DUNCAN LIQUOR LAW LETTER

August, 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.

"In wine there is wisdom, in beer there is Freedom,
in water there is bacteria."
Benjamin Franklin

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OPINION ON REHEARING
IN THE SUPREME COURT OF THE STATE OF KANSAS
No. 110,393
STATE OF KANSAS, Appellant, v. DARWIN ESTOL WYCOFF, Appellee.

SYLLABUS BY THE COURT
K.S.A. 2016 Supp. 8-1025 is facially unconstitutional.

Appeal from Saline District Court;
JARED B. JOHNSON, judge.
Original opinion filed 303 Kan. 885, 367 P.3d 1258 (2016).
Opinion on rehearing filed June 30, 2017. Affirmed.

Natalie A. Chalmers, assistant solicitor general, and Derek Schmidt, attorney general, were on the supplemental brief for appellant. Brock R. Abbey, assistant county attorney, Ellen Mitchell, county attorney, and Derek Schmidt, attorney general, were on the original brief for appellant.

Roger D. Struble, of Blackwell & Struble, LLC, of Salina, was on the briefs for appellee.

The opinion of the court was delivered by LUCKERT, J.:

Darwin Estol Wycoff, like the defendant in State v. Ryce, 306 Kan. ___, ___ P.3d ___ (No. 111,698, this day decided) (Ryce II), challenges the constitutionality of K.S.A. 2016 Supp. 8-1025. In State v. Ryce, 303 Kan. 899, 368 P.3d 2 342 (2016) (Ryce I), we held that 8-1025 is facially unconstitutional. In this case, based on our analysis in Ryce I, we affirmed the district court's decision to dismiss the charge against Wycoff that alleged a violation of 8-1025. See State v. Wycoff, 303 Kan. 885, 367 P.3d 1258 (2016) (Wycoff I).

After we issued our decision in Ryce I and Wycoff I, the State timely filed a motion seeking to stay the mandate until the United States Supreme Court issued a decision in three consolidated cases addressing a similar issue regarding Minnesota and North Dakota statutes that made it a crime to refuse blood alcohol content testing. We granted that motion and, once the United States Supreme Court issued its decision in Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), allowed the parties to submit additional briefs.

After considering those additional briefs and the effect of Birchfield on Ryce I and Wycoff I, we once again in Ryce II determine that K.S.A. 2016 Supp. 8-1025 is facially unconstitutional. While Birchfield requires some modification of our analysis, nothing in the United States Supreme Court's decision alters the ultimate basis for Ryce I: the state law grounds of statutory interpretation of 8-1025 and the statute on which it depends, K.S.A. 2016 Supp. 8-1001.

For the reasons more fully set forth in Ryce I and Ryce II, we accordingly affirm the district court's decision to dismiss the charge against Wycoff that alleged a violation of K.S.A. 2016 Supp. 8-1025. Affirmed.

ROSEN, J., not participating. MICHAEL J. MALONE, Senior Judge, assigned.

STEGALL, J., dissenting: For the reasons set forth in my earlier dissent in State v. Ryce, 303 Kan. 889, 964-72, 368 P.3d 342 (2016), I dissent.

IN THE SUPREME COURT OF THE STATE OF KANSAS
No. 111,401
STATE OF KANSAS, Appellant, v. GREGORY MICHAEL NECE, Appellee.

SYLLABUS BY THE COURT

In light of State v. Ryce, 306 Kan. ___, ___ P.3d ___ (No. 111,698, this day decided) (Ryce II), which holds that K.S.A. 2016 Supp. 8-1025 is unconstitutional, the informed consent advisory in K.S.A. 2016 Supp. 8-1001(k) inaccurately advises a driving under the influence suspect that he or she might

"be charged with a separate crime of refusing to submit to a test to determine the presence of alcohol or drugs, which carries criminal penalties equal to or greater than those for the crime of driving under the influence." Given that inaccuracy, a district court could appropriately hold the suspect's consent to breath-alcohol testing was not freely and voluntarily given under the totality of the circumstances of a given case.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 10, 2014. Appeal from Saline District Court; RENE S. YOUNG, judge.

Original opinion filed 303 Kan. 888, 367 P.3d 1260 (2016).
Opinion on rehearing filed June 30, 2017. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

Natalie A. Chalmers, assistant solicitor general, argued the cause, and Derek Schmidt, attorney general, was with her on the supplemental brief for appellant. Brock R. Abbey, assistant county attorney, Ellen Mitchell, county attorney, and Derek Schmidt, attorney general, were on the original brief for appellant. Michael S. Holland II, of Holland and Holland, of Russell, argued the cause and was on the briefs for appellee.

The opinion of the court was delivered by LUCKERT, J.:

Ultimately, this appeal raises the question of whether the State violated the Fourth Amendment to the United States Constitution when it tested a driving under the influence (DUI) suspect's blood alcohol content after the suspect consented to such a search. The suspect, Gregory Michael Nece, contends the evidence found through the breath-alcohol testing must be suppressed because his consent did not meet the Fourth Amendment standard of being freely and voluntarily given. More specifically, he argues the law enforcement officer coerced his consent by advising him, as the law required at that time, that if he refused consent "you may be charged with a separate crime of refusing to submit to a test to determine the presence of alcohol or drugs, which carries criminal penalties equal to or greater than those for the crime of driving under the influence."

In State v. Ryce, 303 Kan. 899, 368 P.3d 342 (2016) (Ryce I), we discussed K.S.A. 2016 Supp. 8-1025, which provides for the separate crime of refusal to submit that was referenced by law enforcement's advisory warning, and we held that 8-1025 is facially unconstitutional. We then applied Ryce I in State v. Nece, 303 Kan. 888, 367 P.3d 1260 (2016) (Nece I), and concluded the law supported the district court's conclusion, based on the totality of the circumstances in that case, that Nece's consent was unduly coerced 3 because, contrary to the informed consent advisory, the State could not have constitutionally imposed criminal penalties if Nece had refused to submit to breathalcohol testing. 303 Kan. at 896-97. After we issued our decisions in Ryce I and Nece I, the State timely filed a motion seeking to stay the mandate until the United States Supreme Court issued a decision in three consolidated cases addressing a similar issue regarding Minnesota and North Dakota statutes that made it a crime to refuse blood alcohol content testing. We granted that motion and, once the United States Supreme Court issued its decision in Birchfield v. North Dakota, 579 U.S. ___, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016), allowed the parties to submit additional briefs and oral arguments.

After considering those additional arguments and the effect of Birchfield on Ryce I and Nece I, we once again in State v. Ryce, 306 Kan. ___, ___ P.3d ___ (No. 111,698, this day decided) (Ryce II), determine that K.S.A. 2016 Supp. 8-1025 is facially unconstitutional. While Birchfield requires some modification of our analysis, nothing in the United States Supreme Court's decision alters the ultimate basis for Ryce I: the state law grounds of statutory interpretation of 8-1025 and the statute on which it depends, K.S.A. 2016 Supp. 8-1001.

Furthermore, nothing in the Ryce II modification of Ryce I requires us to modify our decision in Nece I, except to update it by referring to Ryce II. Finally, nothing in the Birchfield decision alters our analysis in Nece I. The Birchfield Court, noting that "voluntariness of consent to a search must be 'determined from the totality of all the circumstances,'" left it to the North Dakota state court to determine whether a driver's consent to a blood test had been voluntary "given the partial inaccuracy of the officer's advisory." 136 S. Ct. at 2186 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 [1973]). 4 We, once again, affirm the district court's assessment that Nece's consent was involuntary, under the totality of the circumstances of his case, because it was obtained by means of an inaccurate and coercive advisement. And, once again, because we reach this holding and for the reasons set out in Nece I, we need not address the other arguments raised by Nece or the application of the good-faith exception.

We reverse the Court of Appeals and affirm the district court's decision to suppress Nece's breath-alcohol test results, as the testing resulted from an involuntary consent.

Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

ROSEN, J., not participating. MICHAEL J. MALONE, Senior Judge, assigned.1
STEGALL, J., concurring: For the reasons set forth in my earlier concurrence in State v. Nece, 303 Kan. 888, 898, 367 P.3d 1260 (2016), I concur in the result only.

No. 116,446
IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS, Appellant, v. CHARLES GLOVER, Appellee.

SYLLABUS BY THE COURT
A law enforcement officer has reasonable suspicion to initiate a stop of a vehicle to investigate whether the driver has a valid driver's license if, when viewed in conjunction with all of the other information available to the officer at the time of the stop, the officer knows the registered owner of the vehicle has a suspended license and the officer is unaware of any other evidence or circumstances from which an inference could be drawn that the registered owner is not the driver of the vehicle.

Full text at:

http://www.kscourts.org/Cases-and-Opinions/opinions/CtApp/2017/20170630/116446.pdf

Texas liquor agency rebuked after investigation of Spec's

Jay Root/Texas Tribune
Published: July 2, 2017, 9:14

AUSTIN (Texas Tribune) - Leaders at the Texas Capitol love to bash what they call out-of-control bureaucrats at city halls and in Washington, D.C., but a recent case pitting the Texas Alcoholic Beverage Commission against Spec's Wines, Spirits & Finer Foods looks like state regulatory overreach on steroids.

After an investigation of the state's largest liquor retailer, the TABC sought to yank permits for all 164 of the company's stores - which would effectively shut it down - or hit Spec's with fines of up to $713 million, according to court documents filed last week. The agency also put the company's expansion plans on ice by freezing Spec's new permit applications during the three-year probe, records show.

What did Spec's, a family-run company based in Houston, do to deserve the business equivalent of the death penalty? That's what a couple of Texas administrative law judges wondered last week.

They poured out the TABC like stale beer in a blunt 151-page ruling. The judges said TABC failed to prove dozens of allegations, rebuked agency lawyers for failing to disclose evidence to their own witness (and the court) and called out the agency for "stacking" charges, a tactic commonly used to pressure defendants into a settlement.

In the end, the multi-year prosecution and an eight-day March administrative law hearing - similar to a trial - turned up evidence that Spec's may have paid a $778 invoice from a wine supplier a day or two late in 2011 under the complicated liquor "credit law" spelling out when payments for booze must be made.

The sum total of the sanctions recommended by the judges: a warning, and no fines.

Embattled TABC director resigns amid investigation into perks

TABC spokesman Chris Porter said the penalties described by the judges "are the maximum available penalties for the alleged violations under the Alcoholic Beverage Code," and added that "TABC never seriously pursued the listed sanctions and did not seek to levy such heavy fines or cancel all the permits for all 164 Spec's stores."

The judges have given Spec's the green light to start expanding in Texas again. Spec's, meanwhile, is on the hook for "north of a million dollars" in legal fees, court fees and other costs, said Al Van Huff, the company's attorney. That doesn't count the scrapped plans to expand and grow at time when out-of-state chains like Total Wines are adding outlets in Texas.

"It's an abuse of power," Van Huff said. "How did you waste all this agency's time and the taxpayers' money by prosecuting a case of this magnitude against somebody and the end result is the guy gets a warning for a late payment that happened five years ago? They should have to explain their behavior to somebody."

