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Duncan Liquor Law Letter

DUNCAN LIQUOR LAW LETTER

May, 2018
PART ONE

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.

"Whisky is liquid sunshine."~ George Bernard Shaw

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On April 20, 2018 the Kansas Court of Appeals issued its opinion in the case: State v. Barta, No. 117,990 arising from the Ellsworth District court. Barta was charged with DUI. He moved to suppress the breath-test results, contending that his consent to the test was coerced and involuntary. He challenged the constitutionality of the Kansas implied consent law and argued that the breath test was an unreasonable search in violation of the Fourth Amendment to the U.S. Constitution. The district court denied Barta's motion and found him guilty of a second time DUI.

On appeal, Barta argued that the State violated his constitutional rights by subjecting him to a warrantless breath test pursuant to the Kansas implied consent law. He contended that the State did not prove that his consent to the test was voluntary and free from coercion. The court had ruled in 2017 you could not threaten a driver with a crime if they refused the breath test.

Under the stipulated facts of this case the Court of Appeals ruled that Barta was not improperly induced into consenting to a breath test for alcohol. The advisory he was provided did not vitiate his consent to the test. His consent to the test was voluntary and free from the coercion. The Court stated that "Because K.S.A. 8-1001 et seq. is remedial in nature and is to be liberally construed it is generally recognized that substantial compliance with statutory notice provisions will usually be sufficient' when advising a driver of his or her rights under the Kansas implied consent law, provided that the notice in question 'conveyed the essentials of the statute and did not mislead the [driver]."

Alas for Barta, the district court did not err in denying Barta's motion to suppress the results of his breath test and in finding him guilty of a second-time DUI based on the stipulated facts.

full decision at:
http://www.kscourts.org/Cases-and-Opinions/Opinions/Unpublished/Ctapp/2018/20180420/117990.pdf

Kombucha battle: Trader Joe's, others lie about alcohol content in kombuchas, lawsuit claims

By Michelle Robertson, SFGATE
Published 3:26 pm, Wednesday, April 11, 2018
A kombucha battle has descended upon California's courts.
A series of lawsuits filed Monday on behalf of a California kombucha company alleges the kombucha beverages produced by Trader Joe's and other manufacturers are more alcoholic and sugary than advertised.
Tortilla Factory LLC, which owns Los Angeles-based Kombucha Dog, claims six kombucha producers - Trader Joe's Co., Better Booch LLC, Health-Ade Kombucha LLC, Humm Kombucha LLC, Makana Beverages Inc. and Rowdy Mermaid Kombucha LLC - tricked consumers into purchasing beverages they believed had no or minimal amounts of alcohol and sugar. Prior to the four lawsuits Monday, two were filed in December.

The filings claim the companies' failure to properly disclose the alcoholic content of their kombuchas jeopardizes "health and safety" of consumers, who may have unwittingly consumed the drinks when pregnant or breastfeeding, or served them to minors.
Plus, Kombucha Dog, which has an alcoholic content high enough to be sold in beer sections of stores, lost money.
"They can sell in more stores, sell next to juices," said Stephen Weisskopf of Levato Law, who is representing Tortilla Factory. "My client's product has to sell next to Budweisers."
The complaint filed against Trader Joe's alleges Tortilla Factory "lost profits, failed to obtain the market share it would otherwise have obtained, and was denied a fair marketplace."

Michael Faye started Kombucha Dog more than a decade ago to combine his passion for holistic living and pooches. Each bottle of Kombucha Dog is decorated with a photo of a Los Angeles rescue dog in need of a home.
Despite having won awards and recognition from local media for his "traditionally fermented" product, Faye "can't compete in the marketplace because he's not on a level playing field," Weisskopf said of his client.

But more importantly, "it's about consumers knowing what they're buying, otherwise, there's dangers associated with it."

Kombucha has long been a sticky product for manufacturers, who must contend with stringent state and federal alcoholic beverage laws. The drink, which skyrocketed in popularity among the health-food crowd in recent years, is made by combining tea and sugar with a culture of yeast strains and bacteria, and sometimes fruit juice. The mixture of tea and sugar triggers fermentation, meaning most kombucha drinks contain some amount of alcohol.

Here's where things get tricky: Drinks with alcohol contents of .5 percent or more are classified as alcoholic beverages under federal law and subject to strict regulation. A beverage that contains .5 percent or higher alcohol by volume (ABV) - even a drink touted as a health beverage, like kombucha - is subject to the same state and federal laws that regulate other alcoholic beverages, including limits on where and to whom the product can be sold.

The federal Alcohol and Tobacco Tax and Trade Bureau (TTB) generally classifies kombucha beverages with alcohol contents of .5 percent or higher as beer. This means the kombucha producer must qualify as a brewer, pay taxes to the federal government, file a formula with TTB and label bottles with a warning from the U.S. Attorney General.

The six companies being sued by Tortilla Factory claim their beverages have alcohol contents below .5 percent. Independent testing sponsored by Tortilla Factory found these claims to be false, Weisskopf said.

The "majority" of products they tested were above .5 percent, he said.

Trader Joe's refused to comment on pending litigation. The five other companies could not be reached for comment.

According to Weisskopf, the kombucha industry is rife with violations. He says many of the kombuchas on the market have alcohol contents higher than .5 percent, and in some cases, "considerably more, approaching 1 or 2 or 3 percent." Standard light beers contain anywhere between 2 and 5 percent ABV.

Faye's Kombucha Dog drinks are brewed from a "traditional recipe," according to the company's website, and most contain around 1.4 percent ABV.

"Rather than dilute the flavor and the antioxidant and probiotic potency to reduce the alcohol content, we prefer to bottle as is, so Kombucha Dog is a 21+ beverage," the website says. According to the company, some kombucha makers dilute their beverages with water to skirt alcohol restrictions.

Weisskopf said they plan to sue for "significant damages." Other kombucha makers may come under fire in the coming months.

"We're still investigating other companies," he said. "We'll make determinations down the road whether there are additional lawsuits."

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On Friday the 13th (of April) KY OPENS THE DOOR FOR DTC SPIRITS SALES. On Friday, Kentucky Gov. Matt Bevin signed a bill into law to allow distilleries to ship spirits directly to consumers. The Kentucky Distillers Association says the bill will boost both tourism and profits

TX ABC FILES APPEAL TO KEEP SPIRITS SALES OUT OF WAL-MART WSD 4.18.18

Last month a district judge struck down a Texas state law that prevents public companies like Wal-mart, Costco and Target from selling spirits in the state. But the Texas Alcohol Beverage Commission (TABC) and the Texas Package Store Association (TPSA) aren't ready to give in just yet.

QUICK RECAP. Wal-mart can sell wine and beer in Texas, but is prohibited from owning a package store permit and therefore from selling spirits. The retailer claims it is irrationally banned for being a public company because private package store owners in the state are permitted to sell spirits as are publicly traded hotel corporations.

US District Judge Robert Pitman agreed, ordering the TABC to cease enforcement on the ban on public corporations, the five permit limit and the consolidation exception for family members [see WSD 03-21-2018].

But this fight's not over yet. Last week the TABC and intervenor TPSA filed for an appeal. Moreover, the two filed a motion to stay the judge's order until after the appeal proceedings, which Judge Pitman granted. In its motion to stay, the TABC contends that the public corporation ban was not created to discriminate, rather it was created to limit the number and size of businesses holding package-store permits. The agency also argues the injunction would force the agency to shift resources to review a slew of new applications for package store permits.

"States necessarily suffer irreparable injury when their laws are enjoined. This is particularly true where, as here, an injunction destroys a decades-long status quo and frustrates Texas's framework for regulating retail liquor sales," per court documents. "The Court's judgment if upheld on appeal, will dramatically alter the Texas liquor market and the entities that will be able to survive in that market," adds TPSA.

Wal-mart did not oppose the motions to stay, but it hasn't been silent about what's in them either. The retailer says the motion is "filled with hyperbole, grossly inaccurate conjecture, and descriptions of the impact of the Court's order that are not grounded in fact or reality."

From SCOTUS blog (and I was a bit surprised 'cause folks were saying this was a slam dunk case for the states, maybe not)...

...

Argument analysis: Justices are divided on whether to overrule precedents on sales-tax collection by remote sellers

Anyone who thought that just because one member of the Supreme Court had invited a test case about whether to overrule Quill Corp. v. North Dakota meant that every justice was prepared to do so quickly got a reality check this morning. In South Dakota v. Wayfair Inc., the court is considering whether to overrule Quill, a 1992 decision that the Constitution's commerce clause prohibits the states from requiring out-of-state retailers that do not have a physical presence in the state to collect tax on sales to state residents.

South Dakota Attorney General Marty Jackley explained why he believed the court should reconsider the older ruling.
"There are two very significant consequences brought about by Quill," said Jackley, a Republican who happens to be running for governor this year. "First, our states are losing massive sales tax revenues that we need for education, health care, and infrastructure. Second, our small businesses on Main Street are being harmed because of the unlevel playing field created by Quill, where out-of-state remote sellers are given a price advantage."

He quickly ran into a non-stop series of questions from Justice Sonia Sotomayor, who was not slowed by a fall at her home on Monday morning that, according to the court's public information office, resulted in a broken left shoulder.
"I'm concerned about the many unanswered questions that overturning precedents will create a massive amount of lawsuits about," she told Jackley.
One concern was about retroactive liability for sellers if the court changes the physical-presence requirement. South Dakota has specifically ruled out retroactivity in the 2016 law it passed that seeks to subject out-of-state sellers to sales tax liability based on an economic presence rather than a physical nexus. But other states could seek such retroactive liability, Sotomayor says.
She had more. "How much contact is enough to justify placing this obligation on an out-of-town seller?" Sotomayor said. And while South Dakota and its allies have pointed to sophisticated software programs that help sellers determine their sales tax obligations from the estimated 12,000 taxing jurisdictions in the United States, Sotomayor asked, "What happens when the tax program breaks down, as it already has for the states who are using it, and merchants can't keep track of who they've sold to?"

The high stakes of the case seemed evident throughout the argument, though the justices took note of the fact that there was wide disagreement about the relevant numbers.
South Dakota contends that it is missing out on about $50 million in sales tax revenue under the Quill rule, a significant sum for a state with no income tax.
The state also cites in its brief an estimate from researchers that all the states and local jurisdictions with sales taxes are missing out on $34 billion in revenues because of Quill this year.
The three web retailers who are respondents in this case - Wayfair Inc., Overstock.com Inc., and Newegg Inc. - cite a 2017 Government Accountability Office study that is more conservative, offering an estimate of lost revenue between $8 billion and $13 billion for this year.
"You have wildly different estimates of costs, revenues, and what states are losing or not," Justice Stephen Breyer pointed out to Jackley. He also asked about retroactivity and the standard for determining sales-tax liability.
"When it comes to retroactivity, the states don't want to address this retroactively, which is why South Dakota, illustrative of that, has indicated we're prospective only," Jackley said. "In the briefing, 38 other states have indicated their laws would prevent retroactivity."

Chief Justice John Roberts asked Jackley whether the nation was perhaps past the stage when many large Internet retailers were not collecting sales taxes, in part to enjoy a price advantage over brick-and-mortar stores.

"The suggestion in some of the briefs is that this is a problem that has peaked in the sense that the bigger e-commerce companies find themselves with physical presence in all 50 states," Roberts said. "So they're already covered. And the work-arounds that some of the states have employed are also bringing more [sellers] in. And if it is, in fact, a problem that is diminishing rather than expanding, why doesn't that suggest that there [is] greater significance to the arguments that we should leave Quill in place?"

Jackley replied that e-commerce continues to expand, and the states are expected to miss out on some $100 billion in revenue over the next 10 years.
Deputy U.S. Solicitor General Malcolm Stewart took to the lectern on South Dakota's side, and he pointed out that whether the court overrules Quill or its 1967 predecessor, National Bellas Hess, Inc. v. Illinois Department of Revenue, leaves them in place, or does something in between, "Congress can act."
Deputy Solicitor General Malcolm L. Stewart (Art Lien)
"Congress can impose whatever solution it believes is appropriate," said Stewart. In the courtroom on Tuesday were several members of that body, including Sen. Lamar Alexander, Republican of Tennessee; Sen. Mike Enzi, Republican of Wyoming.; and Sen. Heidi Heitkamp, Democrat of North Dakota. Those three, along with Sen. Richard Durbin, Democrat of Illinois, filed an amicus brief on South Dakota's side that argues that Quill should be overruled but that "Congress is fully prepared to act when needed."

The chief justice pressed Stewart on whether there is a constitutional minimum by which a small Internet retailer facing the burdens of complying with state sales-tax obligations might have a claim for relief.
Stewart said there is no such minimum under the court's dormant commerce clause jurisprudence. A retailer shipping even just one good into a state could be subject to the regulatory burdens of that state's tax requirements. But in an answer to a question from Justice Ruth Bader Ginsburg, Stewart said that Congress could address that issue.

