DUNCAN LIQUOR LAW LETTER

May, 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.

"A tax is a forced contribution to pay for the government's general services, that is, services that benefit the members of the public at large, regardless of whether any particular person has paid the tax. A fee, on the other hand, is not a revenue measure. It is assessed against those who gain the exclusive benefit of the service or, if a regulatory fee, those who are the subject of the regulation."
Kansas Supreme Court,April7,2017

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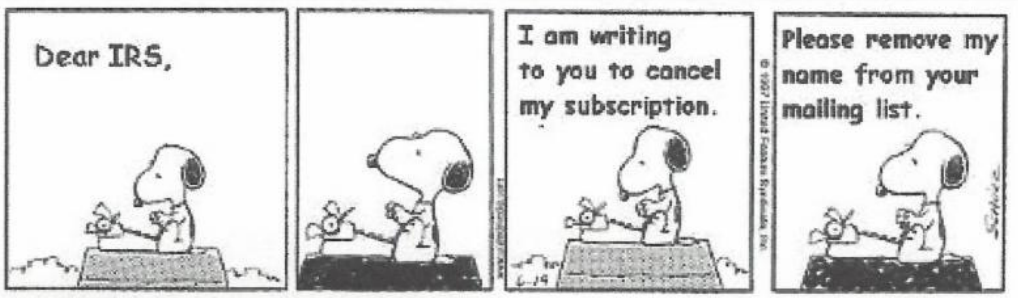

KANSAS LEGISLATURE PASSES AND GOVERNOR APPROVES BILL TO LET GROCERY AND C-STORE TO SELL BEER NOT TO EXCEED 6% BEGINING APRIL 1, 2019

For nearly a decade a coalition of grocers, big-box and convenience stores have pursued efforts to sell wine, beer and spirits in their stores. Legislative session after session those efforts were rebuffed. On National Beer Day 2017 their prospects changed, a little. Only five states today Kansas, Colorado, Oklahoma Minnesota and Utah provide for the sale of cereal malt beverage, known as 3.2 beer, in grocery stores. Actions in three of those states suggest that in 2019 only Kansas and Utah will remain where 3.2 is required to be sold in grocery and convenience and similar stores. There is every indication that if not eliminated 3.2 beer availability will be significantly reduced by 2019.

SB13 became the solution to that dilemma as crafted by the stakeholders. SB13 is a new solution. While perhaps not perfect it is the best that the industry believed could be achieved to provide a 2 year transition so businesses can prepare for the eventuality that 3.2 beer will not be available in sufficient qualities to meet consumers demand. It is a solution offered by those affected.

Starting on April 1, 2019, cereal malt beverage licensees, currently licensed by cities and counties, will be allowed to sell CMB and beer containing not more than 6.0 percent alcohol by volume. These licensees will continue to be licensed by local government.

Also starting on April 1, 2019, liquor retailers licensed by the state to sell alcoholic liquor (beer, wine, and spirits) will be allowed to sell CMB and will be allowed to sell other goods or services up to 20% of their gross sales, excluding the sales of lottery tickets, cigarettes, and other tobacco products.

The Director of the Kansas Alcoholic Beverage Control will have oversight over the sale of beer by CMB licensees in order to maintain an orderly market. The Director is to adopt rules and regulations to administer the bill by July 1, 2018, nine months before the effective date so the stakeholders can prepare for the change in the market place.

Ten years after the bill's effective date the ABC will conduct a market impact study on the sale of beer by CMB licensees. The study would include changes to the number of CMB and alcohol liquor licenses issued, reasons for the changes, the effect on state and local tax revenues, the impact on employment, and other relevant factors. The Director will report the study findings to the Legislature during the 2029 Session. The implication of this provision is that the Legislature

will not make any other major changes in the retailing of beverage alcohol during the interim decade. However, one Legislature cannot bind another.

In agreements between suppliers and distributors made prior to April 1, 2019, the terms "CMB" or "beer" would have the meanings specified in law as of the effective date of the bill. Distributors would be allowed to establish minimum quantities and dollar amounts for orders of CMB and alcoholic liquor.

All licensees must sell CMB or beer at no less than their acquisition cost plus tax. Trade practices in effect for liquor stores will also be applicable to the licensees selling beer not exceeding 6%. Kansas' anti-discrimination laws applicable to liquor stores will be applicable to all licensees. In essence SB13 provides a level playing field.

The legislative process is built on compromise and SB13 is a compromise between the affected parties to solve in a timely manner a predicament not of the stakeholders making, but one that needed attention now The bill passed the Kansas House 80 to 45 and passed the Senate 27 to 11. It was approved by the Governor April 17, 2017.

No. 112,8281 IN THE COURT OF APPEALS OF THE STATE OF KANSAS STATE OF KANSAS, Appellee, v. JUSTIN D. STANLEY, Appellant.

SYLLABUS BY THE COURT
1. The penalty for driving under the influence of alcohol under Kansas law increases based on the number of the defendant's prior convictions. A prior conviction can be a conviction for a violation of another state's law that prohibits the acts that the Kansas driving under the influence law prohibits.

2. Essentially, the Kansas DUI law criminalizes two acts: (1) operating or attempting to operate a vehicle with a blood- or breath-alcohol level of .08 or more; and (2) operating or attempting to operate a vehicle while under the influence of alcohol and/or drugs to a degree that renders the person incapable of safely driving the vehicle.

3. If an out-of-state conviction is based on a statute that is broader than the Kansas statute, then the out-of-state conviction cannot be used for sentencing purposes under 1 REPORTER'S NOTE: Previously filed as an unpublished opinion, the Supreme Court granted a motion to publish under Rule 7.04 (2017 Kan. S. Ct. R. 45). The published version was filed with the Clerk of the Appellate Courts on March 1, 2017. 2 K.S.A. 2012 Supp. 8-1567(a)(1) and (3), because the same acts are not prohibited by both laws.

4. The pertinent Missouri driving while intoxicated statute provides that a person commits the crime of driving while intoxicated if the driver operates a motor vehicle while in an intoxicated or drugged condition. A person is in an intoxicated condition when the driver is under the influence of alcohol, a controlled substance, or drug, or any combination thereof.

5. The Kansas statute specifically requires that to be in violation, the influence of alcohol must be to a degree that renders the driver incapable of safely driving a vehicle (or that the person has a blood- or breath-alcohol concentration of .08 or more). That requirement is more stringent than the Missouri requirement of

intoxication that in any manner impairs the ability of a person to operate an automobile. A driving impairment may not necessarily render a person incapable of safely driving a vehicle. It is clearly conceivable, then, that an act that would be considered driving while intoxicated in Missouri would not be driving under the influence in Kansas.

Decision at:
http://www.kscourts.org/Cases-and-Opinions/opinions/CtApp/2016/20160401/112828.pdf

Published March 1, 2017.

CRYSTAL HEAD VODKA WINS TRADEMARK DISPUTE

Yesterday (March 29) a California federal jury sided with Dan Aykroyd's Crystal Head Vodka parent company Globefill in its trademark infringement suit against the former makers of Kah Tequila, Element Spirits, over the crystal skull bottle design, per Law360.

BACKGROUND. In 2010, Globefill filed suit against Elements and founder Kim Brandi, who also designed the Kah bottle, calling it a "cheap knockoff" of its own skull-shaped bottle. The case went to court in 2013, but the jury sided with Elements. In February 2016, the Ninth Circuit ruled that Globefill should get a new trial. The new trial started up last week and Kim Brandi and Dan Aykroyd have taken the stand to defend their respective bottles.

Just before closing arguments, attorneys representing Crystal Head called tattoo artist and occasional sculptor Walter Szymoniak to the stand as a rebuttal witness, who helped with the Kah bottle prototype. He claimed that Kim lied on the stand about not knowing about Crystal Head Vodka and in fact gave him one of the Crystal Head bottles to copy. Though under cross-examination he did add that he made significant changes to the copy before handing it over to Kim.

