DUNCAN LIQUOR LAW LETTER

May, 2018
PART TWO

A monthly newsletter for the clients of R.E. "Tuck" Duncan, Attorney at Law
Please forward as you deem appropriate.
~ ~ ~ ~ ~
This information is not to be considered legal advice.
Consult a competent attorney on specific questions.

There was so much news, we created PART TWO!

IN THIS ISSUE:
Part Two, See Part One emailed earlier for additional articles.

With Leave to Amend

PAY-TO-PLAY? IN MASS, DIFFERENT STANDARDS FOR DIFFERENT TIERS

Grokking the Legality of Supplier Incentives

Feds warn South Florida breweries
to stop producing marijuana-flavored beer

NC Supreme Court Halts Claim Against Hotel in Alcohol Death

Notice of Public Hearing on Proposed Administrative Regulations

A public hearing will be conducted on Friday, May 11, 2018, from 1:00 p.m. to 2:00 p.m. in the ABC Conference Room, 5th Floor of the Mills Building, 109 SW 9th Street, Topeka, Kansas to consider the adoption of the proposed rules and regulations of the Alcoholic Beverage Control Division, Department of Revenue, on a permanent basis.

This 60-day notice of public hearing shall constitute a public comment period for the purpose of receiving written public comments on the proposed rules and regulations. All interested parties may submit written comments prior to the hearing to the Alcoholic Beverage Control Division, Mills Building, 109 SW 9th Street, P.O. Box 3506 Topeka, Kansas 66601 or by email to debbi.beavers@ks.gov.

All interested parties will be given a reasonable opportunity to present their views orally regarding the adoption of the proposed regulation during the public hearing. In order to provide all parties an opportunity to present their views, it may be necessary to request that each participant limit any oral presentation to five minutes. Any individual with a disability may request an accommodation in order to participate in the public hearing and may request the proposed regulation and economic impact statements in an accessible format. Requests for accommodation to participate in the hearing should be made at least five working days in advance of the hearing by contacting Debbi Beavers at (785) 368-6290 (or TYY 1-800-766-3777). The public entrance to Mills Building is accessible. Handicapped parking is located in front of Mills Building. A summary of the proposed regulation and its economic impact follow. (Note: Statements indicating that a regulation is "not anticipated to have any economic impact" are intended to indicate that no economic impact on the Department of Revenue, other state agencies, state employees, or the general public has been identified.)

Copies of the proposed regulations and the Economic Impact Statement for the proposed regulations can be viewed at the following website: ksrevenue.org/abcindex.html

K.A.R. 14-13-1: Definitions. The proposed amendment to this regulation

coincide with the implementation of K.S.A. 2017 Supp. 41-212 (2017 House Sub. for SB 13), which shall be effective on or after April 1, 2019. The definition for "cereal malt beverage" is added to the existing regulation. There will be no foreseeable economic impact defining this term.

K.A.R. 14-13-2: Application for retail liquor license; requirements, conditions, and restriction on issuance of license. The proposed amendment to this regulation coincide with the implementation of K.S.A. 2017 Supp. 41-212 (2017 House Sub. for SB 13), which shall be effective on or after April 1, 2019. The proposed amendment to this regulation requires the application for renewal of a retailer's license to include a statement of gross receipts from the previous 12-month period showing the sale of all goods and services other than cereal malt beverage and alcoholic liquor is not more than 20% of the retailer's total gross sales. The potential economic impact for this regulation will relate to retail liquor storeowners to have the ability to expand their sales, which will help to off-set the shift of some sales of beer from retail liquor stores to grocery and convenience stores holding a cereal malt beverage retailer license.

K.A.R. 14-13-10: Records of purchases and sales; retention of records; reports. The proposed amendment to this regulation coincides with the implementation ofK.S.A. 2017 Supp. 41-212 (2017 House Sub. for SB 13). The proposed amendment to this regulation requires each retailer to keep all sales receipts involving the sale to any customer of all alcoholic liquor, cereal malt beverage and any other good or service, excluding the sales of lottery tickets and cigarette and tobacco products. There will be no foreseeable economic impact from defining this term.

K.A.R. 14-13-13: Prohibited conduct of retailer. The proposed amendment to this regulation is to prohibit a retailer's manager or employee to not be intoxicated while on duty for the licensee. Presently the regulation prohibits the retailer's manager or employee to not become intoxicated while on duty for the licensee. There is no economic impact related to this proposed amendment.

K.A.R. 14-25-1 to K.A.R. 14-25-6: Off-Premise Cereal Malt Beverage Retailers. These are proposed new regulations related to the implementation of K.S.A. 2017 Supp. 41-212 (2017 House Sub. for SB 13). Specifically, that the Director of the Alcoholic Beverage Control Division promulgate rules and regulations making applicable to cereal malt beverage retailers selling beer containing not more than 6% alcohol by volume such provision of the existing rules and regulations concerning industry trade practices as are necessary and appropriate. Effective April 1, 2019, on-premise cereal malt beverage retailers will also be able to expand their inventory to sell beer not more than 6% alcohol by volume in addition to the cereal malt beverage they currently sell.