Spec's is expecting the TABC to ask the State Office of Administrative Hearings to reconsider at least some of the judges' findings. If that doesn't happen, the regulatory agency has some discretion to change the proposed decision. But that would likely trigger more legal wrangling - this time in state district court.

Porter, the TABC spokesman, said because the case remained open, the agency could not comment on the specific allegations or disclose what steps it would take next. But he said the TABC is required under law to "issue citations if an investigation uncovers evidence of an alleged violation" and that whatever the outcome, "the agency believes in the ideals of due process and rule of law."

Van Huff said Spec's is considering its own legal options, which could include a lawsuit against an agency already in the hot seat at the Legislature after a series of spending controversies and reports of abusive treatment of companies it regulates. Last week, newly-appointed TABC Chairman Kevin Lilly, tapped by Gov. Greg Abbott to help clean up the embattled agency, visited the TABC's Austin headquarters, where he reviewed the personnel files of senior staff and conducted a series of closed-door meetings with them.

Abbott's office expressed concern about TABC's handling of the Spec's case and other matters.
"The governor continues to be deeply concerned about the pattern of practice at TABC," said Abbott spokeswoman Ciara Matthews. "The governor's office is actively working with newly-appointed Chairman Lilly, who has been conducting a top-to-bottom review of all personnel and operations to reform TABC."
Spec's lawyer was particularly critical of the TABC's auditing and investigations chief, Dexter Jones, who oversaw the Spec's investigation, and TABC General Counsel Emily Helm. Van Huff alleged Helm abused her power in early 2016 by offering to get three new permit applications approved for Spec's President John Rydman if the company would agree to settle the existing cases.

According to court documents, the TABC saiddenying the new permits was justified because Spec's threatened the "general welfare, health, peace, morals and safety" of Texans due to the concerns raised in the agency's probe.
Van Huff said he told Helm that the allegations against Spec's were "hyper-technical violations of the code" that had nothing to do with health and safety. Helm's response, he said, was: "If Spec's could be our real friend instead of our fake friend and settle this case then we can let (Rydman) have his permits."

An email seeking comment from Helm went unanswered. Porter, the agency spokesman, said Helm "disputes the wording of this quote" and "any assertion of unlawful conduct."
"Such settlements are offered (often multiple times) during the course of any administrative case in which TABC is involved," Porter said. "This is a common, lawful practice for any administrative or civil court case."

Flimsy charges fell apart
The case against Spec's started with an audit of the retailer's operations that began in February 2013. Two years later, Van Huff and Rydman, Spec's president and owner, were summoned to TABC headquarters and given a "settlement agreement" proposing to fine the retailer $8.6 million, cancel 16 of its liquor store permits and agree to "enhanced oversight" for two years.
Once Rydman and Van Huff started looking through the allegations, Van Huff said they knew there was no way they were going to settle.
The TABC claimed Spec's had illegally accepted millions of dollars in payments from both a wholesaler and a competing liquor store. A liquor retailer such as Spec's generally can't receive money from those entities under the state's byzantine alcohol

regulations, adopted after Prohibition was lifted in the 1930s, that strictly control who can own what piece of the alcohol business.

In both cases, Spec's said it could easily explain the payments TABC auditors discovered. In the case of the wholesaler, Spec's had accidentally paid an invoice twice, so the money coming back into its account from a wholesaler was merely a refund of an overpayment; in the case of the competing liquor store, Spec's was legally purchasing the store and using its merchant accounts during the transition process, Van Huff said.

A phone call could have cleared up those supposed infractions, he said.
"Instead of the auditor who was doing the investigation seeing something questionable and then asking us to explain it, they just made it an allegation in this settlement agreement as the basis for us to agree to write a check and to agree to all these settlement terms," Van Huff said.
A turning point in hearingThe same dynamic - scandalous-sounding charges that didn't survive a cursory check of the evidence - played out repeatedly during the March hearing. During the proceedings, TABC officials attempted to convince the court that Spec's engaged in a pattern of behaviorThe same dynamic - scandalous-sounding charges that didn't survive a cursory check of the evidence - played out repeatedly during the March hearing. During the proceedings, TABC officials attempted to convince the court that Spec's engaged in a pattern of behavior

But one allegation after another crumbled before the judges. TABC's star in-house witness, Houston-based auditor Kathy Anderson, alleged Spec's engaged in illegal price negotiations for wine. Her proof? Emails between a wholesaler and a wine maker discussing what price Spec's might want to charge. But Spec's didn't participate in that email exchange.
"She agreed that there was no evidence Spec's accepted the terms," the judges noted in tossing the allegation. "She also admitted that there was no documentary evidence that Spec's actually purchased any of the products

Even more damaging to TABC was Anderson's claim that one of Spec's wholesalers, United Wine & Spirits, had "admitted" to violations that implicated Spec's in a scheme to skirt liquor laws designed to keep alcohol manufacturers, wholesalers and retailers all in separate lanes. The supposed proof: an agreed-to "waiver order" - basically an acceptance of punishment - that United Wine & Spirits signed. That order was cited like a King's X over and over in TABC's case against Spec's.

A long string of allegations relying on that document collapsed when Van Huff asked Anderson if she had read the settlement agreement attached to the waiver order - which stated that United agreed to pay a fine to "resolve the contested allegations" but did not admit guilt. She said she was not aware of that stipulation.

This was the gotcha moment of the trial.
Van Huff asked Anderson: "We now see that the TABC agreed ... that this wouldn't be construed as an admission by United, correct?"
Anderson: "Correct."
Van Huff: "So each and every time you refer to the waiver order and say it was United Wines & Spirits' admission of wrongdoing that reflects poorly on Spec's, that was all incorrect, wasn't it?
Anderson: "It appears so."
Van Huff: "Thank you. We'll take that as a yes, right?
Anderson: "Yes."

Anderson's admission came within the first few hours of the proceedings. It went downhill from there.

When the TABC called United Wine & Spirits executives to the stand, the executives quickly threw TABC under the bus, testifying that although they disputed the agency's charges, they agreed to pay the TABC $100,000 to "make the case go away." They calculated it would be cheaper and easier than fighting it out.
"Not all witnesses called by (TABC) Staff provided testimony helpful to Staff's case," the judges said in a footnote. "In fact, when called to testify for the Commission, the testimony of the witnesses from United Wine directly contravened Staff's case."

The judges also ruled that the TABC "failed to reveal the contents" of United Wine & Sprits' settlement agreement "to its own witness and to the (administrative court)."
And they determined that - "contrary to (TABC's) contention that the charges are not stacked" - the agency piled one allegation on top of another in a controversial practice that uses the same evidence for multiple charges.
"This is what they do. They intimidate people," said Dick Wills, a former TABC licensing supervisor for the Gulf Coast region who is now a liquor industry consultant. He served as an expert witness for Spec's during the proceedings. "People should be fired over this. This The judges also ruled that the TABC "failed to reveal the contents" of United Wine & Sprits' settlement agreement "to its own witness and to the (administrative court)."

And they determined that - "contrary to (TABC's) contention that the charges are not stacked" - the agency piled one allegation on top of another in a controversial practice that uses the same evidence for multiple charges.
"This is what they do. They intimidate people," said Dick Wills, a former TABC licensing supervisor for the Gulf Coast region who is now a liquor industry consultant. He served as an expert witness for Spec's during the proceedings. "People should be fired over this. This is the most egregious case I've ever seen filed by the TABC. The most, bar none."

Case takes its toll
The TABC's legal Waterloo is helping to lift the cloud that has been hanging for three years over Spec's, launched with a single store in 1962 by Rydman's father-in-law, Spec Jackson. After the company branched out into upscale wines and gourmet food, it went on to become the largest liquor retailer in Texas and the second-largest family owned alcohol retailer in the nation, according to Rydman.

Rydman, who began working at Spec's in 1972, took the stand during the trial and recounted how the probe has taken a toll on his business. He said the company hasn't been able to expand for three years, and earlier this year a landlord threatened to cancel a lease because he was unable to renew a permit.

"This whole process has cost my company a tremendous amount of money," Rydman told a TABC lawyer during the proceedings. "And people throughout the industry chuckling at us, laughing at us, and afraid to do things with us, afraid to talk to us because they don't want to get tainted and have y'all come after them."

BREWDOG LOSES ELVIS BATTLE

Source: the drinks business

by Rupert Millar
11th July, 2017

One of the UK's leading craft brewers has lost its court battle with the Elvis Presley Estate over the naming of a beer. 'Punk' brewers, BrewDog, launched its grapefruit and blood orange brew 'Elvis Juice IPA' in 2015 and it has since become one of the brand's bestsellers with a turnover of £1.9 million last year as was revealed at the hearing.

Last year, however, Elvis Presley Enterprises which manages the name and likeness of the rock and roll great, objected to BrewDog registering the names 'Elvis Juice' and 'BrewDog Elvis Juice' as trademarks. BrewDog's defence rested on the notion that Elvis was a common name and, in a typical stunt, founders James Watt and Martin Dickie both changed their name to Elvis by deed poll last year.

"From this point forward, Elvis Juice is named after us, the brewers formerly known as James and Martin. We may even file a case against Mr Presley for using our names on all his records without our written permission," said Watt.

The UK Intellectual Property Office has not been so understanding however and, as reported by The Scotsman, found in favour of EPE at the start of this week. Trademark hearing officer Oliver Morris, having first made the point that Elvis Presley is without doubt, "the most famous of all Elvises," summed up: "I consider that there is a likelihood of indirect confusion and that the average consumer will assume that the goods come from the same or a related undertaking."

BrewDog was ordered to pay £1,500 in costs and will now have to change the name of the beer or apply to EPE for official permission to use the name. BrewDog has been contacted for comment.

Wineries fight in court to decide whose red is really 'essential'

BY SAM STANTON
sstanton@sacbee.com

JULY 07, 2017 11:08 AM

Sometimes, even everyday words can lead to a legal fight, especially if they're printed on the label of a bottle of California wine.

Bogle Vineyards of Clarksburg, a fixture in the Delta since the Bogle family planted its first wine grapes in 1968, is embroiled in such a legal war of words. Bogle is being sued in federal court in Sacramento by another company over which has the right to use the term "essential" on its wine labels.

Next Wine LLC, a Colorado firm that bases its business in Tucson, Ariz., and sells California wine, claims in its lawsuit that Bogle has tried to bully Next Wine into scrapping its "My Essential" wine labels. Bogle makes its own line of award-winning, affordable wines labeled "Essential Red."

The lawsuit was filed two weeks ago following three years of dispute and competing claims in the U.S. Patent and Trademark Office, as well as talks

between the two wine companies aimed at resolving the conflict.
On the surface, the argument seems silly.
The labels from the two winemakers look nothing alike. Next Wine's looks like a splotch of cabernet has been spilled onto a white label, with the word "Essential" at the top; Bogle's features the family name prominently displayed on its label, with the words "Essential Red" below in smaller type.
Neither side responded to requests for comment this week, but there is serious money at play in the market for wine and other alcoholic beverages.
Bogle's family-run wine operation started out small, but by 2009 the vineyard began building a $60 million wine storage and fermentation facility. The lawsuit comes in an area of litigation that has been seeing explosive growth.
"There are probably more federal and state court trademark litigations pending in the alcoholic beverage space at present than ever before," said John Dawson, a partner in the Carle, Mackie, Power & Ross law firm in Santa Rosa, and a member of the firm's wine group. "From April through May, I had eight federal trademark infringement cases and one state court trademark cancellation proceeding in California, all of which involved wine producers, so we're talking about hundreds on an annual basis around the country."