Ultimately, the jury sided with Crystal Skull. Though no word on what this means for Kah Tequila, which was recently sold to Amber Beverage Group (a part of SPI Group).

Liquor Co. Says Dan Aykroyd's Co. Can't Halt World Sales

Source: Law360
By Kelcee Griffis
April 18, 2017

A tequila company found liable for its infringing skull-shaped bottles has objected to an injunction bid by comedy legend Dan Aykroyd's own liquor brand, saying a worldwide sales ban is over the top. Elements Spirits Inc. on Friday

told the California federal court in its memorandum opposing a permanent injunction that Aykroyd's Crystal Head Vodka brand can't succeed in blocking sales of the product overseas because there's no legal footing for the move.

"Plaintiff's failure to come forward with any evidence of an effect of foreign KAH Tequila sales on Globefill's U.S. business, notwithstanding seven years of litigation and two jury trials, is fatal to its request for a worldwide injunction," the memorandum said. In March, an eight-person jury delivered a unanimous verdict in favor of Crystal Head maker Globefill Inc., finding that defendants Elements Spirits and its founder Kimi Brandi had intentionally infringed Globefill's trade dress by making and selling KAH brand tequila. The jury found that KAH, which comes in Day of the Dead-inspired skull-shaped bottles, was likely to confuse ordinary consumers into thinking it was made by, or affiliated with, Crystal Head, and had been designed with this objective in mind.

Now, Elements says that the injunction Crystal Head proposes is "grossly overbroad," the filing said, and it doesn't recognize that the KAH brand has its own rights to sell outside the U.S. "None of plaintiff's hyperbole is based in fact or even suggested by the record in this case, and none of it advances the ultimate issues the court must determine in fashioning an appropriate injunction," the memorandum said.

Globefill originally filed suit against Elements and Brandi in March 2010, alleging that Elements' KAH brand tequila infringed its bottle trademark. The suit headed to a first jury trial in November 2013 and the jury returned a verdict in favor of the defense on Dec. 3, 2013. Globefill filed a motion for judgment as a matter of law or a new trial in January 2014, which was denied by the district court.

But in February 2016, the Ninth Circuit vacated Elements' win, finding that the district court judge had erred by denying Globefill's motion for a new trial. It agreed with Globefill's assertion that Elements had improperly referenced similar legal proceedings in Mexico during its closing statements in the trial.

Globefill previously argued that anything short of a worldwide injunction would leave the door open for Elements to proceed with potentially infringing activity. It said the company has already shown it has "a long history of disrespect" for the court that doesn't bode well for future compliance.

"It would be a travesty of justice to have this case end with a permanent injunction that basically enjoins nothing," according to an April 10 filing by Globefill. It contended that the court should have no inhibitions about levying a broad injunction barring all sales of Elements' skull-shaped bottles. "This court has clear jurisdiction to compel citizens of this country, and the worldwide liquor conglomerate with which they are now associated, to halt their infringing conduct," Globefill said.

Globefill Inc. is represented by David Berg, Zenobia Harris Bivens, Victoria R. Mery, Michael M. Fay and Jenny H. Kim of Berg & Androphy, and Hernan D. Vera of Bird Marella Boxer Wolpert Nessim Drooks Lincenberg & Rhow PC.

Elements Spirits Inc. is represented by Thomas G. Rafferty and Keith R. Hummel of Cravath Swaine & Moore LLP, and James M. Lee of LTL Attorneys LLP. Kim Brandi is represented by Jon Miller of Miller Johnson Law.

The case is Globefill Inc. v. Elements Spirits Inc., case number 2:10-cv-02034, in the U.S. District Court for the Central District of California.

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Trial Lies Merit Fees In Bottle Battle, Aykroyd's Co. Says

Source: Law360
By Kelcee Griffis
April 24, 2017

Comedy legend Dan Aykroyd's liquor brand on Friday asked that a rival found liable for infringing the brand's skull-shaped bottle designs pay $4.3 million in attorneys' fees and costs after a second jury trial, saying that the competitor's defense was a "fabrication" and that its founder blatantly lied under oath.

Crystal Head Vodka maker Globefill Inc. told the California court on Friday that Elements Spirits Inc. should pay back $13.4 million in profits from its KAH Tequila, which is sold in painted Day of the Dead-themed bottles, along with $4.3 million in attorneys' fees spanning seven years of the litigation.

The jury previously heard testimony asserting that Elements Spirits founder Kim Brandi had lied under oath in claiming she came up with the KAH bottle designs from scratch. She in fact copied the bottles directly from Crystal Head, the brief said.

"Defendants' entire creation story for KAH Tequila is just that, a story, which was completely undermined" by the testimony of a tattoo artist, who told the jury that Brandi gave him a Crystal Head bottle to help him cast early versions of the KAH bottles, according to the filing.

"It is now clear why the KAH Tequila bottle is so strikingly similar to the Crystal Head Vodka bottle and why so many dimensions of the two bottles are identical," the brief said.

Globefill additionally said that Brandi offered the artist a $10,000 check under pretenses that she wanted to make up for "bad karma" from years ago when they were doing business together. But it was really a form of "hush" money because she believed he might be called to testify, the brief asserted.

That conduct should qualify Globefill to receive attorneys' fees, the company argued. saying that it fits the fee award requirements of both "subjective bad faith" and "exceptionally meritless" claims, according to the brief.

Furthermore, the rates that Globefill's attorneys charged "are reasonable and are billed at rates that are typical for attorneys practicing in this district," according to the brief.

Globefill originally filed suit against Elements and Brandi in March 2010, alleging that Elements' KAH Tequila infringed its bottle trademark.

The suit headed to a first jury trial in November 2013, and the jury returned a verdict in favor of the defense the next month. Globefill filed a motion for

judgment as a matter of law or a new trial in January 2014, which was denied by the district court.

But in February 2016, the Ninth Circuit vacated Elements' win, finding that the district court judge had erred by denying Globefill's motion for a new trial. It agreed with Globefill's assertion that Elements had improperly referenced similar legal proceedings in Mexico during its closing statements in the trial.

In March, a Los Angeles jury returned a verdict in the second trial, that time handing Globefill a win in the trade dress infringement suit. Elements recently argued against Globefill's proposed worldwide sales injunction, saying that such a request is drastic and unnecessary.

Counsel for the parties could not immediately be reached for comment on Monday.

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SOUTH CAROLINA LAWMAKERS DELAY SUPREME COURT DECISION ON LIQUOR LICENSE CAPS

After the South Carolina Supreme Court removed the liquor license limit last month, the state Senate now wants to delay the full implementation of the law so that they can change the law, reports a local publication. "This gives the General Assembly the opportunity to address the Supreme Court ruling on a law that has been on the books for 80 years," says Sen. Larry Grooms.

The state Supreme Court ruled that the law restricting the number of stores a licensee can operate to three is discriminatory and unconstitutional . You may recall, this decision reversed that of a lower court in 2014 that upheld the limit when retailer Total Wine & More challenged the law.

The state Senate passed a measure that delay the implementation of the court's order for one year and would require a licensee to pay a hefty fee - the equivalent of a year's total gross sales from one of its existing stores - to open a fourth store within that year. "The fee...is necessary to fund additional law enforcement, regulatory measures, health care costs and associated impacts on the health, safety and welfare of the state's residents resulting from the anticipated additional sales of liquor," per the measure.