K.A.R. 14-25-1: Definitions. This is a proposed new regulation to provide definitions for off-premise cereal malt beverage retailers.

K.A.R. 14-25-2: Trade practices; applicability. This is a proposed new regulation relates to the trade practices of off-premise cereal malt beverage retailers, and adopts by reference K.A.R. 14-10-17.

K.A.R. 14-25-3: Retailer's responsibility for conduct of business and employees. This is a proposed new regulation to identify the responsibilities of any person

selling cereal malt beverage or beer containing not more than six percent alcohol by volume. This regulation is consistent with K.A.R. 14-13-5, which provides the responsibility for each retail liquor dealer.

K.A.R. 14-25-4: Recordkeeping. This is a proposed new regulation to provide notice of the required receipts and other documentation that shall be maintained for any retailer purchasing or selling cereal malt beverage or beer containing not more than six percent alcohol by volume.

This regulation is consistent with K.A.R. 14-13-10, which provides notice of the required receipts and other documentation for each retail liquor dealer.

K.A.R. 14-25-5: Transfer of retailer's inventory; application for permission; seizure and sale of abandoned inventory. This is a proposed new regulation to provide any person selling cereal malt beverage or beer containing not more than six percent alcohol by volume with guidance on the transfer of their stock of alcoholic liquor. This regulation is consistent with K.A.R. 14-13-8, which provides each retail liquor dealer with guidance on the transfer of his or her stock of alcoholic liquor.

K.A.R. 14-25-6: Prohibited conduct of retailer. This is a proposed new regulation to identify prohibited acts by any person selling cereal malt beverage or beer containing not more than six percent alcohol by volume. This regulation is consistent with K.A.R. 14-13-13, which identifies the prohibited acts each retail liquor dealer.

K.A.R. 14-26-1 to K.A.R. 14-26-8: On-Premise Cereal Malt Beverage Retailers. These are proposed new regulations related to the implementation of K.S.A. 2017 Supp. 41-212 (2017 House Sub. for SB 13). Specifically, that the Director of the Alcoholic Beverage Control Division promulgate rules and regulations making applicable to cereal malt beverage retailers selling beer containing not more than 6% alcohol by volume such provision of the existing rules and regulations concerning industry trade practices as are necessary and appropriate. Effective April 1, 2019, on-premise cereal malt beverage retailers will also be able to sell beer not more than 6% alcohol by volume in addition to the cereal malt beverage they currently sell.

K.A.R. 14-26-1: Definitions. This is a proposed new regulation to provide definitions for on-premises cereal malt beverage retailers.

K.A.R. 14-26-2: Trade practices; applicability. This is a proposed new regulation relates to the trade practices of on-premises cereal malt beverage retailers, and adopts by reference K.A.R. 14-10-17.

K.A.R. 14-26-3: Retailer's responsibility for conduct of business and employees. This is a proposed new regulation to identify the responsibilities of any person selling cereal malt beverage or beer containing not more than six percent alcohol by volume. This regulation is consistent with K.A.R. 14-21-11, which provides the responsibility for each drinking establishment.

K.A.R. 14-26-4: Refusal of right to enter or inspect licensed premises prohibited. This is a proposed new regulation to allow the inspection of the licensed premises of any drinking establishment selling cereal malt beverage or beer containing not more than six percent alcohol by volume.

K.A.R. 14-26-5: Minimum prices for drinks; acquisition cost. This is a proposed new regulation to prohibit a retailer from selling any drink to any person for less than the acquisition cost of that drink to the retailer selling cereal malt beverage or beer containing not more than six percent alcohol by volume. This regulation is consistent with K.A.R. 14-21-15, which prohibits a drinking establishment from selling any drink to any person for less than the acquisition cost of that drink to the drinking establishment.

K.A.R. 14-26-6: Recordkeeping. This is a proposed new regulation to provide notice of the required receipts and other documentation that shall be maintained for any retailer purchasing or selling cereal malt beverage or beer containing not more than six percent alcohol by volume. This regulation is consistent with K.A.R. 14-21-10, which provides notice of the required receipts and other documentation for each retail liquor dealer.

K.A.R. 14-26-7: Storage of cereal malt beverage or beer containing nor more than six percent alcohol by volume; removal from licensed premises. This is a proposed new regulation that requires each retailer to store its cereal malt beverage or beer containing not more than six percent alcohol by volume on the licensed premises, unless there is prior approval from the director to do otherwise. This regulation is consistent with K.A.R. 14-21-12, which requires each retailer to store its cereal malt beverage or beer containing nor more than six percent alcohol by volume on the licensed premises, unless there is prior approval from the director to do otherwise.

