DUNCAN LIQUOR LAW LETTER

July, 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.

"America was not built on fear.
America was built on courage, on imagination and an unbeatable determination to do the job at hand."
- Harry S. Truman, 33rd President of the United States

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Friday, June 30, 2017 Lawrence Journal World

2017 session: Kansas lawmakers balk at sin taxes, also decline loosening marijuana laws

TOPEKA - The 2017 legislative session in Kansas was marked by high-profile debates over school finance, Obamacare and reversing course on Gov. Sam Brownback's income tax policies. But roiling beneath those issues were intense debates over a number of other issues.

Among those were debates over so-called "sin taxes" on things such as alcohol and tobacco, as well the decades-old debate over the state's total ban on any form of marijuana, including medicinal and industrial hemp.

It may have been because those other, more high-profile debates consumed so much of the Legislature's time and energy that the lower-profile issues did not advance this year. But advocates of those issues say they hope the topics will remain alive in 2018.

"The Legislature missed an opportunity to improve health and save lives through a cigarette and tobacco tax, and we are disappointed that didn't happen," said Hilary Gee, a lobbyist for the American Cancer Society Cancer Action Network.

When the session started in January, the Cancer Action Network was one of the few organizations that supported Brownback's call for raising cigarette taxes by $1 per pack and raising taxes on other tobacco products by similar rates.

In fact, the only criticism the network members had of Brownback's plan was that they didn't think it went far enough. Gee said her group was pushing for a $1.50 per-pack increase in cigarette taxes.

"That would have generated upwards of $90 million a year, and that's money that could go to efforts in health and prevention, but also other state priorities like education," she said.

Brownback also had proposed doubling the state's liquor enforcement tax, raising it to 16 percent. That's a tax the state levies on liquor and cereal malt beverages sold in retail stores, as well as liquor sold by distributors to restaurants and bars.

Those proposals by the administration, however, were generally viewed as efforts to save the sweeping income tax cuts that he had championed in 2012, tax cuts that many lawmakers had promised to repeal when they ran for office in the 2016 elections.

The liquor industry fought back hard against the proposed alcohol taxes, as it does every year when such taxes are proposed. In the end, though, there was simply no appetite to raise sin taxes after an election in which voters sent such a loud message that they wanted to change course on income taxes.

"We will continue to work with lawmakers to save lives by reducing the burden of tobacco in Kansas," Gee said.

Meanwhile, on a completely separate track, other groups were pushing for legislation to relax the state's laws regarding various forms of marijuana.

Those bills took several forms and had different purposes. The one thing they had in common, however, was that none of them made their way to the governor's desk.

Sen. David Haley, D-Kansas City, sponsored a bill, as he has almost every year for the last five years, to authorize the use of marijuana to treat certain medical conditions. A version of that bill advanced out of committee but it was never debated on the Senate floor.

On the House side, there were several bills dealing with the legalization of hemp, a lower-grade variety of the cannabis plant that contains significantly smaller amounts of the intoxicating substance THC.

Agricultural groups supported a bill that would have authorized pilot projects for research, production and use of "industrial hemp," which can be used to make products such as rope, fabric, paper and synthetic plastics.
That bill passed the House, 103-18, but never came out of a Senate committee.
And Rep. John Wilson, D-Lawrence, pushed again for a bill to legalize the medicinal use of hemp oil to treat certain kinds of seizure disorders.
That bill was the subject of emotional testimony in the House Health and Human Services Committee, where Wilson served as ranking minority member. But when it came up for a vote in that committee, Wilson himself asked to table it when it became clear it did not have enough votes to pass.
"I didn't want it to die," Wilson said about his decision.
Wilson has since announced that he plans to step down from the Legislature later this year, and he said he regrets that he wasn't able to get that bill passed during his tenure in the House.
"It's unfinished business, and yet I think we were able to move forward getting people comfortable talking about marijuana in a serious way," he said.
The Kansas Legislature operates on two-year cycles that start in odd-numbered years following legislative elections. That means any bill that was introduced in 2017 and wasn't killed in a committee or on the floor of either chamber will remain alive for possible consideration in 2018.

6.14 Beer Business Daily

GRANHOLM REDUX: ILLINOIS JUDGE GIVES VICTORY TO STATE-BASED THREE-TIER SYSTEM

Judge Samuel Der-Yeghiayan for the US District Court of Illinois sided with the state and its wholesalers late last week in rejecting a case that challenged the state's direct-to-consumer shipping laws.

Recall, Lebamoff Enterprises, a retailer in Indiana, filed a complaint against the state last year over the Illinois Liquor Control Act (ILCA), challenging its ban on out-of-state retailers' ability to ship wine directly to Illinois residents. Lebamoff argued the law is in violation of the Commerce Clause, and the Privileges and Immunities Clause because in-state retailers are allowed to ship direct to consumers.

The plaintiff claimed its case hinged on the same principles as the Granholm case, which determined state direct-to-consumer wine shipping laws could not discriminate between in- and out-of-state producers, unless those laws relate to the public interest.

In the Court's dismissal of the case, the judge said Lebamoff's claims "fail at the most basic starting point," because they cannot show that the Act "provides for differential treatment of in-state and out-of-state economic interests."

The judge explained that the difference between Granholm and this case, is that in the Granholm case, allowing in-state suppliers to ship directly to consumers, while denying out-of-state retailers the same privilege did constitute preferential treatment. But in this case, Illinois law requires "all alcohol sold in Illinois by retailers directly to Illinois consumers must pass through the three-tier system," regardless of where the retailer is located -- i.e., no discrimination.

"Unlike in-state retailers who have obtained alcohol under the three-tier regulation system, certain out-of-state retailers... have not proceeded through the regulatory system in place to protect the Illinois public from harm," he continued.

Will there be an appeal? Stay tuned.

http://law.justia.com/cases/federal/district-courts/illinois/ilndce/1:2016cv08607/330913/30/

Slow and Steady Wins the Direct Shipping Map

Source: winesandvines.com
June 12, 2017

When it comes to direct-to-consumer (DtC) shipping news, opening Pennsylvania to wine deliveries is a tough act to follow. But a variety of speakers used ShipCompliant's annual conference, held Thursday at the DoubleTree Sonoma in Rohnert Park, to update wine sales and compliance specialists on the progress of this and other DtC initiatives.

Janelle Christian, industry outreach program manager for the Alcohol and Tobacco Tax and Trade Bureau (TTB), said the agency's 2017 budget has been very good and included a $5 million earmark for accelerating the processing of formula and label applications, but the proposed budget would cut funding to the the agency by 7% and not include the earmark.

The proposed budget "would definitely impact us," Christian said of the decreased funding. The federal hiring freeze U.S. president Donald Trump instituted as an executive order early in his presidency has not been lifted in the Department of the Treasury, which includes TTB, and the agency is looking at ways to be more efficient and automate more processes. "Any decrease in funding and requisite staffing would impact our ability to serve you all."

Part of the earmark funding already has been used to increase efficiency, with Certificates of Label Approval (COLAs) being approved within 10 days, down from a high of 70 days a few years ago. TTB refers to the goal of quick approvals as 10-10-10: An answer for labels, formulas and sampling analyses will be returned within 10 days 85% of the time.

Christian said one trick to getting your labels approved quickly when submitting multiple labels is to leave notes in the comment field for a specialist, so that person can look at them all at once. The most common reasons for label applications to be returned include:

1) Errors or missing data
2) Appellation conflict
3) Brand label doesn't meet minimum requirements (all necessary information must be on same label, not front and back)
4) Name/trade name conflict (application vs. label)

6) Appellation information missing on a vintage wine

The most common errors for filing include:

1) Late filing (must be submitted by the 15th day at the end of a reporting period)
2) Person submitting filing doesn't have signing authority (often in cases of new hires)
3) Entry of incorrect information
4) Clerical/data omissions
5) Inaccurate text

Home of Granholm

Teri Quimby, a commissioner with the Michigan Liquor Control Commission, said contrary to popular belief, a regulator's goal is to have compliance, not impose sanctions. Prior to the conference she looked into the most common wine industry violations from her office and found they all related to the Michigan Direct Shipper License. "It's only $100, just get it!" she appealed to the crowd.

Another common oversight happens when a shipping label covers the warning about delivering to someone 21 or older. It's not enough that the box is printed with "Adult Signature Required," the words must be visible.

Quimby said the technology in her agency's office is far behind what is common in corporate America, but they are working to get more processes digitized.

Across the nation

Steve Gross, vice president of state relations for the San Francisco, Calif.-based Wine Institute, said that while no states as large as Pennsylvania have opened in 2017, "We've won a lot of small battles that are going to keep you able to do the business that's important to you."

These battles include introducing shipping bills in the control states of Alabama and Mississippi, where legislators said the wine industry would never find a sponsor for an alcohol-related bill. Wine Institute also worked to soften the language in many pieces of state legislation that would put up barriers to DtC wine shipments. Currently wineries presented with a permit can ship deliveries to Alabama's ABC stores, and Gross advised staff to make sure the permits are current.

Gross gave a DtC update for every state. Most notably, Oklahoma voters passed a direct-shipping ballot initiative, but a lawsuit filed by retailers is challenging it.

Illinois, Michigan and Missouri all are facing lawsuits from retailers who say it is unfair wineries can ship to consumers but they cannot. A bill in New York state is tackling the same issue. Illinois also has enacted rules saying wineries must identify their fulfillment houses at the time of licensing.

A study from Rutgers found that New Jersey is losing up to $4 million per year by not allowing direct shipments from large wineries, so legislation targeting the 250,000-gallon capacity cap is likely to appear in late 2017 or 2018. If such a move proves successful, Ohio would be the only state with such a cap for wineries allowed DtC shipping licenses.

Alaska and Minnesota are the last two states where wineries can ship wine without a license, but that is likely to change. Minnesota is putting together a permit system, and as part of the compromise Wine Institute is trying to negotiate a higher cap on cases shipped.

Arizona set up penalties for out-of-state wineries that violate shipping laws, and such acts could cost up to $150,000. Meanwhile, Maryland is cracking down on wineries selling other wineries' products.

As for Pennsylvania, the state is going to require a SKU report showing how much of each wine you shipped into the state and how much you shipped to each ZIP code retroactive to the time of licensing. "You could already owe them three reports," Gross said, prompting grumbles from the audience.

Wineries shipping to North Dakota must pay local sales tax in addition to 7% gross receipts tax. Colorado plans to start collecting sales tax from wineries that sell more than $100,000 worth of wine in the state, but details are still being ironed out.