April 13, 2017

Widow Jane Pushes Back Against Acquisition

Last month a group of industry executives filed a lawsuit in Delaware Chancery Court against the owner of Widow Jane bourbon, Daniel Preston, for allegedly sabotaging the sale of the brand, claiming that Daniel found a higher bidder T. hough, Daniel argues there is no higher bidder. Rather he doesn't want the sale to go through because he argues in a counterclaim that the buyers struck the sales agreement under false pretenses of how they intend to carry on the brand, per Law360.

The buyer group, referred to only as four "highly regarded" liquor executives, claims that they reached a member interest purchase agreement with Daniel in December following a bidding process. But in February they allege Daniel texted them to say their agreement undervalued the brand and he had "no requirement to sell" below market price. That's where allegations of there being a higher bidder comes in.

At the end of last month Daniel filed his response and a counterclaim denying the buyer group's allegations and claiming the group had misled him about their intentions for the brand. "However, [the buyers'] promises - the only reason [the sellers] agreed to the deal - were nothing more than smoke and mirrors, made intentionally to mislead [the sellers] into entering the deal," per Preston's response.

Daniel claims that the buyers wanted to source a single whiskey and slap the Widow Jane label on it to profit in the short-term, rather than preserving the approach to local ingredients, maintaining relationships with key vendors and retaining key employees. "In fact, [the sellers] have learned that [the buyer] intends to cease production on almost all of [the sellers'] twenty-nine 'farm-to-table' products, and is instead interested in simply slapping the renowned Widow Jane name on a single 'sourced whiskey' product. That short-sighted plan was to the great detriment of [the sellers], who retained a financial interest in Widow Jane's success under the agreement," per court documents.

As a result, Daniel claims the agreement "cannot practicably be consummated."

TEXAS SENATE VOTES TO ELIMINATE LIQUOR LICENSE LOOPHOLE

On Monday (April 10) the Texas Senate voted to eliminate a provision in the Texas Alcoholic Beverage Code that allows certain licensees to own an unlimited number of liquor stores, while others are restricted to five. You may recall, Wal-mart has been battling in court with the Texas Alcoholic Beverage Commission (TABC) over that very issue.

The issue is that the TABC code allows consolidation of package store permits into a single entity if one or two relatives have a majority of the ownership in two or more venues with package store permits, such as Spec's and Gabriel's. The bill's sponsor, Sen. Brian Birdwell, says his intent is to "ensure that all Texas businesses are treated equally regardless of their tenure in the market or their familial makeup."

"By voting to eliminate this preferential loophole, the Texas Senate has sent a clear message that there is no room in Texas for anti-competitive laws that provide special privileges and protections for a select few based on their family trees. It's time to stop this discriminatory practice, which has allowed a handful of families to establish virtual liquor store cartels," says Travis Thomas, spokesman for Texans for Consumer Freedom.

WHAT ABOUT WAL-MART'S CASE? Wal-mart has been fighting to add spirits to the shelves of its 546 stores in Texas since 2015. As a result, Wal-mart is locked in a legal fight with the TABC because the code prevents a public corporation from holding a package store permit and limits the number of package store permits to five for most companies.

Meanwhile, two other bills were introduced last month to eliminate both the block on public companies from having a liquor license and the five license cap . It seems Texas lawmakers are taking Wal-mart's side.

A-B Disapproves MegaMerger in Southeast

4.6.2017

"Three A-B houses in the Southeast are joining forces to form a 35 million case red network operation in what is being described as a mega-merger," we reported in early February. Recall the trio looking to team up included R.A. Jeffreys in North Carolina; Southern Eagle in Georgia and South Carolina; and Crown Beverages in South Carolina. But word has come down that, after their due diligence, A-B disapproved the transaction Monday. A source close to the matter walked BBD through it.

WHY DENY? A-B has encouraged voluntary consolidation in their network. (There's actually a consolidation guide; all wholesaler have a copy.)

But there are limits to the benefits of consolidation. In this case -- and these things are evaluated on a case-by-case basis -- bottom line: the transaction would have involved large, complicated territories and wholesalers who are already stretched to their limits over the past decade's-worth of consolidation.

The would-be merged wholesalers were not expected to be able to fulfill the service element expected under A-B's equity agreement. (Indeed, one part of the merger's plan was to add only one EAM [Equity Agreement Manager] who would cover the territory via personal plane.)

By now, we understand, both sides have filed suit.

MORE WHY? As we understand from the informed source, A-B had been working with the three wholesalers to understand the proposed transaction. Diligence included interviews with the three wholesalers' principals to fact-gather and understand effects. A-B had expressed concerns from the

beginning, but became increasingly concerned about the complexity and implications of the proposed merger.

TOO LARGE? With this would-be monolith, you're looking at basically 500 miles stretching from the southernmost part of Georgia all the way up to North Carolina. It includes major cities like Charleston, and Raleigh, as well as rural markets. The combined territories would span three states (the Carolinas and Georgia). That also means three sets of regulations, state pricing, etc. AKA lots of complexity.

STRETCHED TO THE LIMIT? Southern Eagle is the southernmost piece. RA is the northernmost North Carolina piece and Crown is in the middle. Southern Eagle and RA are the two big wholesalers, and each has grown significantly through consolidation in the last 10 years.

How significantly? In 2007, both Southern Eagle and RA Jeffreys added five territories each. In fact, the two of them combined have gone from 5 million cases in 2007 to 28 million today. We understand that when the wholesalers submitted their proposal, they proposed one EAM would cover the territory with his personal plane. So... A-B denied approval. Also:

THEY'VE FILED A LAWSUIT FOR DECLARATORY JUDGEMENT IN NC. They have no interest in litigating, we hear, but to protect themselves, A-B filed a lawsuit for declaratory judgment in federal court in North Carolina.

And the other side appears to be litigating, too, natch.

Carrabba's Italian Grill Hit With Nationwide Overtime Suit

Source: Law360
By Joyce Hanson
April 7, 2017

Casual dining chain Carrabba's Italian Grill LLC was hit with a proposed class lawsuit Friday in Florida federal court by a former restaurant manager who claims she frequently worked more than 60 hours a week but was not paid overtime, in violation of the Fair Labor Standards Act.

Kyley Reining, the lead plaintiff in the collective action complaint that also names Tampa-based parent company Bloomin' Brands Inc., alleged that it is the pattern and practice of all 242 Carrabba's restaurants nationwide not to pay any of its restaurant managers overtime pay although they are required to perform the same non-exempt duties that hourly employees perform.

"This lawsuit seeks to recover overtime compensation for plaintiff and similarly situated co-workers, salaried restaurant managers, however variously titled, including front-of-house managers, back-of-house managers, culinary/kitchen managers, service and bar managers, who work or have worked for defendants Bloomin' Brands Inc. and Carrabba's Italian Grill LLC at Carrabba's restaurants nationwide," the complaint said.

From January 2013 to May 2015, Reining worked as a kitchen manager at the Carrabba's in Amherst, New York, where she primarily performed the functions of an hourly employee, according to the complaint. She frequently worked more than 60 hours per workweek, but Carrabba's did not pay her "premium" overtime pay when she worked more than 40 hours in a workweek as a restaurant manager, the complaint said.

Carrabba's classifies all restaurant managers as exempt from the overtime pay provisions of the FLSA, but they should be classified as non-exempt, according to the suit. At Carrabba's, restaurant managers must perform the same non-exempt duties that hourly employees perform, spending the majority of their shifts greeting and waiting on customers, expediting and serving food, cooking and preparing food, as well as clearing and setting tables, and cleaning the restaurant, Reining said.

The suit also names Bloomin' Brands as a defendant, saying it maintained control, oversight and direction over Carrabba's employees, including timekeeping, payroll and other employment practices. The putative class members are current and former restaurant managers nationwide who elect to opt in to the suit under the FLSA's collective action provision to remedy Carrabba's violations of the act's wage-and-hour provisions, according to the complaint.