K.A.R. 14-26-8: Transfers of retailer's application for permission; seizure and sale of abandoned inventory. This is a proposed new regulation to provide any person selling cereal malt beverage or beer containing not more than six percent alcohol by volume with guidance on the transfer of their stock of alcoholic liquor. This regulation is consistent with K.A.R. 14-13-8, which provides each retail liquor dealer with guidance on the transfer of his or her stock of alcoholic liquor.

The Latest Ridiculous Lawsuit

Source: https://www.valuewalk.com/
April 24, 2018

On June 6, 1991, Richard Overton finally hit his breaking point. Apparently, Mr. Overton had been spending quite a lot of time in front of his television, watching a flurry of beer commercials featuring scantily clad women falling all over themselves for average looking men.

Overton realized immediately that drinking Anheuser-Busch's magical products would be the solution to all of his problems. So he hurtled to his nearest liquor store for a case of beer. Except. nothing happened. No tropical islands. No Clydesdale horses. No Swedish bikini team.

Moreover, Overton found out that alcohol can actually have negative effects on the mind and body. Overton was shocked and dismayed. He felt that, by buying and drinking beer, he was entitled to the fantasy lifestyle in the commercials. without any of the downside.

Anheuser-Busch had betrayed him. And he wasn't going to take it lying down. So, in the name of beer drinkers everywhere, Overton sued on grounds of false advertising, claiming that Anheuser-Busch's TV commercials "involving tropical settings, and beautiful women. . . had caused him physical and mental injury, emotional distress, and financial loss."

Sadly this is a true story- just one example of the countless absurd, frivolous lawsuits that get filed in the Sue-nited States of America every year.

Jack Daniel's sues competitors, calls out bad customer reviews

Jack Daniel's says the "iconic trade dress" of its whiskey has been consistent for decades.

Source: Louisville Business First By David A. Mann Apr 23, 2018

Jack Daniel's Properties Inc. has filed a lawsuit against two competitors alleging copyright infringement, dilution of trademarks, false advertising and other grievances.

The suit was filed against Dallas-based Dynasty Spirits Inc. and Houston-based Buffalo Bayou Distilleries LLC, which does business as Gulf Coast Distillers. According to the suit, filed in U.S. District Court for the Northern District of California, these companies own a handful of whiskey and bourbon brands that come in bottles and trade dress similar to that of Jack Daniel's.

See the attached slideshow to judge for yourself. These photos come directly from the lawsuit.

https://www.bizjournals.com/louisville/news/2018/04/23/jack-daniels-sues-competitor-calls-out-its-bad.html?ana=e_du_prem&s=article_du&ed=2018-04-23&u=p12D0rz4UYHAuM4RC2Fp0dbaEqX&t=1524558783&j=81179751

The suit was just filed Friday and hasn't been answered yet. It represents only one side of a case.

In the suit, Jack Daniel's Properties claims the brands infringe on its product's trade dress. The whiskies are sold in a square bottle with angled shoulders, beveled corners and a ribbed neck - similar to the Jack Daniel's bottle. One whiskey in particular, Lonehand Whiskey, a Tennessee Sour Mash, is called out for having arched lettering on its label similar to that of Jack Daniel's.

"Defendants have pursued a pattern of conduct and an intentional business strategy designed to mislead and deceive consumers into believing that the accused whiskey are made, put out, licensed or sponsored by, or affiliated or associated with Jack Daniel's," the lawsuit said.

Jack Daniel's said the makers of Lonehand even instructed retailers to display these products near Jack Daniel's.

The lawsuit cites some online customer reviews in which consumers were highly critical calling the whiskey "pure urine in a bottle," "awful in every presentation" and "swill." Jack Daniel's claims the label and trade dress similarities between these whiskies and its product have and will continue to hurt its brand.

Jack Daniel's Tennessee Whiskey is made in Lynchburg, Tenn., and it is owned by Louisville-based Brown-Forman Corp.

Brown-Forman declined to comment. I spoke briefly to a representative of Dynasty Spirits, who wasn't ready to comment (though this story might be updated later.) Messages were left for Gulf Coast Distilleries.

Jack Daniel's says in the lawsuit that it has expended "many hundreds of millions of dollars over the decades advertising and promoting Tennessee whiskey" in print, electronic media, billboards, stadium signage and other manners. In return, the company said it has achieved billions in sales and it calls itself "the best-selling whiskey brand in the United States."

This isn't the first time we've seen Jack Daniel's get into a legal fight over the brand. In 2013, it filed a claim that the Nashville, Tenn.-based distiller of Popcorn Sutton's Tennessee White Whiskey had a label that was "confusingly similar" to its own.