The reason is simple: Americans are drinking more booze of all kinds, including craft beers, ciders, specialty cocktails and wine, Dawson said, and there has been an "incredible surge" of new beverage companies.
"With all these new entrants, there's more trademarks being filed in alcoholic beverages than almost any other consumer food or beverage product," said Dawson, who is not involved in the Next Wine-Bogle case. "Because of that, people are more willing to fight for their brands than ever before."
Legal fights over beverage trademarks have become so prevalent that the Boston-based law firm of Foley Hoag publishes a year-end blog roundup of such cases. Last year's version included a dispute between San Francisco's 21st Amendment Brewery and a bar in New Orleans' French Quarter that was denied its bid to a similar name and logo by the trademark office.
Another involved Portland's Hopworks Urban Brewery and its "Abominable Winter Ale." Hopworks discovered that Seattle's Fremont Brewing Co. was selling a beverage it called "Abominable Ale."
"The parties apparently got on the phone and determined that Hopworks used 'Abominable' first, so Fremont took to Twitter and announced that it was removing the word from its brew's name," the blog reported. "In response to its fan questions, Fremont tweeted: 'Litigation is for suckers, craft beer is for lovers.' "

The dispute between Next Wine and Bogle did not end so tranquilly, despite what the lawsuit describes as repeated settlement efforts.
Next Wine says it organized in May 2012 to produce and market its wines, and that it submitted papers in June 2012 for a trademark on "My Essential Red." Next Wine began selling its reds in January 2013, the lawsuit says, and the patent and trademark office registered "My Essential Red" in April 2013.
The firm also moved forward with plans for essential lines of white, pinot noir and other wines.
The same month that Next Wine was getting started, the lawsuit says, Bogle claims to have begun selling its "Essential Red." Bogle applied for a trademark in August 2013, but the trademark office rejected the application three months later "because of a likelihood of confusion" with Next Wine's brand, the lawsuit says.

Bogle responded in May 2014, "vigorously arguing that there would be no likelihood of confusion between the two brands," the lawsuit says, and the two companies began talking about a "coexistence agreement."
By fall 2016, Bogle asked Next Wine to sign an agreement, but Next Wine declined, in part because the deal would have given Bogle the right to pre-approve any new "My Essential" wine labels Next Wine came up with, the suit says.

Talks continued until April, after which the lawsuit says Bogle "made clear that Next Wine's My Essential wines cannot coexist in the marketplace" with Bogle's Essential Reds and demanded that Next Wine abandon its use of the essential wording.
Next Wine says it wasn't willing to give up its name, given the time and effort it has spent developing its business. Instead, the company sued, asking the court to declare that it is not infringing on Bogle's rights by using "My Essential" on its labels.
Whether the two winemakers will fight this out in court remains to be seen. "Most cases settle," Dawson said. "The question is, when? If they don't settle within the first three months, that's not a great sign for a near-term settlement."

07.24.2017

Consolidation Comes with Legal Challenges As distributors continue to merge, a few face lawsuits

San Rafael, Calif.-The uptick in mergers among U.S. alcohol distributors has been followed closely by another trend: lawsuits. As many major markets have come to be served by just a few companies, their competitors and customers have retaliated with legal push back. One of the most recent legal fights is taking place in West Virginia, where one of the nation's largest distributors, Johnson Brothers Liquor Co., and its West Virginia subsidiary Mountain State Beverage are facing a lawsuit from smaller wholesalers. The Minnesota-based company is the fifth-largest wholesaler in the United States, according to Wines Vines Analytics, and was sued by six smaller distributors in West Virginia. According to a statement by the law firm Bailey & Glasser, which is representing the plaintiffs in the lawsuit filed in early July, Mountain State Beverage used "anticompetitive" practices in an attempt to monopolize the wine market in West Virginia by forcing smaller companies either to sell or go out of business. The distributors filing suit against Mountain State Beverage include Wine and Beverage Merchants of West Virginia, Atomic Distributing Co., Beverage Distributors Inc., Jo's Globe Inc. and Martin Distributing Co. The companies claim Johnson Brothers and Mountain State operated at a loss to drive competitors out of business, paid fees and used other tactics to induce suppliers to not do business with the plaintiffs and regularly claimed to suppliers and the plaintiffs' employees that the companies would soon go out of business.

In March of this year, a judge dismissed a lawsuit filed by New York-based Empire Merchants against Breakthru Beverage Group that was formed following the merger of Wirtz Beverage Group and Charmer Sunbelt. Empire had alleged Breakthru smuggled millions of dollars' worth of alcohol into the New York market via a subsidiary company in Maryland. The case was dismissed with

prejudice by a U.S. district judge. In November of 2016, an owner of several bars in Albany, N.Y., filed a lawsuit against the nation's largest distributor: Southern Glazer's. The owners sought $1.25 million in damages and alleged a Southern employee fabricated thousands of dollars of orders of sales and also charged more than $100,000 through the bars' Southern accounts for alcohol that may have been sold on the side. According to reports in the The Times Union newspaper, the attorney representing the bars rejected an offer to settle the case because Southern refused to acknowledge such abuses by its staff were widespread. The company later released a statement to the Albany paper that it plans to "vigorously defend" itself against the "inaccurate" claims in the suit and blamed the wrongful conduct on "a single employee acting independently of company policy and who has been terminated." The current status of the case is unclear, and James Linnan, the Albany attorney representing the bars, did not immediately return a call or email for comment by Wines & Vines. The claims in that case are quite similar to allegations in a lawsuit filed earlier this month. Southern Glazer's Wine & Spirits is the target of a class-action lawsuit that alleges "unfair, unlawful, deceptive and fraudulent business practices" that run afoul of numerous state and federal laws.

The lawsuit was filed July 5 in the U.S. District Court of Northern California by the firms Scott Cole & Associates APC and Wakeford Gelini on behalf of San Jose, Calif., resident James C. Nguyen, who holds a liquor license for a San Jose restaurant and bar. According to the lawsuit, Nguyen learned of Southern's allegedly deceptive practices after he received a tax bill from the state for liquor he never ordered from the wholesaler. That's because his attorneys argue Southern's management and employees made a habit of using their customers' account numbers to process fraudulent purchases to either achieve their sales quotas or drive up business for lucrative accounts. The lawsuit also alleges Southern sold alcohol to unlicensed third parties as well as provided full-size liquor bottles with "sample" labels for free or sold alcohol for a penny per bottle as "kickbacks" or as a way to keep retailers and restaurants from reporting any unethical behavior. Southern is also accused of threatening to cut off supply if a restaurant or retailer didn't buy sufficient quantities of brands offered by the wholesaler. The goal, according to the lawsuit, was to maintain exclusive and profitable relations with the top suppliers and extract as much profit as possible from restaurant and retail clients. "Through its unscrupulous, unethical and unlawful schemes detailed herein, Southern has enjoyed increased revenues, profitability and market share from its larger volume of sales," the lawsuit filing alleges. "These practices have given Southern an unfair competitive advantage over its competition with a resultant disadvantage to the public and class members."

The company's practices, as described in the lawsuit, also allegedly helped secure "highly desirable and highly profitable supply relationships" and that, "during the class period, Southern enjoyed numerous exclusive contracts with alcohol manufacturers/producers, with a resultantly larger client base, more orders therefrom and higher profitability." A spokesman for Southern did not immediately reply to Wines & Vines' request for comment but was quoted in other news reports as saying the company was still reviewing the allegations in the lawsuit and did not have any comment on the lawsuit. In a statement released after filing the lawsuit, attorney Scott Cole said the case, if successful, could "substantially" compensate many of Southern's customers for several years' of business. "Southern's clients trusted they'd be treated right-not charged for liquor they never bought, not forced to buy what they didn't need," Cole said. "The

sheer number of potential violations is jaw-dropping." According to Wines Vines Analytics' distributor database Southern operates in 44 states and distributes for 1,178 domestic wineries. On its website, the company claims to sell 150 million cases of wine and spirits per year, and Forbes estimated the firm's total revenue in 2015 at nearly $12 billion.

Indiana Supreme Court rules against Monarch Beverage in bid to sell liquor

Justin L. Mack, justin.mack@Indystar.comPublished 2:55 p.m. ET July 24, 2017

Monarch Beverage Co. has been dealt another major blow in its years-long push to distribute liquor in Indiana, this time by the state Supreme Court.
In a unanimous decision Friday, the court ruled against Spirited Sales LLC, an affiliate company created by the state's largest beer and wine distributor to get around Indiana's alcohol laws. Indiana is the only state that does not allow wholesalers to distribute both beer and liquor.
Although the affiliate is a separate company, the state's highest court found that Monarch and Spirited are not separate enough.
The decision follows a June 30 ruling by the 7th U.S. Circuit Court of Appeals on a separate attempt by Monarch to distribute liquor. The Indianapolis company argued that Indiana's policy of separating beer and liquor wholesaling violated the Constitution's Equal Protection Clause. A federal district court disagreed, and the Appeals Court affirmed that decision.
IndyStar has reached out to Monarch Beverage officials for comment.

DECISION AT:
United States Court of Appeals, Seventh Circuit.
MONARCH BEVERAGE CO., INC., Plaintiff-Appellant, v. DAVID COOK, et al., Defendants-Appellees.
No. 15-3440 Decided: June 30, 2017
http://caselaw.findlaw.com/us-7th-circuit/1866576.html

From Beer Business Daily 7.24.17

ANOTHER BIG BLOW DEALT TO MONARCH BEVERAGE IN SPIRITS FIGHT

It's been a tough month for Monarch Beverage and its fight to sell spirits.

Recall that Indiana holds a "prohibited-interest law," which requires the separation of beer and liquor wholesaling i.e. a beer distributor is barred from carrying spirits and vice versa. Earlier this month, the 7th Circuit upheld Indiana state law barring the beer and wine distributor from obtaining a spirits license .

Then the one avenue that looked somewhat promising for Monarch was shot down this past

Friday, when the Indiana Supreme Court reversed the Superior court's decision to grant Monarch affiliate, Spirited Sales LLC, a liquor wholesaler license, per Indiana Lawyer.

As you may know, Spirited Sales filed suit last year alleging that the governor's office hampered its progress in getting a permit to sell spirits, thus violating Indiana law that an alcohol regulator cannot deny a new permit for political reasons. The Indiana Superior Court ended up siding with Spirited Sales and granted it a temporary permit to sell spirits in September 2016.

But in the unanimous 4-0 opinion handed down by Justice Steve David on Friday, the "justices concluded the language of Title 7.1 in Indiana Code is clear, and the commission's decision to deny the permit followed the unambiguous language."