Reining seeks an award of damages including unpaid wages and unpaid overtime wages and required employment taxes to be paid by the defendants. A spokesperson for Bloomin' Brands and Carrabba's Italian Grill said Friday that the companies as a general policy do not comment on pending litigation.

Legal counsel for Reining did not immediately respond to a request for comment on Friday. Reining is represented by Jeffrey A. Klafter of Klafter Olsen & Lesser LLP. Legal counsel information for Bloomin' Brands and Carrabba's Italian Grill was not available. The case is Reining v. Bloomin' Brands Inc. and Carrabba's Italian Grill LLC, case number 8:17-cv-00820, in the U.S. District Court for the Middle District of Florida.

Legal, Political and Practical Challenges in Regulating Recreational Marijuana

BY ARTHUR J. DECELLE ON APRIL 5, 2017POSTED IN ADVERTISING AND MARKETING, DISTRIBUTION, FOOD SAFETY AND FDA, GENERAL INTEREST,IMPORT/EXPORT, TRADE PRACTICES, TRANSACTIONS

On March 30, eight bills were introduced by senior members of Congress from both parties to legalize, regulate and tax marijuana. The bills were referred to at least five House Committees, as they address federal criminal law, taxation, banking, transportation, immigration, veterans' affairs, access to federal benefits and other issues. The legislative activity follows establishment of the Congressional Cannabis Caucus in February. Leaders of the new caucus represent four of the eight states where voters have approved recreational use of marijuana by adults.

In the initial press conference held by Cannabis Caucus members and in statements explaining the new legislation, House and Senate members made frequent reference to laws regulating alcohol beverages. Bills introduced earlier in the current session of Congress also call for state-by-state regulation using language similar to the Section 2 of the Twenty-first Amendment, which authorized each state to regulate the delivery and use of "intoxicating liquors" within its borders.

The failure of national Prohibition of alcohol beverages is often cited as a rationale to legalize recreational marijuana use. Before proceeding toward wider legalization, policymakers should gain a deeper understanding of the history of Prohibition and the regulatory scheme that emerged after repeal. Government regulation is necessary in a complex and pluralistic society of 320 million, but effective marijuana regulation is a tall order.

The aim of several recent proposals is simply to reconcile federal and state policies. That initial step is a practical and political challenge given the deep-seated contradictions in current marijuana policies at the federal and state levels. A few examples follow:

1. The states where recreational marijuana use is now legal are solidly "blue" or "purple" on the electoral map. Yet many safeguards to prevent diversion into illegal markets included in the laws enacted by the people can only be enforced through intrusive law enforcement methods, such as ongoing inspections of the number of plants in homes and on private property. Likewise, the great rush of promised tax revenue can only be realized with "big brother style" oversight of the regulated industry members to prevent illegal diversion.

1. In 2009, California officially declared marijuana smoke to be a carcinogen with a compendium of evidence. Eight years later, California regulates marijuana for medical use and is in the process of establishing policies for recreational use.

1. At the local level in California, the Undersheriff of Humboldt County, California told the PBS Newshour that he believes most of the marijuana

grown in the fertile fields of his jurisdiction purportedly for medical use is actually diverted to the illegal market. His agency conducts raids each month, confiscating weapons and other contraband.

Simultaneously at the federal level, the President and many of his top aides routinely cite drug smuggling through Mexico and associated lawlessness as part of their defense of a multibillion dollar wall, more than 750 miles south of Humboldt County.

1. Presidents Obama and Trump-polar opposites in temperament and philosophy-appear to agree on maintaining longstanding federal policies classifying marijuana in a category of dangerous and addictive drugs. President Trump's team is threatening stricter enforcement of existing laws.
2. Advocates of marijuana legalization extol its relative safety and benefits while top federal medical researchers estimate that approximately six million Americans suffer from "marijuana use disorder."

Regulating and taxing a popular consumer product subject to abuse is far greater challenge today than the task facing Congress and the states after repeal of Prohibition. More on those challenges in future blogs.

March 31, 2017

Congressman Submits Long Shot Bill to End Federal Prohibition on Marijuana

Included in a larger package of bills designed to create a framework for federal regulation of marijuana submitted yesterday, is a proposal to make the drug federally legal and regulate it similar to alcohol, per Newsweek.

The three bills in the package tackle a range of issue including taxation, banking, individual protects etc., but the one most pertinent to our readers, is the Regulate Marijuana Like Alcohol Act submitted by Colorado Rep. Jared Polis. This proposed legislation would remove cannabis as a Schedule 1 substance (meaning it would no longer be federally illegal) and put regulation in the hands of the TTB. It would allow adults 21 and up to legally purchase recreational marijuana nationwide, and the Department of Veterans Affairs would make recommendations on how it could be used for medicinal purposes.

"Colorado has proven that allowing responsible adults to legally purchase marijuana, gives money to classrooms, not cartels; creates jobs, not addicts; and boosts our economy, not our prison population," said Rep. Polis. "Now, more than ever, it is time we end the federal prohibition on marijuana and remove barriers for states that have chosen to legalize marijuana. This budding industry can't afford to be stifled by the Trump Administration and its mixed messages about marijuana."

Although Congress could use a big smoke circe right about now, it's probably a long shot that the bills will make it to the president's desk, per Marijuana

Business Daily. But we'll keep our eyes on it as they move through the legislative process.

April 5, 2017

Craft Distillers Angling for a Granholm Ruling of Their Own

Direct-to-consumer shipping for spirits has been a prevalent topic of discussion at this year's American Distilling Institute (ADI) convention. Although interstate DTC shipping is legal for wineries, shipping spirits to consumers is a much murkier area of law in the US.

"I think as we move on, you'll see we see no difference between direct shipping craft spirits, and direct shipping wine," said El Buho Mezcal founder John Henry during a talk on direct shipping.

In fact, a small group of East Coast distillers and retailers are looking to initiate their own version of the Granholm case. Doug Stone, the founder of online retailer websites For Tequila Lovers and For Whiskey Lovers has taken the lead on it by engaging Robert Epstein from Epstein Cohen Seif & Porter law firm. Robert is the attorney who argued the constitutionality of interstate wine shipping in the Granholm case. And in 2008, he successfully argued that the Granholm ruling apply to retailers as well in Michigan federal court - an issue some retailers in other states are still grappling with.

SIDEBAR: The US Supreme Court determined in the 2005 Granholm v. Heald case that permitting in-state wineries to ship directly to consumers while prohibiting out-of-state wineries from doing the same was unconstitutional. Thus, opening the door for an increase in direct-to-consumer sales for wineries.

The catch is the firm is requiring $10,000 in contingency, so Doug set up an indiegogo campaign in an attempt to crowdfund the money. "We've got to [stop] this whole political climate of antagonism, factionalism," said John. "We've got to start building a critical mass like Free the Grapes Did." Recall, Free the Grapes is an organization that advocates to reform wine distribution laws and implement regulated direct-to-consumer sales across the country.

ABC ENFORCEMENT - TRENDS AND PREDICTIONS
April 3, 2017 John Hinman
WHAT WINERIES SHOULD KNOW ABOUT BEVERAGE LAW, RULES AND INVESTIGATIONS
By: John Hinman, Rebecca Stamey-White and Jeremy Siegel
As long time supporters of Wine Business Monthly, we are always more than happy to contribute when given the opportunity. Wine Business Monthly is the wine industry's leading publication for wineries and vineyards, and they asked us to provide their readers with an overview of the California Department of Alcohol Beverage Control's current enforcement trends, and what we see in the near future.