STAG'S LEAP TRADEMARK CASE FIZZLES OUT

Source: Wine & Spirits Daily
June 6, 2017

After months of loaded public commentary, the trademark lawsuit between Treasury Wine Estates and Ste. Michelle Wine Estates has been settled with little to no fanfare. Court documents indicate the parties mutually agreed to dismiss the litigation and handle their respective attorney's fees.

Neither company offered much in the way of explanation for dismissal on this one. SMWE declined to comment at all, while TWE confirmed the case had been dropped, and that it is "proud to continue to offer St. Huberts The Stag varietals to its customers in the US and abroad."

Recall, the impetus for the lawsuit was a proposed new TWE wine under its St. Hubert brand that includes the term and image of a stag, but isn't sourced from the Stags Leap District or Napa Valley, which SMWE initially took issue with [see WSD 02-07-2017].

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK DIAGEO NORTH AMERICA, INC., Plaintiff,v. W.J. DEUTSCH & SONS LTD. d/b/a DEUTSCH FAMILY WINE & SPIRITS, and BARDSTOWN BARREL SELECTIONS LLC, Defendants. (Excerpt)

Source: Law360
June 6, 2017

Plaintiff Diageo North America, Inc. ("Diageo" or "Plaintiff"), by its attorneys

Jenner & Block LLP, for its complaint against Defendants W.J. Deutsch & Sons Ltd. d/b/a Deutsch Family Wine & Spirits and Bardstown Barrel Selections LLC (collectively "Defendants"), alleges as follows:

This case involves the willful acts of trademark infringement, unfair competition, and dilution by a direct competitor of Diageo who redesigned the bottle and label for a line of its whiskey beverage products in order to knock off the appearance and unfairly trade on the reputation of Diageo's extremely popular BULLEIT® brand bourbon and rye whiskey.

Defendants' Infringement of the Bulleit Design Mark and Trade Dress

Upon information and belief, Defendant W.J. Deutsch & Sons Ltd. d/b/a Deutsch Family Wine & Spirits produces and sells a competitive line of premium whiskey beverages under the "Redemption" brand name. Upon information and belief, the "Redemption" name is owned by Defendant Bardstown Barrel Selections LLC.

Connecticut: Federal Court Dismisses Anti-Trust Challenge To Connecticut's Liquor Pricing Law

Source: Hartford Courant
David Owens and Edmund H. Mahony
June 6th

A federal court on Tuesday dismissed an effort that would have lowered prices and increased competition in the Connecticut liquor market by overturning the outdated state system under which manufacturers, wholesalers and retailers combine to establish minimum prices.

In dismissing a suit by retailer Total Wine & More, Chief U.S. District Judge Janet C. Hall said the state laws and regulations establishing the complex, Connecticut pricing system cannot be preempted by federal anti-trust law that prohibits activities restricting interstate commerce and competition in the marketplace.

The Connecticut system establishes a floor for liquor prices that, for the most part, retailers cannot go below.

Hall's decision said that she was effectively bound by applicable federal law in Connecticut to uphold a liquor pricing system that legal experts have said was designed years ago to discourage the consumption of alcoholic beverages by Connecticut residents.

Total Wine argued repeatedly in its litigation that the Connecticut pricing system is unfair to consumers and to retailers trying to reduce prices in order to obtain a bigger share of a competitive market.

Specifically, Total Wine wrote in a legal filing that "Under this anti-competitive regime, a retailer like Total Wine & More cannot use its market and business

efficiencies to reduce the prices offered to consumers."

In a telling footnote in the 40-page decision, Hall said the correction of anti-competitiveness in the state law falls to the executive and legislative branches of state government rather than the federal judiciary.

"The court notes that Total Wine's Complaint includes several allegations that suggest the Connecticut liquor regime is unfair to consumers," Hall wrote in the footnote. "Whether or not the statutory and regulatory scheme implemented by the State of Connecticut is wise is not a question for this court."

"Rather, the court can only be asked to determine whether the challenged provisions are preempted by federal law," the decision said. "Arguments as to the harm inflicted on consumers by this scheme are more appropriately directed to Connecticut's executive and legislative branches of government."

The state has regulated liquor prices for at least 35 years and Total Wine challenged that authority by temporarily pricing some products under state minimums. It halted the practice after the state Department of Consumer Protection launched an investigation and ultimately fined the retailer.

Total Wine customers said Tuesday that they supported the store's efforts to offer lower prices.

"For a while they were going against the law and offering [liquor] lower, and it was nice to see the lower prices," said Krystal Cocolla of Wethersfield, who was shopping at the West Hartford store Tuesday. "I know that they don't want the smaller liquor stores to go out of business ... but it'd be nice to see lower prices."

A.J. Castellucci of West Hartford said he also favored allowing Total Wine to charge what it wanted.

"That's pretty much how business works," he said. "If you can sell for a certain price and people buy it, then that's fine. But if people stopped coming here because they thought it was too high, or they found lower prices somewhere else, that's just how it works."

The fast-growing chain of liquor superstores that has four outlets in Connecticut argued that the state's regulatory scheme that sets minimum prices for wine and spirits violates U.S. antitrust laws.

"It's price-fixing," Edward Cooper, vice president of public affairs for Total Wine & More, said when the suit was filed.

Under Connecticut law, liquor retailers cannot sell wine and spirits below cost. Connecticut is the only state with such a prohibition.

The state Department of Consumer Protection regulates liquor retailers and has the authority to suspend, revoke or refuse to renew a permit for the sale of liquor if it finds "reasonable cause" that a seller has violated state law. It also has the ability to levy fines.

Gov. Dannel P. Malloy has tried for years to repeal the state's minimum pricing laws, but has run up against the lobby that represents small mom and pop

package stores. They oppose doing away with the law because they fear large retailers will undercut them and give big retailers an edge. Ultimately, they argue, many small stores will not be able to compete and will be forced out of business.

"Changes to Connecticut's outdated minimum bottle laws would benefit consumers by allowing arbitrary prices to be lowered to fair market value and would in turn generate more revenue for the state," said Meg Green, a spokeswoman for Malloy. "Governor Malloy remains committed to fighting on behalf of Connecticut consumers for fairer prices that benefit their bottom lines."

Under Connecticut law, liquor distributors must give the same price to all retailers, regardless of volume. Likewise, retailers cannot go below a certain price.

Total Wine & More co-owner David Trone said through a spokesman that he has not had a chance to read the judge's decision.

"The fact remains that this is a bad law for Connecticut's consumers that allows consumers in the state to be overcharged for alcohol," Trone said. "Total Wine & More will not stop fighting the package store cartel that rips off all Connecticut consumers. We will work diligently on behalf of consumers to ensure that this pricing scheme in Connecticut does not continue."

Carroll J. Hughes, the longtime chief lobbyist for the Connecticut Package Store Association, said the judge got it right.

"We think that is a good decision in properly interpreting the way the alcoholic beverage laws are crafted across the country, not just in Connecticut," he said. With the repeal of Prohibition, the federal government gave states the power to regulate alcoholic beverages."

"Some states chose to control it themselves," he said. "Other states set up a system whereby they would strongly regulate all aspects of alcohol sales, which is what Connecticut did. Connecticut has a very intricate set of regulations that were upheld by the judge."

Total Wine customer Justin Allen of Rocky Hill said the judge's decision hurts consumers, but "There's a lot of good mom and pop places out there that can't compete with these bigger places bringing in more volume. I do see that being the flip side of it."

BBD 6.15.17

BOSTON GLOBE: WAS HUNTERDON FINE PART OF "QUID PRO QUO" ARRANGEMENT?

A Boston Globe article connected the dots surrounding the recent spate of Sheehan distributor fines, revealing what most who have been paying attention already know: The company has a history of trade practice run-ins.

We reported last week that New Jersey-based Sheehan craft distributor, Hunterdon Brewing Co., [not sure why a distributor is called a brewing company] agreed to pay the New Jersey Division of Alcoholic Beverage Control a record $2 million (roughly) for charges related to record maintenance and account reporting. The distributor's statement on the matter chalked this case and fine up to its own inaccurate accounting.

The case involved Hunterdon selling draft beer tap systems "to about 150 bars and restaurants for less than fair market price." The ABC found that situation "in a discriminatory manner."

But, says the Globe: "The New Jersey ABC declined to release detailed records of its investigators' work, leaving it unclear whether any of the hundreds of retailers in the New Jersey case saw the discounts as part of a quid pro quo arrangement."

Now, why might that be the case? "Two other Sheehan wholesalers have previously acknowledged that markedly similar arrangements were intentional schemes meant to boost their sales," says Globe.

In the case of Union Beer, Sheehan's Brooklyn distributorship, "executives admitted in depositions that they had plied bars around New York City for years with free equipment - and even checks to charity in the retailers' names - to increase revenue."

And, of course, Craft Brewers Guild remitted a $2.6 million fine in Massachusetts "for paying five restaurant groups more than $100,000 to reserve taps for its beers." The distributor still has a suit pending against the agency.

Bill passes United States House with swipe fee protections intact

June 8, 2017

The National Restaurant Association celebrated a big victory June 8, as the House of Representatives passed the Financial CHOICE Act with debit swipe fee protections still intact.

We waged a comprehensive public affairs campaign leveraging grassroots advocacy, digital advertising, and social and traditional media to express our concerns regarding the repeal of the swipe fee protections with lawmakers. Our effort showed them how financially devastating repeal of the protections would be to our industry as well as other small businesses and consumers nationwide.

Keeping the debit swipe fee protections in place means restaurant owners and other small business operators won't face skyrocketing fees every time a customer uses his or her debit card during a transaction.

"By keeping debit swipe protections in place, small businesses will not be stuck with a debit card tax on top of their already thin operating margins," said Cicely Simpson, our executive vice president of government affairs and policy.

Authored by Rep. Jeb Hensarling, R-Texas, House Financial Services Committee chair, the Financial CHOICE Act seeks to reverse overregulation of the financial services industry. The debit swipe fee protections, also known as the Durbin Amendment, passed in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

6.15 BBD, **Ninth Circuit Hands Down Rare Victory for Three-Tier**

Yesterday, an en banc panel (that's a full panel of judges) of the tricky and often unpredictable 9th Circuit Court handed down a stunning victory for state based three-tier laws over federal free speech law. The big win comes as the 9th Circuit issued its opinion in the long and winding Retail Digital Network (RDN) case, which challenged California's tied-house laws as a violation of the First Amendment.

Ten of the 11 judges sitting in on the en banc review affirmed the lower court's decision in the case and rejected RDN's argument, ruling the challenged California law "directly and materially advances the state's interests in a triple-tiered distribution scheme."