Spirited Sales is owned by E.F. Transit Inc., which shares its five shareholders with Monarch, per report. "Here, ties between EFT and Monarch were so extensive that EFT could reasonably be deemed to hold an interest in a beer wholesaler's permit - an interest prohibited," David wrote. "Likewise, Monarch and Spirited's overlapping ownership also bars Spirited from obtaining the sought-after permit."

Nevada's marijuana 'emergency' coming to an end; first distributors' license issued

Jenny Kane, jkane@rgj.comPublished 11:55 a.m. PT July 13, 2017 |

Editor's note: This story has been updated to reflect the issuance of a second distributors' license on Thursday.

The end of Nevada's pot "emergency" could be near.
Nevada issued its first recreational marijuana distribution license Wednesday night to a wholesale liquor distributor who partnered with a medical marijuana distributor, and a second license on Thursday.

The news comes a week after the state issued a "statement of emergency" given recreational marijuana distribution licenses had yet been issued and the resulting delay on recreational marijuana shipments to dispensaries statewide.
The state Department of Taxation awarded a $15,000 license (not including the $5,000 application fee) to Rebel One, a Las Vegas-based wholesale alcohol distributor, and Crooked Wine Company.

Crooked Wine has signed an operation agreement with Blackbird, an established medical marijuana distributor also based in Reno. Crooked will have the license, but Blackbird will be in charge of the on-the-ground duties, according to Stephanie Klapstein, spokeswoman for the department.
More: When did Nevada's alcohol industry get dibs on marijuana delivery?

More: Nevada dispensaries running out of marijuana; governor steps in
It is unclear when deliveries to dispensaries of much-desired weed will begin. Representatives were not immediately available for comment Thursday morning from either business.

Marijuana dispensaries statewide have been on edge about the delay in issuing recreational marijuana distribution licenses, licenses that enable the delivery of marijuana from grows to the shops.
As of July 1, the debut date of Nevada's early start recreational marijuana program, the state has not been able to award distribution licenses. Many dispensaries are close to running out because of the halt on deliveries of product, according to the state.

State officials initially could only issue licenses to liquor wholesalers because of language in the initial ballot measure passed in November. Due to a shortage of interested or qualified parties, the state attempted to issue licenses also to marijuana establishments.
Disgruntled alcohol distributors sued the state, but an emergency regulation passed today by the Nevada Tax Commission could end that court battle. The regulation would allow the Department of Taxation to issue licenses also to marijuana establishments.

Currently, seven alcohol distributors have applied for a recreational marijuana distribution license, whereas 87 marijuana establishments have done the same. The department has conducted four inspections of alcohol distributors' operations, and some could receive licenses as soon as next week. As for the marijuana establishments, the department has had to sit on their applications.

If the Nevada Tax Commission passes the regulation today, then the department will be able to review applications also from the marijuana industry.
Gov. Brian Sandoval budgeted $70 million in state revenue from the fledgling industry over the next two years. The state will not be releasing revenue numbers so far until late September because businesses don't report their numbers until August.

Currently the state has issued the following licenses for the early start recreational marijuana program:

- One distribution license
- 47 retail licenses
- 64 cultivation licenses
- 44 production licenses
- Seven laboratories

"It's our responsibility to make sure that we've licensed enough people in our market, that's what we have to do. Our job is to license folks and to bring in the tax dollars," Klapstein said.

NV JUDGE SIDES WITH LEGE ON MARIJUANA DISTRIBUTION 7.31.17

Last November Nevada voted to legalize recreational marijuana, but the state is still ironing out some kinks for the distribution of the drug.

As part of the ballot initiative that passed, alcohol distributors were given first dibs on the marijuana distribution licenses as well as the sole ones allowed to distribute marijuana at all for the first 18 months. But the alcohol wholesalers weren't exactly clamoring for the new licenses. As a result, Nevada Gov. Brian Sandoval signed an emergency statement to allow some retailers to transport cannabis to their stores, reports a local publication. "Without the retail sale of marijuana, the state will not realize the revenue on which the state budget relies," per the emergency statement.

A group of alcohol distributors filed suit to stop the recently approved emergency regulations, saying there is no emergency situation that would require anyone other than the alcohol wholesalers to distribute the marijuana, according to the group's attorney Kevin Benson. "Because the department itself is at fault for creating the situation that it now claims is an emergency, it cannot use that as a basis to short-circuit the rule making process," per the filing.

A Nevada judge denied the distributors' request to stop the emergency regulations, agreeing with the state that the emergency regulations are protecting state tax revenue. The distributors will now try to convince regulators that there are plenty of alcohol wholesalers interested in distributing marijuana, according to Kevin.

Owner of Minhas Craft Brewing in Monroe suing two international brewing giants

BARRY ADAMS badams@madison.com Aug 2, 2017

Two international brewing giants conspired to limit other U.S. beer companies from selling their products in Ontario, Canada, according to a federal lawsuit filed this week by the owner of Minhas Craft Brewery in Monroe.
Mountain Crest SRL LLC, which has been brewing value-brand beers in Monroe since 2003, alleges that AB InBev of Belgium and Molson Coors Brewing Co. in Denver had a secret agreement from 2000 to 2015 with the government-owned Liquor Control Board of Ontario that restricted imports and sales of other U.S. beer company products in the Canadian province.
The suit, filed Tuesday in U.S District Court in Madison, contends that the beer companies violated the Sherman Antitrust Act by controlling the only two options for distribution and retail in Ontario. About 70 percent of sales at LCBO stores are ABI and Moslon Coors products, while the two beer companies own Brewers Retail Inc., a cooperative that has over 450 locations doing business as The Beer Store.

Mountain Crest believes the secret agreement - exposed by a whistle-blower in 2014 to the Toronto Star - combined with ABI and Molson Coors' 98 percent

ownership of The Beer Store outlets, limited Mountain Crest growth and sales. The company is seeking lost revenues and $200,000 in punitive damages. The suit was filed in the U.S. under the Foreign Trade Antitrust Improvements Act of 1982, which authorizes causes of action for American businesses under American anti-trust laws for lost export sales, even if the conspiracy took place in foreign commerce.

"Plaintiff's injury is precisely the sort that the antitrust laws were intended to forestall; namely, two dominant businesses using their market power to stifle competition," the complaint states. "Defendants' conduct was within the flow of, was intended to, and did, in fact, have a direct effect on the export commerce and export trade of brewers in the United States."
ABI is the world's largest brewer and has a 45 percent share of the U.S. and 43 percent share of the Candadian beer markets and brews its three global brands, Budweiser, Corona and Stella Artois, all in Canada.

Molson Coors accounts for about 28 percent of the U.S. and 34 percent of the Canadian market with brands like Carling, Coors, Miller and Molson Canadian. "We've just received the lawsuit and have no further comment," Colin Wheeler, a spokesman for Molson Coors, wrote in an email Wednesday.
ABI spokeswoman Gemma Hart said the company "was aware that the lawsuit has been filed and intend to vigorously defend against it."

Mountain Crest, owned by the Minhas family and based in Alberta, purchased the Monroe brewery in 2006 and has transformed the second-oldest brewery in the country into one of the largest breweries in the U.S. Much of that growth has come from the production of low-priced beer like Mountain Crest Classic Lager, Clear Creek Ice and Boxer, much of it exported to Canada.
By 2005, the beer from Monroe exported to Alberta made up 85 percent of the brewery's total production, according to the complaint. Mountain Crest has been exporting Boxer to Ontario since November 2009, but growth there has not matched that of other markets, despite a $1 million television advertising campaign, the lawsuit contends. Mountain Crest also paid $631,797 to get its products in 440 TBS locations.

TBS stores do not operate like traditional U.S. liquor stores.
The vast majority of stores contain no shelving and only list inventory on a wall. Most products are kept out-of-sight of customers, rolled out on conveyor belts once an order is placed, which "discourages customer shopping and limits competition to brands the customer is already familiar with," the lawsuit contends. Some stores, however, have a grab-and-go cooler where a limited number of single-serving cans of beer are sold. TBS charges brewing companies for access, but the coolers are mostly filled with AB and Molson Coors products, according to the lawsuit.

The restrictions of the agreement included that the LCBO not sell beer in packages containing more than six containers, which ensured that American brewers could not export beer to Ontario in 12- or 24-packs unless they paid to use the TBS stores owned by AB and Molson Coors. A second element of the agreement prohibited "pack-up pricing" that allowed consumers to purchase four individual six-packs and receive the same discount as if they had purchased a 24-pack case.

This has the effect of "enabling defendants to fix prices for the Ontario market and greatly limiting the LCBO's attractiveness as a beer retail destination for value consumers, as well as discouraging sales of plaintiff's beer at the LCBO," according to the lawsuit. "For example, TBS charged plaintiff a $3.32 fee for every 24-unit case plaintiff sold into the Ontario market, in addition to other fees."
Other clauses of the secret agreement included that the LCBO was not to sell to restaurants and bars any of the major brands not carried in its regular stores, a move that discouraged bars and restaurants from purchasing beer at LCBO stores.

When the secret agreement was signed, 177 communities in Ontario had LCBO stores that sold 12- and 24-packs of beer. But under the agreement, if a TBS opened in any of those areas, nearby LCBO stores would have to cut back their beer offerings to six-packs. That discouraged the LCBO from opening new stores in areas where the TBS might also decide to open a store.
"Throughout the duration of the secret agreement, TBS expanded locations, thus displacing LCBO beer sales," according to the complaint.

"Vegetarian lobbyists were defeated today when it was discovered that their bill was full of pork..."

House Panel OKs Common Sense Menu-Labeling BillAmended bill now awaits consideration by full House of Representatives.

July 28, 2017, 02:10 pm

WASHINGTON, D.C. - In a bipartisan vote of 39 to 14, a U.S. House of Representatives panel gave the go-ahead to H.R. 772, the Common Sense Nutrition Disclosure Act of 2017.

Reintroduced in February by U.S. Reps. Cathy McMorris-Rodgers (R-Wash.) and Tony Cardenas (D-Calif.), and Sens. Roy Blunt (R-Mo.) and Angus King (I-Maine), H.R. 772 is intended to provide a more practical and flexible approach to the current regulations, which the U.S. Food and Drug Administration (FDA) planned to begin enforcing on May 5.

However, the agency delayed final adherence for the bill in April.

During the House Energy & Commerce Committee's consideration of the legislation, McMorris-Rodgers and Cardenas explained that the issue is not whether caloric disclosure should be required, but how that disclosure takes place. McMorris-Rodgers urged that the FDA's menu labeling regulations are a one-size-fits-all approach and create a costly use of retailers' time to comply, reported NACS, the Association for Convenience & Fuel Retailing.

> "When the FDA announced its final rule implementing a national menu labeling standard in 2014, the intent was twofold: deliver customers increased access to nutrition information; and establish a single, uniform national standard. However, in trying to create a uniform standard, the FDA's 400-page rule attempts a one-size-fits-all approach to an industry as diverse as its ingredients," urged McMorris-Rodgers.