The article, which can be found in the April issue of the magazine, touches on some of the bigger cases we have defended over the past few years, the lessons learned from these cases, and areas where we have been able to effectively negotiate with the ABC to not only avoid costly hearings for our clients but to further their marketing and sales agendas through legally compliant programs. These areas include social media marketing and advertising, indirect ownership and other interests between retailers and suppliers, as well as the important details and restrictions that flow from events such as winemaker's dinners. Looking forward toward this year's ABC enforcement priorities, we also commented on a recent uptick in ABC enforcement with regards to credit laws, we touched on the growing prominence of unlicensed third parties in the wine space and we noted that the ABC's trade enforcement unit is enlarging and becoming more active. You may never know when that knowledgeable new consumer at your event is really an ABC Agent testing compliance.
We hope that this article highlights the value of understanding the laws and policies that govern activities in our highly regulated space, as well as the value of consulting effective and experienced alcohol counsel when in doubt. Grappling with the alcohol laws is not for the faint of heart, but with strong compliance programs, direct confrontations with the ABC (in California and throughout the US) should be few and far between.

ARTICLE LINK HERE:

ABC ENFORCEMENT TRENDS ARTICLE

LIME-A-RITA CLASS ACTION PLAINTIFFS AT IT YET AGAIN

"Bud Light Lime-A-Rita drinkers urged the Ninth Circuit on Thursday to reconsider a decision shutting down their claims that Anheuser-Busch LLC tricked them into thinking the sugar-loaded beverage is a low-calorie drink, saying two of three judges overlooked similarities between the malt beverage's packaging and Bud Light Lime beer," Law 360 reported over the weekend.

Mind you, last month, the Ninth Circuit panel had already affirmed a lower court's dismissal. The suit claimed 'Ritas packaging misled consumers into thinking the beverage was comparable to Bud Light Lime. But the panel's 2-1 ruling held that the product's label, "which includes a picture of a margarita, makes clear the malt beverage isn't a normal beer, so purchasers wouldn't be tricked into thinking the drink has fewer calories than one."

Plaintiffs have since filed a petition for rehearing. They say the panel "overlooked facts that show comparisons are plausible under California's 'reasonable consumer' test: "In fact, [Anheuser Busch] invites comparisons to beer and other malt beverage products through its own public characterization of the Lime-A-Rita products, the Bud Light website, and details of the Lime-A-Rita labels and packaging," per petition.

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9th Circ. Rebuffs Lime-A-Rita Drinkers' Bid To Rethink Suit

Source: Law360
By Steven Trader
April 26, 2017

Bud Light Lime-A-Rita drinkers on Tuesday lost their bid for the Ninth Circuit to reconsider a decision in early March shutting down their claims that Anheuser-Busch LLC tricked them into thinking the sugar-loaded beverage is a low-calorie drink.

In a March 16 ruling, a Ninth Circuit panel affirmed a lower court's dismissal of a putative class action alleging Anheuser-Busch misled consumers into thinking that the Lime-A-Rita drink is comparable to Bud Light Lime by using the "light" label, when in fact it contains nearly three times as many calories.

The panel's 2-1 unpublished decision ruled the label, which includes a picture of a margarita, makes clear the malt beverage isn't a normal beer, so purchasers wouldn't be tricked into thinking the drink has fewer calories than one. But the consumers filed a petition for rehearing or rehearing en banc in late March, saying the majority overlooked facts that show comparisons are plausible under California's "reasonable consumer" test.

On Tuesday though, the panel turned down the rehearing petition. The dissenting judge in the March opinion, Judge Morgan Christen, voted to grant the rehearing, but no other judge of the court requested a vote on it, the panel wrote in its one-page decision. Counsel for the consumers and Anheuser-Busch did not immediately return a request for comment late Wednesday.

The proposed class action was filed by Sheila Cruz in November 2014 in California state court. Cruz alleged that Lima-A-Ritas are "the highest calorie alcoholic beverage sold by [Anheuser-Busch]." Lime-A-Ritas have 192 to 220 calories in 8 ounces, according to Cruz, whereas a full Budweiser has only 145 calories and a normal Bud Light 110 calories in 12 ounces, she said in the complaint. The suit alleged false advertising, omission and breach of warranty under California law.

The U.S. Food and Drug Administration generally limits the use of "light" to products that have, at most, two-thirds the calories of the comparable reference product, Cruz said. Anheuser-Busch introduced Lime-A-Ritas in 2012, and the beverage line also includes Raz-Ber-Rita, Straw-Ber-Rita, Mang-O-Rita and Apple-Ahhh-Rita, Cruz says, selling $462 million worth of product nationally in 2012. Those varieties have now been joined by several other flavors.

The suit, later joined by plaintiffs Deborah Esparza and Catherine Silas, was removed to federal court in December 2014 and dismissed in June 2015 for failure to state a claim, and the plaintiffs appealed to the Ninth Circuit in July 2015. During oral arguments in February, the consumers' counsel argued that Anheuser-Busch's use of the Bud Light logo on the box means it is plausible that consumers would draw the comparison to an ordinary Bud Light, or a Bud Light Lime - both of which have many fewer calories than the Lime-A-Rita.

In its March 16 ruling, the appellate panel disagreed, siding with Budweiser's argument that the proper comparison for the product is a hypothetical Lime-A-

Rita made with full-calorie Budweiser - which would in fact have more calories than the light version, were it to exist.

Judge Christen, however, dissented, agreeing with Sadeghi's contention that consumers would compare the Lime-A-Rita to Bud Light Lime and saying she would have at least revived the plaintiffs' claims of false advertising.

The plaintiffs are represented by Christopher Ridout, Caleb Marker and Behdad G. Sadeghi of Zimmerman Reed LLP and Kevin Mahoney of Mahoney Law Group APC. Anheuser-Busch is represented by Peter Morrison of Skadden Arps Slate Meagher & Flom LLP.

The case is *Sheila Cruz et al. v. Anheuser-Busch LLC*, case number 15-56021, in the U.S. Court of Appeals for the Ninth Circuit.

Eighth Defendant Pleads In $8M Fraud Of MillerCoors

Source: Law360
By Diana Novak Jones
April 18, 2017

The remaining person charged in an $8.6 million scheme to defraud MillerCoors LLC through falsified invoices for fake marketing events admitted to the crime Tuesday, closing the door on the fraud led by a longtime executive at the beer giant. Andrew Vallozzi accepted a plea agreement and pled guilty to one count of wire fraud, joining former MillerCoors executive David Colletti and six other vendors Colletti recruited in copping to the scheme. Vallozzi faces up to 20 years in prison and will be ordered to pay $1,163,223 in restitution, according to his plea agreement.

Like his co-conspirators, Vallozzi operated several vendor companies that would contract with MillerCoors to host marketing events for the company's products. Vallozzi would submit invoices to Colletti at MillerCoors for the purported cost of putting these events on. But the invoices were often inflated or entirely falsified, reflecting costs for events that never happened, prosecutors said.

Once MillerCoors paid the invoice, Colletti and Vallozzi or the other vendors would split the proceeds, according to court records. Colletti would collect his cut, either in cash, trips or collectible firearms, prosecutors said. Vallozzi, who originally faced three counts in the 2015 indictment, admitted to submitting a false invoice for $67,490 to MillerCoors for a supposed responsible drinking program his companies, AVA Marketing & Communications LLC and Food and Beverage Network, put on for the company in 2010.

Vallozzi billed MillerCoors for logo development, copywriting, creative direction and "complete execution of the program," according to his plea agreement. But the event did not take place as described, prosecutors said. When he got the money from the invoice, Vallozzi used it to pay debts on an investment property he owned with Colletti, according to the plea agreement.

Vallozzi joins co-defendants Francis Buonauro, Roderick Groetzinger, James Rittenberg, Thomas Longhi, Scott Darst and Maryann Rozenberg - all purported vendors - in pleading guilty. Colletti, who worked at MillerCoors managing accounts for sales at stadiums and venues for 32 years, entered his own plea in 2016.