It's also been on the receiving end of this type of conflict. In 2015 it was sued by Metairie La.-based Sazerac Co. Inc., which alleged that Jack Daniel's brands infringed on its trademark for Fireball Cinnamon Whisky by using the word "Fireball" in its Google Adwords marketing for Jack Daniel's Tennessee Fire.

Jack Daniel's is Brown-Forman's largest brand. The company also owns Woodford Reserve, Old Forester and Early Times.

Sony sues Knee Deep Brewing Co. over 'Breaking Bad'-inspired beer

Source: http://www.sacbee.com/
BY BENJY EGEL April 18, 2018

Sony Pictures Television filed a lawsuit Tuesday against Auburn-based Knee Deep Brewing Co. over the brewer's Breaking Bud IPA. The TV titan is suing for trademark infringement, dilution, false designation of origin and unfair competition related to the AMC television show "Breaking Bad," according to The Hollywood Reporter. Sony is seeking monetary damages from Knee Deep's Breaking Bud sales as well as an injunction to pull the beer from the market.

"Rather than investing the time, effort and resources necessary to establish their own reputation and identity, Defendants have instead opted to hijack the famous brand identity associated with SPT and its BREAKING BAD show for Defendants' own intended benefit," the lawsuit reads. "Defendants' unauthorized use of SPT's trademarks and design elements threatens to erode the value of SPT's BREAKING BAD Marks by undermining SPT's continuing ability to attract licensees for such marks and secure compensation for the right to associate one's products with the BREAKING BAD show."

Aside from the similar names, Knee Deep ripped the hazmat suit, desert background, RV and lettering from "Breaking Bad" posters, Sony's lawsuit claims. The brewery, which opens at noon, did not immediately respond to a request for comment Wednesday morning.

Prohibition Is Alive and Well in Absurd State Alcohol Laws

Source: https://www.nationalreview.com/
By ANASTASIA BODEN & JONATHAN WOOD
April 16, 2018

Nearly 100 years after Prohibition's repeal, government still can't seem to shake its obsession with our vices. Although society has advanced immeasurably over that time, the puritanical obsession with people wetting their whistles continues. The nation's paternalistic and corrupt experiment with banning alcohol has been widely decried as a failure. Nevertheless, piles of costly, anti-competitive, and inane alcohol laws remain in force today.

The modern vestiges of Prohibition tend to be as corrupt as that failed institution. In the 1920s, Prohibition enriched organized crime, which bribed officials and law enforcement to protect their racket. Today, arbitrary alcohol laws enrich entrenched businesses by preventing competition, and they return the favor with campaign contributions to the politicians who defend those laws.

Idaho, for example, restricts the number of liquor licenses, allowing just one for every 1,500 people. The government claims that the limit is meant to further temperance, which Idaho's 1889 constitution calls an element of government's "first concern." In reality, the limit acts as an anti-competitive boon to the established businesses that already have a license and can keep out new competitors, as well as to the politicians who can grant exemptions through special legislation.

In Indiana, only liquor stores can sell cold beer, while groceries stores, convenience stores, and pharmacies are stuck selling beer at room temperature. There is no good justification for this. The state claims it doesn't want people chugging cold beer in the parking lot before getting behind the wheel. But how exactly does that justify letting cold beer be sold in liquor stores but not in Whole Foods? Does the state have any evidence that customers are more likely to get sloshed in the parking lot if a store sells both cold beer and organic kale? No, Indiana's law is a transparent attempt to benefit politically active liquor-store owners at their competitors' expense.

Some outmoded alcohol laws are downright ridiculous. In Virginia, happy hour is legal, but the state heavily restricts what business owners can say about it. Bars may advertise that they have "happy hour." But they cannot name their happy-hour prices anywhere outside the store - which effectively renders any happy-hour advertisement useless. The entire point of happy hour is that drinks are sold at a reduced price.

Even more absurd, Virginia forbids bars from calling their happy hour by anything other than the generic terms "happy hour" or "drink specials." In other

words, the state bravely protects its residents from lame alcohol puns such as "WINEdown Wednesday." George Washington, a whiskey distiller, home brewer, lover of liberty, and Virginian, must be rolling in his sarcophagus.

We shouldn't laugh off these silly laws. They have significant real-world effects, especially on bars that need to advertise to attract customers. Chef Geoff owns an eponymous restaurant in Tysons Corner, Va., where he promises "great food, libation," and "merriment." But the restaurant cannot truthfully advertise that its happy-hour specials beat the competition, costing Chef Geoff business and his lost customers a good time.

Represented by Pacific Legal Foundation, Chef Geoff has filed a First Amendment lawsuit challenging this silly censorship. The government cannot prohibit truthful speech about legal business practices, even if the information relates to alcohol. The Supreme Court has repeatedly held that the First Amendment protects the right to advertise truthfully, and consumers entering the marketplace benefit from such information. That's as true for happy hour as for any other lawful business practice. There is no "vice" exception to the First Amendment.