The current legislation is problematic for two reasons, according to the lawmaker. For one, the "made-to-order" portion of the food industry offers endless, constantly changing combinations of ingredients, therefore it's an "unrealistic use of these business owners' time" to have to put on paper all of the variations and calorie counts for ingredients. Secondly, nearly 90 percent of orders in some restaurants are made digitally, so customers never have to step foot in a brick-and-mortar store, therefore rendering it senseless for physical calorie counts to be posted in-store.

During the July 27 vote, two amendments were offered for H.R. 772:

1. The bill's sponsors suggested shortening the required compliance timeline, so the FDA would have more flexibility in enforcing the new rule that would be drafted under new legislation. This amendment was accepted by a voice vote of the committee.
2. The second amendment, offered by Rep. Kurt Schrader (R-Ore.), would have stricken the provisions of the bill that would allow establishments who received greater than 50 percent of their orders remotely (i.e. pizza delivery chains) to post the required caloric disclosure remotely, such as on a website. That amendment failed in a 33-19 vote.

According to NACS, the Common Sense Nutrition Disclosure Act maintains but modifies the FDA's menu-labeling regulations, allowing businesses to provide nutritional information to customers in a more practical format. It also protects small businesses from "overly burdensome" costs and penalties, and removes the possibility of criminal penalties.

The House's amended bill now awaits consideration by the full House of Representatives. NACS said it hopes that the House will consider the legislation in September after Congress returns from the August district work period. Similar legislation was passed by the House in 2016, but was not considered by the Senate before the end of the legislative session.
Senate sponsors of the legislation are looking for ways to move the bill, but the chamber is currently occupied with action related to the health care legislation.

Rock, Meet Hard PlaceWhat Nonprofit Employers Need to Know about Accommodating Medical Marijuana

Until recently, employers had no duty to accommodate an employee's use of medical marijuana unless a state statute said otherwise-they could rely on their drug-free workplace policy and just say no. Indeed, the federal Drug-Free Workplace Act of 1988 (Act) required federal contractors to maintain drug-free workplaces, and many state laws followed. Many nonprofit employers not subject to the Act adopted drug-free workplace policies anyway. Such policies became the norm in the private and public sectors. But efforts to legalize medical marijuana also have taken hold. Twenty-nine states have legalized medical marijuana, beginning with California in 1996 (though it remains illegal under federal law). Of those 29 states, some explicitly prohibit employers from terminating or otherwise penalizing employees for using medical marijuana.1 In those states where medical marijuana has been legalized without explicit employment protections, state courts have consistently found no affirmative duty to accommodate employees who use it. Until now, nonprofit employers in those states have been on reasonably solid legal ground in refusing to permit exceptions to their drug-free workplace policies to accommodate the use of medical marijuana.

But that ground may be shifting, at least in some jurisdictions. Recently, the Massachusetts Supreme Judicial Court (SJC) in Barbuto v. Advantage Sales and Marketing, LLC ruled that employers cannot escape their affirmative duty to engage in the interactive process with an employee who is prescribed medical marijuana simply because the employer has a drug-free workplace policy and federal law prohibits the use of medical marijuana. Ms. Cristina Barbuto applied for, and was offered, a position with Advantage Sales and Marketing. ASM advised her, post-offer, that it required a drug test. Ms. Barbuto agreed but explained that she would test positive for marijuana because, per Massachusetts law, she uses medical marijuana under a prescription to manage her Crohn's disease. She said she did not use it daily or right before or at work.

Ms. Barbuto took the drug test, tested positive as she forewarned, and completed her first day of work-whereupon ASM fired her for violating its drug-free workplace policy. Ms. Barbuto sued for handicap discrimination in violation of Massachusetts' anti-discrimination law, M.G.L. 151B § 4, citing ASM's failure to accommodate her use of medical marijuana.

The Massachusetts SJC reversed the Massachusetts Superior Court's dismissal of Ms. Barbuto's complaint for failure to state a claim for disability discrimination under Massachusetts law. ASM argued that Ms. Barbuto's

claim should fail on its face, because it could not be reasonable to accommodate the use of a substance prohibited by federal law. The SJC rejected that argument, noting that Massachusetts voters and the state legislature enacted the medical marijuana law protecting that use. Accordingly, all employers-including nonprofit organizations-must treat an employee's use of medically prescribed marijuana as it would the employee's use of any other lawfully prescribed medication. Massachusetts employers can no longer simply rely on their drug-free workplace policies to terminate employees who use medical marijuana. Instead, Massachusetts employers must at least engage in the interactive process to explore alternative accommodations that would allow the employee to do his or her job.

The Barbuto decision applies only to Massachusetts, but it may portend things to come elsewhere. Nonprofit employers there and across the country should consult the state statute on medical marijuana (if one exists) to determine whether it requires accommodating employees. In some states, that duty is explicit. Other states do not explicitly protect employees who use medical marijuana, but have protections that resemble the Massachusetts "denial of a right or privilege" provision. In those states, whether an affirmative duty to accommodate exists, and the extent of that duty, will depend on how that state's courts interpret the statute. Absent such a decision from the state's courts, guidance from the state anti-discrimination agency may be useful.

As more states legalize the use of medical marijuana, more may require employers to engage in the interactive process with their employees to accommodate the use of medical marijuana. Nonprofits, particularly those with employees in multiple states, will need to remain aware of their legal obligations. Understanding your legal obligations when an employee requests such an accommodation will help you find a comfortable space between the rock and the hard place.

Consumers Short-changed Again on Shipping

Parcel delivery companies like UPS and Fedex are cracking down on shipping wine between states.

The accessibility of wine is being reduced as delivery companies police the shipping law instead of state agencies.

By W. Blake Gray | Posted Tuesday, 01-Aug-2017

Bad news for wine lovers (and Wine-Searcher users) in most of the United States: your ability to order wine may be about to be diminished.

UPS and FedEx are cracking down on interstate shipping of wine, according to wine retailers, so that stores you have been ordering from may start saying "Sorry, but no."

"I've been selling online to 47 states. Now they're going to cut it down to 16 states," Marwan Bisher, president of The Wine Connection in California told Wine-Searcher. "It does take a bite out of business."

The crackdown is not a new law; instead UPS and FedEx are enforcing existing laws in many states that have not been friendly to wine shipping, says Tom Wark, executive director of the National Association of Wine Retailers.

"UPS has been cracking down in New York for at least a year," Wark told Wine-Searcher. "They're cracking down in Illinois too. When they crack down in New

York and Illinois, you're looking at two of the top five states for wine shipments. It's millions of dollars. Probably hundreds of millions."

Because of the way Prohibition was repealed, each individual state has enormous power over the distribution and sale of alcohol in a way that is not allowed with other products. Some states allow residents to order wine from any retail store in the country. Others don't allow any shipments of wine into the state.
Then there are several states that don't understand the crucial 2005 US Supreme Court decision in Granholm vs. Heald, which required states that allow their own wineries to ship directly to consumers to allow other states' wineries to ship also. Michigan, one of the states that lost in that lawsuit, is being sued again for nearly the same thing. The only difference is that this time it's out-of-state retail stores instead of out-of-state wineries.

"Michigan was part of the Granholm decision; they changed their laws to allow out-of-state wineries to ship in," Wark said. "At the same time, they changed to allow in-state retailers to ship but not to allow out-of-state retailers. Then they changed the law so that retailers can ship, but only if they use their own truck. This year, they went back to what they had before: allowing in-state retailers to ship and not out-of-state. I went there and I testified and I told them they would get sued."

Illinois and Missouri currently face similar lawsuits, Wark said.
"I can't stress this enough: This is not lost taxes for the state of Illinois," Wark said. "When a consumer in Illinois wants a bottle of wine, they're going to go down to the local retailer and buy it. They're always going to buy locally if they can because who's going to pay the shipping costs?
"People who are buying wines from out-of-state retailers are buying hard-to-find wines," Wark said. "They're buying small production wines. They're buying wines that retailers sell out of immediately. Small production stuff that doesn't show up in every state. And if it does show up, it sells out fast. But another retailer in another state might have it."

Wark blamed lobbying by the Wine & Spirits Wholesalers of America (WSWA), which wants retailer shipping restricted to protect its members' profits.
In California, a winery can sell directly to a retail store; this is very unusual in the US. Most states have laws that require wineries or importers to sell their wine to a distributor (invariably a WSWA member), which adds 25 to 33 percent markup and sells the wine to retail stores. Thus a California retail store like Bisher's can cut out the middle tier.

This doesn't always mean cheaper prices for consumers. Wineries and importers often charge California stores more to keep their prices nationally uniform, so they take extra profits. What it does mean is WSWA members don't get those profits, so it's worth it to them to lobby state legislatures not to liberalize wine shipping laws.
"I just got done doing a report on political contributions in different states and WSWA is the number one contributor," Wark said. "In the last five election cycles, wholesalers have given $107 million in contributions to political campaigns. That's more than the combined amount given by wineries, brewers, distributors and retailers."

Wark said bills were introduced in the past year in New York, Texas, Connecticut, Kentucky and Rhode Island to liberalize retailer shipping, but none

passed.
Consumers may not have noticed the UPS crackdown until now because, it turns out, individual retailers have separate contracts with the delivery company.
"My UPS salesperson, she made me sign a new contract that says, from August 1, I'm not able to ship to those states. I'm very limited now," Bisher said. "UPS is cracking down because they say the states are cracking down."

from www.wine-searcher.com/

TOTAL WINE SCORES A WIN IN MA ON DISCOUNT PRICING

Last week Total Wine & More scored a win in Massachusetts after Superior Court Judge Robert Gordon ruled that retailers can price alcohol based on bulk discounts, per the Boston Globe. That means Total Wine and other retailers can provide discounts to consumers without violating the state's law banning alcohol retailers from selling below cost.

The judge's ruling was in response to a lawsuit Total Wine filed earlier this year against the state after the agency slapped sanctions on Total Wine for selling products $1 - $6 below wholesale costs [see WSD 02-03-2017]. Total Wine promptly filed suit against the Alcoholic Beverages Control Commission (ABCC) holding its longstanding claim that these regulations protect their smaller competitors.

"There was clearly no predatory pricing carried out in this case," the judge writes, "only a salutary effort by a retailer to pass along savings derived from volume purchasing at the wholesale level to its customers. This is something the law should promote rather than punish." However, the judge declined to rule on Total Wine's argument that the minimum pricing law violates anti-trust laws.

No word yet on whether or not the ABCC will appeal.

Total Wine Claims Victory In Massachusetts Pricing Suit July 27, 2017

Massachusetts judge Robert B. Gordon has sided with Total Wine & More in the retailer's suit over spirits pricing against the state Alcoholic Beverages Control Commission. Gordon ruled that alcohol retailers like Total Wine may pass on bulk discounts to consumers.
In January, Total Wine's Massachusetts licenses were suspended by the ABCC for allegedly selling liquor below cost. The retailer claimed that the ABCC was ignoring bulk discounts the company was set to receive from wholesalers once the retailer ordered sufficient quantities of liquors, effectively misinterpreting the true cost of the goods. In his decision, Gordon wrote "there was clearly no predatory pricing carried out in this case" and these types of discounts are what

"the law should promote rather than punish." In a statement, Total called the decision "a victory for consumers and a validation of Total Wine & More's commitment to lawfully provide consumers access to the best values possible on the products we carry Massachusetts."