Here's how we got here. Follow me here, it's an interesting education in how precarious legal arguments can be interpreted so differently at different times and venues.

RDN CHALLENGES CALI ABC. For those of you who don't remember, Retail Digital Network (RDN) is a third-party company that installed and operated digital screen displays in retail outlets throughout Southern California. The screens played a two-minute loop of advertisements and RDN would sell 15-second spots to any supplier/wholesaler that wanted some airtime. RDN's plan was to take that ad revenue, break off a piece to the retailer housing the screen, and pocket the rest.

When RDN went shopping for business, the suppliers and distributors said "thanks, but no thanks" fearing that they were indirectly paying a retailer to advertise and therefore violating California's tied house law.

RDN finally got fed up with suppliers/distributors telling them "sorry, we can't do it" and went to the District Court to challenge the tied house provision. RDN argued the provision is really a violation of the First Amendment, because what they're engaging in is truthful non-misleading commercial speech.

CALI ABC FIGHTS BACK. The Cali ABC tried to squash the case in District Court and moved for summary judgment. The department argued that the 9th Circuit has already considered such a challenge to the state's tied house laws with the 1986 Actmedia, Inc. v. Stroh case and rejected it.

SIDEBAR: In that case, Actmedia was an "advertising middle-man" that would lease ad space on shopping carts. Actmedia entered into an agreement with Coors to advertise their beer on the carts. The ABC stepped in and said this type of conduct is a violation of the tied-house provision and Coors promptly

terminated its relationship with Actmedia. That set Actmedia off and they filed a lawsuit saying the provision "impermissibly restricted commercial speech under the First Amendment." Actmedia lost the case in District Court, appealed, took it to the 9th Circuit, and the judges there affirmed the lower court's decision, relying on the Central Hudson case. In Central Hudson, as some of you may know, the "Supreme Court reiterated that the First Amendment accords some protection to commercial speech, but that 'the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.'"

So back to RDN's dispute in District Court: the Cali ABC thought they had a slam dunk here as RDN's argument pretty much mirrors Actmedia's and the District Court agreed. The court granted the ABC's motion for summary judgment relying on the Actmedia case.

RDN FIGHTS BACK. RDN then appealed the lower court's decision and took their case to the 9th Circuit, arguing that Actmedia "was no longer good law" because the Supreme Court's decision in Sorrell v. IMS Health Inc. (2011), "fundamentally altered the Central Hudson test by adopting a more demanding standard for assessing restrictions on commercial speech."

STAY WITH ME. The three-judge panel of the 9th Circuit apparently liked RDN's argument, because the panel sent the case back to the District Court (remanded) and instructed them to apply heightened judicial scrutiny to restraints on commercial speech. Basically, they told the District Court to look at this one again, because this provision may in fact be unconstitutional under the First Amendment.

INDUSTRY STARTS TO SWEAT. The remanding of the case gave the District Court the opportunity to determine the constitutionality of tied-house provisions. And it appeared the lower court would side with the higher court's advice and rule the provision to be unconstitutional.

That development put the industry on edge. National industry associations like the NBWA, WSWA, and the BA filed amicus briefs in support of the state's tied house laws. And, of course, state associations like the CBBD, WSWC and the CCBA chimed in as well. The trade groups plead for a rehearing or an en banc review and after being inundated with requests, the 9th Circuit granted the rare en banc hearing. And that's how we got to yesterday's decision.

9th CIRCUIT HANDS DOWN MAJOR DECISION. The en banc court affirmed the district court's summary judgment in favor of the Cali ABC.

The en banc court rejected RDN's "contention that Actmedia was no longer good law because the Supreme Court's decision in Sorrell fundamentally altered the four-part test for evaluating restrictions on commercial speech, established in Central Hudson."

The en banc court held that Sorrell did not modify the Central Hudson test that been applied in Actmedia.

The en banc court wasn't fond of Actmedia's "reliance on California's interest in promoting temperance as a justification for tied house laws, the court nevertheless held that Actmedia's reliance on temperance did not negate the

sound and well-reasoned conclusion that [tied house laws] withstood First Amendment scrutiny."

The en banc court agreed that (1) tied-house laws "directly and materially advanced the State's interest in maintaining a triple-tiered market system," and (2) "there was a sufficient fit between that interest and the legislative scheme."

LONG STORY LONG: Another victory for three-tier against broad First Amendment parameters. If it had gone the other way, it could've opened the floodgates for other suits against three-tier interests.

Says NBWA chief Craig Purser: "The 9th Circuit ruling today is a significant win for state-based alcohol regulation and statutes designed to prevent vertical integration and preserve the independence of each tier in the alcohol industry. This is an important decision for responsible alcohol regulation and avoids a dangerous precedent that would have undermined states' primary authority to regulate alcohol."

En Banc Opinion Could Set Precedent for Tied-House Laws

BY MARC SORINI ON JUNE 15, 2017POSTED IN ADVERTISING AND MARKETING, GENERAL INTEREST, LEGISLATION, TRADE PRACTICES

Yesterday, the en banc (full) Ninth Circuit Court of Appeals issued the attached opinion in the case of Retail Digital Network v. Prieto, No. 13-56069.

As you may recall, the Retail Digital Network case concerns the legality of sections of California's tied-house laws, California Business and Professions Code Section 25503(f)-(h), which prohibit manufacturers and wholesalers (and their agents) from giving anything of value to retailers in exchange for advertising their products. Retail Digital Network (RDN), which installs advertising displays in retail stores and contracts with parties to advertise their products on the displays, sought a declaratory judgment that Section 25503(f)-(h) violated the First Amendment after RDN's attempts to contract with alcohol manufacturers failed due to the manufacturers' concerns that such advertising would violate these tied-house provisions.

The District Court found Section 25503(f)-(h) constitutional under a Ninth Circuit case from 1986, Actmedia, Inc. v. Stroh, in which the court upheld Section 25503(h). Then in January 2016, a panel of the Ninth Circuit reversed, holding that Actmedia is "clearly irreconcilable" with the Supreme Court's 2011 opinion in Sorrell v. IMS Health Inc. The panel accordingly would have remanded the case to the District Court for further proceedings under Sorrell's allegedly more restrictive First Amendment standard. But the state requested an en banc (full court) rehearing, which the court granted.

Yesterday's en banc opinion reverses the panel and affirms the decision of the District Court. The en banc court's analysis begins with a detailed review of Actmedia's application of the four-part test first articulated by the Supreme Court in Central Hudson v. Public Service Commission of N.Y., 447 U.S. 557 (1980), and the observation that in spite of considerable debate on the subject, the Supreme Court still applies Central Hudson in First Amendment commercial speech cases. The Central Hudson test looks at whether: (1) the speech is not misleading and concerns lawful activity; (2) the governmental interest justifying

the regulation is substantial; (3) the regulation directly advances the governmental interest; and (4) the regulation is not broader than necessary to serve the governmental interest.

First addressing the RDN position that prevailed before the panel, the en banc court opinion rejects the notion that Sorrell marked a fundamental departure from Central Hudson. Instead, the opinion views Sorrell as an application of Central Hudson, and thus compatible with the analysis conducted by the Ninth Circuit back in 1986 in deciding Actmedia.

Turning to the merits of Actmedia's application of the Central Hudson test, the en banc opinion upholds Actmedia's conclusion that the California tied-house provisions at issue satisfy prongs three and four of Central Hudson. In particular, the value of the tied-house laws in maintaining California's "triple-tiered distribution scheme" was found to satisfy the Supreme Court's test for commercial speech restrictions. And because the numerous exceptions to the tied-house laws are narrow (according to the en banc court), they do not render the overall scheme irrational. The opinion does, however reject Actmedia's reliance on temperance as a justification for upholding the tied-house laws. Echoing the reasoning of several post-Actmedia Supreme Court opinions, the en banc opinion recognizes that reducing the amount of advertising seen by consumers does not satisfy the requirements of Central Hudson's third and fourth prong.

Ninth Circuit Chief Judge Thomas wrote a dissenting opinion. In it, he argues (consistent with the three-judge panel's reasoning) that Actmedia is irreconcilable with Sorrell and accordingly should be overruled.

The en banc Ninth Circuit decision represents a substantial victory for defenders of both federal and state tied-house laws and related statutes and regulations. It also could become a substantial precedent, as it reflects the views of the entire Ninth Circuit, not just a panel, in a case widely followed by the industry and by First Amendment observers. That high profile also means an attempt to seek Supreme Court review seems likely. The Supreme Court, however, only accepts a very small percentage of the cases brought before it. So for now at least, California's tied-house statutes remain intact.

IN THIS ISSUE

Greetings! This week's top news includes an invitation for recommendations about Treasury Department regulations that can be eliminated, modified, or streamlined to reduce burden, a notice from FDA withdrawing draft guidance on the use of fruit juice and vegetable juice as color additives, and a reminder to complete our 2017 satisfaction survey.

REVIEW OF REGULATIONS

Source: Federal Register / Vol. 82, No. 113 / Wednesday, June 14, 2017 / Proposed Rules

AGENCY: Department of the Treasury
ACTION: Request for information
SUMMARY: On January 30, 2017, the President signed Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, to direct agencies to eliminate two regulations for each new regulation issued and to limit costs for this fiscal year to zero. On February 24, 2017, the President issued Executive Order 13777, Enforcing the Regulatory Reform Agenda, which requires agencies to convene a regulatory reform task force to assist in the implementation of Executive Order 13771. In furtherance of those Executive Orders, this notice invites members of the public to submit views and recommendations for Treasury Department regulations that can be eliminated, modified, or streamlined in order to reduce burdens.
DATES: Comment due date: July 31, 2017
SUPPLEMENTARY INFORMATION: Executive Order 13777, Enforcing the Regulatory Reform Agenda, requires agencies to convene a regulatory reform task force to assist in the implementation of Executive Order 13771 as well as Executive Orders 12866 and 13563. The Department is forming such a task force, which will evaluate existing regulations and make recommendations to the Secretary to prioritize their possible repeal, replacement, or modification, consistent with applicable law.
Read the Federal Register Notice for more details and for information about how to submit comments.

The Slants Win Supreme Court Battle Over Band's Name In Trademark Dispute

June 19, 201710:29 AM ET
BILL CHAPPELL

Members of the Asian-American rock band The Slants have the right to call themselves by a disparaging name, the Supreme Court says, in a ruling that could have broad impact on how the First Amendment is applied in other trademark cases. The Slants' frontman, Simon Tam, filed a lawsuit after the U.S. Patent and Trademark Office kept the band from registering its name and rejected its appeal, citing the Lanham Act, which prohibits any trademark that could "disparage ... or bring ... into contemp[t] or disrepute" any "persons, living or dead," as the court states.