Anastasia Boden and Jonathan Wood are attorneys at the libertarian Pacific Legal Foundation.

Michigan: Judge rules for state in liquor store competition fight

Source: https://www.detroitnews.com/

Jonathan Oosting April 16, 2018

Michigan liquor store owners could face new competition next door as a result of a court ruling allowing the state to act on plans to lift a longstanding rule prohibiting licensees from operating within a half-mile of each other. Michigan Court of Claims Judge Stephen Borrello on Monday dismissed a lawsuit filed by an association representing existing liquor store owners, who argued they paid to buy their businesses and licenses with the expectation the proximity rule would stay in place.

"There is no property right to be free from increased competition," Borrello wrote in a summary opinion and order siding with the Michigan Liquor Control Commission. "Nor can plaintiff claim a property right in the continuation of an existing law or rule."

The ruling is the latest development in a prolonged fight over the 1968 rule, which generally limits liquor stores from operating within 2,640 feet of each other. The Michigan Liquor Control Commission began efforts to rescind the law in 2017, calling it "protectionist and anti-competitive."

Borrello temporarily blocked those plans in January after the Associated Food and Petroleum Dealers sued the state for a second time. A group spokesman was not immediately available for comment. The Liquor Control Commission was "confident that the judge would agree with our arguments, and we are pleased with the decision today," said spokesman David Harns. "We are now taking the necessary steps for final rescission of this rule and we look forward to working

with all of our licensees to continue to ensure the health, safety, and welfare of the public."

Liquor store owners have flooded recent commission and legislative hearings in protest. Association attorneys argued they would face "irreparable harm" after investing substantial "sums, time and sweat" into their businesses.

The lawsuit asked Borrello to keep the rule in place while the Michigan House of Representatives considers a Senate-approved bill that would write the distance rule into state law. But passage of that legislation "is far from guaranteed," Borello wrote.

"At most, plaintiff has called into question the advisability of the rescission," he said. "The apparent wisdom (or lack thereof) of the MLCC's action is not a matter for this Court. It is, however, a matter for the Legislature, where apparently, plaintiff's fate lies."

State Sen. Rick Jones, a Grand Ledge Republican who sponsored the bill that would keep the half-mile rule in place, said Monday he continues to push for action in the House Regulatory Reform Committee. The panel has not yet taken up the measure the upper chamber approved 27-9 in December.

"Most cities would prefer that they don't have four liquor stores on a corner. They would prefer that they're evenly spaced," Jones said. Changing a rule owners have operated under for years is "an extremely bad way to treat people who have invested their life savings in a store," he added.

Wisconsin: Taco Bell franchise sues city of Madison over alcohol license denial

Source: http://host.madison.com/ By Abigail Becker April 17, 2018

Owners of a Taco Bell franchise on State Street are suing the city of Madison over denial of a liquor license. Assistant City Attorney Jennifer Zilavy will lead the city's defense. Zilavy said her next steps are to review and respond to the complaint.

In a complaint filed April 13 in Dane County Circuit Court, Bell Great Lakes, LLC alleges that the city's denial was "unlawful and discriminatory" when considering the city's prior restaurant liquor license approvals and current policy. The complaint highlights that the city approved a liquor license to Chen's Dumpling House, located across the street from Taco Bell Cantina at 505 State Street, three weeks after the city denied a license for Taco Bell.

"There was no meaningful or material difference between (Bell Great Lakes') application and the applications the City earlier and later approved," the complaint states. "The disparate treatment is arbitrary, unlawful, and unfair."

Pat Eulberg, a representative of the franchise, was not immediately available for comment Monday.

Greg Flynn, chairman and CEO of Flynn Restaurant Group, which owns Bell Great Lakes, said in a statement Monday that the company offered to comply with restrictions placed on an alcohol license and offered to take steps to improve

public safety, including installing additional video cameras on-site, increasing lighting on State Street, using ID scanners, providing employee training and increasing the visibility at the front of the restaurant.

"The bottom line is that while we have been beyond accommodating to all involved parties, we truly believe that the way this matter was handled is due solely to the Mayor's unwarranted bias against our restaurant brand," Flynn said.

The Madison City Council originally approved a license last December for Taco Bell Cantina to serve wine and beer at 534 State Street until 10 p.m., Sunday through Thursday each week, and until 11 p.m. on Fridays and Saturdays.

Madison Mayor Paul Soglin vetoed the license Dec. 12. He argued that the city has enough alcohol establishments and that granting an alcohol license to a fast food restaurant downtown would impair public safety and increase police costs.

The City Council held two votes to overturn the veto but was not successful. Ald. Mike Verveer, District 4, said he was not surprised by the news because the franchise owners filed open record requests for all documents, including emails between policymakers, related to the license.

"Although I supported granting the beer and wine license, I'm disappointed that the applicant filed suit against the city," Verveer said.