When George Isaacson, the Lewiston, Maine, lawyer representing the retailers, began his argument time, he quickly ran into a concern from Ginsburg.
"How about going back to the very basic issue?" she said. "The assertion is that asking an out-of-state seller to collect tax on goods shipped in-state discriminates against interstate commerce. But, as I see it, why isn't it, far from discriminating, equalizing sellers. That is, anyone who wants to sell in-state, whether an in-state shop, an out-of-state shop, everybody is treated to the same tax collection obligation. All who exploit an in-state market are subject to the in-state tax. Why isn't that equalizing rather than discriminating?"

Isaacson replied, "Well, the dormant Commerce Clause takes as its principal objective the maintenance of a single national marketplace that is free and accessible to all participants." He pointed out that at the time of the Bellas Hess decision in 1967, there were some 2,300 taxing jurisdictions, a figure that had jumped to 6,000 at the time of the Quill ruling in 1992, and to today's estimate of 12,000. "So the concern that the Bellas Hess and Quill courts had was the notion that a free and open market would be encumbered by that degree of complexity," Isaacson said. "And that complexity has only worsened over time."
Justice Neil Gorsuch, who as a member of the U.S. Court of Appeals for the 10th Circuit wrote a concurrence that questioned the vitality of Bellas Hess and Quill, pressed Isaacson on why, when brick-and-mortar stores must comply with sales

tax obligations, the court should favor " a particular business model that relies not on brick and mortar but on mail order?"

"I understand in Bellas Hess the court was concerned about a nascent, small mail order industry," Gorsuch said. "Those concerns seem a little antiquated today."

Isaacson replied that "Borders count. States exercise their sovereignty based upon borders, territorial limits. It's a key part of horizontal federalism in this country. So, if there's going to be some standard that determines when is a company subject to the tax jurisdiction of a state, using the territorial limits of that state make sense."

Isaacson said that Congress would be the best branch to address the issues of sales-tax collection for out-of-state sellers, such as by requiring one tax rate per state for all remote sales. "It can require a clearinghouse that can be used for the processing of payments," he said. "It can require standard uniform definitions of products so that food and sportswear and clothing doesn't mean one thing in one jurisdiction and another elsewhere."

When Sotomayor asked Isaacson whether there was anything the court could do to signal to Congress "to act more affirmatively in this area," Isaacson said, "I would welcome a decision from this court that would indicate that Congress should move forward with consideration and action upon legislation."

This prompted an observation from the chief justice that lawmakers perhaps have already decided "that this is something they're going to leave the way it has been for, whatever it is, 25 years." "I think it would be very strange for us to tell Congress it ought to do something in any particular area," Roberts said. "Just a thought."

Kennedy, who had invited the challenge to Quill with his concurrence in 2015's Direct Marketing Association v. Brohl, asked only a couple of questions, in which he appeared to be restating the arguments of Isaacson or others. He referred to a proposition, whether it was that of the parties or his own, that "this court has made a statement of constitutional law that ... has now, especially in light of the cyber age, proven incorrect."

There were multiple references to the retail denizens of the cyber age. Roberts and other justices cited Amazon several times, even though the web retailing giant is not involved in the case as a party or amicus. Justice Elena Kagan cited Amazon as well as sites such as eBay and Etsy.com that might seek to take over tax-collection duties for their smaller, affiliated sellers.

Justice Stephen Breyer set himself apart by asking what it would cost "for a mandolin seller who sells mandolins on the Internet to sell them in 50 states? How much does it cost him to enter that market?"

And Breyer wondered how much it had cost "Sears, Roebuck" to enter the national market. Perhaps sidestepping the recent struggles of the storied catalog and department store retailer, he added, "You know, that's an ancient name, but they did all right."

A decision in the case is expected by late June.

[Disclosure: Goldstein & Russell, P.C., whose attorneys contribute to this blog in various capacities, is among the counsel to the petitioner in this case. The author of this post is not affiliated with the firm.]

The internet sales tax Supreme Court case is huge, but won't impact wineries much

April 16, 2018

By Jeff Carroll, Vice President of Product and Marketing

The US Supreme Court (SCOTUS) will begin hearing arguments this week in the case of South Dakota v. Wayfair, Inc., and a likely outcome is that states like South Dakota will gain the authority to compel sellers like Wayfair to remit sales tax, even if they do not have a physical presence in the state. If the Justices agree that South Dakota has the right to tax these out-of-state ("remote") sellers, wineries will probably not see a tremendous amount of change as a result though.

At issue in Wayfair is whether SCOTUS should overturn a 1992 decision called Quill Corp. v. North Dakota that created the current standard where a state can only go after out-of-state sellers (including eCommerce businesses) for sales tax remittance if they have "substantial nexus" in that state. A simple scenario for thinking about what nexus means is one where the seller has a physical presence because of an office, a distribution warehouse, or an employee in the state. However, nexus definitions can be tricky, and states tend to define and enforce nexus differently.

Wineries already pay sales tax in most states

US wineries are already used to dealing with complicated sales tax requirements from state to state. The 1997 Model Direct Shipping Bill that has been used as a guide in state legislatures across the country since then includes the requirement that wineries remit sales taxes to the destination state.

If located outside of this state, annually pay to the [State Revenue Agency] all sales taxes and excise taxes due on sales to residents of [State] in the preceding calendar year, the amount of such taxes to be calculated as if the sale were in [State] at the location where delivery is made.

The requirement to remit sales tax typically comes as a prerequisite to obtaining a license from the state Alcoholic Beverage Control (ABC) agency for the purpose of shipping wine directly to consumers. As a result, unlike most small- to medium-sized businesses (SMBs) that are operating under the Quill guidance, wineries that are licensed to ship to consumers are already remitting sales tax to the destination state in the majority of states that allow direct shipping.

Therefore, if SCOTUS overturns Quill, it will have enormous implications for most SMBs in the United States, but US wineries will likely see minimal change to the status quo.

South Dakota's new law that is being challenged by Wayfair says that businesses that sell more than $100,000 per year or make more than 200 transactions (sales) per year must register to pay sales tax. If you assume that the average order size for wine shipments is roughly $200 though, 200 transactions for wineries means about $40,000 in annual sales. Since the majority of wine shipments come from small wineries, most wineries will also generally fall under this $100,000 / 200 transaction test if it becomes the new standard for sales tax registration.

State by state analysis

As can be seen in the map, there are effectively five different types of states from the perspective of a winery (Prohibited, NOMAD, Required, Not Required, and Unique Rules). I'll break down each of the groups below.

Prohibited: The set of states that still do not allow wineries to ship to consumers for off-site sales includes Utah, Oklahoma (coming October 1st), Arkansas, Mississippi, Alabama, Kentucky, Delaware, and Rhode Island. Since shipping is prohibited in these states, the question of sales tax registration is moot unless wineries decide to ship non-alcoholic items like winery merchandise or clothing.

No Sales Tax: There are five states that do not require sales tax, and those states are commonly referred to as the NOMAD states. New Hampshire, Oregon, Montana, Alaska, and Delaware all fall into this category. New Hampshire presents a special case that I'll talk about below.

Unique Rules: Wyoming, Kansas and New Hampshire each have special taxes on wine products that are sometimes referred to as "markup taxes". These are a hybrid between an excise tax and a sales tax where a percentage is applied to the retail value of wine sold to consumers in the state. In New Hampshire, for example, even though it is a NOMAD state that doesn't require any sales tax, wineries must pay an 8% markup "fee" (they despise the word "tax") on the retail value of wine shipped to the Live Free or Die state.

Sales Tax Not Required: Wineries with no nexus are not currently required to register for sales tax in Colorado, Minnesota, Iowa, Missouri, Florida, Washington D.C., and Massachusetts. Minnesota is considering a bill this year that would create a permit and the requirement to register for sales tax. Massachusetts is a special case where sales tax is required for businesses that sell non-alcoholic products, but wineries are exempted because of a ballot initiative that repealed sales tax on alcohol. Also, Wine Institute recommends that all wineries voluntarily register to collect and remit sales tax in Colorado because of a unique reporting requirement. That leaves Minnesota, Iowa, Missouri, Florida, and Washington D.C. as states that could potentially revisit their sales tax requirements for wineries, depending on how SCOTUS rules in Wayfair.

Sales Tax Required: In all of the other states not listed above, wineries are required to register for and remit sales tax. Sometimes states requires a flat rate for the entire state, and sometimes states require sales tax at the local jurisdiction (city and county) level as well. In Texas, wineries that do not have nexus are required to pay the base state rate of 6.25% only, but wineries with nexus are required to pay local taxes in the specific jurisdiction(s) where nexus occurs.

Will Congress act?

SCOTUS experts are predicting the "Kill Quill" movement to prevail, meaning that South Dakota will see its law upheld, and the 1992 Quill decision will be effectively overturned. However, much will hinge on the scope of the ruling and therefore how states can craft future laws to take advantage of the new precedent. Assuming Quill is overturned, states will surely rush to their legislatures to take advantage of their new-found ability to close the tax gap between their in-state businesses and out-of-state businesses that are not collecting sales tax. Given that state and local governments lose out on at least $26 billion of uncollected sales tax annually according to a 2015 estimate, the incentive for states to act quickly is very high. Similar to the flurry of state legislation following the 2005 Granholm v. Heald SCOTUS decision, we'll see a new type of rush as states will likely read Wayfair closely to improve their budget gaps by finding a constitutional way of collecting tax from remote sellers.

The wildcard in this sales tax battle is Congress, where interstate sales tax requirements could be clarified. The SCOTUS decision in Wayfair could prompt Congress to finally settle the score on sales tax law instead of relying on court decisions. Congress has made multiple attempts to create new laws around internet sales tax over recent years, but to no avail. If Congress does act though, it would be possible if not likely that the outcome would be a comprehensive simplification of sales tax rules. One of the central claims from the Kill Quill contingent is that the world has changed significantly since 1992 and sales tax software has made it much easier to comply with state and local laws. However, complying with 50 sets of state and local jurisdictional rules is unbelievably difficult for SMBs. Sales tax software, which can be expensive and cumbersome, is certainly not a panacea. Following this SCOTUS decision, regardless of the outcome, Congress should act to provide clear guidance and to simplify the process for SMBs.

As always, contact us if you need help getting registered, calculating sales tax, or remitting sales tax returns to the states.

April 22, 2018 Article By Marc E. Sorini
McDermott Will & Emery Alcohol Law Advisor

Durational-Residency Requirements for Alcohol Beverage Retail Licensees Held Unconstitutional

On February 21, 2018, the US Court of Appeals for the Sixth Circuit published its opinion in Byrd v. Tennessee Wine and Spirits Retailers Association, No. 17-5552. The decision, which includes a partial dissent, affirms a Middle District of Tennessee decision finding that the "durational-residency" (residency) requirements imposed by Tennessee law for alcohol beverage retail licensees are unconstitutional under the "dormant" Commerce Clause.
Tennessee law requires an applicant for a retail license to have been a resident of Tennessee for at least the two-year period immediately preceding the submission of the license application. For corporate license applicants, the two-year requirement applies to any officer, director or stockholder of the corporation. Moreover, to renew such a license the law requires Tennessee residency for at least ten consecutive years.

Two prospective retail applicants that did not meet the two-year residency requirement, notably including the Tennessee affiliate of Total Wine Spirits & Beer, sought licenses. Expecting litigation, the Tennessee Attorney General filed a declaratory judgement action in state court seeking to have the residency requirements declared constitutional. The action was removed to federal court, and the Middle District of Tennessee found the requirements unconstitutional.
Under the so-called "dormant" Commerce Clause, absent congressional authorization state statutes and regulations generally cannot discriminate against out-of-state interests or in favor of in-state interests. The 21st Amendment acts as a partial limitation of dormant Commerce Clause principles when the issue involves a state law regulating alcohol. While Supreme Court opinions from the 1930s (shortly after passage of the 21st Amendment) suggested that this exemption of state alcohol laws from Commerce Clause scrutiny was very broad, a series of opinions since then have limited the protection that the 21st Amendment provides to state laws regulating alcohol.

In affirming the district court decision on appeal, the Sixth Circuit - both majority and partial dissent - presents very thoughtful views on the cutting edge of where the Commerce Clause meets the 21st Amendment. The majority opinion starts with an overview of Supreme Court guidance, particularly the Bacchus Imports v. Dias(1984) and Granholm v. Heald (2005) decisions.
Tackling head-on the current controversy over whether the non-discrimination Commerce Clause principles elaborated in those cases apply only to producers of alcohol beverages and their products, the majority opinion emphatically answers the question as "no." Endorsing the Fifth Circuit's 2016 opinion in Cooper v. Tex. Alcoholic Beverage Comm'n ("Cooper II"), the court gives no fewer than six reasons why Commerce Clause non-discrimination principles cannot be limited to producers and products:

Nothing in Granholm suggests that it intended to limit the broad non-discrimination principle articulated in Bacchus.

In Granholm, the Supreme Court expressed concern over the protection of economic interests across state lines, suggesting that the 21st Amendment does not automatically immunize state laws concerning wholesalers or retailers.
The Supreme Court has emphasized that the 21st Amendment does not permit discrimination based on state citizenship, indicating that the flow of products alone is not the sole concern of the Commerce Clause in this area.
The Supreme Court has reiterated in its most recent case on the subject (Granholm) that the Commerce Clause limits the 21st
The Supreme Court has also stated that there are times when the three-tier system is invalid.