The scheme went on for a decade, ending in 2013, prosecutors said. All told, MillerCoors paid out $8,658,302 in approximately 200 invoices. The first sentencing in the scheme is scheduled for next week, according to court records. There is no sentencing date set for Vallozzi, although prosecutors said he is likely to face between 33 and 41 months in prison.

The government is represented by Jennie Levin and Joel R. Levin of the U.S. Department of Justice. Vallozzi is represented by Darryl A. Goldberg. The case is U.S. v. Colletti, et al., case number 1:15-cr-00260, in the U.S. District Court for the Northern District of Illinois.

Vendor Seeks Probation In MillerCoors Marketing Fraud Case

Source: Law360 By Joyce Hanson April 21, 2017

A fraudulent vendor who pled guilty to her role in an $8.6 million scheme to help a former MillerCoors LLC executive submit phony invoices for nonexistent beer marketing events asked an Illinois federal judge on Friday for a sentence of probation, saying she faces extenuating circumstances.

Counsel for Maryann Rozenberg in a letter to U.S. District Judge Jorge L. Alonzo wrote that a sentence of probation constitutes punishment that is "sufficient but no greater than necessary" to serve the government's federal sentencing goals, saying his 59-year-old client has already bent over backward to pay restitution, is virtually destitute and has recently suffered great personal losses.

"Ms. Rozenberg has demonstrated an exceptional acceptance of responsibility," counsel Michael J. Cohn wrote in his letter. "Prior to indictment, she agreed to and had a complete debriefing by the government. As part of her debriefing, she produced all of the related records in her possession. She also agreed to a debriefing by the private attorneys for Miller-Coors which took place on May 17, 2016, and provided them with the related records."

In addition, Cohn said, Rozenberg made full restitution of $100,000, which exceeded the $95,326 restitution amount in her pre-sentencing report. She faces up to a 20-year sentence, but the government expects to recommend between 15 and 21 months as per the plea agreement. Rozenberg's sentencing hearing is set for Tuesday.

Rozenberg pled guilty to a single charge of wire fraud in May 2016, admitting she submitted inflated invoices or billed for events that never took place as part of a fraud spearheaded by former MillerCoors Vice President David Colletti. The scheme resulted in 200 false bills coming from 15 fraudulent vendors over a five-year period ending in 2013, according to Colletti's plea agreement. In total, MillerCoors paid out $8,658,302.

Rozenberg was Colletti's longtime secretary at MillerCoors until 2008, when the two hatched a plan to fraudulently bill the beer maker for events, according to prosecutors. Through that company, Rozenberg was paid more than $95,000.

To make the full $100,000 restitution amount, Rozenberg divested herself of the entirety of her pension and has no more savings to support herself, according to Cohn, who added that she has suffered two traumatic events in her personal life: the death of her son and an impending divorce.

"Her son died after a lengthy period of suffering from mental illness," Cohn wrote. "Then her husband left her and divorce proceedings have started. The

extent of his financial support is to continue to pay on the loan against their home primarily to protect his interest in that asset. Ms. Rozenberg is now supporting herself by working as a hostess at a restaurant."

Eight defendants have pled guilty to the scheme to defraud MillerCoors, all of whom operated vendor companies that would contract with MillerCoors via Colletti to host the purported marketing events for the company's products.

Colletti, who worked at MillerCoors managing accounts for sales at stadiums and venues for 32 years, would coach the vendors to file the false invoices and in some cases sign off on them before collecting a portion of the money MillerCoors paid to the vendor, according to his plea agreement.

Colletti's single charge of wire fraud comes with a maximum sentence of 20 years in prison, Assistant U.S. Attorney Jessica Romero said. In exchange for his cooperation and testimony against his seven co-defendants, who served as the purported vendors in the scheme, the government agreed to ask for a little more than five years in prison, according to the plea agreement.

Counsel for Rozenberg did not immediately respond Friday to requests for comment. A representative for the U.S. Department of Justice in the Northern District of Illinois declined to comment. The government is represented by Assistant U.S. Attorneys Jessica Romero and Jennie H. Levin. Rozenberg is represented by Michael J. Cohn of Pledl & Cohn SC. Colletti is represented by Eugene E. Murphy of Murphy & Hourihane LLC.

The criminal case is USA v. Colletti et al., case number 1:15-cr-00260, in the U.S. District Court for the Northern District of Illinois.

Wal-Mart Ordered To Pay $12M For Lifting Trade Secrets

Source: Law360
By Melissa Daniels
April 21, 2017

An Arkansas jury on Friday awarded digital agency Cuker Interactive LLC more than $12 million in trade secret damages from Wal-Mart Stores Inc. after it lodged counterclaims against the big-box retailer in a dispute arising from a contract for website development.

The case stems from a January 2014 contract where Wal-Mart agreed to pay Cuker around $577,000 to build a responsive e-commerce website for its Asda Stores Ltd., a brick-and-motor retailer in the United Kingdom that also has online shopping services. The relationship soured in the months that followed, and Wal-Mart sued for breach of contract. Then Cuker filed counterclaims alleging Wal-Mart didn't live up to it end of the bargain and stole various trade secrets stemming from the development of the site services.

After a 10-day trial, a jury found Wal-Mart hadn't proved Cuker breached its contract. But it did find Wal-Mart misappropriated trade secrets in four areas - phased release support technique, a CMS tweak development tool, Adobe Illustrator and Photoshop source files and zoning tools - and awarded damages totaling just over $12 million. The jury found the misappropriation was willful and malicious except for the CMS tweak development tool, according to the verdict.

"The jury made a specific finding that Wal-Mart acted willfully and maliciously in misappropriating Cuker's responsive e-commerce website technology," Cuker attorney Callie Bjurstrom of Pillsbury Winthrop Shaw Pittman LLP said in a statement. "The evidence established that Wal-Mart acquired and exported Cuker's software technology to offshore and lower cost website developers in violation of the parties' confidentiality obligations."

Wal-Mart said the company is considering its options, including an appeal. "The finding and damages awarded are not supported by the facts," the statement said. "The verdict wrongfully holds Wal-Mart responsible for taking the very materials which Cuker transferred or licensed to us under contract."

The jury also found Cuker proved Wal-Mart breached the contract, meriting around $30,600 in damages, and was unjustly enriched, awarding about $400,000 in damages. Wal-Mart kicked off the dispute in summer 2014 with a complaint against Cuker in the Arkansas state court, then Cuker removed the action to federal court.

Cuker's answer included a counterclaim asserting six claims including a declaration the contract was void, fraudulent inducement breach of contract, unjust enrichment and misappropriation of trade secrets. It claimed Wal-Mart failed to pay a down payment and failed to provide feedback and a development site, and obtained 33 more templates than the contract provided for.

Wal-Mart sought summary judgment on the counterclaim in April 2016, saying Cuker had failed to meet deadlines and repeatedly raised disputes over the project, and that it never received the responsive website it had contracted for. In December, U.S. District Judge Timothy Brooks tossed some of Cuker's claims but kept alive the breach of contract and trade secret claims. The litigation included multiple discovery motions and sanctions hearings. A jury trial had been set for August 2016 and reset for January, then rescheduled for April 10.

Judge Brooks in January also denied a motion for sanctions against Wal-Mart for failure to preserve electronically stored information from a former employee who Cuker contended had plotted to leverage its assets for other uses shortly before the initial complaint was filed - though Judge Brooks wrote that it was "a very poor practice" for a company to wipe a laptop if it knew litigation was looming.

The trade secret damages include around $5.3 million for misappropriation of the phased release support technique, about $2.8 million each for the CMS tweak development tool and the Adobe source files and nearly $1.1 million for the zoning tools misappropriation.