Illinois liquor licenses revoked, suspended after bootlegging from Indiana

Source: http://www.nwitimes.com/
Joseph S. Pete
Apr 3, 2018

Illinois revoked the liquor license of a south suburban nightclub and suspended a liquor store's license for bootlegging booze from Indiana.

Historically, bootlegging involved Tommy gun-wielding gangsters like Al Capone delivering bathtub gin and other ill-gotten spirits to underground speakeasies. But authorities say it continues on in the Illiana area where Illinois liquor stores and bars illegally port over alcohol from Indiana so they can dodge the higher state alcohol taxes in the Land of Lincoln.

Last week, the Illinois Liquor Control Commission revoked the license of Club Suavee, a nightclub at 79 W. Joe Orr Rd in Chicago Heights, after a state inspector found it imported 45 liters of spirits from Indiana without paying Illinois taxes. The dressy dance club, which claims to be "well-known for stepping, house music, karaoke, comedy shows, line dancing and the best Long Islands in the south suburbs," sits about 8 miles west of the state line.

"Licensee violated the Illinois Liquor Control act by importing alcoholic liquor into Illinois from outside state," the commission ruled while revoking the license. The commission also voted last week to suspend the license of Richton Liquors at 22228 Governors Highway in Richton Park for 10 days for importing liquor from Indiana. The south suburban liquor store also got slapped with a $10,000 fine that must be paid in full by June 23.

Last year, federal law enforcement officials seized $1 million from Columbia Liquors in Hammond, which was alleged to have bought booze from three Indiana distributors and sold it under the table for cash to liquor stores across the south suburbs in Illinois, where the excise taxes are substantially higher.

Excise tax rates for liquor are significantly lower on the Indiana side of the state border: $0.115 for beer in Indiana compared to $0.611 in Chicago, $0.47 for wine in Indiana compared to $2.52 in Chicago, and $2.68 for liquor in Indiana compared to $13.73 in Chicago when state, city and Cook County taxes are all factored in.

District Court Dismisses Pending Trade Practice Case, With Leave to Amend

By Marc Sorini on April 23, 2018
Posted in Distribution, Trade Practices

This month, the United States District Court for the Northern District of California issued an opinion in Arena Restaurant and Lounge, Inc. v. Southern Glazer's Wine and Spirits, No. 17-CV-03805-LHK. The Arena case, also called Nguyen after its original named Plaintiff, seeks to certify a class action against Southern Glazer's for a wide range of allegedly fraudulent, deceptive, and otherwise illegal acts related to the sale and distribution of wine and spirits in California. The court's recent order, issued on April 9 and amended on April 16, 2018, dismisses all claims brought by the Plaintiffs in their Second Amendment Complaint (SAC). Significantly, however, the court will allow the Plaintiffs to file an amended complaint within 30 days in an attempt to cure defects in many of the SAC's claims.

At the center of the Arena case are allegations that Southern Glazer's engaged in practices such as selling to unlicensed persons and hiding such sales by recording them as sales to licensed retailers like the Plaintiffs. These "phantom" sales, in turn, allegedly created tax problems for the Plaintiff retailers. The SAC also alleges price discrimination between different retailers, selling to retailers without delivering the inventory in order to meet sales quotas, engaging in giveaways of free product to retailers, engaging in illegal "tie-in sales" practices, and a host of other alleged wrongs. The SAC packages these wide-ranging allegations into no fewer than eleven claims for relief.

Southern Glazer's moved to dismiss the SAC under FRCP Rule 12(b)(6). In its April opinion, the court dismissed all eleven claims for relief. The court reasoned:

1. Turning first to plaintiffs' promissory fraud and common law fraud claims, the court rejected Southern Glazer's argument that the claims were barred by the "economic loss prohibits," which bars fraud claims if the claims also arise from a contractual relationship. But the court went on to dismiss both claims for failure to meet FRCP Rule 9(b)'s heightened pleading standard for fraud. Examining Plaintiffs' claim that Southern Glazer's fraudulently used their tax and license information to make third-party sales, the court explained: "Plaintiffs do not allege who made the alleged third-party sales, when the sales were made, or what was sold. Nor do Plaintiffs identify the third parties." The court accordingly dismissed both fraud counts, with leave to amend in order to plead these claims with the required specificity.
2. The court next turns to four claims arising from California's Unfair Practices Act and alleging illegal below-cost sales, loss-leader sales, secret

rebates and unlawful intimidation. The court first rejected Southern Glazer's argument that only a competing wholesaler has standing to bring claims for below-cost or loss-leader sales, explaining that the statute clearly gives any "person" harmed the right to sue. But the court found that all four claims fail to state a claim for relief as they merely make conclusory allegations and fail to cite a single specific instance of alleged unlawful practices. As with the fraud claims, however, the court gave the Plaintiffs a chance to amend their complaint by pleading facts with more specificity.