After a federal court agreed with Tam and his band, the Patent and Trademark Office sued to avoid being compelled to register its name as a trademark. On Monday, the Supreme Court sided with The Slants.

"The disparagement clause violates the First Amendment's Free Speech Clause," Justice Samuel Alito wrote in his opinion for the court. Contrary to the Government's contention, trademarks are private, not government speech."
The band has said it wanted to reclaim what is often seen as a slur.
"We grew up and the notion of having slanted eyes was always considered a negative thing," Tam said in January. "Kids would pull their eyes back in a slant-eyed gesture to make fun of us. ... I wanted to change it to something that was powerful, something that was considered beautiful or a point of pride instead."

06.22.2017

FDA Begins Winery Inspections Wine-production facilities must have current registration, comply with Food Safety Modernization Act

by Kate Lavin Inspectors from the U.S. Food & Drug Administration are likely to inspect bottling lines for possible contamination. San Rafael, Calif.-Wine law specialists have warned since 2011 that the U.S. Food & Drug Administration (FDA) would eventually start inspecting wineries for compliance with the Food Safety Modernization Act. This spring those inspections started in earnest. According to Barbara Snider, senior counsel for the California-based Hinman & Carmichael law firm, wineries from Washington state to Napa and California's San Joaquin Valley have reported unplanned visits from the FDA. Snider told Wines & Vines that industry members expected the FDA to start inspections with the largest wineries, but that has not been the case. U.S. wineries are required to register with the FDA as food-production facilities and renew their registration every two years under the Bioterrorism Preparedness and Response Act. Wineries that have neglected to register with the FDA are particularly prone to receiving surprise visits, according to Snider, who recommends making sure all paperwork is current in case an inspector drops by. She also suggested wineries appoint two staff members who know where to find the key documents in case of an inspection. What are agents looking for? While consumers gobble up calendars, books and other merchandise dedicated to winery dogs, having animals in a food-production area is a no-no as far as the FDA is concerned.

Inspectors also will be on the lookout for pests such as rodents and insects, and for wineries with outdoor crush pads, inspectors will want to know how they keep birds away from the harvested grapes. "They're going to inspect it as if it's a food manufacturer, because they are food manufacturers," Snider said. Bottling lines are of particular interest because they are common spots for contamination, and as in the rest of the winery, sanitation is key. Inspectors aren't expecting small wineries to have ozone on hand, but they will want to know the facility's process for cleaning and sanitizing wine-processing equipment, and they'll want to see the products used during the process. Everything should be clearly labeled. Pesticides and other toxins should be kept in an area separate from yeast, amendments and anything else that comes in contact with grape juice or wine. When inspectors come knocking The FDA is working with state health and agriculture departments, so Food Safety Modernization Act inspections might be conducted by state inspectors rather than FDA agents. Regardless, inspectors don't have to provide notice prior to a visit, and according to Snider, "They usually won't because they want to see you as you really are, for better or for worse." Employee hygiene is another topic of concern to inspectors. Cellar workers must have access to hot water to properly wash their hands, and all employees should have documented education in food hygiene. Inspectors may also ask for records of food products received by the facility (grapes in the case of wineries, along with yeast and fining agents), so make sure weigh tags are available to the staff member appointed to represent the winery to the FDA. Records of where wine was sent after leaving the winery also need to be available for inspectors. Agents may not ask for Certificates of Label Approval, but they should also be available at a moment's notice.

Read more at: https://www.winesandvines.com/template.cfm?section=news&content=186032

KANSAS: Appellate Reversal of Conviction for Contempt
June 12, 2017

On December 8, 2015, Terra McDaniel was required to report for jury duty in Sedgwick County District Court. Due to emergency circumstances, proper care for her young child was unavailable, and she was unable to report for jury duty on time. When she arrived late, she was told to report at a hearing on December 18, 2015, to explain to the judge why she did not arrive for jury duty on time. Without at attorney, Ms. McDaniel appeared as directed on December 18, 2015, ready to explain her child care dilemma. To Ms. McDaniel's surprise, the hearing was a hearing to determine whether her late appearance for jury duty constituted criminal contempt of court. Based on information relayed from the jury clerk, the judge found Ms. McDaniel to be in direct criminal contempt of court, imposed a six-month controlling jail sentence, and ordered Ms. McDaniel to serve 30 days in jail beginning immediately after her hearing.

On appeal, Joseph, Hollander & Craft's Jess Hoeme helped Ms. McDaniel secure a reversal of this conviction. In the written opinion released June 9, 2017, In re McDaniel, Kan. Ct. App. Case. No. 115,614, the Kansas Court of Appeals held that the facts underlying Ms. McDaniel's conviction could not amount to direct contempt of court because the conduct was not directly observed by the judge. "If the judge needs to rely on statements and testimony from others regarding

what they know about the contemptuous acts, however, the misconduct is no longer direct contempt but instead is indirect contempt."

The appellate court ruled:
McDaniel's failure to appear the morning of her second day of jury duty did not constitute a direct criminal contempt but instead indirect criminal contempt, if contempt at all. As explained above, the accused is entitled to greater constitutional procedural safeguards in proceedings for indirect contempt because the judge has no personal knowledge of the misconduct. Those safeguards are entrenched in accepted principles of constitutional due process and are codified in K.S.A. 2016 Supp. 20-1204a(a). In Kansas, the court must file an order to appear and show cause why a judgment of indirect contempt should not be entered. The court must file an affidavit with this order that specifically sets forth the facts supporting the allegation of indirect contempt. K.S.A. 2016 Supp. 20-1204a(a), (d). The accused must have a reasonable opportunity to meet the charges of indirect contempt by way of defense or explanation, which includes right to be represented by counsel, the right to testify, and the right to call and cross-examine witnesses. In re Oliver, 333 U.S. at 274-75.

Noting that Ms. McDaniel was denied a number of these rights, the appellate court held that the judge further erred in summarily punishing Ms. McDaniel and thereby depriving her of procedural due process. The appellate court also found that the conviction was void due to noncompliance with statutory requirements in the journal entry that memorialized the conviction.

The district court judge was directed to vacate Ms. McDaniel's conviction.

6.7.
Thwarted Southeast "Mega" Distribs Call A-B Suit Moot

In April, A-B rejected a Southeast megamerger between RA Jeffreys, Crown and Southern Eagle that would have spanned 500 miles across three states and amounted to 30 million cases a year. A-B said it would be "unwieldy," offer little synergies and ultimately endanger the brands, opening up these family companies to interfamilial squabbles [see BBD 04-06-2017]. A-B filed a preemptive suit in North Carolina the day they denied the merger, citing their equity agreement.

Monday, RA and Co. filed motions and answers to the suit.

Main thrusts:

1) A-B has approved more sprawling, less congruous deals, so their excuse of this deal being too unwieldy is a shield to pre-empt a megadistrib that could threaten their control;
2) A new proposal was submitted June 1st anyhow, so ruling on this case is moot and;
3) U.S. District Court for Eastern District of North Carolina is the wrong venue for the case, because the seat of the proposed transaction would be Georgia anyhow.

OVERALL: A-B's CONCERN IS "PRETEXT"; THEY JUST WANT TO

MAINTAIN CONTROL. "This is a case in which the Plaintiff, under the guise of claiming 'reasonableness,' seeks to control the operations of wholesalers in order to prevent them from obtaining the type of scale that could threaten the Plaintiff's control and bargaining power over them," says RA Jeffreys in its answer to A-B's litigation against the distributors.

After disapproving the would-be, Georgia-based company, "Exceptional Beverage," A-B sought declaratory judgment dealing with its disapproval.

But RA Jeffreys says A-B's stated reasons are simply "pretexts": A-B has previously approved several-state mergers, involving non-contiguous entities. But Exceptional would have been both contiguous, "and smaller than territories that the Plaintiff has permitted across the county which are noncontiguous and span areas far larger than the area set forth in this paragraph," it said.

RA CALLS OUT EQUITY AGREEMENT NOTIONS AS "FICTION." Of course, the Equity Agreement was invoked throughout the docs. But RA Jeffreys calls A-B out on the notion of the agreement as a "personal service contract" that requires "highly personalized promotion and sales service effort."

Jeffreys admits that A-B characterizes the agreement as such. But in reality, says the distributor, that notion is "a fiction created by Anheuser-Busch that is designed to allow it to control the size, growth and ownership of existing wholesalers in an effort to effectively control all operations of the wholesalers."

MOREOVER, A NEW PROPOSAL IS UNDER REVIEW; OLD CASE NO LONGER EXISTS. Oh, and by the way, says Jeffreys: Why are we even arguing outdated things?

A new proposal for the Southeast mega merger was submitted last week, and it's now under review.

The new proposal opts for two Equity Agreements and and Equity Agreement Managers (one for Southern Eagle and Crown's combined territories in South Carolina and Georgia, and the other for RA Jeffreys in North Carolina), rather than the singular ones previously submitted. So actually, there's no present "'case' or 'controversy'" at hand, and "Court does not have subject matter jurisdiction," says RA.

PLUS, MANY MATTERS OF JURISDICTION. Then, among other jurisdictional and logistical challenges, Jeffreys says the U.S. District Court for Eastern District of North Carolina is a bogus venue for this complaint.

Why? "The transactions proposed implicate the laws of South Carolina and Georgia and, at the close of the transactions, a Georgia company, owned by the Defendants or their successors, would be the surviving and controlling company."

SOUTHERN EAGLE, CROWN SPEAK. Southern Eagle and Crown also both filed motions to dismiss A-B's claims "for lack of personal jurisdiction."

The two wholesalers say neither of them do any business in North Carolina.

More importantly, A-B's argument that it has the right to disapprove this

transaction is based on equity agreements that were entered into Georgia (Southern Eagle) and South Carolina (Crown), and they're governed by those states. What's more, the duo argues that A-B purposefully omitted the equity agreements for Southern Eagle and Crown in their complaint to place the case in North Carolina.

"Since these agreements were entered into in Georgia and South Carolina, and since by their terms they are each governed by the law of those states, the omission of these agreements was a calculated attempt to make it appear that North Carolina law was the governing law over all of the Equity Agreements," according to the distribs' filings.