The opinion in Granholm did not clearly limit its application to alcohol beverage laws concerning producers or products.
Concluding that the 21st Amendment does not exempt laws regarding wholesalers and retailers from Commerce Clause scrutiny, the opinion next examines residency in connection with the state powers that the 21st Amendment sought to protect. The opinion concludes that the 21st Amendment does not shield Tennessee's residency requirements from Commerce Clause scrutiny, relying heavily on the Fifth Circuit's opinion in Cooper II. In following Cooper II, however, the opinion draws an important distinction between residency requirements and location requirements:

[R]equiring retailer- or wholesaler-alcoholic-beverage businesses to be within the state may be essential to the three-tier system, but imposing durational-residency requirements is not, particularly when those durational-residency requirements govern owners.
Without the 21st Amendment to shield the Tennessee residency requirements, the opinion not surprisingly finds them unconstitutional. With respect to the appropriate remedy, the opinion concludes that the residency requirements in Tennessee's licensing laws can be "severed" from those laws and struck down without affecting the entire statutory scheme.
Concurring in part and dissenting in part, Judge Sutton opens his opinion with a thoughtful review of the 21st Amendment in light of history and the development of Commerce Clause and 21st Amendment case law. He would hold that the two-year residency requirements for new license applicants are constitutional, but agrees with the majority opinion that the ten-year residency requirement for license renewals amounts to nothing other than economic protectionism and therefore is unconstitutional.

In following Cooper II and rejecting the approach of the Second Circuit in the Arnold's Wines decision (2009) and the Eighth Circuit in the Southern Wine decision (2013), the Sixth Circuit's Byrd opinion highlights a growing split in the Circuits on the interaction between the Commerce Clause and the 21st Amendment after Granholm. Eventually, one can expect the Supreme Court to revisit these issues to resolve the split and to provide clear guidance to the federal judiciary. Whether that happens on a (presumably likely) appeal from Byrd or in a future case, the Sixth Circuit's opinion makes Supreme Court review of the issue incrementally more likely.

But in embracing Cooper II's distinction between residency and location requirements, the Byrd opinion is not a complete win for those hoping to use Granholm principles to open up state markets to interstate shipping by retailers. As that issue plays out in several federal courts, the Sixth Circuit's opinion gives

significant support to the position of the retailer and consumer plaintiffs, but does not provide the magic bullet they may have hoped for.
In the meantime, Total Wine & More has secured yet another legal victory in its spread across the nation in the face of resistance from local economic interests and their allies in state government.

IS POT KILLING BEER

April 6, BBD

"Alcohol appears likely to be the big loser from pot legalization. The new research from Cowen finds that the monthly level of binge drinking in states where recreational pot use was legal as of 2016 was 13% lower than in states where cannabis was completely illegal." That's from Investor's Business Daily.

There's more: "U.S. pot sales could reach $75 billion by 2030 if the nation fully legalized recreational use, an analyst said in a report Wednesday, potentially making the industry bigger than the U.S. wine market is today."

Is this alarming? The quick answer is: You bet your damn ass it is. It scares the tar out of me.

But there are a few caveats.
It will be years, (if it even happens), that recreational pot is legal in all 50 states. ED. NOTE: Listen, Kansas and Texas gave New Belgium problems for putting non-THC hemp in their new Hemporer HPA. Hemp is like putting cotton in your beer, and the ABCs from those two states still gave them problems because the hemp plant is related to the marijuana plant, just as it is related to another plant we put in beer: hops. Texas acquiesced, Kansas did not. More on that later....

1. Access to market: Even if made legal, you can only get it from a very few licensed dispensaries, and at least the smokeable product can't be consumed in many public places like beer can.
2. It is still federally illegal, and many skilled blue collar jobs require mandatory and random drug testing.
3. Few are talking about how to detect cannabis use when driving, particularly with edibles. It will become a thing.
4. And most of all: Dude, beer drinkers smoke weed in all fifty states already, the vast majority of it in the black market, which is cheaper and more available than legally taxed weed. So there are tough comps you would expect, because it's already happening.

Will weed kill the radio star? TV was supposed to kill radio. Cable was supposed to kill network television. Netflix was supposed to kill theater sales (well.... Jury still out). But listen, there's a lot of room for recreational social lubrication. I think we all will sustain our businesses.

Budweiser parent absolved of pay-to-play charge in Mass.

By Dan Adams Globe Staff April 18, 2018
In a case closely watched by the US beer industry, Massachusetts alcohol officials have determined that a local beer wholesaler owned by Anheuser-Busch is not liable under state anti-pay-to-play rules for giving away nearly $1 million in equipment to beer retailers.
Tuesday's ruling by the state Alcoholic Beverages Control Commission is the latest example of the agency's struggle to effectively enforce its prohibition on pay-to-play arrangements, in which brewers and distributors give money or valuable equipment to bars and liquor stores in exchange for dedicated taps or shelf space.

Craft brewers have decried the tactic, saying it allows large companies to squeeze out smaller competitors that can't afford such incentives.

Investigators at the ABCC last year charged Anheuser-Busch's wholly owned distribution subsidiary in Medford, August A. Busch & Co. of Massachusetts, with providing coolers to liquor stores and elaborate draft "towers" (or taps) to bars in 2014 and 2015. All told, the equipment was worth $942,200, they said, and went to 441 retailers.

In exchange, the commission wrote in its ruling, "Anheuser-manufactured alcohol beverages were required to be stocked in the draft towers and coolers," leaving fewer taps and less shelf space available to competitors.
But the ABCC's three commissioners held that Anheuser-Busch - not the bars and liquor stores - technically retained ownership of the draft towers and coolers and could have removed them at any time.
They also said Anheuser-Busch, not its distribution subsidiary, paid for the equipment. The company's Medford distributor merely helped facilitate the deals, they ruled.
But a person closely familiar with Anheuser-Busch's operations in Massachusetts said the parent company and its Medford distributor are effectively one and the same. The person also said that while Anheuser-Busch may have retained ownership of the equipment on paper, it never actually removed coolers or taps from retailers.

In 2016, the ABCC exonerated several Boston bars that had allegedly accepted thousands of dollars in payoffs from a craft beer distributor to stock certain beers on a similar technicality. In that case, the commissioners dismissed the charges because the money from the distributor went to separate marketing and management entities controlled by the bars' owners, and not to the businesses that held the liquor licenses overseen by the ABCC.
Experts said the Anheuser-Busch decision represented an extraordinarily narrow reading of state alcohol rules.
"I can't remember the last time I've seen this kind of logic applied to the law," said John Connell, a veteran Massachusetts alcohol lawyer who frequently represents companies before the ABCC. "It's a very, very, very strict, constructionist interpretation of this regulation."
Connell said the ruling would likely encourage more incentives between alcohol firms, and could allow large alcohol companies to control which beers are available to consumers. In fact, he added, the ABCC has provided the industry with a road map for getting away with pay-to-play in Massachusetts - as long as the money or equipment passes through a third party, neither the retailer receiving it, nor the brewer or distributor providing it, can be held accountable.
"You might see a lot more of this kind of behavior," Connell warned.

Critics of the ABCC have long charged that the agency is too beholden to the industry, to consumers' expense. For example, it is known to frequently overrule municipal licensing boards seeking to suspend the licenses of problematic local bars.

Another problem: the agency has no prosecuting attorney, leaving ABCC investigators who don't have law degrees to argue against attorneys hired by alcohol companies. Officials in state Treasurer Deborah Goldberg's office, which oversees the ABCC, said they are seeking additional funds from the Legislature to hire a prosecuting attorney.

A finding against Anheuser-Busch could have encouraged other states to pursue pay-to-play charges against the company, which gave away taps and coolers in hundreds of markets across the country, according to two people familiar with the company's operations.

Anheuser-Busch argued at a disciplinary hearing in November that the apparent giveaways were not a quid pro quo deal with retailers but a merchandising program intended to put more Budweiser and Bud Light logos in front of consumers.

"Far from some clandestine kick-back scheme," the Medford distributor "engaged in only a highly visible marketing campaign aimed at increasing recognition of Anheuser-Busch products," Richard P. Campbell, the company's attorney, wrote last year in a filing to the ABCC.

The company declined to comment.

In 2016, the ABCC levied a record $2.6 million fine against Craft Brewers Guild, an Everett craft beer distributor the agency said paid at least $120,000 to several Boston restaurant groups to stock its beers. The company is challenging the fine in state court.

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Split Supreme Court Approves Warrantless Blood Draw in DWI CaseThe majority ruled in "State v. Zalcberg,"a 5-2 decision on Tuesday, that a lack of training for police about the need for and availability of telephonic warrants-in the context of a serious road accident and a changing landscape for such warrants at the time-could form an exigency that renders the warrantless blood sampling compliant with the Fourth Amendment.

By Charles Toutant | March 28, 2018 at 05:34 PM

A drunken driving suspect's constitutional rights were not violated by a blood draw where police officers believed no warrant was needed and were unaware that warrants could be obtained by telephone, a divided Supreme Court ruled.

The majority ruled on Tuesday in State v. Zalcberg, 5-2 decision, that a lack of training for police about telephonic warrants-in the context of a serious road accident and a changing landscape for such warrants at the time-could form an exigency that renders the warrantless blood sampling compliant with the Fourth Amendment.

The two dissenting justices said the officers' ignorance of the law does not justify the violation of a defendant's constitutional rights.

The court reversed an order below suppressing evidence from the blood test.

The case concerned a 2011 crash in Freehold Township in which a vehicle containing Shayna Zalcberg and two passengers struck another car. A passenger in Zalcberg's car, Feliciano Colon, was killed. Police had probable cause to suspect Zalcberg was driving drunk when paramedics reported that she smelled of alcohol and a small liquor bottle was found on her car's console, according to the court's decision.

There were some case law complexities, and a prior trip up the appellate ladder, leading up to Tuesday's ruling.

The judge who granted a defense motion to suppress evidence of the blood draw was guided by the U.S. Supreme Court's 2013 decision in Missouri v. McNeely, which said that dissipation of alcohol from a defendant's blood does not constitute a per se exigency justifying a warrantless blood draw. The motion to suppress came four months after the Supreme Court decided McNeely.

But in 2015, the Appellate Division ruled in State v. Adkins that McNeely should be applied only prospectively. Based on the Appellate Division ruling in Adkins, another appellate panel in Zalcberg reversed the order granting the defense motion to suppress.

Then, also in 2015, the Supreme Court took up Adkins and ruled that McNeely was subject to pipeline retroactivity. In light of that, the Supreme Court, having also taken up Zalcberg, reversed the Appellate Division's ruling and remanded for a new suppression hearing.

On remand, the trial court again granted Zalcberg's motion to suppress. The Appellate Division affirmed that ruling, and the state appealed.

Before the Supreme Court, the prosecution argued that the courts below had failed to evaluate the totality of the circumstances in evaluating exigency. The state said it was vital to consider that the responding police officers, before reopening the road to traffic, had to investigate a major accident in which victims were recovered using the "Jaws of Life" and taken away by helicopter; had to interview witnesses; and collect evidence from the scene.

The state also argued that, because of those factors, telephonic warrants were effectively unavailable to officers on the night in question. Although the court rules permitted warrants to be granted by phone, the state asserted that no workable statewide procedure existed at the time of the crash.

Justice Faustino Fernandez-Vina-joined by Chief Justice Stuart Rabner, and Justices Jaynee LaVecchia, Anne Patterson and Lee Solomon-said the defendant's reliance on the "technical existence" of telephone warrants was "unavailing" and "ignores both the impracticality of the warrant system in place at the time of the accident and the police officers' genuine pre-McNeely belief that a warrant was not compulsory."

"Defendant contends that the officers could reasonably have learned of the availability of telephonic warrants by consulting a legal authority. But that begs the question-why would the officers seek out legal advice if they had an earnest belief that warrants were not required for blood draws? We conclude that the officers' lack of awareness of any formal procedure through which they could obtain a telephonic warrant, coupled with their pre-McNeely belief that they did not need such a warrant, suggests there was no reasonable availability of a warrant," Fernandez-Vina wrote for the majority.

The justices also rejected the defendant's assertion that reversing the trial court's suppression creates a "bright-line accident exception" to the warrant requirement for blood draws in suspected DWI cases. "Not every automobile accident produces a set of circumstances sufficient to constitute exigency," the court said.

Justices Barry Albin and Walter Timpone, in their dissent, criticized the majority's reliance on the officers' lack of awareness.
"The majority's finding that a warrantless blood draw was permitted in this case, which involved no true exigency, effectively renders McNeely a nullity and undoubtedly will be cited to justify further end-runs around the warrant requirement," they wrote.