However, Judge Gordon did not rule on Total Wine's argument that the Massachusetts price floor violates U.S. anti-trust laws. Retailers are still prohibited from selling liquor below cost in the state. Total Wine's victory merely allows companies to more accurately adjust prices based on volume discounts. According to the Boston Globe, the ABCC has not decided whether to appeal. - Shane English

Mass. judge sides with Total Wine in pricing dispute

MetroWest Daily News Staff
Posted Jul 27, 2017 at 9:36 AMUpdated Jul 28, 2017 at 5:23 AM

BOSTON - A Suffolk Superior Court judge has sided with a big-box liquor dealer in a legal dispute over minimum pricing.
Associate Justice Robert Gordon found fault with the state Alcoholic Beverages Control Commission pricing rule that prohibits retailers from selling alcohol for less than its invoiced cost. He overturned a commission decision suspending Total Wine & More's liquor licenses at its Natick and Everett stores.
Total Wine & More also has Massachusetts stores in Shrewsbury and Danvers.
The Natick and Everett stores faced multiday license suspensions after the commission found that the company priced alcohol below invoiced cost. Total Wine & More argued it priced the liquor based on anticipated discounts from its suppliers for purchasing certain amounts of product. The commission said that violates its rules because the initial invoices do not show that discount. Total Wine & More appealed the decision in Suffolk Superior Court.
Justice Gordon took issue in a Monday ruling with the commission limiting invoiced cost to what is on the initial invoice.
That "bears no rational relationship to the legislative policy of prohibiting anti-competitive pricing practices," Gordon wrote.
This is not a case of predatory pricing, he wrote. Instead, it is an effort by Total Wine & More to pass on to customers savings it receives for buying certain quantities of product, he wrote.
"This is something the law should promote rather than punish," Justice Gordon wrote.
He questioned a commission position on the discounts that could actually hurt small retailers who cannot afford to stockpile product until they receive the discount.
The commission can have regulations that seek to prohibit anti-competitive pricing and require documentation of costs on invoices, he wrote.
Total Wine & More only applied the discounts to its retail pricing once it knew it purchased sufficient product to earn the discount. The company maintained regular contact with its suppliers about the discounts, which are typically passed on to the store at the end of a promotional period, Gordon wrote.
In a statement, Total Wine & More praised the decision as "a victory for consumers and a validation of Total Wine & More's commitment to lawfully provide consumers access to the best values possible on the products we carry Massachusetts. We agree wholeheartedly with the court's conclusion that the law

should 'promote' practices that provide better value to consumers, rather than punish retailers like Total Wine who, consistent with the letter of the law, choose to provide product value, selection and service to Massachusetts consumers."
The company hopes the decision and a campaign about alcohol rules will "provide a platform for further discussion with key decision-makers and industry participants in Massachusetts to modernize Massachusetts laws and further the interests of everyday consumers," the statement said.
Some local liquor store owners have worried about the case, in part because invoice pricing is a key point of equity between larger stores and locally owned businesses.
The commission is still reviewing Gordon's decision, a spokeswoman said.

Drunken driving on private driveway can violate DWI law, state supreme court rules

POSTED
JULY 26, 2017, 4:38 PM CDT
BY DEBRA CASSENS WEISS

The Michigan Supreme Court has ruled that prosecutors can bring charges against a man accused of driving while intoxicated on his own private driveway.
The supreme court reinstated the prosecution of Gino Rea of Northville in a July 24 decision (PDF) noted by How Appealing. The Associated Press, MLive.com and the Petoskey News have coverage.

The court ruled that the state's drunken driving law covers conduct in an area that is generally accessible to motor vehicles, even if it is on private property.
A police officer called to investigate a noise complaint arrested Rea in March 2014. The officer saw Rea start to back his car down the driveway, but Rea stopped when the officer shined his flashlight in the car. Rea then put the car in drive and pulled the car back into the garage.

Rea's blood alcohol was three times the legal limit, according to the Michigan Supreme Court.
The state's drunken driving law says a person shall not operate a motor vehicle while intoxicated "upon a highway or other place open to the general public or generally accessible to motor vehicles."
The court, in an opinion by Justice Richard Bernstein, said Rea's private driveway "was designed for vehicular travel" and there was nothing on it that would have prevented cars on the public street from turning into it.

4 vendors to Pennsylvania Liquor Control Board agree to pay $9 million in penalties for gifts to agency officials

PAUL PEIRCE | Thursday, July 27, 2017, 4:18 p.m.
PATRICK CONNOLLY | TRIBUNE-REVIEW

Four alcohol vendors reached a deal to pay stiff fines instead of facing prosecution for plying Pennsylvania Liquor Control Board officials with cash, trips and other kickbacks, the U.S. Attorney's Office in Harrisburg announced Thursday.
The companies will pay more than $9 million in penalties as part of non-prosecution agreements reached with the government.

According to U.S. Attorney Bruce D. Brandler of Pennsylvania's Middle District, the four companies are:
* Southern Glazer's Wine and Spirits of Pennsylvania, LLC, which is successor company to Southern Wine and Spirits of Pennsylvania, LLC, and wholly owned by Southern Glazer's Wine and Spirits of Miami, Fla.
* Breakthru Beverage Pennsylvania, LLC, the successor company to Capital Wine and Spirits, LLC, and wholly owned by Breakthru Beverage Group, Inc. of New York, N.Y.
* White Rock Distilleries, Inc., which formerly was headquartered in Lewiston, Maine
* Pio Imports, LLC, headquartered in North Wales, Pa.
Brandler said each company agreed to pay substantial penalties, implement compliance measures and refrain from engaging in similar activities in the future. In return, the government agreed not to prosecute the companies or any of their employees who gave things of value to LCB officials.

Brandler said in a news release several factors that resulted in the settlements included the cooperation of the businesses in the government's investigation, the merits of the individual cases, as well as the historic nature of the conduct, which stopped in 2012 when the state Ethics Commission initiated an investigation.
A federal grand jury had begun an investigation by 2014.
"Although the history between these organizations and the Pennsylvania Liquor Control Board is clearly disturbing, it is in the interests of justice to expose this history and hold the organizations responsible," Brandler said. "The monetary penalties imposed on these successor organizations more than disgorges the financial benefits received and discourages future misconduct by those in the industry."

In September 2015, James H. Short , 52, the LCB's former marketing director, pleaded guilty to honest services fraud for receiving numerous benefits from White Rock and Capital Wine and Spirits over a 10-year period.
For example, he was flown by private jet to Bonita Springs, Fla., for a golf vacation with representatives for Pinnacle Vodka, which received approval to be sold in state stores six weeks after the trip, documents show.
The investigation also snared five former LCB officials for taking lavish dinners, golf outings, trips and other gifts from alcohol vendors seeking favorable treatment for their products.

According to the agreement:
* Southern Glazer's Wine and Spirits will pay $5 million for their employees' role in providing cash, all-expenses-paid trips, tickets to shows and sporting events, entertainment and other things of value to LCB officials from 2000-2012.
* White Rock Distilleries will pay $2 million for their employees' role in providing cash, all-expenses-paid trips, and other things of value to LCB officials 2000-2011.
* Breakthru Beverage Pennsylvania, which until recently operated as Capital Wine & Spirits, will pay $2 million for their employees' role in providing gift cards, tickets, meals, and entertainment to LCB officials from 2007-2012.
* Pio Imports will pay $200,000 for their employee's role in providing gift cards to LCB officials from 2007-2012.

Alan N. Greenspan, executive vice president and general counsel of Southern Glazer's Wine & Spirits, maintained the company cooperated with the investigation and ceased the activity in 2012. The Dallas attorney said the activities of the largest wholesale distributor of wine, spirits and beer in North America were "isolated to Pennsylvania."
"We take very seriously our responsibility to operate our business in compliance with the law; and, accordingly, we require all employees to complete ongoing trade practice compliance training," Greenspan said. " We are continually evaluating and strengthening our compliance programs and policies. Our expectation is that every employee will adhere to the highest ethical standards."
Paul Peirce is a Tribune-Review staff writer. Reach him at ppeirce@tribweb.com.

07/27/2017

Pennsylvania Liquor Control Board Issues Statement on Federal Investigation into Wine and Spirits Suppliers

Following the U.S. Department of Justice's announcement today regarding non-prosecution agreements reached with four suppliers to the Pennsylvania Liquor Control Board (PLCB), Board Chairman Tim Holden and Board Members Mike Negra and Michael Newsome issued the following statement:

"The PLCB has been fully cooperative with the U.S. Attorney's investigations over the last two years, and these companies' admissions of unethical behavior occurring from 2000 to 2012 are a matter the PLCB is taking very seriously. The Board has called senior leadership of each the three companies still supplying wines and spirits to Pennsylvania into PLCB headquarters in the immediate future to discuss the settlements and determine how the agency and these suppliers can move forward preserving the highest ethical standards.
"Following investigations into former PLCB employees who violated state ethics standards, in 2014 the PLCB clarified and reissued its employee code of conduct and developed a new and separate code of conduct for wine and spirits vendors. Although we already had one of the strictest employee conduct codes in Pennsylvania state government, the unethical actions of a few cast a temporary shadow over the agency. As a result, the PLCB has embraced the opportunity to regularly remind employees of their ethical obligations and foster a culture of awareness and the highest standards of integrity among its employees and suppliers.

"The Board is disappointed at the action of all parties involved, who violated the trust of the agency and Pennsylvanians."

The agency's employee code of conduct and vendor code of conduct are publicly available at www.lcb.pa.gov.
The PLCB regulates the distribution of beverage alcohol in Pennsylvania, operates more than 600 wine and spirits stores statewide, and licenses 20,000 alcohol producers, retailers, and handlers. The PLCB also works to reduce and prevent dangerous and underage drinking through partnerships with schools, community groups, and licensees. Taxes and store profits - totaling $15.1 billion since the agency's inception - are returned to Pennsylvania's General Fund, which finances Pennsylvania's schools, health and human services programs, law enforcement, and public safety initiatives, among other important public services. The PLCB also provides financial support for the Pennsylvania State Police Bureau of Liquor Control Enforcement, the Department of Drug and Alcohol Programs, other state agencies, and local municipalities across the state.

CONTACTING TTB: SKIP THE EMAIL AND JUST HIT 'SUBMIT'
It just got easier to contact us with questions about permit applications, taxes, labeling, exporting/importing, or about any other topic at TTB. We now have a convenient online method for you to tell us exactly what you need, so we can get your inquiry to the proper person and answer it quickly.
When you have a question for us, complete the Contact Us form on our site by using the drop down topics or add a quick note in the comments section and hit the "submit" button. It's just that easy!
For more information, see the frequently asked questions and answers in our news feature, Contacting TTB: Skip the Emails and Just Hit 'Submit'.

https://www.ttb.gov/news/contacting-ttb.shtml

Alcohol and Tobacco Tax and Trade Bureau Announces Joint Operation Targeting Alleged "Pay-to-Play" Activities in Florida

BY BETHANY HATEF ON JULY 25, 2017
POSTED IN ADVERTISING AND MARKETING, TRADE PRACTICES

On July 20, 2017, the Federal Alcohol and Tobacco Tax and Trade Bureau (TTB) announced a joint operation it conducted with the Florida Department of Alcoholic Beverages and Tobacco (DABT) to investigate potential trade practice violations in the Miami, Florida area. According to a very brief press release issued by TTB, the investigation focused on alleged "pay-to-play" schemes. "Pay-to-play" is an industry term generally used to mean the provision of payments or other "things of value" by an upper-tier industry member (i.e., supplier or wholesaler) to a retailer to secure placement for the industry member's products in the retailer's premises.