Why this tactic? The wholesalers believe A-B "believed it had the greatest leverage" in the North Carolina forum. They, too, label A-B's disapproval as "pretextual" and say it was "simply part of an overall litigation strategy with a goal of imposing the costs of litigation in a forum away" from South Carolina and Georgia.

In a separate motion judgement on the pleadings, Jeffreys further calls A-B's allegations "woefully insufficient to invoke the power and jurisdiction of the federal courts." At the very least, Jeffreys says, the Court should "decline to offer an advisory opinion on a proposal that no longer exists."

Judge rules supermarket chain must make web site accessible

Source: CSA
JUNE 15, 2017

Website accessibility is shaping up as the next big challenge for retailers with regards to ADA compliance.

A Miami federal judge has ruled that Winn-Dixie violated the Americans with Disabilities Act by not making its website, which was recently updated, accessible to blind and visually impaired users, the Miami Herald reported. The Jacksonville, Florida-based supermarket chain has set aside $250,000 to revamp its online site and was ordered to pay the plaintiff's legal fees, according to the report.

The case was brought by a Miami resident who is legally blind and uses screen-reading software to access the internet. The software has allowed him to use 500 to 600 websites, including Publix, Walgreens and government sites, the report said. But the software could not read information on Winn-Dixie's site when he tried to order a prescription and look up store hours.

"We understand Winn-Dixie plans to appeal," Scott Dinin, an attorney for the plaintiff, told the Miami Herald. "We welcome the opportunity to bring this issue to the public light, and show how important it is to see accessibility and diversity at the center of every decision making process." Dinin said he plans to take the case to the Supreme Court if necessary

WineAmerica and ASCAP Partner to Introduce New Music License for Wineries

WASHINGTON, DC, (June 15, 2017)- WineAmerica, the national organization of American wineries, and ASCAP, the American Society of Composers, Authors and Publishers, are working together to simplify music licensing compliance for the American wine industry with the introduction of a unique music license created specifically for wineries.

The wine industry is unique: many wineries and vineyards are all-in-one agriculture, manufacturing, and retail establishments. ASCAP undertook a reevaluation of their winery license and crafted a new license that better serves the wine industry's needs while ensuring compensation for its music creators. WineAmerica will work closely with ASCAP to administer the license to its member businesses and will provide an additional 10% discount to WineAmerica members.

ASCAP is a membership association that operates on a non-profit basis and represents more than 600,000 songwriters, composers and music publishers. ASCAP's mission is to license the public performances of their songs, collect those license fees, and ensure that songwriters are reasonably compensated for their work, a principle which WineAmerica fully supports. Under copyright law, when a venue such as a winery, restaurant or other establishment plays recorded, or offers live performances of, copyrighted music, it must purchase a license in order for the songwriter to be paid.

"WineAmerica has taken the leadership role on this issue, thanks to the diligent efforts of Vice President Tara Good," said WineAmerica President Jim Trezise. "The new winery-specific license is simple and affordable, and WineAmerica members save even more."

"A large number of wineries sincerely want to offer live music as part of their visitor experience, but the terms of the license did not meet their needs," said Good. "We applaud ASCAP for recognizing this and for modifying their license so that it works for our establishments. We're looking forward to collaborating with ASCAP to ensure that visitors can continue to enjoy music as much as they do the wines during their winery visit."

"Music is more than just an art form for music creators - it's their livelihood. It's how they put food on the table and send their kids to school," said Vincent Candilora, ASCAP EVP of Licensing. "WineAmerica recognizes the importance of paying music creators to use their music, and understands that it is both the lawful and right thing to do. We're proud to work together with WineAmerica to develop a solution that works for wineries and for our music creators."

The new winery license:

- Lowers the square footage basis for determining license fees for smaller wineries. Wineries up to 3,750 square feet will pay the lowest fees.

- Removes the requirement to purchase separate licenses for different venues on a winery's property (e.g., tasting room versus restaurant);
- Separates the live music and recorded music options, allowing the winery to choose just one or both;
- Offers a seasonal discount range;
- Provides a special reduced price for wineries under 5,000 gallons a year that host 6 or fewer performances per year.

In addition to the savings that wineries will gain from the new license, WineAmerica members are eligible to receive an additional 10% reduction on

their licensing costs. WineAmerica is also available to help wineries assess whether licensing music is right for their business needs and to help shepherd them through the process. To learn more visit www.wineamerica.org/music or contact Tara Good at tgood@wineamerica.org. For additional questions ASCAP has a toll-free number for business owners to ask questions or concerns: 1-800-505-4052 (option 4).

About WineAmerica

WineAmerica is the national voice of the American wine industry. Based in Washington, D.C., WineAmerica represents wineries in 41 states and leads a coalition of state and regional wine and grape associations. As an industry leader, WineAmerica encourages the dynamic growth and development of American wineries and winegrowing through the advancement and advocacy of sound public policy.

About ASCAP

The American Society of Composers, Authors and Publishers (ASCAP) is a professional membership organization of songwriters, composers and music publishers of every kind of music. ASCAP's mission is to license and promote the music of its members and foreign affiliates, obtain fair compensation for the public performance of their works and to distribute the royalties that it collects based upon those performances. ASCAP members write the world's best-loved music and ASCAP has pioneered the efficient licensing of that music to hundreds of thousands of enterprises who use it to add value to their business - from bars, restaurants and retail, to radio, TV and cable, to Internet, mobile services and more. The ASCAP license offers an efficient solution for businesses to legally perform ASCAP music while respecting the right of songwriters and composers to be paid fairly. With over 600,000 members representing more than 10.5 million copyrighted works, ASCAP is the worldwide leader in performance royalties, service and advocacy for songwriters and composers, and the only American performing rights organization (PRO) owned and governed by its writer and publisher members. Learn more and stay in touch at www.ascap.com, on Twitter and Instagram @ASCAP and on Facebook.

Music in the Tasting Room: Are You Breaking the Law?

Performing Rights Organizations (PROs) are monitoring wineries--what you need to know before pressing "play."

by Emily Rasmussen

Dec 2015 Issue of Wine Business Monthly

It's an amenity so universal that it occasionally fades into the background: the soundtrack to a wine tasting experience. For some wineries, ambient music is as simple as streaming a radio station; for others, a specifically-crafted playlist features just the right combination of highs and lows, energetic beats and soothing tones to set the scene for a winery visit.

But there's more to playing music in a winery than wiring a sound system and pressing the "play" button. According to Chris Passarelli, senior intellectual property counsel at Napa's Dickenson, Peatman & Fogarty law firm, a number of Sonoma and Napa wineries have recently received legal notices from copyright owner groups regarding songs subject to copyright protection being played.

"It's actually an ongoing saga," Passarelli said, "and not exclusive to the wine industry." These legal notices come from a performing rights organization (PRO), such as ASCAP, SESAC and BMI, which exist in order to liaise between a collection of musical artists and the commercial establishment seeking to play

that artist's music. "Musical compositions, like other intellectual property, belong to their creators," performing rights organization SESAC explains on their website.

Performing Rights Organizations in the U.S.

These organizations exist in order to liaise between a collection of musical artists and the commercial establishment seeking to play that artist's music and include:

* ASCAP (American Society for Composers, Authors and Publisher): est. 1914

* SESAC (formerly Society for European Stage Authors and Composers): est. 1930

* BMI (Broadcast Music, Inc.): est. 1939

"If you are using someone's property (song) there is a moral and legal obligation to obtain the owner's permission," said Bill Lee, senior vice president, licensing operations for SESAC. "When a person writes a song, they copyright that song, and they own that song-it's their property. It's only fair that if someone wants to use that property, they should be compensated for it."

To confirm the legality of music being played, a performing rights organization sends representatives to visit an establishment and note any songs from their repertory. If a song from the PRO's portfolio is played without a license, the society will send to the winery details of their infringements and instructions on how to rectify the situation: either by desisting from playing the songs in violation or obtaining the appropriate license needed to play the music.

That license is most often a form of "blanket licenses," which vary in price ($359 to $1,314 per year) based on the size of the establishment, the potential audience and the manner in which the music is performed. A blanket license authorizes the performance of a collection of compositions in the PRO's repertory; each sale generates revenue that is then divided into royalties paid to each artist or musical group in the catalog. As ASCAP described in a May 2015 press release, "ASCAP ensures its members can earn a living from their art by licensing the public performances of their songs, collecting those license fees and distributing royalties to its members." Passarelli added that without the PRO, "Up-and-coming artists, in particular, would never be able to reach each individual winery or establishment."

The blanket license was created to be a practical means for venues to play music legally but what was once designed to be a convenient solution is now facing the challenge of the musical world's changing landscape.

"Our members need policies that are understandable and transparent," said Caroline Shaw, executive vice president of Jackson Family Wines and WineAmerica chair, in a September 2015 press release, "so they can book local singers and songwriters, stream internet radio and remain an attractive place to enjoy a local wine." It was this need that led WineAmerica-the national trade organization that represents American winery interests before the federal government-to join the MIC Coalition, a group advocating a rational, sustainable and transparent music access system.

"This is an important issue for wineries, and we wanted to be a leader in effecting change," Michael Kaiser, WineAmerica director of public affairs, explained. The first step, he said, is education. "There's a lot of misinformation out there, and that's one of the main goals of WineAmerica: to educate the industry about issues like this and others that may affect the industry at a federal or state level."

Chris Passarelli said that PROs have been targeting restaurants for quite some time, but the increase in winery targets "simply correlates to the popularity of wine industry tourism. Wineries are peculiarly situated economically and are likely to comply; with a winery, it's easier for the rights society to satisfactorily resolve the problem with money flowing to them. It's an effective monetization of their intellectual property."

Exceptions to Musical Copyright Law: the Homestyle Exemption

A winery is not liable for royalties if:

* Your tasting room has less than 3,750 gross square feet of space. This includes areas that are not accessible to the public, such as kitchen space, preparation and storage rooms, as well as back offices. Parking lots are excluded.

* - and - plays radio or television, where copyrights are covered by the broadcasters. Does not apply to music intended for personal use, i.e., CDs or downloads.

* - or - Your tasting room has 3,750 gross square feet of space or more

* - and - uses no more than six loudspeakers, of which not more than four loudspeakers are located in any one room or adjoining outdoor space

* - and - if television sets are used, there are no more than four televisions, of which not more than one is located in any one room and none has a diagonal screen size greater than 55 inches.

(Source: WineAmerica)

Copyright law applies to live music as well, even when performed at a private event. Passarelli's advice for wineries with regard to live performances is to ask the musicians whether they've secured the rights to play their song selections, or if they are performing original music. "Never assume," he said. "Due to liability, you are under a responsibility as a venue. Make sure those performers have appropriate permissions, or you could be on the hook for their infringement."