The appellate lawyer for Zalcberg, Patricia Quelch of Helmer, Conley & Kasselman in Freehold, called the ruling "troubling" for its recognition of police ignorance of procedure.
"This is creating a de facto good-faith exception. Law enforcement is now going to reap the benefit of this particular ruling if they've made a mistake in procedure," Quelch said.
Handling the case for the Monmouth County Prosecutor's Office was Assistant Prosecutor Monica do Outeiro.
The office in a statement said the decision "allows us to proceed with our prosecution in this fatal motor vehicle collision and use the best evidence of defendant's guilt, blood tests demonstrating that the defendant had a BAC over the legal limit."

The office added: "Following the fatal collision here, a system to obtain telephonic warrants was implemented statewide, with the assistance of the judiciary. Since implementation of this system in 2013, the Monmouth County jury and law enforcement have received training as to this process. The Supreme Court decision does recognize, however, that there are cases-like Zalcberg-that present sufficient objective exigency permitting a blood sample be taken without a warrant. The practice of the Monmouth County Prosecutor's Office since 2013 has and will continue to be to obtain a telephone warrant where [practicable] under the circumstances."

Cherry Hill lawyer Jeffrey Gold, who defends drunken driving cases but is not involved in Zalcberg, likewise called the decision troubling. "The Supreme Court has veered dangerously toward accepting a form of good-faith exception to a warrant requirement. They have previously and rather assiduously stayed away from accepting any form of good faith," Gold said.
However, Gold saw one good point for defense lawyers in the court's ruling-its holding that an accident alone, in combination with the inherent dissipation of alcohol, was not enough to create an exigency. That holding would be helpful to the defense bar, he said.

MillerCoors Claps Back at Stone: We Didn't Copy You, You Copied US

April 12, BBD

A couple months back Stone Brewing decided to engage in battle with MillerCoors by filing suit against the macrobrewer for allegedly trying to rebrand its Keystone beer as "Stone" [see CBD 02-12-2018].

MillerCoors responded yesterday with a barrage of punches in an 82-page counterclaim that, we feel, evokes Tony Montana slamming down his landline phone yelling: You wanna go to war? We take you to war, okay. Yet, MillerCoors claims "there is no war between these two companies." We'll let you be the judge with the information below...

WE USED STONE FIRST. The most intriguing and perhaps dooming argument (for Stone) presented in the document, is MillerCoors' stance that 'we didn't bite off of you, you bit off of us.' Yep, MillerCoors claims that its "use of 'STONE' and 'STONES' in advertising predates Stone Brewing's use."

The brewer backed this claim with a little history lesson, stating that Coors applied for the trademark KEYSTONE for beer, and was awarded that trademark by the USPTO in 1991, "several years before Stone Brewing decided to name themselves Stone, and nearly a decade before Stone Brewing registered the trademark STONE."

THE RECEIPTS. By the time 1992 rolled around Coors was already using the term 'STONE in "key advertisements," the brewer said and displayed a few of these old ads in the filing. A few years after that Coors started to "embrace the nickname" and began to slap it on outer packaging as well, noting how a 30-rack of Keystone beer became known as 30 'STONES. "Therefore, Coors' use of STONE and STONES predates Stone Brewing's use of STONE," MillerCoors reasons.

"When co-founders Greg Koch and Steve Wagner decided to adopt the moniker Stone Brewing in 1996, Coors was already selling Keystone beer nationally in cases labeled STONES and running marketing campaigns advertising Keystone beer as STONE. MillerCoors did not 'verbatim copy' Stone Brewing's trademark. If anything, it is much more likely that Stone Brewing copied the STONE name from Coors, since Keystone beer was already advertised as such in the market." With that said, MillerCoors asked the court to grant it "the exclusive right" to "STONE" in connection with beer. Need to check with our sources, but that could spell trouble for Stone if the court does.

TOO LATE TO DEBATE NOW. Another interesting argument presented by MillerCoors comes in the form of a laches defense, meaning it's too late to debate now. "Stone Brewing cannot even assert these claims today," MillerCoors says.

Why's that? Well, Stone Brewing had an opportunity to fight this back in April 2010, MillerCoors states, after "Stone Brewing's attorneys objected to MillerCoors' use of 'STONE, STONES, and HOLD MY STONES,' alleging they were likely to cause consumer confusion." MillerCoors refuted the allegations at the time, but "Stone Brewing took no further action until filing this lawsuit eight years later," per counterclaim. That said, "Stone Brewing's claims are clearly barred by laches," MillerCoors argues.

We thought this was over, the brewer says, we have invested "heavily" into Keystone marketing, and continue to use and promote STONE and STONES, and we "cannot be dragged into court eight years later," the brewer concludes.

The last argument we'll cover from the counterclaim is MillerCoors' assertion that Stone Brewing chose to "only include images in its Complaint that misrepresent the look of Keystone cans and outer packaging." MillerCoors says that "every can and every package of Keystone beer is labeled KEYSTONE" and "every Keystone can and every package displays the COORS BREWING COMPANY mark."

CONFUSION... REALLY? "No beer drinker would be confused between these two beers... The available customer data reveals that it is nearly impossible to find a consumer who purchased both Keystone Light and one of Stone Brewing's beers in the last year." But if there were "any confusion between these two beers, MillerCoors' rights are superior to Stone Brewing's," MillerCoors says, arguing once again that "MillerCoors used KEYSTONE, STONE, and STONES to sell Keystone beer prior to Stone Brewing's first use of STONE."

STONE IS FRUSTRATED, MILLERCOORS CONCLUDES. "Stone Brewing's misleading and meritless claims show this case is not actually about trademarks. This case is not about 'verbatim copy[ing],' but Stone Brewing's struggle with its new identity as a global mega-craft beer manufacturer. Gone is the small Stone Brewing of old. Today, Stone Brewing is one of the largest brewers in the United States, and its beer is sold on five continents."

So what does MillerCoors want from the court? They want the right to use STONE and STONES in their marketing, of course. But they take it a step further, as we alluded to earlier, asking the court to grant it the "exclusive common law right to use 'Stone' in connection with the sale of beer in the United States." MillerCoors also ask the court to rule that their laches defense is applicable in this matter, as Stone waited eight years to file suit, and bars the brewer from enforcing its trademark.

Pay-to-Play Schemes Keep TTB Busy

Subterfuge is well and truly alive with little sweeteners proving all too effective.

How to stay out of trouble in the US wine sales business.

By Liza B. Zimmerman | Posted Saturday, 14-Apr-2018

A host of so-called "pay-to-play" infractions have become one of the Alcohol and Tobacco Tax and Trade Bureau's (TTB) top legal, investigative targets in the past couple of years. These schemes all involve payment or bribery of an operator to increase sales of specific alcoholic-beverage products or to obtain preferential shelf or promotional space in the store or restaurant that will lead to greater sales.

What suppliers, importers or distributors may get in exchange for paying retailers may be preferential shelf or display space for their brands, says former TTB chief consul Robert Tobiassen, who is now a legal consultant in Virginia.

These infractions, he adds, can "include on-premise and off-premise retailers. The preferred shelf space at an off-premise retailer may be the space near the check-out counter or the eye-level on the aisle shelves .... For an on-premise retailer, it could be the draft beer taphead, the well product or, again, some shelf or display space that traditionally captures the eye of the consumer who may then order that brand."

These types of interactions - often also called slotting fees - can include "furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other things of value", according to Tobiassen.

They can - to elongate the list - also include paying or crediting the retailer for advertising and displays; repaying a store or a restaurant's financial obligations; or extending credit to an operator beyond the period of time allowed by various state laws.

The list of illegal, financial offences that have been committed by suppliers and wholesalers is a long one. "Your article isn't long enough to list all the practices going on," jokes John Hinman, a partner in the San Francisco-based, alcoholic beverage law practice, Hinman & Carmichael.

The background on pay-to-play

Both the funds and manpower focused on uncovering and prosecuting these cases has increased at the TTB for a number of reasons.

"The emphasis on trade practice investigations declined over the years at ATF," says Thomas Hogue, a spokesperson for the TTB when it was part of the Bureau of Alcohol, Tobacco and Firearms. The bureau was later reorganized to become part of the Department of the Treasury - because of its tax-collecting functions - and the TTB was officially created in 2003.

The agency's funding - according to Hogue - has also increased, which has allowed it better leverage to go after these infractions. The "significant increase in our enforcement and outreach efforts is the result of directed funding from Congress. In Fiscal Year 2017, Congress provided TTB with $5 million in funding specifically to increase our trade practice enforcement and outreach," he adds.

And the agency's outreach also now goes beyond just enforcement. Hogue says the TTB is also engaging in education outreach to industry members and will be doing trade practice seminars in a handful of key US cities starting this month.

Many in the wine industry have directly witnessed the positive results of these new investments in terms of how they are reducing the number of pay-to-play cases.

"The TTB seems to be showing more willingness to try to tackle this problem. At the end of the day, we all want a system that is based more on a brand's consumer pull than on a supplier's ability to have competitors excluded," shares Stephen Rannekleiv, global sector strategist for beverages at Rabobank's New York City-based RaboResearch Food & Agribusiness.

© Wikimedia Commons | Distributors put a lot of effort into securing the best shelf positioning for their products.

The TTB has settled a number of high-profile, pay-to-play cases over the past close to a decade, according to Tobiassen. Companies implicated include big names like Bacardi, Diageo and Pernod-Ricard, according to documents provided by Tobiassen.

The amounts the companies paid to settle the cases vary from $225,000 by Gallo to $650,000 by Diageo for an aggregate record $1.9 million in payments received from six industry members - including Bacardi, Diageo, Gallo, Future Brands, Moët Hennessy and Pernod Ricard - for a pay-to-play arrangement with Harrah's, a Las Vegas casino.

The funds, according to Tobiassen, are then deposited into the US Treasury. The TTB and the "Treasury get no direct share of it. It goes to help pay the Federal budget."

"We currently have 50 active trade practice cases," shares Hogue about the agency's pay-to-play caseload. He adds that they involve beer, wine and spirits and manufacturers, importers and wholesalers. He adds that they range in scope from outright commercial bribery to what is called "exclusive outlet", a situation in which a supplier or wholesaler requires that a retailer purchase its alcohol beverages, to the exclusion of others, among other charges.

Pay-to-play payments can be made in cash or falsely put on a credit card to look like potentially expensive drink purchases that never actually occurred. They can also, according to Tobiassen, be in the form of a "'discount' price which is really a subterfuge to pass the money to the retailer rather than a product-purchase discount".

Another way pay-to-play infractions can be used is as a way to entice a retailer to carry a new product, according to Hinman. "The purpose would be to induce the account to carry the brand or item of the supplier. The thing of value can be anything [cash, credit or taking back product that doesn't sell, free services, etc] that isn't permitted. There are a lot of permitted exceptions. That's what makes this area so hard. However, [the use of] cash is always prohibited and that is classic 'pay to play'."

What the fallout is

The motivation for using these payment schemes has long been to build and solidify wholesalers' relationships with retailers and to increase sales of that wholesaler's wines by the retailer who is being paid.

Open states - meaning those without a control state system, such as the one that exists in Pennsylvania - are the most vulnerable to these scams, according to Hinman. They also tend to happen more in the more populous states, such as California, New York, Illinois, Texas and Florida, he adds.

"Nevada is also a state with issues," he notes. These same states are almost all monopolized by two large wholesalers, with Southern-Glazer's Wine & Spirits estimated to have more than two-thirds of the Las Vegas market, according to insiders.

Having so few companies doing the bulk of the sales in these states also makes it easy for these types of scams to go undetected. Enforcement of the full range of pay-to-play schemes is difficult and expensive, according to Hinman, and this is a major reason why they have continued to proliferate in the wine business.

Recent infractions have even included outright bribery, according to Hinman; a pay-to-play move that many had thought was no longer in use. In 2016, the Craft Beer Guild paid a $750,000 settlement for having paid for taps in various bars in Massachusetts.

Bottom line is that these schemes are "bad for the industry because more often than not, you are penalized for playing by the rules," concludes Rannekleiv.

The TTB has increased its enforcement budget-here's what you need to know to stay in the clear

Source: https://daily.sevenfifty.com/
Ryan Malkin March 21, 2018

"If you swipe your credit card for $2,000, I'll put you on our menu right now," said the bar manager at a high-volume bar and restaurant. Sitting at the bar, listening to sales pitches from suppliers and wholesalers, you occasionally overhear proposals like this one.

In this case, if the supplier had exchanged money for that menu placement, the transaction would have been illegal. This practice is called pay to play. Although it may be permissible in some industries to pay a store to place your product at eye level, the same is not true for us in the beverage alcohol industry. Lately, the Alcohol and Tobacco Tax and Trade Bureau (TTB), which is responsible for the administration and enforcement of federal beverage alcohol regulations, has been reinvigorated with fresh enforcement funds.

The federal government has allocated $5 million for TTB trade practice enforcement funds in 2018, available during the agency's fiscal year, which ends September 30. "Prior to receiving this funding, TTB averaged two trade practice investigations per year based on its limited enforcement resources and the resource-intensive nature of these investigations," noted TTB's fiscal 2017 report. Thanks to the new infusion, TTB said it will "substantially increase" the number of trade practice investigations. So far, it has kept that promise.