Wal-Mart is represented by Neal Manne, Vineet Bhatia, Joseph S. Grinstein and Elisha Barron of Susman Godfrey LLP and Jess Askew III, Andrew King and Robin E. Stewart of Kutak Rock LLP. Cuker Interactive LLC is represented by Mark Henry and Adam Hopkins of Henry Law Firm and Callie Bjurstrom and Michelle Herrera of Pillsbury Winthrop Shaw Pittman LLP.

The case is Wal-Mart Stores Inc. v. Cuker Interactive LLC, case number 5:14-cv-05262, in the U.S. District Court for the Western District of Arkansas.

Texas Roadhouse ropes a few key wins in trademark infringement case

Source: Louisville Business First David A. Mann Apr 21, 2017

Louisville-based Texas Roadhouse Inc. has scored a few key legal victories of late in a trademark lawsuit against Texas Corral Restaurants Inc. In August 2013, Texas Roadhouse filed a lawsuit against several entities that operate the Texas Corral and Amarillo Roadhouse concepts in Indiana, Illinois and Michigan. The matter is being heard in the U.S. District Court Northern District of Indiana, which is located in Hammond, Ind.

The litigation is in the middle of the discovery process and that's come with some disputes, said Scott Eidson, partner at Stinson Leonard Street LLP in St. Louis, which is representing Texas Roadhouse. Last week, magistrate judge Paul Cherry issued an opinion and order allowing discovery to move forward following a dispute about whether attorneys fees would be disclosed. Also recently, a motion to dismiss Paul Switzer, who is named as a defendant and an owner of Texas Corral Restaurants Inc., from the suit was also decided on in Texas Roadhouse's favor.

With these decisions now being made, Eidson estimated that the discovery process will likely continue into the summer. Texas Corral attorney Stephen Fardy, partner with Swanson, Martin & Bell LLP in Chicago, agreed with that estimated time line. After discovery a jury trial is anticipated, though no date has been set.

Texas Corral has nine restaurants in Michigan, Indiana and Illinois, according to the lawsuit. It also operates another business called Amarillo Roadhouse in Indiana. In the lawsuit, Texas Roadhouse alleges that Texas Corral uses trade markers, trade names, designs and logos that are confusingly similar to its own. It says its buildings look confusingly similar both on the inside and out.

Travis Doster, spokesman for Texas Roadhouse, said the chain's look is important because it's how people know the brand. "We don't advertise. That building serves as our advertising. When they see the building, they know made-from-scratch food, free peanuts, free rolls," he said. Eidson said Texas Roadhouse isn't trying to shut down Texas Corral all together, but wants the company to "stop marketing themselves to look like Texas Roadhouse."

Fardy contends that both steakhouses are using Western themes that were developed long before either of the two restaurants came around about 20 years ago. The idea of a Texas-themed steakhouse - "it's pretty generic," he said. Texas Roadhouse is by far the larger of the two chains, with more than 400 locations compared to Texas Corral's 10.

If the matter goes to court, it will be the second big legal battle for Texas Roadhouse to come to a conclusion this year. In March, we reported that the company settled a lawsuit with the Equal Employment Opportunity Commission over alleged age discrimination.

Ruth's Chris Steak House loses beer license for three days after serving Michelob to decoys

Source: Times Free Press by Tim Omarzu April 20th, 2017

Expect to get carded at Ruth's Chris Steak House near Chattanooga's Hamilton Place shopping mall. That's the new policy at the upscale franchise steak house, after a waitress served one Michelob, each, to two underage decoys during a March 19 sting operation. Because of the violation, the Chattanooga Beer Board voted 5-2 at its meeting Thursday to suspend beer sales for three days at Ruth's Chris Steak House starting May 4. The sting took place during a check of

restaurants near the mall - and because an informant told law enforcement officials that Ruth's Chris Steak House didn't check IDs, Officer Marty Ray of the Hamilton County Sheriff's Office told the beer board. "We had information that they really don't check IDs; that's why we went there," Ray said. "We only issued one citation, even though they did sell to two [decoys]." The restaurant's owner apologized, he said the restaurant takes alcohol laws seriously and he said the restaurant fired the waitress who served the youths. "She knew better, she was just careless," said Markham D. Oswald, whose family runs the Ruth's Chris Steak House in the Embassy Suites hotel near Hamilton Place along with 12 other restaurants in Tennessee, Georgia, Alabama and South Carolina. "I am devastated by it, quite honestly," Oswald told the beer board. He said the Ruth's Chris Steak House will now card all customers at its Chattanooga location. "We're checking 100 percent of IDs. [Servers] don't have discretion anymore," Oswald said.

The Tennessee Alcoholic Beverage Commission will decide next whether to issue a similar suspension of wine and alcohol sales at the restaurant. Oswald asked the beer board if it was possible to appeal the suspension. Assistant City Attorney Keith Reisman, who attends all beer board meetings, told Oswald he could appeal to Hamilton County Chancery Court.

Other establishments also had their beer sales suspended by the beer board. Rossville Billiards at 4205 Rossville Blvd., got a three-day suspension that starts April 27 for selling beer to a 20-year-old man on March 1, the same night a man died inside the bar. Ichiban Japanese Steakhouse at 5425 Highway 153 had its beer sales suspended for 30 days starting April 27 for sale to a minor on Jan. 26, which was its third violation.

News From TTB

Source: TTB April 21st

TRADE PRACTICE FREQUENTLY ASKED QUESTION: I WOULD LIKE TO USE SOCIAL MEDIA TO INFORM CONSUMERS WHERE TO FIND MY ALCOHOL BEVERAGES OR TO PROMOTE A SPECIAL EVENT AT A RESTAURANT OR RETAILER. ARE THERE ANY RESTRICTIONS ON THIS?

As we stated in TTB Industry Circular 2013-01, TTB considers advertising in social media to be subject to all of the same requirements and restrictions as any other type of advertising under the Federal Alcohol Administration Act (FAA Act) and the TTB implementing regulations (27 CFR part 4 subpart G, 27 CFR part 5 subpart H, and 27 CFR part 7 subpart F, and the "tied house" regulations at 27 CFR part 6).

See TTB FAQ A28 for more information.

https://protect-us.mimecast.com/s/pVAaBRhMpoWH2?domain=links.govdelivery.com

WHISTLEPIG AND CHATHAM BUTT HEADS OVER USE OF "CROP" TERM

WhistlePig has filed a federal lawsuit against Chatham Imports asking a judge to determine whether WhistlePig's use of the term "crop" on its latest whiskey release infringes on Chatham's trademark of the term. The product at hand is WhistlePig's new Farmstock whiskey, which includes a designated "crop number" corresponding to the crop of rye used as an ingredient in making the

whiskey. Chatham is the sales representative for Crop Harvest Earth Vodkas in the US, and on March 21, sent a cease and desist letter to WhistlePig for its use of the term, claiming it is likely to cause consumer confusion. WhistlePig argues in its complaint that the Farmstock whiskey and Crop Harvest vodka are "entirely different in appearance and overall commercial impression," and therefore would like a judge to declare a preliminary injunction against Chatham to stop the company from charging it with **trademark infringement and unfair competition** . April 11, 2017

Wine Spectator: Charles Banks Pleads Guilty To Fraud

Charles Banks, the financial advisor and founder of Terroir Life, which owns or manages nearly a dozen wineries in California, New Zealand and South Africa, pleaded guilty to one count of wire fraud in a federal courthouse in San Antonio yesterday. The charge carries a maximum penalty of 20 years in federal prison.
The case stems from allegations made by former NBA star Tim Duncan, a longtime Banks client, who says he was duped out of millions of dollars in various investments Banks made on his behalf. In a "statement of facts" filed March 31, lawyers for Banks admitted that he misrepresented the terms of an agreement Duncan signed related to investments in a sports-merchandising company called Gameday. "Charles Banks acted with a knowing intent to deceive Tim Duncan," states the document.
The case does not involve any of Banks' wine enterprises, and executives at Terroir Life insist the company is running smoothly. But Banks has been tangling in civil court with his business partners in Mayacamas, the Napa winery he purchased in 2013 with American Eagle Outfitters and DSW chairman Jay Schottenstein and his family. Wine Spectator has the full story.