Although neither TTB nor the DABT has released any specific details of the investigation or the parties involved, the investigation suggests that TTB is acting on prior announcements that it would seek to aggressively enforce its trade practice regulations. TTB's 2017 budget included a $5 million earmark to enhance trade practice enforcement. As part of this effort, TTB transitioned 11 of

its existing investigators to new roles focusing exclusively on trade practice enforcement.

The joint investigation also comes on the heels of other recent enforcement of trade practice laws and regulations-specifically involving allegations of pay-to-play activities-by state alcohol regulators. In just the last few months, the Massachusetts Alcoholic Beverages Control Commission initiated an enforcement action against an Anheuser-Busch InBev (ABI)-owned distributor in connection with an alleged pay-to-play scheme. The California Department of Alcoholic Beverage Control also recently settled an enforcement action against ABI wholesalers for alleged trade practice violations. Also, in June, a New Jersey beer wholesaler agreed to pay a nearly $2 million fine to settle trade practice allegations brought by the Division of Alcoholic Beverage Control.

TTB AND FLORIDA AUTHORITIES CONDUCT JOINT TRADE PRACTICE INVESTIGATIONS 7.21.17

From TTB newsletter

Miami, Florida - This week, the Alcohol and Tobacco Tax and Trade Bureau (TTB) conducted a joint operation with Special Agents from the Florida Division of Alcoholic Beverages and Tobacco (ABT), Miami District Office, targeting alleged "pay to play" schemes in the greater Miami area. This is the largest trade practice enforcement operation that TTB has initiated to date.
"Pay to play," also known as "slotting fees," is an unlawful trade practice that hurts law-abiding industry members and limits consumer choice.
TTB takes its responsibility to actively enforce a level playing field very seriously and appreciates this opportunity to work together with our law enforcement partners in Florida to ensure that existing industry members and smaller businesses just entering the marketplace can compete based on customer service and consumer preference rather than on their ability to buy shelf space.

07.20.2017

The Next Verse in the Music Licensing Saga New legislation would create a searchable music database accessible to wineries by Linda Jones McKee

New legislation introduced in the U.S. House of Representatives would make it easier for wineries to host live music for guests. Photo: City Winery Chicago Washington, D.C.-One of the problems for wineries who want to play music or have musicians perform live in their tasting rooms is they have no way to find out which songs are copyrighted and which performing-rights organization protects the copyright of a given song. U.S. Rep. Jim Sensenbrenner of Wisconsin and co-sponsor Rep. Suzan DelBene of Washington introduced legislation today in the U.S. House of Representatives that would require the Register of Copyrights to establish and maintain a searchable digital database of historical and current copyright ownership and licensing information for musical works subject to copyright law. Once the bill, the "Transparency in Music Licensing and Ownership Act," is passed, it will be easier for wineries (or any other venue) playing live or recorded music to comply with copyright laws. According to Tara Good, vice president of WineAmerica and an expert on music licensing for wineries, "Under the current music-licensing system there is no centralized location to find out which performing rights organizations (PROs) represent which songwriters.

Under industry pressure, the four major PROs (ASCAP, BMI, SESAC and GMR) currently offer separate online databases. These databases are gated by heavy-handed legal language stating that its contents may not be up-to-date and therefore should not be used to make licensing decisions. Because a winery cannot reliably find out which PROs represent which music, the winery is forced to purchase licenses from all four PROs. This drives up the cost of offering live music and, in many cases, exceeds a small venue's budget, forcing them to cancel their live music program. "The intention of the database is to give wineries the business tools they need to make sound business decisions," Good told Wines & Vines. "The database should be free and easy to use." The new legislation Under Sensenbrenner's legislation, the Register of Copyrights must hire employees and/or contractors to create and maintain the database, enforce requests for information and spend the funds necessary to do so. The database must be accessible without charge on a website maintained by the Copyright Office, and that office will provide access to the website from copyright.gov. It also must be searchable by any of the identifying fields set forth in the legislation and exportable in whole or in part to standard spreadsheet programs or in Extensible Markup Language and other formats as determined by the Copyright Office. Other sections of the bill define who will supply the data for the database. If a winery makes a good-faith effort to use the database, and the PRO has not updated their information, the PRO can now only sue for actual damages rather than statutory damages, and that can be a difference of up to $150,000 per infringed song.

Wineries that want to get involved can contact their member of Congress by email or phone and urge their representatives to support the legislation. WineAmerica can supply a letter template and talking points for wineries that need assistance. Tara Good can be contacted at tgood@wineamerica.org. WineAmerica's music-licensing survey WineAmerica conducted a survey of wineries across the country about music usage and licensing in late 2015. The survey responses indicated that the business practices of the PROs had had a major impact on the ability of wineries to play recorded music and host live music events. The summary of WineAmerica's survey findings stated, "As of January 2015, 96% of U.S. wineries can be classified as small businesses. Therefore, many do not have the necessary legal resources to litigate disputes with PROs. This leaves winery owners vulnerable to harassment. Nearly 85% of respondents described being harassed and legally threatened by PROs demanding license payment."

The survey found that 32% of responding wineries had cancelled their live music, and an additional 17% were considering cancelling live music because of the exorbitant rates and the business practices of the PROs." 'MIC' coalition The Music Innovation Consumers (MIC, pronounced "mike" as in microphone) is a coalition of associations "whose members provide music over the nation's airwaves, through the internet and in stores, hotels, restaurants, bars and taverns throughout the country." WineAmerica is a part of the MIC coalition, which is "committed to a rational, sustainable and transparent system that will drive the future of music and ensure that consumers have continued access to music across a variety of platforms, venues and services."

The goal of the coalition is to create greater transparency 1) in determining who owns what, with that information available in an up-to-date, accessible format such as a copyright database; 2) in providing information in an easily trackable format about where the money goes that music users and distributors pay; and 3) in establishing clear billing practices that include licenses that accurately reflect actual usage, identify the space where the music is heard, and frequency that music is played by a venue, and also invoices that state clearly what a location must pay by law or by contract and when they are exempt. Other associations in the MIC coalition include the American Beverage Licensees, American Hotel & Lodging Association, Brewers Association, Computer &

Communications Industry Association, Consumer Technology Association, Digital Media Association, National Association of Broadcasters, National Restaurant Association, NRB Music License Committee, National Retail Federation and Radio Music License Committee.

California Bev Alc Control Counsel on the Tribulations of Regulation

7.21.17 from Beer Business Daily:

Matt Botting, general counsel for the California Department of Alcoholic Beverage Control, took the stage at the Beer Institute meeting earlier this week to talk regulation.

NOT A WHOLE LOT OF RESOURCES DEVOTED TO TRADE PRACTICE. It seems like an age of increased regulation, with high-profile violation flags from Massachusetts to California.

But Matt put it into context: They have 140 sworn peace officers to enforce California law against alcoholic licensed businesses. Basically these guys deal with sales of alcohol to minors and drunks, problems with drug deals and prostitution, and the like.

Trade practice enforcement, however, is another story. "If you ask most people outside this room" about that, they are "clueless" or "don't care," said Matt.

So "devotion of resources" to trade practice regulation is fairly low -- involving three or four supervising agents. And investigations are "largely complaint driven," usually from competitors. ("You're all diming each other out, which is great for us," he said.)

THE EXAMPLE OF A-B'S RECORD SETTLEMENT. "We're kind of the referee in the game here," Matt said. "We like to keep things moving along." But "every now and then someone does something really stupid and we have to throw a flag."

He referenced the groundbreaking A-B settlement from earlier this year. Recall, after a year-long investigation into alleged pay to play activities, involving branch wholesalers and a bevy of retailers, A-B agreed to pay a record $400k to the ABC (half to be paid now and half in escrow for 3 years; if A-B's branches "behave," the other $200k will be returned) [see BBD 03-08-2017].

In that case, it was indeed competitors that'd tipped them off to practices that Matt says involved "harmed competition" and "reducing access to market." They were provided "with a lot of information that pointed us in the right direction."

Still, "some of the stuff didn't pan out," or couldn't be established, when they dug in. "But we did identify a number of issues that we felt were inconsistent with the statutory provisions related to providing certain equipment to retail licensees." That case involved about 35 "actions" or accusations against retailers for soliciting or accepting things of value, and against a number of A-B wholesalers.

But Matt gave A-B props. "Once we started really getting into this investigation, A-B came to us and recognized they had an issue, and wanted to work with us from get go on how to resolve this," he said. "I give them a great deal of credit for that; it's a change from things we often see." He said they have "a great relationship moving forward."

That begged the question: Is the seemingly heightened regulatory climate a push from the regulators? Not exactly, says Matt. There "does seem to be this heightened interest in this." But he again pointed to competitor tip-offs rather than more proactive agencies as the driving force.

"THERE'S A CHALLENGE FOR US TO SEE WHAT'S GOING ON IN THE MARKETPLACE." "There's a challenge for us ... to really see what's going on in the marketplace," Matt explained. It's "not always apparent just looking at something that there's a problem."

The reality is, it's not a perfect system. "We've got 90,000 licenses in the state of California; something like 45,000 are retailer licenses. There's a lot of potential activity for us to look at. So - direction helps. We often get a lot of low-hanging fruit. Often times, we're accused of not enforcing. And when we do, it's like we go over[board]. [Or] too focused on the minutia." That outside "direction" is partly why "it looks like we may be picking on someone."

SMALL BREWERS CAN WREAK HAVOC, TOO. In other regulatory anecdotes: Panel emcee Benj Steinman of BMI asked whether the state's stable of green craft brewers were causing more regulatory issues.

They had about 554 small beer manufacturers in 2015; by the end of 2016, it shot up to about 750.

So there are a lot of little guys that "don't know the rules; we were seeing a lot of violations," said Matt, like giving extra kegs away to accounts. It got worse as the segment grew; violations became "rampant."

"The best thing that ever happened to us was that they got organized, with the California Craft Brewers Association," he said. They started to self-police, and seek clarifications and help.

There's still "plenty of Wild West out there," but it's "better now than 6,7 years ago."

EXEMPTIONS -- LIKE THE SIX RETAIL INTEREST ALLOWANCE - DON'T SWALLOW RULES. Since the 1950s, cross ownership and advertiser exceptions to the code "have made life so much more complicated" for the agency.