For recorded music, a few options exist to assure full compliance with copyright law: playing royalty-free music, for example, or using the radio or a third-party service, such as Sirius XM or Pandora for Business, whose services include securing the proper licensing for the songs in their playlists.

In the event that a notice of copyright infringement arrives in the mail or for those seeking to confirm the legality of music being played, Chris Passarelli's advice is to contact your lawyers. The risk of ignoring a cease and desist-or even unknowingly playing music that isn't compliant with copyright law-is, at best, the significant effort and expense involved in obtaining the correct licenses from each performing rights organization. At worst, it risks a lawsuit, one wherein an establishment could be liable for hundreds of thousands of dollars. In addition to attorney fees, damages can start at $750, according to WineAmerica, and can go up to $35,000 per song or even $150,000 if the violation is considered willful. WBM

by Emily Rasmussen

Born and raised in small-town Iowa, Emily Rasmussen moved to Sonoma County in 2011 with an English degree and a bright-eyed fandom for the wine industry. She has lived and worked in Sonoma wine country ever since, with the exception of one harvest spent in Hawke's Bay, New Zealand. Now with an Advanced

Certification from the Wine & Spirits Education Trust, Rasmussen works as a full-time communications manager in Carneros and lives outside of Glen Ellen with her husband Cody and their golden retriever.

ABI SABMiller It Aint Done Until Its Done June 9

Consumer groups filed an amicus brief Tuesday expressing concern that the OJ's proposed final judgement involving the ABI SAB merger would "not sufficiently alleviate anti-competition concerns," particularly as the DOJ has admitted AB InBev has engaged in anti-competitive activities for years, per Law360. Specifically, Consumer Action and Consumer Watchdog "take issue with the fact that AB InBev is allowed to acquire craft breweries after the merger. The pair said that although new entry from craft breweries increases choice and innovation, the ability of AB InBev to scoop up those smaller entities, and with it their sources of distribution, is clearly anti-competitive." The group has asked for a public hearing on the issue. To allay antitrust concerns in the U.S. surrounding ABI's purchase of SABMiller, SAB divested of MillerCoors. Beyond that, the DOJ's proposed settlement with ABI required the brewer's adherence to a number of behavioral remedies to protect the beer industry and its consumers. But that settlement is not final-final. The Tunney Act requires that consent agreements undergo a judicial review process to safeguard the public interest. "It is now up to Judge Emmet Sullivan to initiate proceedings where he will make a determination on whether to approve the PFJ," per Andre P. Barlow of Doyle Barlow & Mazard PLLC, the watchdog groups' counsel.
Andre says "simple structural remedies" like divestitures have not been proven to effectively restore competition. He told BBD the terms of the final judgment are important because "once approved, they will undoubtedly decide the future course of the beer market in the United States."
Andre stressed the importance of a public hearing, where "Judge Sullivan may ask the DOJ, ABI, and possibly any interveners questions to help him understand whether the PFJ resolves all of the competitive concerns raised by the merger." At the end of the process, Judge Sullivan will either approve or deny the PFJ.

Courtwatch: Schrader Cellars Sues to Protect "Double Diamond" Trademark

by Kerana Todorov
June 12, 2017

A Napa Valley winery is suing a former partner over the ownership of the trademark name of one of its wines. Schrader Cellars LLC of Calistoga on June 5 filed the lawsuit against Midsummer Cellars LLC of St. Helena to have Midsummer Cellar's name removed as a joint owner of the trademark "Double Diamond," according to a lawsuit filed June 5 in Napa.

Schrader Cellars first sold "Double Diamond" cabernet sauvignon wines in 2003 from bulk wine the company purchased with Midsummer Cellars. Schrader Cellars continues to produce a cabernet sauvignon under that label.

But in October 2004, Midsummer Nights' owner Rollie Heitz offered to sell his company's interest in the "Double Diamond" project for about $66,450, according to the complaint. Schrader Cellars' owner Frederick "Fred" Schrader agreed and paid the full amount, plus interest by January 2005, according to the lawsuit filed in Napa County Superior Court.

The U.S. Patent and Trademark Office, however, apparently continued to list both companies as joint owners of the trademark "Double Diamond."

Schrader Cellars and Midsummer Cellars had applied in November 2002 to register the "Double Diamond" trademark with the U.S. Patent and Trademark Office. The trademark was registered in June 2004. According to the lawsuit, the agreement's "implied covenants" included recording the sale of Midsummer Cellars' interest in the project with the U.S. Patent and Trademark Office to "reflect that Schrader Cellars had become the sole registrant."

But Midsummer Nights has remained listed as a joint owner of the "Double Diamond" trademark on the U.S. Patent and Trademark Office database. Schrader Cellars' attorney has sent emails, letters and left phone messages since April to ask Midsummer Nights to sign a form to correct the federal database, according to the complaint.

Schrader Cellars alleges the uncorrected database "adversely" affects "Schrader Cellars' ability to police the DOUBLE DIAMOND trademark, Schrader's ability to maintain and defend that registration, and Schrader Cellars' ability to obtain additional trademark registrations for the trademark DOUBLE DIAMOND or similar trademarks," according to the court filing.

Schrader Cellars' lawsuit, which alleges breach of contract and other allegations, seeks unspecified damages and a court order to require Midsummer Cellars to transfer retroactively its rights to the "Double Diamond" trademark, according to the court filing. The complaint also seeks attorney fees and other lawsuit-related costs.

Schrader Cellars' Fred Schrader, his Sacramento-based attorney, Carrie Bonnington, of Pillsbury Winthrop Shaw Pittman LLP, and Midnight Cellars, could not be reached to comment on the case.
Schrader Cellars produces "Double Diamond" wines with fruit from Napa Valley and Andy Beckstoffer's Amber Knolls Vineyard in Lake County, according to Schrader Cellars' website.

Midsummer Cellars opened in 2000, according to the winery's website. Midsummer Cellars produces wines with fruit from three vineyards, including Cañon Creek Vineyard.

FTC Provides Tips on Avoiding Skimmers

Daily inspection of pumps, payment inside the store are among advice.

June 28, 2017, 12:00 pm

WASHINGTON, D.C. - The Federal Trade Commission (FTC) has released sets of tips to help both retailers and consumers avoid skimmers at the gas pump.

Skimmers are illegal devices criminals attach to payment terminals to take data from a credit or debit card's magnetic stripe, then sell the stolen data or use it to make purchases.

Consumers are not the only victims of skimmers. Retailers who are compromised can suffer from associated costs and a damaged reputation.

The FTC advises retailers to include gas pump inspection as part of the daily routine for employees. Companies should also use and track pump security seals, and log the serial numbers of these seals to guard against the use of counterfeit security stickers. Warped or protruding surfaces, such as card readers and PIN pads that are not flush with the pump's door panel, are also warning signs for potential skimmers.

People who claim to be technicians performing unscheduled work should be treated with suspicion. IDs should be checked and scheduled work appointments should be confirmed. Retailers should also check on vehicles that are parked at the gas pump for a long time.

If a skimmer is suspected, retailers should shut down and bag the pump and have it carefully checked for criminal devices.

Consumers can avoid skimmers by checking to make sure the gas pump panel is closed and does not show signs of tampering, such as checking the security seal. They should also compare the card reader itself to other readers at the gas station. If it looks different from the other readers, it could be due to a skimmer.

Additionally, wiggling the card reader before inserting a card may reveal the presence of a skimmer.

Consumers who use a debit card at the pump can choose to run it as a credit card instead of entering a PIN, keeping the PIN safe and keeping the money from being immediately deducted from their account if the pump is compromised. If this is not an option, they can cover their hand when entering the PIN, as some criminals use pinhole cameras placed above the keypad area to record PIN entries.

To avoid skimmers at the pump entirely, consumers can also pay inside or select a gas pump near the front of the store, which may be a less likely target due to being in the visual range of attendants.

Away from the gas station, consumers should monitor their credit cards and bank accounts to spot unauthorized charges.

Meagher County attorney may sue sheriff, saying her bar has been target of unfair attention

By MATT HUDSON mhudson@billingsgazette.com Jun 29, 2017

Bar 47 sits on Main Street in White Sulphur Springs. Meagher County Attorney Kimberly Deschene took over the business in 2014, leading some to accuse her of conflict of interest.

MATT HUDSON, Gazette Staff

Upon the dismissal of a liquor violation case against a White Sulphur Springs bar, the owner of the establishment asked government agencies to retain records in case of a lawsuit. Those government agencies who received the notice are the Montana Departments of Revenue and Justice and the Meagher County Sheriff's Office.

The bar owner is Meagher County Attorney Kimberly Deschene, and the possibility of her bringing the sheriff into a lawsuit is the latest twist in a conflict-of-interest feud in central Montana. Deschene has been plagued by concerns about her ability to run one of the few bars in town while prosecuting DUI offenders. Meagher County Sheriff Jon Lopp has previously criticized Deschene's prosecution of those crimes, saying the conviction rate is too low. Other county officials have denied any conflict exists.

The revenue department brought multiple liquor license violations against Deschene last year for operations at Bar 47, the business she owns in White Sulphur Springs. She faced a liquor license suspension and fine for allegations that included transferring ownership of the bar without her partner's final signature and locking the bar during business hours when a deputy was trying to get inside.

The allegations were reported by the Meagher County Sheriff's Office to the Montana Department of Revenue, which handles liquor violations. While the complaint laid out the evidence from the sheriff's office, Deschene claimed her bar was the target of unfair attention. But on June 22 of this year, the Department of Revenue agreed to forego a hearing on the allegations and dismissed the case with prejudice, meaning the same allegations can't be brought up again for punishment.

Deschene and her attorneys reached a settlement with state liquor control administrators. The settlement document said Deschene admitted to some technical violations before the department proposed any penalty, so the department ultimately chose to drop the case.

Tyler Moss, Deschene's attorney, wrote in an email to The Gazette that Deschene "appreciates the DOR's willingness to reconsider the charges against Bar 47's liquor license as the underlying facts became clear" and that she agrees with the dismissal.

Moss added there is "no litigation pending at this time." But on June 20, two days before the liquor violation case was settled, Deschene's attorneys put the departments on notice. The letter referenced Deschene's longstanding claim that the sheriff's office has unfairly maligned her for her dual roles as prosecutor and bar owner.