As of late 2017, the TTB reported 11 active trade practice investigations, two of which were joint crackdowns with state regulators in Miami and Chicago, targeting alleged pay-to-play activities. The investigations are probably not yet complete, as settlements and violations have yet to be announced. In March 2018 the TTB commenced a joint operation with agents from the California Department of Alcoholic Beverage Control, investigating alleged prohibited consignment sale arrangements in Napa and Sonoma Counties.

Possibly setting the tone for the $5 million trade enforcement budget was the 2016 Massachusetts Craft Beer Guild settlement with the TTB for $750,000. The settlement resulted from alleged violations that Craft Beer Guild paid "slotting fees" to retailers in exchange for favorable product placement and shelf space. So what exactly is a "slotting fee"?

Learn Which Practices Are Prohibited

The terms pay to play and slotting fees refer to schemes whereby a supplier, importer, manufacturer, or wholesaler (for simplicity, the "brand") gives a retailer something in exchange for favorable product placement or shelf space at the retailer's store, bar, restaurant, or other licensed venue. One of the more common violations is the tied house. Sparing you the history lesson (for that, check out Last Call), this refers to the pre-Prohibition arrangement in which a retailer would be tied to one house or producer. Federal and state tied-house laws were created to keep the upper tiers-for our purposes, the brand-separate from the retailer tier.

It is unlawful to attempt to induce a retailer directly or indirectly-for example, through an affiliate or agency-to purchase any products from the brand to the exclusion in whole or in part the products of other brands. (So no, just having your agency do it does not make it legal.) The conduct must be "made in the course of interstate or foreign commerce," but this is generally an easily provable element for TTB, since most products are sold across state lines. There is a small wrinkle for beer in that the state must also impose similar requirements, though most do.

Prohibited brand conduct includes acquiring or holding any interest in any on-premise or off-premise retailer; acquiring any interest in real or personal property owned, occupied, or used by a retailer; paying or crediting a retailer for advertising or display services; guaranteeing a loan or repayment of a retailer's financial obligations; extending credit to a retailer beyond reasonable limits; requiring a retailer to buy or sell a certain amount of products; or furnishing, giving, renting, lending, or selling to a retailer any equipment, fixtures, signs, supplies, money, services, or other "thing of value." This, naturally, is the most common, as all brands want to give retailers signs and other point-of-sale materials.

As noted, a tied-house violation occurs if a brand induces a retailer to buy from the brand at the exclusion of other brands in interstate or foreign commerce. Exclusion occurs when the practice "puts the retailer's independence at risk" by means of a tie or link between the brand and the retailer and results in the retailer purchasing less than it would have of a competitor's product. There is a test to determine whether exclusion exists. The TTB looks at the practice and asks the following questions: Did the practice restrict the free choice of the retailer to decide which products to purchase or the quantity to purchase? Did it obligate the retailer to participate in a brand promotion to buy the product? Did it require an obligation to purchase or promote the brand or require a commitment not to terminate the relationship with the brand with respect to purchasing products? Did it allow the brand to be involved in the day-to-day operations of the retailer? Or did it result in discrimination among retailers-meaning that the brand did not offer the same thing to all retailers in the local market on the same terms without business justification for the difference in the treatment?

There are some exceptions, however. These permit a brand to offer point-of-sale advertising material; consumer and retailer advertising specials; product displays; combination packages; consumer tastings and samplings; coupons and sweepstakes or contests; educational seminars; and stocking, rotation, and pricing of the brand's own products. Brands that operate legally will work within these exceptions.

Meanwhile, a "tie in" sale occurs when a brand requires a retailer to buy a product that it didn't want in order to buy a product that it did. For instance, it would not be permissible for a brand to force a retailer to buy a certain amount of regular vodka in order to be allowed to purchase the special holiday version. Similarly, it would be impermissible to require a retailer to purchase 10 cases of Winery X's Merlot in order to purchase Winery X's award-winning Pinot Noir. "Commercial bribery" refers to the practice whereby a brand induces a wholesaler or retailer to purchase its products "by offering or giving any bonus, premium, or compensation to any officer, or employee, or representative." For instance, it would not be permissible for a brand to offer a promotional sales contest in which retailer employees would get a cash prize from the brand for selling that brand.

In addition to tied-house violations, unfair trade practices also include exclusive outlets and consignment sales. An "exclusive outlet" occurs when a brand requires a retailer to purchase its products to the exclusion, in whole or in part, of other brands by means of a contract or agreement, written or unwritten. In short, it's prohibited to require a retailer to purchase distilled spirits, wine, or malt beverages from the brand in more than just a single sales transaction. A "consignment sale" refers to a sale, offer for sale, or contract to sell with the privilege of return. For example, a brand testing the popularity of a new product cannot sell it to the retailer under the condition that if it doesn't sell, the retailer can return the product.

Avoid "This" for "That" Situations

Remember, state law will play a major role in your day-to-day activities. The above discussion refers solely to federal law, so be sure to check each state's rules to confirm permissibility. Still, there are some things you can do to ensure compliance both in the states and federally. Although giving permissible point-of-sale items is a great way to market a brand, it should not be conditioned on receipt of display space of shelf position. For instance, don't provide signs or a new retailer specialty only if the retailer agrees to preferential display or menu placement.

Here's another common example: Say a brand is entering into an otherwise permissible sponsorship agreement for signage at an event or arena. Think twice before including a purchase requirement and placement requirement. The brand is not bargaining to be the only tequila sold and the only tequila on the menu. Rather, the brand is bargaining for advertising space based on the marketing value it will receive from the ads and other branding.

By avoiding situations where you give something, a thing of value or service, in order to get preferential display or shelf or menu placement, you will hopefully avoid tied-house violations. A good rule of thumb is to consider whether the brand is giving "this" for "that." If the answer is yes, think twice.

Given the TTB's enforcement budget, the best way to avoid pay-to-play violations is to be sure you are acting compliantly. Many industry professionals seek to play in the "gray area," which suggests some risk. About risk, a wise attorney used to say, if you're driving in a 25 mph zone, you need to know if you're going 30 mph or 60 mph. Of course, it's never recommended to violate the rules, and strict compliance should be of paramount importance to brands. To that end, the TTB is hosting trade practice seminars in many cities; check out the schedule and RSVP here.

Ryan Malkin is the principal attorney at Malkin Law, P.A., a law firm in Miami Beach, Florida, that specializes in serving the beverage alcohol industry. Nothing in this article is intended to be and should be not be construed as specific legal advice. Additional reporting by Ashley Hanke, attorney at Malkin Law.

https://issuu.com/artisanspiritmag/docs/artisanspirit_issue022_web/32

TTB in a Deregulatory Mood

By Marc Sorini on April 18, 2018
Posted in Advertising and Marketing, Alcohol Excise Taxes, Trade Practices, TTB COLAs and Formulas
Changes in Administration and other political shifts can have subtle and, occasionally, not-so-subtle influences in the Alcohol and Tobacco Tax and Trade Bureau (TTB) policies and priorities. In the article, "TTB in a Deregulatory Mood" published by Artisan Spirit, Marc Sorini explores how the Trump Administration's desire to reduce regulatory burdens on business has already influenced TTB's regulatory priorities. Particularly, in the most recent "Unified Agenda," a bi-annual compilation of federal regulatory initiatives, TTB placed a priority on deregulatory projects, several of which would alter the regulatory environment for the industry. Marc discusses how the change in administration appears to have an effect on TTB's rulemaking efforts.
Access the full article at the link above...

Originally published in Artisan Spirit, Spring 2018.

GRAPE GROWERS SUE WINERY FOR REJECTING SMOKE TAINTED GRAPES   4.10.18

After wildfires tore through the North Bay area of California last year, some winemakers rejected grapes with smoke taint and any other damage, hurting some growers in the region. Last week a Calistoga couple filed suit against a winery for rejecting its grapes for alleged smoke taint, per Wine Business.

Christopher Tynan, owner of Christopher Tynan Wines in Napa, agreed to purchase 4-5 tons of cabernet sauvignon from Ronald and Linda DeKoven at a$7,500 a ton. "Defendants unreasonably rejected the harvest asserting that the subject crop was allegedly tainted due to poor air quality, including, but not limited to, smoke and ash," per the complaint.

The DeKovens are seeking $52,500 for the grapes plus interest as well as the cost of the lawsuit.   You may recall, Constellation Brands rejected grapes from the Old Hill Ranch in Sonoma Valley due to smoke taint towards the end of last year [see WSD 11-03-2017]. It seems small-scale growers will see the biggest losses as winemakers reject tainted grapes.

MORE COLOR ON DEBATE OVER TEXAS TIED HOUSE LAWS   4.2.18 WSD

Last week the Texas Alcoholic Beverage Commission (TABC) made the decision not to enforce an administrative law judge's ruling in a high-profile tied-house case [see WSD 03-29-2018]. Today we'll take a closer look at the decision and what it means.

BACKGROUND. Recall, McLane Company has been angling to obtain an alcohol distributor license in Texas for years. It applied for one in 2011 and then pulled its permit application because it was allegedly told its ownership structure was a problem. McLane's parent company, Berkshire Hathaway, also owns share in the retail tier (Wal-mart) [see WSD 05-24-2016].

Then in November 2016, McLane formally protested the renewal of Core-Mark Midcontinent's liquor license because Core-Mark, one of the largest distributors of consumer goods in North America, is owned by large investors such as Vanguard and T. Rowe Price, which also have small stakes in Nordstrom, Bed, Bath and Beyond and Molson Coors. McLane argues they are also violating the state's tied-house laws based on the so-called One Share Rule [see WSD 09-26-2017].

[SIDEBAR: The section of the TABC code McLane calls the One Share Rule states that a person who owns or has an interest in a supplier or wholesaler cannot own or have a direct or indirect interest in a retailer. The issue is that "interest" is vague, meaning it can be interpreted as strictly as one person having one share.]

Administrative Law Judge Robert Jones sided with McLane (somewhat reluctantly), and recommended that Core-Mark's license not be renewed based on the aforementioned rule.

TABC SAYS ENFORCEMENT SUBJECTIVE. In deciding to renew Core-Mark's license, the TABC explained that the Texas beverage code is complex and created almost 80 years ago. If it were to be carried out literally to the word there would likely be no legal alcohol beverage industry in Texas.

The TABC claims it is "'afforded a great deal of discretion and deference' particularly with its interpretation and application of the Alcoholic Beverage Code." So enforcement is essentially subjective.

In this case specifically, TABC claims "the nature of the ownership is important," and the strict regulations on mutual funds like T. Rowe Price "mitigate any risk of tied-house issues." The TABC suggests that tied-house laws are confined to relationships between industry businesses, "not external ownership by non-industry entities," and institutional investors do not 'deal with' a retailer or a consumer in the same way that a bev alc supplier would deal with a retailer.

To add insult to injury, TABC is also taking steps to change the way protests against liquor licenses can be made, presumably so McLane can't challenge a limitless number of them down the road. "The Code cannot be weaponized by competitors to put each other out of business. If Protestant [read: McLane] wants a permit to do business in Texas, Protestant may submit an application and provide the required information to the Commission."

Does this decision mean McLane is more likely to get a license if they applied again? Not necessarily, says TABC. "TABC uses the Alcoholic Beverage Code Sec. 102.01 to determine which parties are eligible to hold a license or permit to manufacture, distribute, or sell alcohol in the state. This decision will not change that standard," writes TABC spokesman Chris Porter.

MCLANE NOT HOLDING ITS BREATH. McLane's attorney, Brett Charhon, a managing partner at Charhon Callahan Robson & Garza, indicates this decision will make McLane's odds worse, in fact. "McLane is not optimistic that the TABC would treat such an application fairly in light of its recent decision in the Core-Mark case," Brett tells WSD.

McLane believes this decision undermines the state legislature and that the agency "overstepped its authority by rewriting the Alcoholic Beverage Code to achieve a decision that favors entrenched businesses who do not want competition in the marketplace," according to Brett.

The distributor is now exploring whether the TABC has the authority to make such changes and "silence Texas citizens from raising concerns about TABC's conduct."

New Details Emerge On IRS Investigations Involving State Liquor Sales

By Todd Bookman * Apr 3, 2018

This photo by the New York State Department of Taxation and Finance shows 757 liters of liquor that were allegedly purchased across five different stores in New

Hampshire.

Internal Revenue Service agents want to review communications between New Hampshire state liquor store employees and two New York residents, one of whom was arrested in that state in December on charges of bootlegging.

An email sent by James Richards, store operations administrator for the New Hampshire Liquor Commission, to all retail store managers last Friday says that IRS agents want copies of any emails, notes, voicemails or text messages exchanged between store employees and the two New York men, identified as Xiaojun Zheng and Juncheng Chen, as well as sales receipts and their method of payment.
A copy of an email sent by a Liquor Commission administrator to retail store managers last Friday.