3. The court dismissed with prejudice Plaintiffs' constructive trust claim, explaining that a constructive trust is a remedy, not a claim and, in any event, Plaintiffs appear to have abandoned the argument.

4. The court also dismissed with prejudice Plaintiffs' breach of fiduciary duty claim, explaining that under California law no fiduciary duties arise from a commercial buyer-seller relationship.

5. The court next turned to Plaintiffs' claim under California's Unfair Competition Law, which prohibits unlawful, unfair and fraudulent conduct. The court dismissed the claim as Plaintiffs failed to plead its claim with sufficient specificity and did not adequately allege that they suffered economic harm as a result of Southern Glazer's allegedly unlawful, unfair, and fraudulent conduct. Once again, however, the court allowed Plaintiffs to amend their complaint to plead this claim with greater specificity.

6. The breach of contract claim was also dismissed with leave to amend. According to the court, Plaintiffs failed to specify the contracts upon which they based their breach claim.

7. The court ended on Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. Because this claim relied entirely on the same allegations as those underlying the breach of contract claim, the court dismissed it as duplicative.

The court ends its opinion by giving Plaintiffs' 30 days to cure the deficiencies identified in the claims dismissed with leave to amend/without prejudice. Plaintiffs may not, however, add new causes of action or new parties without the permission of the court.

On May 16 we will know if the Plaintiffs will rise to the court's challenge and re-plead their claims.

" Your Honor, I'm here to make excuses for my client. "

PAY-TO-PLAY? IN MASS, DIFFERENT STANDARDS FOR DIFFERENT TIERS From Beer Business Daily April 20

Anheuser-Busch's branch in Massachusetts, August A. Busch & Co., found itself in hot water around this time last year for alleged pay-to-play activity. Now the branch is in the clear.

Recall back in May 2017, the state Alcoholic Beverages Control Commission had accused the branch of providing nearly $1 million worth of draft towers and coolers to hundreds of Boston-area retail outlets to induce purchasing of its brands over the course of 2014-2015, [See BBD 05-10-2017].

But earlier this week, ABCC officials determined that the branch was "not liable under state anti-pay-to-play rules" for the actions above, reports The Boston Globe.

The ABCC's three commissioners ruled that A-B was the one with the pocketbook, and the branch was just a facilitator. And further held that A-B was essentially loaning the equipment to the retailers, as the brewer

"technically retained ownership" of the items, "and could have removed them at any time," per report.

WHAT??? For the love of Mary, Jesus, and Joseph, they are the same company! One is a division of the other. But even after the Sheehan's Craft Brew Guild got fined over $2 million last year [see BBD 10-04-2017], the A-B branch gets a break because it was "Anheuser" who funded the pay-to-play and the wholesaler, which they own, only provided "*de minimis*" labor?

EXTRAORDINARILY NARROW READING OF THE RULES. The Globe reached out to a few "experts" for their take on the ruling. The response was the decision represents "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," longtime bev alc lawyer up in Massachusetts, John Connell, tells The Globe. "It's a very, very, very strict, constructionist interpretation of this regulation."

PAY-TO-PLAY NOW BASICALLY LEGAL IN MASS. John believes the ruling could propel pay-to-play activity, as "the ABCC has provided the industry with a road map for getting away with pay-to-play in Massachusetts." If the money and equipment go through a third party, then there's nobody to blame, and if that's the standard then "you might see a lot more of this kind of behavior," John concluded.

April 17, 2018
Grokking the Legality of Supplier Incentives
Beer Business Daily

I was having dinner with a beer distributor recently who is not particularly regulatory-minded (he'd rather talk about sales and suppliers and history books than trade practices), and his eyes got wide and said, almost in a whisper, "Have you heard the feds are going to start going after supplier sales incentives?" I felt like I was in a scene in The Godfather.

I had indeed heard. What he is talking about is the fairly common practice of breweries directly offering distributor salespeople trips and cash and other in-kind incentives for

specific goals (placements, distribution, displays etc).

But here's the deal: That IS technically illegal, unless the supplier gives the incentive directly to the distributor, and the distributor has total leeway in how to incentivize their own salespeople. But in practice, suppliers will often package a specific incentive and the distributor just passes it through to their salespeople. This is where the law gets tricky, because that could run afoul of "commercial bribery" prohibition in the federal FAA Act if not careful.

As we've reported, the federal Tax and Trade Bureau (TTB) is taking a more aggressive stance on trade practice enforcement, most recently in California, Illinois, and Florida, along with state ABCs. While the focus has been on inducements to retailers, distributors lay themselves open to liability in how they deal with supplier incentives.

(Ed. Note: Remember that distributors, not brewers, hold a federal permit to distribute alcohol which can be revoked, and so the onus is with the distributor to abide by the federal regulations).