'Anticipated litigation'

The letter was titled "notice of anticipated litigation." And while Deschene's attorney said there is no lawsuit pending at this time, the letter says that the agencies may "reasonably expect to answer to litigation." According to the letter, this stems from law enforcement action "wrongfully pursued" against Deschene, as well as "other tortuous and malignant comment."

The letter asks the Departments of Revenue and Justice, as well as the Meagher County Sheriff's Office, to retain all records related to Deschene in case of a future lawsuit. Moss, Deschene's attorney, asked to communicate via email and did not elaborate on specific allegations of misconduct. Sheriff Lopp declined to comment. Deschene has battled conflict-of-interest allegations since she purchased Bar 47 in 2014. She was already county attorney at that time, though the position is part time.

She came to the aid of one of her employees who faced a DUI charge in 2015, according to court documents. Deschene would normally prosecute those cases. The county brought in outside prosecutors to handle that case and others. There was also concern that DUI offenders, some of whom drink at Deschene's bar, weren't convicted very often. Neighboring Judith Basin County, which has a similar population to Meagher, had roughly five times the number of misdemeanor DUI cases filed in its Justice Court.

Deschene faced a legal battle when a citizen brought a recall petition to remove her from office in 2016. A judge ultimately ruled against the recall. The situation spawned a short-lived bill proposal in the Montana Legislature that would have prevented county attorneys from owning bars. In January, as county officials discussed the formation of a DUI task force, Deschene publicly challenged Sheriff Lopp over proposal language related to over-serving. When asked, she clarified that she was at that moment representing herself as a bar owner, according to meeting minutes.

As county attorney, she normally represents the county's legal interests at commissioner meetings. It's unclear who would represent Meagher County if Deschene filed a lawsuit that included the county sheriff. It's also unclear if Deschene would be able to remain in place as county attorney if that happened.

The three county commissioners didn't return requests for comment. While trying to prove that she's been unfairly targeted, Deschene has tried before to collect information created by her detractors. She subpoenaed the woman who brought a recall petition against her, trying to obtain the names of people who signed it and those who refused. She also sought emails the woman, Katherine Walter, sent to media outlets.

In this latest letter of anticipated litigation, Deschene's attorney indicates that a search continues for evidence of misconduct by the sheriff's office. Sheriff Lopp has denied undue targeting of Deschene's business or its customers. The letter asks agencies, including the sheriff's office, to keep records of any correspondence that involves Deschene or Bar 47, despite their "private or personal" nature. "To the extent the Meagher County Sheriff's Office or any of its employees have taken issue with Ms. Deschene's conduct ... they must

June 9 BBD

MARIJUANA OPERATIONS "MIGHT JUST GET HIT WITH THE RICO"

The U.S. Court of Appeals for the 10th Circuit in Denver weighed in on a number of lower court's dismissals earlier this week and the 10th Circuit's ruling on one particular matter could spell trouble for the marijuana industry, reports the Washington Post.

Basically, the three-judge panel ruled that a private individual, who is able to provide sufficient evidence that their land has been adversely affected by a neighboring marijuana operation, is eligible to pursue a claim against that operation under the federal RICO statute.

Recall the RICO Act (The Racketeer Influenced and Corrupt Organizations Act) among other things, allows private citizens to take action against "racketeering" enterprises that harm the plaintiff's property. Because marijuana is still classified as an illicit drug under federal law, the production or distribution of marijuana counts as racketeering.

A Colorado couple, Phyllis and Michael Reilly, pursued a federal RICO case against a neighboring marijuana operation in Colorado district court, claiming the facility wafted "noxious odors" on to their land and the operation's proximity caused the value of their property to drop. The district court dismissed the suit, but the Reillys appealed and took their case to the 10th Circuit. After presenting their claims in the 10th Circuit, the judges ruled that the Reillys do in fact have a case and remanded it to the district court.

At this stage in the litigation, we conclude that it is reasonable to infer that a potential buyer would be less inclined to purchase land abutting an openly operating criminal enterprise than she would be if that adjacent land were empty or occupied by a lawfully-operating retailer. Based on the Reillys' assertion that the Marijuana Growers' operation is anything but clandestine, the Reillys' land plausibly is worth less now than it was before those operations began. Therefore, we conclude that the Reillys pled a plausible diminution in the value of their property caused by the public operation of the Marijuana Growers' enterprise.

Brian W. Barnes, an attorney for Safe Streets Alliance, a D.C.-based organization opposed to the legalization of marijuana that took on the Reillys' case told the Cannabist that if the district court sides with them "his clients could be eligible to receive up to three times the claimed financial damages, have attorneys' fees reimbursed, and have the court shut down the offending operation."

Brian added that the Reilly's case "is basically a road map for people who own property that is near (a marijuana facility) ... for how to bring a federal suit to get relief." Although, the 10th Circuit stressed that the Reillys presented a solid case, and their ruling in the matter does not leave the door wide open for potential future claims.

We are not suggesting that every private citizen purportedly aggrieved by another person, a group, or an enterprise that is manufacturing, distributing, selling, or using marijuana may pursue a claim under RICO. Nor are we implying that every person tangentially injured in his business or property by such activities has a viable RICO claim. Rather, we hold only that the Reillys alleged sufficient facts to plausibly establish the requisite elements of their claims against the Marijuana Growers here. The Reillys therefore must be permitted to attempt to prove their RICO claims.

Even though the Judges tried to classify their ruling as a singular instance, Christopher Jackson, a Denver-based attorney for the Sherman & Howard firm, who is not involved in the case, believes people will still run with the ruling. "The court is limiting its application, but I still think that you're going to see a ton more lawsuits citing this case," Christopher told the Cannabist.

KANSAS IS IN THE 10TH CIRCUIT

FDA extends deadline for menu-labeling comments

NRA request results in 30-day extension
Ron Ruggless | Jun 29, 2017

The Food and Drug Administration extended Thursday its deadline for comments on restaurant menu-labeling rules by 30 days, after the National Restaurant Association asked for extra time beyond the original July 3 deadline. In May, the FDA said it would delay menu-labeling compliance for restaurants and retail food establishments by a year, to May 7, 2018, and allowed a 60-day period for comments.

The NRA petitioned for a 60-day comments extension, saying it would have difficulty meeting the July 3 deadline. The FDA is granting an additional 30-day period.
The comments deadline will now be in early August, and the FDA decision does not change the compliance date in 2018.

"We appreciate the Food and Drug Administration granting our request for a 30-day extension to offer comments on menu labeling," said Cicely Simpson, the NRA's executive vice president for government affairs and policy, in a statement. "This is an issue that is extremely important to our industry, and it's vital that our members' voices are heard."

WHEN IT EXTENDED THE MENU-LABELING COMPLIANCE DATE IN MAY, THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE PARENT AGENCY TO THE FDA, SAID: "WE ARE TAKING THIS ACTION TO ENABLE US TO CONSIDER HOW WE MIGHT FURTHER REDUCE THE REGULATORY BURDEN OR INCREASE FLEXIBILITY WHILE CONTINUING TO ACHIEVE OUR REGULATORY OBJECTIVES, IN KEEPING WITH THE ADMINISTRATION'S POLICIES."

FDA's Delay of the Menu Labeling Rule Challenged
BY VANESSA K. BURROWS ON JUNE 29, 2017
Alcohol Law Advisor

Two consumer advocacy groups recently sued the Food and Drug Administration (FDA) for delaying the compliance deadline for the agency's 2014 menu labeling rule for a fourth time. The menu labeling rule requires menu items offered for sale in restaurants with 20 or more locations to disclose nutritional information and the number of calories in each standard menu item. FDA and Congress previously extended or delayed compliance with the menu labeling rule three times in 2015 and 2016. Before the latest delay, the most recent "compliance date" for the menu labeling rule was May 5, 2017.

FDA's Justification of the Delay

The day before the compliance date, FDA delayed the compliance date for an additional year by issuing an interim final rule. This interim final rule stated the extension of the compliance date was (1) consistent with three executive orders and (2) done in response to questions raised by stakeholders affected by the menu labeling rule and its implementation. Two of the executive orders cited were issued by President Trump and address regulatory reform and regulatory costs. President Obama issued the third executive order, which discusses retrospective analyses of existing regulations. Since the menu labeling rule took effect in 2015, it would be considered an existing regulation, though FDA has delayed compliance with the rule. FDA also stated its desire to reconsider the menu labeling rule and indicated that the rule's requirements may change as a result. FDA announced it would accept comments regarding the agency's extension of the compliance date and implementation of the already-effective final rule.

Today, FDA announced an extension of the comment period. FDA will now accept comments until August 2, 2017, a few weeks prior to the next step in the litigation on the interim final rule, as discussed below. It is possible that the agency could use the additional comments on the extension of the compliance date to further justify the delay of the compliance date.

Alleged Administrative Procedure Act Violations

In Center for Science in the Public Interest v. Price, the consumer groups challenged the interim final rule and the agency's delay of compliance with the 2014 menu labeling rule on Administrative Procedure Act (APA) grounds. The consumer groups argued the interim final rule was arbitrary, capricious, an abuse of discretion and issued in violation of the APA's procedural requirements, discussed below. The lawsuit asks the US District Court for the District of Columbia to vacate the FDA's interim final rule and to declare that compliance with the menu labeling rule is required no less than 15 days after the court's ruling. The government's answers are due August 14, 2017.

The APA sets forth the procedures for the rulemaking process, in which agencies provide the public with notice of, and an opportunity to comment on, substantive proposed regulations. The APA has an exception from its notice and comment requirements for procedural rules. FDA relied on this exception in issuing its interim final rule.

In the event that a court were to find that the FDA's interim final rule was a substantive rule requiring notice and comment, instead of a procedural rule, the FDA justified the interim final rule's issuance under the APA's good cause exceptions. The APA permits agencies to forego the notice and comment requirements if the agency for good cause finds that notice and comment are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Additionally, the APA requires a final rule to be published at least 30 days before its effective date, unless the agency finds good cause. 5 U.S.C. § 553(d)(3). The FDA argued that the "imminence of the compliance date" (one day after publication of the interim final rule) and the questions raised by regulated stakeholders constituted good cause such that an opportunity for comment was "impracticable and contrary to the public interest."

The consumer advocacy groups asserted two violations of the APA. First, the plaintiffs argued that the FDA failed to comply with the APA's requirements for notice and comment and publication 30 days before the effective date of the interim final rule. The consumer groups asserted that the agency lacked good cause. Second, the consumer groups argued that the FDA's changing interpretation of the menu labeling requirements was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and thus should be set aside as an invalid agency action under the APA's standards of judicial review. 5 U.S.C. § 706(2)(A).

