholesaler level regulation in the Southern Wine case at the 8th Circuit.

Illinois has had high profile investigations into unauthorized sales of alcohol by Indiana businesses. Illinois estimates losing million in tax revenues due to illegal sales.

Previously, the same plaintiff team unsuccessfully filed a lawsuit against Indiana laws relating to winery sales and the 7th Circuit ruled for Indiana in an opinion by Judge Posner that highlighted strong 21st Amendment rationales.

Lebamoff Enterprises, Inc. et al v. Rauner et al
Plaintiff: Lebamoff Enterprises, Inc., Joseph Doust and Irwin Berkley
Defendant: Bruce Rauner, Lisa Madigan, Constance Beard and U-Jong Choe
Case Number: 1:2016cv08607
Filed: September 1, 2016
Court: Illinois Northern District Court
Office: Chicago Office
County: XX US, Outside the State of IL
Presiding Judge: Samuel Der-Yeghiayan
Nature of Suit: Other Civil Rights

Cause of Action: 42:1983
Jury Demanded By: None

December 8, 2016 5:10 PM

Company suspends plans to offer home alcohol delivery in KC after questions surface

Drizly launched and promptly suspended its home alcohol delivery service in Kansas City on Thursday. KEVIN ANDERSON File photo
By Steve Vockrodt

What if there were a way to order alcohol from a local liquor store and have it delivered to a home in Kansas City? There's an app for that.
Whether that's allowed is another question.
Drizly, a Boston-based company, spread word around early Thursday that it had officially launched a home alcohol delivery service in Kansas City through a web application it had developed. Kansas City, according to its news release, was its latest market among some 40 North American cities.
But by Thursday afternoon, and after The Star quizzed Drizly about its compliance with Kansas City liquor laws, Drizly announced it had suspended the service.
"We've become aware that while at the state level Drizly is compliant, the delivery aspect of our business and how it pertains to specifics of The City of Kansas City's liquor codes require further review with our counsel and the city," Drizly co-founder Justin Robinson wrote in an email to The Star. "We always err on the side of caution. As we re-review local regulations, we've suspended our home delivery option prior to any orders being placed today."
Drizly works like this: A consumer downloads its mobile app or visits Drizly's website. When the customer feels like buying liquor but doesn't want to leave their house to get it, they place their order through Drizly. Drizly then partners with a local liquor store - in Kansas City's case, that's Mike's Wine and Spirits - which processes the payment, handles the delivery and collects a fee and a tip from the customer.
Problem is, Kansas City's liquor codes forbid such an arrangement.
Jim Ready, manager of Kansas City's Regulated Industries, said alcohol deliveries are allowed only after a customer has made a payment in person at the "liquor license premises" - in other words, at the liquor store.
"The person has to show up personally," Ready said.
For example, a liquor store could deliver a couple of beer kegs to someone's house in Kansas City - but only after that customer showed up to the store and paid for those kegs.
And the local liquor store, Ready added, would need to tell Regulated Industries of its plans to deliver off-site.
"I have not received such a request at this time" regarding Drizly, Ready said.
Robinson said before Drizly launches in a new market, it hires a local attorney to look into the state regulations.
"We did that with our attorney two years ago when we launched in St. Louis," Robinson said. "We'd communicated with them two years ago and more or less got the green light."
Mike O'Connell, spokesman for the Missouri Department of Public Safety, said there's no record of Drizly holding a state license.

Missouri regulations say that "no licensee, his/her agent or employee shall sell intoxicating liquor or nonintoxicating beer in any place other than that designated on the license or at any other time or in any other manner except as authorized by the license."
"This is interpreted as requiring that the transaction take place on the premises of the licensee, and not through a third party," McConnell said in an email.

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