Still Waiting on Shoes to Drop in Taprooms, Pay-to-Play

April 25 Beer Business Daily

It wouldn't have been Craft Brewers Conference without McDermott Will & Emery partner Marc Sorini running through the most important regulatory issues. In case you forgot, there are still a couple shoes to drop from major actions over last year and a half:

WHAT WILL COME OF SO MANY BREWERY TAPROOMS? We covered this in CBD, but it's a very timely topic. Sorini predicted storm clouds gathering for brewer tasting rooms rights, and we've already seen one fight in Texas over them.

The backdrop: About 97% of U.S. breweries produce less than 15,000 barrels a year, selling an average of 31% of their beer onsite. That doesn't exactly make retailers or distributors happy.

But more contentious is the loophole that brewer on-site sales potentially opens for the big brewers. Sorini, however, thinks this overblown: He believes that every state has limits on the number of brewery-owned taprooms.

If ABI could own hundreds of retailers, Sorini said, that could look like tied house. "But they can't," he said. "They can go to Cali and have six," for example. "Six is not going to undermine the competitive landscape in way that hundreds or thousands would."

Speaking of ABI overreach...

WHY STATE AGENCIES SETTLE, RATHER THAN SUSPEND FOR, INFRACTIONS. Switch gears to another regulatory hot spot: pay to play.

Sorini recapped some activity at the state level. Recall that ABI WODs in California paid $400,000 to settle an ABC investigation that it provided free equipment to retailers. Meanwhile, Heineken paid $30,000 to settle an ABC investigation into a creative coupon deal.

In Seattle, ABI was slapped with a $150,000-plus fine to settle another investigation into tied house activities at two concert venues.

Which begs the question:

WHY DO THEY ALL SETTLE? Why not suspend licenses in these cases? "It's worthwhile for the agency to save money," for one. But there's another reason: "If the wholesaler licenses of A-B guys in Cali had been suspended for 30 or 60 days - you think there would have been a riot?" It's a "mutually assured destruction thing."

As for the Craft Brewers Guild deal in Massachusetts, where the distributor paid a $2.6 million fine for pay to play activities - recall, the distributors still have a suit against the state pending. If they succeed and strike down the statute, it could blow up the entire prohibition on giving "things of value" in that state.

Federal Trade Commission Reminder about Advertising Disclosures

BY ARTHUR J. DECELLE ON APRIL 24, 2017POSTED IN ADVERTISING AND MARKETING, IMPORT/EXPORT, TRADE PRACTICES

In mid-April, the Federal Trade Commission (FTC) sent out 90 letters to advertisers, celebrity endorsers and influencers who use their fame and the power of digital advertising to help promote products. The facts in each letter vary, but the FTC's message was a strong reminder that clear and conspicuous disclosure is required if a "material connection" exists between and endorser and the marketer of a product.

Typically, the marketer is a manufacturer, importer or an advertising agency that establishes a relationship with an endorser. In 2009, the FTC created endorsement guides to ensure that consumers are on notice that an endorser or influencer is being compensated by a marketer. In 2015, the FTC published an Enforcement Policy Statement on Deceptively Formatted Advertisements. Those sources provide straightforward guidance to inform consumers that an endorser is acting on behalf of a marketer and to differentiate advertising from truly independent news or reviews of products.

Throughout history, producers of consumer goods marketed their wares with endorsements from famous people and "satisfied consumers." Social media provides an enormous boost to the most ancient form of marketing, "word of mouth." An image of your product with a celebrity or the perfect "ordinary consumer" in a creative setting can quickly go viral to millions of consumers or receive hundreds of thousands of likes on Facebook.

All ads should be truthful, targeted appropriately, and compliant with industry codes. If appropriate, ads should also be clearly identified as paid endorsements or advertising material to reduce the risk of consumer deception. These principles are especially important in the digital domain where viewers tend to move rapidly from one destination to another.

A successful ad that includes use of celebrities or influencers should meet the FTC's standards to avoid future enforcement initiatives. The reputation of the advertiser and endorser as well as the integrity of the brands should not be placed at risk by the failure to include clear and conspicuous notices or disclaimers. Congress granted the FTC broad jurisdiction to police deceptive ads. The FTC's guidance has now been around long enough to be on the checklist of every advertiser-particularly those under pressure to publish the next iconic image on Facebook or Instagram!

Supreme Court Orders Review of Swipe Fees & Free Speech IssueN.Y. law on credit card surcharges returns to lower court.

March 31, 2017, 02:24 pm

WASHINGTON, D.C. - A New York law that bans businesses from tacking on surcharges on credit card purchases will get a second look.

The U.S. Supreme Court ruled unanimously on March 29 to send a case about the fees back to the lower court for review. The issue before the justices was whether the measure violates merchants' free-speech rights. The federal appeals court in New York that upheld the law concluded that it regulated conduct, not speech, according to The Associated Press.

The justices said the law deals with speech and ordered the appeals court to re-evaluate it.

To read the opinion, written by Chief Justice John Roberts, click here.

The Supreme Court Justices heard arguments Jan. 10 in Expressions Hair Design v. Schneiderman, which challenged laws in 10 states that prohibit merchants from imposing a surcharge when customers use a credit card, as CSNews Online previously reported.

According to the National Constitution Center, several states - including New York - have enacted laws that allow merchants to charge higher prices to customers who pay with a credit card rather than with cash. The practice allows merchants to recover money they pay in swipe fees on each credit card transaction.

However, merchants such as Expressions are barred from using the word "surcharge" when informing customers about the price difference. Instead, the word "discount" must be used in New York when referring to a cash payment.

RETAILER REACTION

The National Retail Federation (NRF) welcomed the ruling.

> "Most retailers have no desire to surcharge their customers for using credit cards," NRF Senior Vice President and General Counsel Mallory Duncan said. "That would be the opposite of our industry's goal of bringing credit card swipe fees under control. But merchants do want to be able to show customers the cost of using a credit card without running afoul of the law."

According to Duncan, the ruling by the highest court in the land "is a clear stand in favor of the free speech protections of the First Amendment. The nation's

highest court has recognized that whether a merchant chooses to communicate credit card fees through a surcharge or through a cash discount is a matter of speech."
"While merchants don't want to surcharge, having the ability to do so would be an important negotiating tool in convincing the card industry to charge reasonable fees instead of continuing to drive up consumer prices through this skyrocketing hidden tax," Duncan added.
The Alliance for Main Street Fairness also applauded the ruling.
"The court's ruling is a major victory for small businesses across America," said Kevin Lawlor, a spokesperson for the Alliance for Main Street Fairness. "On a daily basis, Main Street businesses are straddled with the excessive costs credit card companies impose on them every time a customer swipes their card. This ruling ensures that there is transparency between merchants and their customers so that all consumers understand that the hidden costs large credit card companies impose ultimately lead to higher prices."

Final Push on Inter-State Shipping of Craft Spirits campaign

Source: American Distilling Institute
April 26, 2017

For-Lovers (the parent company of ForWhiskeyLovers and ForTequilaLovers.com) and the American Distilling Institute have joined forces to change legislation to allow distillery-to-consumer interstate shipping of craft spirits.

To do so, we have retained the services of Epstein Cohen Seil & Porter, the law firm that successfully changed the constitutional laws that limited interstate shipping of wines, enabling wineries to ship directly to consumers in other states.

Editors note: sounds like Granholm II is coming.

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