From: James E. Richards
Sent: Friday, March 30, 2018 2:38 PM
To: [redacted]
Cc: [redacted]
Subject: Important Information Request
Importance: High

Good afternoon everyone,

On Wednesday, March 28th, IRS agents visited NHLC Outlets and Headquarters as part of an investigation of two individuals for possible tax evasion. Of course we are fully supportive of the IRS in their investigation. They have requested all records and books of account relative to the financial transactions involving either Xiaojun Zheng, 3316 208th ST, Bayside, NY 11361 or Juncheng Chen, 136 64th RD, Flushing, NY 11367; 2155 Bayridge PKWY, Brooklyn, NY 11204; or 339 52nd ST, Brooklyn, NY 11220.

Please check your stores for any records or work-papers you may have involving these two individuals including, Retail Sales Receipts, Retail Logs showing the date, time, location, method of payment, products, product sales prices, transaction amounts, correspondence, memos, notes, voicemails, text messages, emails, hand-written notes, etc. The IRS would like you to include the name or identification number of any employee associated with transactions involving the two individuals above. The period requested include the years 2014 through 2018.

The IRS requires this information by next week so please make this a priority. Scan any information you find to Store Operations. If you do not have anything please send an email to Charline Everson to communicate that fact by Wednesday April 4, 2018. A response from every store is required by April 4th.

Thanks for your cooperation and efforts. Have a Happy Easter!

Jim Richards
Store Operations Administrator
New Hampshire State Liquor Commission

The IRS is also requesting the names of all employees who completed transactions involving the two men dating back to 2014, according to the email.
A copy of the email, which was obtained by NHPR, says that IRS agents visited the New Hampshire Liquor Commission's Concord headquarters on March 28th, along with several retail stores, as previously reported.
The investigation by IRS agents comes amid calls by Executive Councilor Andru Volinsky for the state Attorney General's office to look into how the Liquor Commission, which manages 79 retail stores statewide, handles large all-cash transactions, many of which involve out of state residents.
On December 8th of last year, Chen, 45, was pulled over by New York State Police on Interstate 95 in the town of Rye, north of New York City. Inside Chen's vehicle, police found 757 liters of liquor, including large quantities of Hennessy cognac, allegedly a favored spirit of cross-border bootleggers.
According to the New York State Department of Taxation, Chen allegedly made his purchases at five different New Hampshire liquor stores. He has been arraigned on felony charges for possessing untaxed liquor, and faces up to four years in prison. He has pleaded not guilty, and has his next court date on April 17.
It is unclear if the IRS's interest in Xiaojun Zheng is related to the case involving Chen. Court records show no outstanding charges in New York State or federal courts involving Zheng.
The IRS requires most businesses to file a form when customers make all-cash purchases in excess of $10,000. It is illegal to "structure" a transaction so that the dollar value falls below that threshold by splitting up the purchase by visiting multiple stores.
In a February letter to Governor Chris Sununu and Attorney General Gordon MacDonald, Volinsky says he witnessed a large transaction structured in such a way to avoid having to complete IRS Form 8300. He's calling for an investigation in Liquor

Commission policies on this topic to determine if the agency is "actively facilitating these types of transactions or simply turning a blind eye."
The Liquor Commission denies the allegations made by Volinsky, and says it has a long track record of following all state and federal laws. The Commission adds that its policies surrounding large all-cash transactions have been reviewed numerous times and always found to be legally sound.
The Attorney General's office says it will look into the implementation of those policies at the request of Volinsky, but hasn't provided a timeline of when that review may be completed.

THREE INDIVIDUALS INDICTED FOR BRIBING NAVAL EMPLOYEE TO ALLOW THEM TO MAKE UNAUTHORIZED LIQUOR PURCHASES

On Tuesday, April 10, 2018, Adam Agaev, 43, and David Manasherov, 37, both of Brooklyn, New York, and Edwin D. Fragoso, 44, of Freeport, New York, were indicted for providing cash bribes to an employee of the U.S. Department of the Navy. The indictments followed a criminal investigation in which TTB was a participant.
Agaev and Manasherov allegedly purchased liquor worth over $5 million, and Fragoso purchased over $1.3 million of liquor, over the course of the scheme. In addition to bribery, the defendants were also charged with conspiracy to defraud the United States, wire fraud, and honest services fraud. Manasherov was charged with tampering with an official proceeding and destruction of evidence subject to a federal search warrant. Fragoso was charged with making false statements to law enforcement agents.

PRESS RELEASE:

Three Individuals Indicted for Bribing Naval Employee to Allow Them to Make Unauthorized Liquor Purchases

Three New York residents were indicted today in two separate indictments for providing cash bribes to an employee of the U.S. Department of the Navy to make unauthorized liquor purchases at a Navy Exchange (NEX), announced Acting Assistant Attorney General John P. Cronan of the Justice Department's Criminal Division.

Adam Agaev, 43, and David Manasherov, 37, both of Brooklyn, New York, were charged together in a nine-count indictment, and Edwin D. Fragoso, 44, of Freeport, New York, was charged in a six-count indictment, all in the Eastern District of New York. Agaev and Manasherov allegedly purchased liquor worth over $5 million, and Fragoso purchased over $1.3 million of liquor, over the course of the scheme. In addition to bribery, the defendants were also charged with conspiracy to defraud the United States, wire fraud, and honest services fraud. Manasherov was charged with tampering with an official proceeding and destruction of evidence subject to a federal search warrant. Fragoso was charged with making false statements to law enforcement agents.

Eric J. Jex, 29, of Uniondale, New York, an employee of the U.S. Department of the Navy who received the bribes, previously pleaded guilty to one count of bribery before U.S. District Judge Joanna Seybert of the Eastern District of New York and is scheduled to be sentenced on May 11.

According to admissions made in connection with Jex's guilty plea, as a supervisory sales associate at the NEX at Mitchel Field in Garden City, New York, Jex was responsible for preparing and processing retail transactions, and he had direct authority to make decisions concerning large liquor orders and shipments from the NEX's warehouse in Suffolk, Virginia. He was also subject to policies limiting access to the NEX's goods to authorized personnel, such as Navy service members, and requiring NEX employees to check purchasers' IDs.

According to the allegations in the indictments filed today, from approximately Nov. 13, 2015, through Dec. 13, 2016, Jex agreed with Agaev, Manasherov and Fragoso to arrange repeated large purchases of liquor from the NEX. Jex allowed these three unauthorized purchasers to buy NEX liquor at significant discounts. According to his plea agreement, Jex admitted that, in exchange, he accepted more than $250,000 in cash bribes, typically $5 to $20 per case of liquor.

In doing so, the indictments allege that Agaev, Manasherov and Fragoso caused interstate wires to be sent from New York to Virginia, deprived New York State of excise taxes and resold the liquor purchased from the NEX for profit.

The Naval Criminal Investigative Service (NCIS), Alcohol and Tobacco Tax and Trade Bureau (TTB), and New York State Department of Taxation and Finance, Criminal Investigations Division investigated the case. Trial Attorneys Luke Cass and Andrew Laing of the Criminal Division's Public Integrity Section are prosecuting the case with the assistance of the U.S. Attorney's Office for the Eastern District of New York.

Iowa Alcoholic Beverages Division Increasing Trade Practices Enforcement

Source: IABD   April 19, 2018

The Iowa Alcoholic Beverages Division (Division) today announced the hiring of a new investigator whose duties will focus solely on trade practices enforcement.
"Strong trade practice regulations are the cornerstone of the three-tier system," said Division Administrator Stephen Larson. "We are committed to ensuring that interactions between industry members and retailers in Iowa are being conducted in a fair and legal manner."

The addition of the new investigator is part of a broader initiative by Larson to reactivate the Division's regulatory compliance program, which had been dormant for a number of years prior to his appointment.
"One of my top priorities since becoming administrator has been increasing the Division's regulatory footprint in the state of Iowa," Larson said. "It is imperative that we strive to create a fair and level playing field for our licensees and permittees through a strong regulatory compliance program and active enforcement of alcoholic beverages laws, rules and regulations."

"An immediate focus of the new investigator will be on validating the legality of discounts offered by industry members to retailers for purchases of designated quantities of alcoholic beverages," stated Josh Happe, the Division's Regulatory Compliance Bureau Chief. The Division will also be exploring opportunities to partner with the federal Alcohol and Tobacco Tax and Trade Bureau (TTB) to conduct joint trade practices investigations in the future.

The Division's Regulatory Compliance Bureau consists of 21 positions across six units - Licensing, Compliance, Administrative Actions, Education and Outreach, Tobacco and Administrative Support. The addition of the new investigator brings the total number of full-time alcohol investigators to four.

April 18

Missing Wine Case Heading to Court

Marc Lazar is heading to court to defend an action over missing wine

A former associate of Rudy Kurniawan lawyers up after millions of dollars of wine allegedly goes AWOL.
Source: https://www.wine-searcher.com/
By W. Blake Gray   17-Apr-2018

Two wine people with, um, interesting backgrounds and their insurance companies are suing each other in multiple courts over $2 million in allegedly missing wine. It's a complicated case, with multiple parties involved, but here's the gist of it.   Reid Buerger and his wife Krista filed an insurance claim for nearly $2 million with their insurance company, Great Northern, claiming that more than 1300 bottles of wine they stored with Marc Lazar's Domaine storage companies went missing. Great Northern paid the claim and sued Domaine's insurance companies in Pennsylvania. The case has migrated to federal court in Missouri.

Lazar claims that at least some of the wine did not actually go missing, instead having been consumed or sold by the Buergers. Both of these men have run afoul of courts in the past.

Buerger is founder of Coventry First LLC, a company that buys life insurance policies from people before they die and resells them to investors, who pay the premiums and collect upon the subject's death. American International Group, a huge insurance company, bought nearly 7000 of these policies from Coventry. In 2016, AIG reached a settlement with Coventry on a civil racketeering lawsuit that alleged Coventry overcharged it by about $160m in hidden markups and fees.

Buerger also was a victim of Rudy Kurniawan. A court ordered Kurniawan to pay Buerger $192,254 in restitution for counterfeit wines Buerger bought. Lazar was convicted in 2005 of statutory rape in the first degree of a person under the age of 14, and statutory sodomy. He was also facing charges in Missouri of selling wine without a license. Missouri law does not allow convicted sex offenders to receive a license to sell alcohol. However, the charges were dropped three weeks before the trial was due to start.

Lazar also was named in a lawsuit in 2016 by a Singapore-based investment firm that claimed he was a co-conspirator in the sale of 132 bottles of counterfeit Domaine de la Romanée-Conti created by Kurniawan because he was responsible for transport. Lazar told Wine-Searcher his involvement was settled last year for less than the cost of his own attorneys.

The Buerger-Lazar relationship began in 2005, according to court documents, when Buerger contracted Lazar "to advise, select, purchase, transport and/or store wine on behalf of the Buergers for a fee." The Buergers say Lazar purchased and/or stored 10,000 bottles of wine for them at Domaine warehouses in Missouri and New Jersey.

In 2014, the Buergers decided to end the business relationship and demanded all of their wine back. In September 2015, the Buergers' attorney sent Lazar a letter claiming 1377 bottles of wine worth nearly $2m were missing. That's an average bottle price of $1436.

Later that month, Lazar's attorney responded with an eight-page letter stating that a preliminary review of 40 of the allegedly missing items had turned up discrepancies.

Lazar's attorney claimed that 11 of the wines had been consumed while in the Buergers' custody, including bottles of 1985 Antinori Solaia, 1997 Antinori Tignanello, 1995 Araujo Cabernet Sauvignon, 1997 Bernard Dugat-Py Charmes Chambertin (3 bottles), 1995 Bernard Dugat-Py Mazis-Chambertin, 1994 Bodegas Vega-Sicilia Ribera del Duero Unico, 1981 Bollinger Champagne VVF, 1982 Bollinger Champagne VVF, 2001 Bond Melbury, 1997 Castello del Rampolla Sammarco and 2003 Chateau Cos d'Estournel. For some of the bottles, the letter is very specific, such as about the 1982 Bollinger, "The allegedly missing bottle was consumed while it was stored at the New Jersey vacation home in 2008."

Lazar's attorney claimed 17 bottles had been sold, including a 1989 Domaine de la Romanée-Conti 12-pack assortment. These claims are also specific. "2002

Bouchard Montrachet 1.5L (3 purchased, 1 allegedly missing) - the Buergers sold all 3 bottles of this wine in 2010 with Epic Cellars," the letter reads. Lazar's attorney also claimed that another 12 wines were never delivered to either of the Domaine locations for storage. The letter also states that at the time, in Sept. 2015, Lazar and Domaine had not done a complete forensic review of all 1377 allegedly missing wines, but reserved the right to do so.

"Domaine categorically denies in the strongest possible language that any of the wine in question was misappropriated," Lazar told Wine-Searcher. "Our insurance carrier would not be paying for the defense of the lawsuit if they thought Domaine had done something fraudulent. We are being defended and vigorously so by our carrier."

The attorney for the Buergers' insurance company did not comment on the case. A hearing on a motion to dismiss is scheduled for next month in federal court in Missouri.