Case Law on Agency Rulemaking Delays

As the FDA's interim final rule postpones the "compliance date" of a final rule instead of the rule's effective date, the case raises interesting administrative law issues before the US District Court for the DC Circuit. That court previously held that a delay notice issued by an agency did not constitute a substantive

rulemaking for which notice and comment was required: a "temporary stay to preserve the status quo does not constitute a substantive rulemaking because, by definition, it is not 'designed to implement, interpret, or prescribe law or policy.'" See Sierra Club v. Environmental Protection Agency, 833 F.Supp.2d 11, 28 (D.D.C. 2012). In that case, however, the agency's delay notice was not an interim final rule, as in the current case. Though the court found that the agency's delay notice was not required to undergo notice and comment, the court ultimately concluded the delay notice was arbitrary and capricious, and vacated and remanded the delay notice to the agency.

Federal courts have previously considered whether an agency's regulation delaying an effective date was issued in accordance with the APA's procedural requirements for rulemaking. For example, in Natural Resources Defense Council v. Abraham, the US Court of Appeals for the Second Circuit found that the Department of Energy's (DOE) delay of the effective date of energy efficiency standards was not issued consistent with the APA's requirements. 355 F.3d 179 (2d Cir. 2004). In that case, the agency claimed the rule was a procedural rule exempt from notice and comment and the 30-day effective date requirement. The Second Circuit held that the rule was a substantive rule subject to the APA's notice and comment requirements and cited a D.C. Circuit case finding that the "suspension of a deadline with respect to [a] whole class of individuals that had the effect of relieving them of attendant substantive obligations was [a] rule subject to notice and comment requirements." Id. at 205. To the extent that the menu labeling rule is viewed as relieving stakeholders of the obligation to comply with the existing regulation, a court could find the interim final rule is a substantive rule subject to notice and comment and the 30 day publication requirement.

Courts generally construe the good cause exceptions "narrowly in order to avoid providing agencies with an 'escape clause'" from the APA's requirements. See United States v. Johnson, 632 F.3d 912 (5th Cir. 2011) (quoting United States v. Garner, 767 F.2d 104, 120 (5th Cir. 1985)). As a result, a court may find that an agency lacked good cause and that the APA's notice and comment and publication procedures should have been followed. In Abraham, the Second Circuit also examined DOE's good cause argument. The agency stated "it wished for more time to 'review and consider' the new efficiency standards, and the effective date for those standards was imminent." Id. The court disagreed that "an emergency of DOE's own making can constitute good cause" and cited cases from the DC, First, Fifth and Ninth Circuits with similar conclusions. Id. The Second Circuit held the DOE delay rule was issued without complying with the APA and was invalid, and as a result, failed to amend the original rule's effective date. Id. at 206. It remains to be seen whether the court will use similar reasoning in the present case, in which the agency cited the rule's "imminent compliance date" versus an imminent "effective date."

Five ways to detect a malicious 'phishing' email

Mark Brunelli, Senior Writer
July 19, 2016

PhishingFor as long as there's been email, there's been email scams. At least since the time email first started gaining widespread popularity in the 1990s, phishing scams have been showing up in email accounts. They're called 'phishing' emails because the cybercriminals who send them are fishing for victims.

These fraudulent emails, which may appear to come from a legitimate company or even a personal acquaintance, are designed to trick people into giving up personal information, such as credit card and social security numbers. They may also be designed to scam unwitting victims into opening a harmful attachment or clicking a link that unleashes ransomware or some other type of malicious computer virus.

Back in the early days of the internet, phishing emails were full of typos, and laden with obvious clues-appeals from faraway princes or rich relatives you never knew you had. These were very easy to spot. But cybercriminals have upped their game since then. For example, some cybercriminals go to great lengths to match the branding, color schemes and logos associated with the companies they are trying to impersonate.

Phishing email scams generally fall into one of these categories:

Traditional phishing attack

The traditional phishing attack casts a wide net and attempts to trick as many people as possible. A classic example of this is the Nigerian prince advance-fee scam.

Spear phishing

Spear phishing attacks are designed to target a specific individual or small group of individuals. For example, a spear phishing attack my use information about a particular restaurant or small business to target one or more employees at that business. Or it could look like an email from a friend.

Whaling

Whaling attacks, which have become increasingly popular in recent years, are targeted at high-profile victims like C-level executives and their teams. A typical whaling email may look like it was sent from the CEO of your company. But it's really a fake designed to get you to share valuable information about the company.

Protect yourself from phishing scams

Phishing emails may be more difficult to identify these days, but there are some important steps you can take to avoid becoming a victim. If you answer 'yes' to any of the questions below, there's a very good chance that you're looking at a phishing email.

1. Does the message ask for personal information?

Always remember that reputable businesses do not ask for personal information - such as social security and credit card numbers - via email.

2. Does the offer seem too good to be real?

If it seems too good to be true, it's a fake. Beware of emails offering big rewards - vacations, cash prizes, etc. - for little effort.

3. Does the salutation look odd?

Reputable companies will use your name in the salutation - as opposed to "valued customer" or "to whom it may concern."

4. Does the email have mismatched URLs?

If you receive an email from an organization that includes an HTML link

in it, hover your mouse over the link without clicking and you should see the full URL appear. If the URL does not include the organization's exact name, or if it looks suspicious in any other way, delete it because it's probably a phishing email. Also, you should only visit websites that begin with 'https' because the 's' at the end indicates advanced security measures. Websites that begin with "http" are not as secure.
5. Does it give you a suspicious feeling?
Trust your instincts when it comes to email. If you catch yourself wondering whether it's legitimate, and your instinct is to ignore and delete it-then pay attention to that gut check.

Don't get hooked: Four email phishing scams to watch out forNorman Guadagno
March 20, 2017

About 100,000 email phishing attacks are reported each month and thousands of people fall for them, compromising sensitive personal and business information in the process, according to The Anti-Phishing Workgroup.

The FBI believes email phishing scams helped cybercriminals breach IT security defenses at Yahoo and the Democratic National Committee. The same goes for the famous Sony Pictures hack of 2014.
Email phishing scams are regularly used by cybercriminals who want to spread ransomware and gain access to sensitive personal and business information-and phishing attacks are on the rise, according to a new report from Wombat Security Technologies, a company that specializes in helping businesses avoid phishing emails.

"The threat of phishing attacks is real. News headlines and numerous studies have proven that phishing attacks are on the rise, and our survey of security professionals showed the same," the report reads. "Not only are more organizations reporting being the victim of phishing attacks, but the number they are experiencing has gone up. Attackers are becoming more sophisticated and varied in their approach, using multiple threat vectors."

The most effective phishing scams
In addition to the survey results provided in Wombat's new "State of the Phish" report, the company also analyzed the results of millions of simulated phishing attacks sent through its platform to customers. The simulated phishing attacks are one of the tools the company uses to help train businesses on how to steer clear of phishing scams. The analysis shed light on the most effective types of phishing scams.

Wombat found that phishing emails disguised as legitimate work emails are some of the most effective when it comes to hooking victims. In one example, a simulated phishing email disguised as an "Urgent Email Password Change" request had a 28% click rate.

"Users were most likely to click on attachments and messages they expected to see in their work inboxes, like an HR document or a shipping confirmation,"

Wombat writes. "They were more cautious with messages we consider to be 'consumer oriented,' such as gift card offers and social networking notifications." The Wombat report went on to describe four types of highly effective phishing emails that employees need to be cautious about. They include:

- Technical emails
  These types of scams typically pose as error reports and bounced email notifications. A "Delivery Status Notification Failure" is a popular example, according to Wombat.

- Corporate emails
  Corporate email scams are designed to look like official corporate communications. Examples of these include benefits enrollment messages, invoices and communications about confidential human resources documents.

- Commercial emails
  These are business-related emails that may not be specific to your organization. Some of the topics of these phishing emails include insurance notifications, shipping confirmations and wire transfer requests.

- Consumer emails
  These types of scams are designed to replicate many of the emails that are regularly sent to the general public. Examples include messages about social networking notifications, gift cards, bonus miles, frequent flier accounts, big-box store memberships and more.

"Remember, phishing attacks are often preceded by social engineering phone calls, or impostors gaining access to information or areas they should not," the report reads. "You should teach your end users to not only watch out for phishing emails, but other [social engineering] threat vectors as well."

The vin guard: 'Sherlock Holmes of wine' on the hunt for fraudsters who cash in on fake plonk

Source: mirror.co.uk
Nada Farhoud
June 25, 2017

Meet the woman on the trail of wine counterfeiters behind global frauds worth an estimated £800million. Maureen Downey, dubbed the Sherlock Holmes of wine, says old bottles flogged on eBay help fuel the trade.

Empties that once held vintage wine are being sold with original corks for hundreds of pounds. Swindlers then fill them with inferior wine and shift them to unsuspecting buyers for thousands. An estimated 20 per cent of all "fine wine" is fake - around £800million-worth.

The problem has got worse in recent years as investors pour money into vintage wine, sending prices through the roof, says a BBC documentary. Maureen, the world's top wine expert, said: "Counterfeit wine is far more prevalent than people

realise, affecting every level of the industry. "In 15 to 20 years we have seen this highly lucrative, low-risk business explode, especially across Europe, where organised crime gangs are involved."

American Maureen, who studies labels with a magnifying glass looking for the tiniest clues, helped put the biggest ever wine fraudster behind bars in 2013. She was a prosecution witness in the trial of Rudy Kurniawan, who mixed fake vintage wine in his California kitchen. Kurniawan was jailed for 10 years for selling £400million of fake plonk - much of it believed to be still in circulation.

Experts say the industry is not doing enough to tackle the problem due to the embarrassment of being duped. Documentary presenter Susie Barrie said: "There are three ways to create a counterfeit bottle: refill an empty original with lesser wine, recreate an existing wine including the label, or make a vintage that never actually existed."

"While most of us don't buy super-expensive bottles of wine, there are also examples of everyday wines being faked." She found a 1984 Romanée Conti - a top Burgundy - with the original cork for £280 on eBay. Originals sell for £13,000.

How to spot a fake

Poor quality labelling, possibly with spelling mistakes.

If the seal is broken, don't drink it. Even if it's not illegal, it could have been tampered with.

Does it look its age? Shiny new labels are often stained with tobacco or dirt.

Bordeaux corks are typically 52-55mm long, and are branded, rather than inked. Check for corkscrew scoring marks.

R.E. "Tuck" Duncan, Attorney at Law LLC
785.233.2265 | tuckduncanlaw@yahoo.com
www.tuckduncanlaw.com