Speaking of cross-ownership: do "exceptions swallow the rule?" Benj asked. Matt doesn't think so. Take the locally allowable six retail interests for beer manufacturers: "Six. Who is gonna dominate the world with six places to sell your beer at retail? It says 'selling at retail,' it doesn't mean, holding retail licenses ... it means you can operate a taproom under a beer manufacturer -- what we call a duplicate -- license. So you're not actually making the beer, but can sell your own beer. That's considered a retail outlet. None of you in this room are going to dominate the California market ... by selling at six locations."

BUT CONFLATION OF PRIVILEGES ARE A THREAT TO THE SYSTEM. So while exemptions may not be a huge threat to the system, Matt says there's been a "creep over the last decade or so [of] conflation of privileges."

"Retailers are no longer just retailers," Matt said. There are retailers with certain manufacturing privileges, but they are still retailers." Meanwhile, many manufacturers have retail privileges built into their licenses.

"That creates confusion to the consumer. ... So we see [provisions] that would allow a winery immediately adjacent to a brewery, for those two licenses now to share a space under their respective licenses jointly ... that's a fundamental shift of the way licenses privileges have worked in Cali up to this point."

The Case of the Counterfeit Krug Champagne

LVMH has settled a legal fight with auctioneer Acker Merrall & Condit over a bottle of 1947 Krug. What does it mean for wine collectors?

Samantha Falewée Posted: July 18, 2017

It was a press release that caught the wine collecting world's attention. On July 6, luxury goods conglomerate LVMH issued a statement announcing that a Hong Kong court had settled a case between it and international auction house Acker Merrall & Condit over a counterfeit bottle of Krug Champagne.
While both parties expressed satisfaction at settling the matter, the spat over the bubbly was a rare public battle between a winery and an auction house. And it may be a sign that wine producers are pushing more forcefully on rare wine merchants when it comes to fighting counterfeits.

"In the final ruling, Acker Merrall & Condit acknowledges and admits that it infringed upon Moët Hennessy registered trademarks, and passed off a product not the genuine Krug Champagne as and for such a Champagne," read the statement.

The roots of the claim stretch back five years to a blockbuster auction by Acker in Hong Kong. On Sept. 21 and 22, 2012, at the Grand Hyatt Hong Kong, a single bottle of Krug Collection 1947 sold for more than $13,500.
It's not known who bought the bottle. But apparently it came to Krug's attention. Moët Hennessy brought a court action for trademark infringement to the High Court of the Hong Kong Special Administrative Region, after it determined the bottle was counterfeit. (Neither Krug nor LVMH responded to requests for comment).
Wine Spectator has learned that the suspect bottle was from the cellar of one of the world's most famous Champagne collectors. The lot was part of a Champagne collection consigned by Robert Rosania, a real-estate mogul. Acker issued a press release after the sale that touted the 1947 Krug. "The legendary Champagne Collection of Robert Rosania generated immense interest from worldwide collectors and realized nearly $1 million in total," stated the release.
Rosania was one of the "Twelve Angry Men," a group of high-flying wine collectors known for extravagant tasting dinners together. Acker president and CEO John Kapon was part of the group, frequently blogging about the rare collectible wines they tasted. Also connected to the group was Rudy Kurniawan, the infamous wine counterfeiter who is now serving time in federal prison.
Rosania could not be reached for comment. But in a 2007 interview with Wine Spectator, part of a collecting roundtable that included Kapon, he remarked that counterfeits were a threat and working with reputable merchants was crucial. "This auction season is the safest time to buy the oldest and rarest," he said. "Because every auction house is all over it."

New Rules
After LVMH released its statement, Acker Merrall & Condit (Asia) responded with its own, stating that it is "pleased to have amicably settled" the case. But the auction house takes issue with the accusatory wording of LVMH. "Contrary to the insinuation of MHCS's press release, there was no trial and, as such, the court never ruled against Acker on any disputed issues of fact."
In an email to Wine Spectator, Kapon noted, "Although Acker (Asia) and its affiliated entities have sold tens of thousands of bottles of Krug Champagne, it bears emphasizing again that this case involved what was determined to be a single counterfeit bottle."
The court settlement has garnered interest in the wine community due to the high-profile nature of the players involved, and because it represents a shift in the way counterfeits-once a taboo topic-are being handled in the industry.
Typically, luxury goods companies avoid discussing fraud because the mere affiliation, even a combative one, tarnishes the brand's perceived ability to project quality and exclusivity. Wineries typically contacted auction houses and merchants quietly, asking for suspect bottles to be withdrawn. A rare exception was Burgundy's Laurent Ponsot, who vocally called attention to fake bottles from his family domaine that had been consigned to a 2008 Acker auction in New York.

Since Kurniawan's conviction, auction houses have stressed that they are investigating provenance and authenticating bottles more thoroughly. Whether

that's true is a matter of debate. But wineries are also becoming more vocal about protecting their brands.
As announced by LVMH, the court settlement details that Acker Merrall & Condit will conduct "appropriate authentication procedures" moving forward to ensure more stringent verification measures when handling all Moët Hennessy Champagne.

In the email, Kapon said, "To my knowledge, Acker was the first wine auction business in the world to retain third-party inspectors to both inspect and authenticate many of the wines we sell before they ever hit the auction block." He calls the process "groundbreaking."
"The bottom line is that, in my opinion, our inspection processes and customer service are the best and most robust in the industry. And our wide international client base apparently agrees, which is why, year after year, Acker remains atop the wine auction world."

In the future, more wine and luxury goods producers may become vocal as they work to protect their images with consumers. "I think you're going to see more lawsuits coming against vendors," said Maureen Downey, who founded wine management company Chai Consulting and is regarded as a top authority on counterfeit wines. "You're going to see that people recognize the only way to start chipping away at the problem that is counterfeit wine is one spoonful of the mountain at a time."
"Every time there's a court case that comes against one of these fraudsters and it's successful, people will recognize 'This vendor is selling bad wine, and he's not even apologetic about it.'" Downey says. "Hopefully that's going to start affecting vendors' businesses, and then vendors will be forced to have better business practices."

Restrictive concealed carry law violates Second Amendment, DC Circuit rules
POSTED JULY 26, 2017, 8:40 AM CDT
BY DEBRA CASSENS WEISS
A federal appeals court has blocked a Washington, D.C., gun law that that restricts concealed carry permits to those who can show a good reason for carrying firearms.

The U.S. Court of Appeals for the D.C. Circuit ruled 2-1 on Tuesday that the restriction violates the Second Amendment because it amounts to a total ban on the right to carry a gun for most residents. The Wall Street Journal (sub. req.), Reutersand the Washington Post covered the decision (PDF).
"At the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions," Judge Thomas Griffith wrote for the majority. Traditional restrictions include licensing requirements, but not special-needs requirements, he said.
"The Second Amendment erects some absolute barriers that no gun law may breach," Griffith wrote.
At least four other federal appeals courts have upheld similar restrictions, while a fifth has recognized a constitutional right to carry a gun outside the home, according to the Wall Street Journal.
The Washington, D.C., gun law says the police chief "may issue" concealed carry permits to those who show "good reason to fear injury to his person or property

or has any other proper reason for carrying a pistol."
To show "good reason," applicants have to show evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life. District regulations interpret "other proper reason" to include employment involving the transportation of cash or valuables.

Washington, D.C., is considering asking the full court to hear the appeal, which had consolidated two cases-Wrenn v. District of Columbia and Grace v. District of Columbia.

Date:July 18, 2017

PROPERTY DEVELOPERS PUSH FOR OPEN DRINKING ON CITY STREETS

posted by: Admin in News

Property developers trying to create buzz for open-air shopping districts are lobbying regulators to relax open-container rules and allow patrons to walk around streets and parks with alcoholic beverages in hand.
As landlords hustle to get customers into their properties, they are looking to tap into growing demand for food-and-drink experiences. The hope: that lively atmospheres will encourage patrons to linger and shop.
Three years ago, Atlanta-based developer Vantage Realty Partners LLC proposed an open-container ordinance in Duluth, Ga., where it developed a retail and entertainment complex called Parsons Alley in a historic district downtown. The ordinance was passed this year.
"Every restaurant and retailer loved it. It increases their sales. Their customers don't have to stay confined in their premises and can walk to the town green or fountain with a drink," said Chris Carter, co-founder of Vantage Realty.
Of the 45,000 square feet of space at Parsons Alley, roughly 70% is leased or sold and the firm is picking tenants for the remaining space.
The retail sector is slumping as internet shopping increasingly eats into revenue. Retail landlords are trying a variety of tactics to boost foot traffic at their properties, from adding restaurants and entertainment venues to creating open-air districts downtown.
Local city councils and zoning boards from Georgia and Alabama to Texas and Iowa in recent months have proved amenable to changing land-use and public-drinking ordinances to boost activity in once-bustling shopping districts.
"I don't know why alcohol is so important, but if you have a brew in hand and walk around, you'd enjoy it more, especially when there's good weather and live music," said Marc Moen, partner and owner of property developer Moen Group, a builder and operator of condominiums, retail, office and hotel buildings in the downtown area of Iowa City, which passed an open-container measure in May.
Last October, the board of commissioners of Forsyth County, Ga., permitted businesses in certain development districts to serve alcoholic beverages in to-go cups, with certain limits.
County officials understood the challenges in the retail environment, said Patrick Leonard, principal at RocaPoint Partners, which is building a $370 million, 135-acre mixed-use project in Forsyth County called Halcyon that would include plenty of lawn space.
"It seems to be a trend for retail property to help get people outside," said Mr. Leonard, adding that the looser open-container regulations "absolutely helped us

lease retail space."
Iowa City's ordinance permits patrons to carry open containers on sidewalks and streets between licensed premises. That allowed the Iowa City Downtown District business association to apply for a temporary license for a downtown block party, which took place in June.
"It's an area that attracts all ages, little kids, grandparents, working adults and college students. Residents love being around activity and young people," said Mr. Moen, who supported the open-container ordinance.
In the downtown block party last month, cups were sold to partygoers who had to patronize bars and restaurants in the district to be served. The organizers also arranged for Uber pickup and drop-off points and parking garages nearby that offered free overnight parking.
"We wanted to make sure the event is safe and people are getting home," said Nancy Bird, executive director of Iowa City Downtown District, adding that there were no incidents. The party targeted 15,000 revelers, and 30,000 showed up.
Ohio in 2015 passed a bill allowing open-container zones, which opened the door for municipalities to do so. In the New York state Senate, lawmakers in February proposed a bill to allow patrons of a licensed business located within a leisure or recreation district to leave with alcohol in an open container if they stay within certain boundaries. The bill passed the Senate by a vote of 61 to 1 but has yet to be signed by the governor.
Pushing for change on public drinking often takes time. College towns, in particular, are resistant to measures that could lead to disorderly behavior.
Mr. Carter of Vantage Realty in Atlanta, said that having people visit Avalon, another retail-mixed use development 10 miles away where an open-container ordinance had already passed, helped his campaign in Duluth.
"They see how robust Avalon is. They had to touch it and experience it. And they realized it wasn't so scary," said Mr. Carter.
Source: The Wall Street Journal, July 18, 2017 12:18pm PST
Author: Esther Fung/ esther.fung@wsj.com

Kansas passed a common consumption area bill this year.

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