Court Rules Any Bacardi Spying on Rival in Trademark Infringement Suit is Discoverable, Lodestar Says

Source: https://globenewswire.com/ April 17, 2018

A federal judge has ruled that Lodestar Anstalt has the right to establish whether Bacardi spied on the chairman of rival Lodestar and his wife during a trademark infringement lawsuit, Lodestar said today. Lodestar asserts Bacardi attempted to "intimidate witnesses" by putting Lodestar's Chairman Andre Levy and his wife under surveillance after the lawsuit was filed.

Lodestar's suit accuses Bacardi of trademark infringement and unfair competition. Lodestar also claims Bacardi was involved in "pay-to-play" schemes designed to force smaller competitors out of the market. "[I]nformation regarding the alleged surveillance is discoverable . through a deposition, interrogatories, or a request for production of documents," wrote the Honorable Frederick F. Mumm, United States Magistrate Judge. The court order was dated April 6.

Crucially, Judge Mumm also dismissed a claim by Bacardi's attorneys that any surveillance was protected by the attorney work product doctrine. "Usually the question of the discoverability of surveillance activities requires an analysis of whether the information is entitled to protection as work product of defense counsel. Here, however, defendants' counsel disavow any knowledge of any surveillance of plaintiff's employees. Therefore, [it] is inapplicable," Judge Mumm wrote.

According to the suit, Bacardi stole Lodestar's rugged UNTAMED® image because Bacardi was "struggling to rebrand itself." Even Bacardi's own advertising agency said consumers perceived that Bacardi's products were "for girls and douche bags" and that the brand had "weak equity."

Bacardi simply "hijacked Lodestar's trademarks, goodwill, and entire backstory" without permission and without paying compensation, the lawsuit says.

It alleges that Bacardi "cut and pasted" Lodestar's signature and trademarked UNTAMED® advertising campaign and used it to create Bacardi's UNTAMEABLE ad campaign. Lodestar's UNTAMED® campaign is based on the story of The Wild Geese, a reference to hardships and acts of real sacrifice and heroism in the face of exile after the Irish Diaspora in 1691.

Bacardi has a "long history of confiscating others' trademark rights and ideas without any compensation," the suit says. In a series of Open Letters in February, Lodestar's Chairman demanded answers about Bacardi's history of stealing trademarks, why it's so secretive about keeping its operations out of U.S. legal jurisdiction, and inconsistencies about its heritage.

MY MAY ARTICLE FOR THE KANSAS BEVERAGE NEWS:
ON LAWS AND LITIGATION
May 2018 KS Beverage News article: Laws and Litigation

04.02.2018 Thornhill Wins Wine Brand Infringement Case

CustomVine admits to using Turn Key and other brands to sell 'inferior' wine by Bill Ward The Thornhill Companies successfully sued CustomVine for using the Eleanora Marie brand (top label) for a California appellation wine. Santa Barbara, Calif.-Thornhill Companies has reached a cash settlement and obtained a contributory trademark infringement finding against CustomVine Corp. and its CEO after a lengthy dispute over wines sold under a Thornhill brand name. Nicholas Miller, whose family's Thornhill Companies holdings include the Turn Key brand, said that CustomVine CEO Kevin Boyer began bottling and selling inferior wine using Turn Key and other labels. "They took our Santa Barbara Chardonnay with my brother's only daughter's name on it and put a California appellation on it," Miller said, noting that this was just one of the wines that CustomVine, a custom-wine producer and brand developer, sold under Turn Key-owned labels. "It was such a callous disrespect for other people's marks. We had federally registered that name [Eleanora Marie]."

U.S. District Court Judge R. Gary Klausner entered a judgment against CustomVine and CEO Kevin Boyer for contributory trademark infringement against four Turn Key brands, and the parties reached a $315,000 settlement, Miller said. Miller is vice president of sales and marketing for Thornhill, and his brother Marshall is vice president of operations. Their father, CEO Stephen Miller, runs the company, which manages three vineyards, including the esteemed Bien Nacido in the Santa Maria Valley, as well as custom-crush wine facilities and estate wine labels, among other concerns. The Millers originally hired Boyer in 2013 as an executive consultant and national on-premise sales manager, after Boyer left his post as vice president of online retailer Lot18. When Boyer and Lot18 wine flash site founder Philip James launched CustomVine, Turn Key was one of the original investors.

"At the time we thought we had a synergistic arrangement," Nicholas Miller said. "But basically none of the programs Kevin said were going through were hitting. Of all the restaurants Kevin brokered, none of them came through. He spent all of our money and made all these promises. We took the loss and walked away from them, with 6,000 cases of aging inventory." Shortly thereafter, the Millers discovered in the spring of 2016 that Boyer "took these brands of ours and went to other suppliers and to Lot18 to print new labels." The wines were designated California rather than Santa Barbara, Miller said. When Turn Key slapped cease-and-desist orders on CustomVine and the affiliated Penrose Hill to stop selling wines under Turn Key's trademarked brands, "they accelerated their sales instead of stopping," Miller said. "All we wanted was for them to stop, but they sucked us into a year and a half of pain." CustomVine offered "to just walk away," Miller said, "and we said 'no no no, we need to know the damage here, we need to understand what happened to our brands.' "

After a year of wrangling, in December 2017 the two sides reached the monetary settlement and received the District Court rulings: a finding against Boyer, another against Boyer and CustomVine for brand infringements (on Turn Key, Compass Point, Eleanora Marie and Wayside) and one against Penrose Hill for the Turn Key trademark. Boyer, who remains president and CEO of CustomVine (James is president), had no comment on the case. "Unfortunately [there's] nothing to talk about," he said via email. Boyer's lead attorney, Massachusetts-based Louis Miller Ciavarra, said that after extended discussions, "the parties got to a place where they felt they could reach an agreement and move on." But the saga is not completely over, because the Turn Key brands have been "tarnished for a long time," Miller said.

"There's a lesson here in how other people disregard the value of your own trademarks. Once people take it and run with it, they can have it a long time. Then it takes a long time to repair the damage that's been done." Related litigation on the rise Protecting brands has been part of Wines & Vines' ongoing coverage on facets such as the vigilance needed to protect intellectual property and the basics on dealing with brands at risk. J. Scott Gerien, a partner with wine-industry law firm Dickenson Peatman & Fogarty in Napa, Calif., said that cease-and-desist orders such as those Thornhill used have limited effectiveness. "Cease-and-desist is the first step," Gerien said, "because if it works that's great and sometimes people are innocently doing it, most of the time there's a resolution. But if people have bad intent, they're not going to go 'oh, we'll cooperate.' "

He added that getting a national trademark is essential, especially in an era in which so many brands already exist. In December 2017 for example, Sonoma County's Davis Family Vineyards sued a newer Napa Valley winery called Davis Estates over trademark infringement. But problems exist with even more generic names. "You have to be pretty original to find one that's available," Gerien said. "It is more difficult to find a mark that's clear, and as a result of that we are seeing more litigation."

From Fintech:

Important Regulatory Updates

The California Department of Alcohol Beverage Control (ABC) is warning the general public and ABC licensees about a new scam that has been circulating around Southern California.

Callers identifying themselves as IRS officials have targeted ABC licensees, contacting them, demanding they pay "back taxes" on their alcohol licenses. The ABC and IRS have made it clear that these are fraudulent calls as both departments will always put back tax and fee requests in writing. Always contact your state agency to confirm and report these instances.

Fintech also reports:

Historically, federal and state laws have prevented establishments from offering inebriated patrons free cab rides home, believing this encouraged overconsumption. States like California and Wisconsin are making strides to keep roads, intoxicated people, and the general public safer. California is allowing alcohol manufacturers to provide rides home and Wisconsin is increasing the budget for their non-profit "Saferide Program" which provides $25 cab vouchers to customers.

Wine sales in Texas after the Walmart lawsuit

by Wine Curmudgeon Posted On 12 Apr 2018
Oh no! These shelves will be empty! Poor, poor pitiful us.
We'll still be able to buy quality wine in Texas after the Walmart lawsuit, no matter what the panic mongers are telling us
Yes, it's doom and gloom here in Texas after last month's ruling that ended the unconstitutional monopoly that the state's liquor store owners have enjoyed for more than 40 years. How will we ever be able to buy something besides Barefoot ever again?

> "So while these new rulings, if enacted in Texas, might free up the market and lower prices they could ultimately harm the overall quality of the Texas wine market by lessening the overall total wine selection."

Which, of course, we will. The naysayers, prominently quoted in the Wine-searcher.com piece quoted above, make it sound like allowing Walmart to open liquor stores is the beginning of the end: "Some of the most-legislated markets - such as New York and Texas - also have the most vibrant wine markets because these laws have forced owners to specialise and have steered fine-wine buyers to wine-focused independents and chains."
Excuse me while I reach for my hyperbole eraser.
Nothing will change in Texas if and when Walmart, Kroger, and any other national chain opens standalone liquor stores. Yes, I'll be able to buy a fifth of bourbon when I go to the grocery store, but that's about it. I'm not even sure prices will go down; has anyone noticed the foolishness behind supermarket wine pricing?

Some independent retailers, shorn of the monopoly that has protected them since the state's retail lobby "convinced" the Legislature to pass unconstitutional legislation in the early 1970s, might go out of business. But it's difficult to feel sorry for any business that stays afloat because a law was designed to stop it from failing.

Know three things about Texas wine sales after the Walmart lawsuit:
* Supermarkets sell spirits in Florida and California; I haven't heard anyone complain they can't buy a quality bottle of wine in either state. Right, Kermit Lynch?
* Some small Texas retailers don't need the monopoly - they have thrived selling quality wine and offering quality service, knowing those are more effective weapons than an unconstitutional law. Pogo's in Dallas, the not-related Wine Merchants in Austin and Houston, and Put a Cork in It in Fort Worth don't need the Legislature to protect them.
* The independent pet store was supposed to go out of business in the early 2000s, thanks to national chain retailers like Walmart and PetsMart and more pet products in grocery stores. Sound familiar? But there may be more independent pet stores in the U.S. today than there were then.

So no, I'm not worried about Walmart or Kroger or Target or whatever opening a liquor store and destroying my chance to buy quality wine. And anyone who reads the blog knows that if there was a reason to worry, I'd be the first one to write about it.

The other thing to know? If and when three-tier reform hits your state, you'll read and hear the same dire warnings. And there won't be any reason to believe them, either.

Challenge to Minnesota's wine law is turned back

Source: https://www.bizjournals.com/ By Mark Reilly Apr 11, 2018

A federal judge has rejected a lawsuit brought by a pair of Minnesota vineyards objecting to a Minnesota law that most state wineries must use mostly Minnesota grapes to make their wine. The Star Tribune reports on the ruling, which dealt a blow to New Prague's Next Chapter Winery and Alexis Bailly Vineyard in Hastings, which had claimed that the state rule unfairly hampered their business by blocking them from using, say, mostly California grapes in their Minnesota wine.

The two wineries had sued last year, with the backing of the Institute for Justice, a libertarian nonprofit. They plan to appeal the case. U.S. District Judge Wilhelmina Wright didn't rule on the merits of the state's law but said the wineries lacked grounds to sue because they had a way around it. Minnesota lets wineries that obtain a manufacturing license to make wine with any grapes they choose. But that would mean giving up direct sales to consumers, because of a separate state law.

Wineries like selling to tourists, so they generally avoid the manufacturing license. The Minnesota Grape Growers Association said most of the state's 80 producers support the law, saying it will help Minnesota establish itself as a wine region. Kansas has a 30% requirement.

April 5

SOUTH CAROLINA REINSTATES LIQUOR LICENSE LIMIT

Last year the South Carolina Supreme Court struck down the liquor license cap, finding that it was discriminatory and unconstitutional after Total Wine & More challenged the law in court [see WSD 03-30-2017]. But state legislators are still keen on limiting the number of liquor stores in the state and boxing out big retailers like Total Wine.

A new bill, which the House voted on 100-1 on Tuesday, amends the law to keep the cap on liquor stores to three per licensee, but does allow a retailer to open up to three additional locations in counties with more than 250,000 people. The bill is now headed to the governor's desk.

You may recall, Total Wine filed suit against the state in 2014, challenging the cap on liquor store locations. A lower court sided against retailer, but the Supreme Court's ruling last year overturned that decision.

Total Wine has had a lot of success in its fight to change state laws, swaying legislation in their favor in eight of the 20 states they operate in [see WSD 02-27-2018]. And it seems like the fight isn't over in South Carolina.

April 5

MAST-JAGERMEISTER PUSHES BACK ON FRANCHISE LAWSUIT IN MISSOURI

In February, Mast-Jagermeister notified its distributor network that it intended to consolidate its US footprint with Southern Glazer's Wine & Spirits. Mast-Jager's Missouri distributor, Major Brands, promptly filed suit against both the supplier and SGWS, alleging violation of Missouri franchise law [see WSD 02-13-2018]. Major Brands argues Mast-Jager did not establish the "good cause" necessary for termination in Missouri.

MOTION TO DISMISS. Mast-Jager responded with a motion to dismiss the lawsuit this month, arguing that MB is not a franchisee of Jagermeister and "has failed to allege facts to demonstrate otherwise," per Mast-Jager's attorneys. They characterize the relationship as "nothing more than a run-of-the-mill vendor/vendee relationship" with an oral contract and no specific start or end date, making it terminable by either side.

Mast-Jager says to be qualified as a franchisee, MB would need to show that it "wraps itself with the trade name of [Jagermeister] and relies on [Jagermeister's] goodwill to induce the public to buy," per court documents.

At the same time, SGWS filed its own motion to dismiss the case, echoing the issues that Jager brought up. MB alleges SGWS engaged in tortious interference and civil conspiracy, and used "improper means" to instigate Mast-Jager's decision to terminate its relationship with MB.

SGWS claims "these are pure legal conclusions without any factual support whatsoever," per the motion to dismiss. The only thing SGWS says MB did prove is the fact that the two companies are competitors.

POTENTIAL PRECEDENT. You may recall, MB was in a similar situation with Diageo in 2013. Diageo terminated its distribution agreement with MB to move over to Glazer's. The two hashed out the dispute in court for almost two years. Similar to Mast-Jager, Diageo argued it did not have a "community of interest" with MB.

St. Louis Circuit Judge Robert Dierker ruled in June 2013 that the two companies did have a franchise relationship based on Missouri law, but Diageo was not prohibited from taking its business over to Glazer's. Ultimately, the two settled the case outside of court before the final hearing and jury trial for damages concluded [see WSD 09-23-2014 and 09-18-2014].

President Trump Commits to Protect Colorado's Legal Marijuana Industry

By Vanessa K. Burrows & Benjamin O. Kostrzewa on April 17, 2018

On Friday, April 13th, Senator Cory Gardner (R-CO) announced that President Trump assured him that the Department of Justice's decision to rescind the Obama-era guidance on marijuana enforcement would not affect Colorado's legal marijuana industry. President Trump also promised Senator Gardner that he would support a federal legislative fix that takes into account state decisions to legalize marijuana. In turn, the senator lifted holds on all Department of Justice nominees, ending an intra-GOP standoff over the Department's cannabis policy.

In January, Attorney General Jeff Sessions rescinded guidance that outlined eight marijuana enforcement priorities, heightening the possibility of a federal crackdown in states that legalized recreational and medical cannabis. Pro-legalization advocates feared that Sessions' announcement granted federal prosecutors broader discretion to pursue criminal charges against marijuana businesses operating legally under state law in states like Colorado, Washington, California and elsewhere. Sen. Gardner immediately responded that he would block all DOJ nominations over the new policy.

On Friday, Sen. Gardner said Trump "has assured me that he will support a federalism-based legislative solution to fix this states' rights issue once and for all." White House Press Secretary Sarah Huckabee Sanders confirmed that was President Trump's position. Sen. Gardner is working on a bill that would protect states' marijuana policies from federal interference, saying, "My colleagues and I are continuing to work diligently on a bipartisan legislative solution that can pass Congress and head to the President's desk to deliver on his campaign position." We note that during the campaign, President Trump indicated that marijuana legalization should be a state issue, but he also called Colorado's marijuana legalization scheme "bad," and said that the state's scheme has "big problems," is "causing a lot of problems," and is not "trouble-free."

While the announcement comes as a relief to pro-legalization advocates that a broader federal crackdown is not forthcoming in Colorado, there are many unanswered questions. The deal between Sen. Gardner and the Trump Administration appears only to provide assurances for Colorado's policies, making it unclear as to whether federal prosecutors will treat other states the same as Colorado. Attorney General Sessions' guidance is still in effect, leaving the risk of expanded federal prosecutions. Further, any legislative fix faces a perilous path through Congress, especially during what will be a fractious mid-term election cycle. It is also unclear if President Trump will continue to issue signing statements on bills restricting the Department of Justice's use of funds to prevent the implementation of state medical marijuana laws.

Still, Friday's announcement comes as more and more leading Republicans are publicly supporting legalization. Last week, former Speaker of the House John Boehner announced that he was joining the Board of Advisors for a cannabis company operating in 11 states. Boehner, who said in 2011 that he was "unalterably opposed" to legalization, now says that his position has "evolved." In a statement, he said, "I'm convinced de-scheduling the drug is needed so we can do research, help our veterans, and reverse the opioid epidemic ravaging our communities." The expanding mainstream support for legalization will make it more difficult for anyone to alter state cannabis laws.

NABCA's 25th Annual Legal Symposium
Source: NABCA
March 20, 2018

Now in its 25th year, NABCA's two-day Legal Symposium on Alcohol Beverage Law and Regulation provided participants with timely information and dialogue about crucial issues and challenges facing state regulators, industry officials and others impacted by beverage alcohol regulation. This year's symposium provided for the first time, the option to participate in the full conference via webcast.

To follow are summaries of several of the presentations from day one of the event.

Here Comes the Judge
Themes discussed during this session provided practical insights from sitting judges, including the Hon. Selina Malherbe, administrative law judge with the North Carolina Office of Administrative Hearings, Mecklenburg County, the Hon. Marla Graff Decker with the Court of Appeals of Virginia, and former U.S. District Judge for the eastern district of Virginia, Walter Kelley who is now in private practice.

Participants were reminded of the importance of writing briefs clearly and concisely without legalese and to cite appropriate case law. Panelists discussed the pros and cons of oral arguments when given the chance, it can be a valuable tool to answer questions. Further, participants learned that getting a case before the appellate court is more about form than substance, but once before the court, the case needs the substance.

Turning focus to the federal level, panelists discussed current issues specific to alcohol advertising, the Commerce Clause, and antitrust concerns. There was a sentiment that the U.S. can anticipate more federal court cases challenging state regulatory schemes, primarily driven by aggressive sellers pushing boundaries, the craft alcohol movement, and the prevailing value of deregulation.

21st Century Technology Meets 20th Century Regulation
Nidhi Kumar, General Counsel at Drizly and moderator for this session began by sharing an interesting rumor about the potential use of Bitcoin to purchase alcohol, which shows how far innovation with alcohol technology has gone and where it can go in the future.

Patrick Cushing, attorney at Williams Mullen, spoke about the decentralization of manufacturing and retail, the change in customer trends, adoption of new technologies, and the change in ownership structure. The common triggers of regulatory movements are tragic events, consumer demand, and when new technology becomes an industry or business standard.

Skyler Genest, director of compliance and enforcement at the Vermont Department of Liquor Control, cited how technology and regulation have changed from the pre-prohibition era. Some states are hanging their hats on emerging business trends, while other "ready states" are innovative in modernizing regulations. He talked about the pros and cons of the 20th century standard regulation models, with one of the pros being that it was easy to enforce regulation during that time.

David Toomey, senior corporate counsel for the grocery delivery company Shipt, said that people today enjoy using delivery services, such as Amazon, and that alcohol delivery is an innovation that is either supported and opposed in different states.

Trade Practices: A Civil Matter?
In this session the panelists discussed cases currently in litigation where members of one tier are suiting members of another tier for damages and mandatory attorney fees, which can be hefty. They also explored unfair business practices affecting state and federal laws and more specifically the "thing of value" trade practice violation.

Robert Tobiassen, compliance consultant and former TTB staff, shared that the government agency has received funding and is beginning to work with the states to better investigate trade practice enforcement matters, which if violations are found, will result in an increase in TTB cases. The panel also discussed that retailers are looking for new avenues for consumer sales because of the change in the consumer marketplace led by players such as Amazon. It was stressed that lying to the government is not a good idea. What will occur over the next few years as TTB increases its investigations into alcohol business practices will lay the framework for the debate in civil court case matters.

John Hinman, founding partner at Hinman & Carmichael, LLP posed the question about how much competition will there be between the state investigators and the TTB. The reply was that these two government bodies will need to converse more as the state investigators know their laws and the TTB has nationwide jurisdiction.

Jim Webster, president, Webster Powell, P.C., talked about private party litigation and the causes of the shift toward it. The general feeling is that this trend will continue to increase.

Moderator for this session was Jessica Starns, founder and managing partner, Jessica Starns Law Firm.

Global Alcohol Distribution Systems
This session explored trade policy and its impact on the beverage alcohol industry. In 2017, there were $4 trillion in imports and exports in the U.S., with top trading partners being China, Canada, Mexico, Japan, Germany, South Korea, United Kingdom, and France.

Bennett Caplan, head of secretariat FIVS, provided a conceptual framework for attendees to think about trade, outlining different trade agreement levels: Multi-lateral, where there is no real action; a regional level, which have been less of an interest for the current administration; and bi-lateral agreements, where most of the trade negotiation action have been.

Panelist CJ Helie, the executive vice president of Spirits Canada, spoke about the strong business relationship between Canada and the U.S., and the efforts they are doing to ensure policymakers and stakeholders at the federal level understand the history and importance of this relationship as the uncertainty around trade agreements persist.

Matthew Weston-Dawkes, deputy general counsel of E & J Gallo Winery in California shared that they are concerned about disruption of the export business even though wine was not on the list of proposed tariffs, and shared the frustration among the other panelists regarding the lack of progress toward trade agreements in the U.S.

Moderator for this session was Arthur Decelle, counsel, McDermott, Will & Emery, LLP.

The Legal Relevance of "Toward Liquor Control"
What can a book about alcohol regulation over 80 years old bring to the table today? That was the topic of this session, moderated by Nicholas Capezza from NABCA. He provided an overview of the history leading to national prohibition under the 18th Amendment and the Volstead Act, and the history leading to their repeal. He noted that national prohibition was a popular decision but the unforeseen consequences of it led to the passage of the 21st Amendment, and the regulation of alcohol mostly left to the states. Toward Liquor Control came from a desire to implement the best regulatory methods possible in the post-prohibition world.

Kentucky's Department of Alcohol Beverage Control's General Counsel Stephen Humphress discussed how Toward Liquor Control continues to serve as a relevant resource for government regulators and attorneys. Among other things, the book explores alcohol license structures, the prevention of tied house situations, and outlet density issues. It has continually been cited in legal opinions up to the present day and provides insight for constitutional issues that have arisen including First Amendment and Commerce Clause challenges.

Professor Brannon Denning of Samford University's Cumberland School of Law reviewed current matters facing the alcohol regulatory world including the rise of the craft alcohol industry and e-commerce. He suggested a "modest proposal" to update or rebrand the goals stated in Toward Liquor Control to make it more accessible for a modern world as well as look at the general goals that alcohol regulation should have moving forward.
The panel and session participants expressed a consensus that Toward Liquor Control remains relevant and an important tool for attorneys and regulators though the terminology and goals set forth may need an update.

ADA Digital Compliance

Kristina Perry Alexander, moderator, opened this session by introducing each speaker and provided an overview best practices for website compliance particularly in the area of alcohol.

Karen Elliott, partner at Eckert Seamans, discussed what compliance looks like as it relates to web accessibility. Karen explained how compliance laws apply to the federal government, federal contractors, private businesses and at the state level. Courts may require a website to be compliant if the website affects access to a physical place of accommodation. If a website is non-compliant, an advocate may file a lawsuit or send a demand letter on behalf of a person with disabilities because they were unable to freely move through a website based on their need.

Joel Erb, senior director of digital growth at Padilla talked about ADA web accessibility requirements. Accessibility ensures a digital experience is made easier for people with physical and/or mental disabilities. This is about 20% of the US population. To see if your website is compliant, one way to determine is to use POUR. POUR stands for Perceivable, Operable, Understandable, and Robust. Another is WCAG which are the web content accessibility guidelines. Both options can help to determine if a website is compliant. A person can use an online tool, i.e., Google Chrome which includes an add on that will perform a check on a website for any compliance issues. Joel also suggested hiring an outside company to perform an audit. Remember "accessibility means empathy."

Background Checks: How Much is Too Much?

Kate Hardy, partner at Strike & Techel, was the moderator of this session. She talked about her firm, and asked the two panelists about their specific company and experiences with licensed background checks.

April Renée Randall, assistant general counsel at the Alcoholic Beverage Regulation Administration (ABRA) in the District of Columbia, provided insight into the agency, which issues and renews ABC licenses in the District. Categories and types include manufacturer's licenses, wholesaler's licenses, and off-premise and on-premise retailer's licenses. The general applicant must meet seven qualifications, including being of good character and generally fit for licensure, at least 21 years of age, and cannot owe D.C. more than $100. There are many elements involved in receiving a license, including conflict of interest and special qualifications for wholesale and retail license holders.

Jill Valachovic, senior paralegal at Dave & Buster's, offered her perspective about background checks and the required information licensees must provide. Her concern was the level of privacy when applying for licenses as the questions asked require divulging family details such as personal financial statements, fingerprinting, every address ever lived, and the social security numbers and dates of birth of children.

Ethics: Protecting Client Data in a Mobile Digital World

Neal Insley, moderator, opened the session by introducing Seth Guggenheim who is the assistant ethics counsel at the Virginia State Bar.

Mr. Guggenheim discussed the importance of and how to protect data. He provided examples of data that was leaked or hacked and said that law firms are desirable targets because they are "one stop shops" for high value information, with weak security. He also discussed basic terms and definitions such as cyber security, two-factor authentication, phishing, encryption and other terms. He explained that companies have a duty to safeguard confidential information and should make great effort in doing so.

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