The NBWA's head lawyer Paul Pisano recently posted to Alcohollawreview.com a trade practice update dealing with supplier incentives. The post was a response to a series of questions he asked the TTB to clarify what it considered permissible and what it did not when it comes to supplier-to-distributor incentives, and to "address various hypothetical sales incentives under the commercial bribery provision such as trip incentives or individual sales personnel incentives."

The TTB's response is interesting, and worth a read. To summarize the juicy parts, the TTB writes:

"The commercial bribery provisions of the FAA Act and TTB regulations do not preclude offering or giving money or other things of value directly to a wholesale entity itself (i.e., the corporation, partnership, or individual who owns the business). However, TTB will consider the wholesaler as acting as a mere conduit between its officers, employees, or representatives and the industry member, if:

There is an agreement or understanding, implied or explicit, that the money or thing of value will be passed on to the officers, employees, or representatives, or
It is obvious by the very nature of the item given (such as a free trip) that a pass through to the officers, employees, or representatives is clearly contemplated, or
The records of the recipient wholesaler do not accurately reflect such money or item as an asset of the wholesale entity, thus being subject to all ensuing tax consequences as distinguished from the receipt of the money or item as a personal asset of an officer, employee, or representative."

Recall the TTB requires distributors to retain sales records for at least three years. Also recall that federal alcohol trade practice statutes only apply if there is a comparable state law, so it behooves wholesalers to get up to snuff on their state statutes to protect themselves. In addition, the TTB is conducting regional seminars to clarify trade practices. https://ttb.gov/news/save-the-date.shtml

Feds warn South Florida breweries to stop producing marijuana-flavored beer

Marijuana beer is the latest trend in South Florida's brewing industry, but the cannabis terpenes oil used in the brews needs to be tested and approved. Breweries in the area are planning to host 420-themed parties.

Source: http://www.southflorida.com/
Phillip Valys April 18, 2018

The newest trend in South Florida's craft-beer industry is marijuana beer, but local brewers this week face a major buzzkill thanks to a key ingredient in the brew: cannabis terpenes oil. This week, the federal Alcohol and Tobacco Tax and Trade Bureau , aka the TTB, mailed cease-and-desist letters to Invasive Species Brewing in Fort Lauderdale and Devour Brewing in Boynton Beach. The letters, which arrived last week and Monday, block sales of any craft beer infused with cannabis terpenes oil that the federal agency hasn't approved.

In response, the owner of Devour told SouthFlorida.com on Tuesday that they may cancel beer parties planned for Friday, April 20, the unofficial pot holiday. But other breweries, such as Invasive Species, say canceling at the last-minute amounts to a waste of beer.

"[The Alcohol and Tobacco Tax and Trade Bureau] told me not to make any more beer, but they didn't tell me I had to cancel my event," says Phil Gillis, Invasive Species' head brewer, referring to his party Invasive Species Celebrates 420, set to begin at 4:20 p.m. on April 20. "It's a little bit of a drag, I won't lie, but frankly, I've got two bands booked and the beer's already made."

Cannabis terpenes are fragrant oils, extracted from marijuana plants, which give pot its signature stinky flavor. But Gillis claims he wasn't aware the oil needed federal approval, since it contains no THC (Tetrahydrocannabinol), the psychoactive substance in marijuana that produces a euphoric high. It also contains zero CBD (cannabidiol), a nonpsychoactive said to offer relief from pain, anxiety and depression.

After reading the cease-and-desist letter, Gillis called the TTB. An agency representative explained the crackdown on breweries started after recent media coverage alerted the agency to South Florida's marijuana-beer trend. From there, the agency "went to our Facebook page and found our event, and we were busted," Gillis says.

Breweries who use cannabis terpenes oil "should stop production of any fermented beverages [.] until you have obtained the appropriate formula approval," a TTB letter mailed to Devour Brewing Company reads.

So long as it tests negative for controlled substances such as THC, cannabis terpenes oil isn't illegal, says Thomas Hogue, a TTB spokesman and director of the agency's Office of Congressional and Public Affairs. But it must still be tested and submitted for approval by the agency to ensure brewers aren't spiking beers with illicit chemicals, he says.

"If you've used an ingredient, like [cannabis] terpenes oil, you would need to come to us for formula approval first, since that product isn't recognized as a traditional beer ingredient," Hogue says. Depending on the recipe's complexity, he says, oil-infused beers may also need independent approval from the Food and Drug Administration and the Drug Enforcement Administration.

While he wasn't aware that his terpenes oil-infused beers needed federal approval, Fran Andrewlevich, co-owner of Twisted Trunk Brewing, says an independent laboratory in Davie tested his oil. It contained "zero-point-zero percent" THC and CBD, he says.

For Andrewlevich, cannabis terpenes oil is the next great frontier in craft-beer experimentation. Oil extracted from different strains of cannabis plants unlocks a bounty of new beer flavors, he says.

"It's kind of like the fifth Beatle," Andrewlevich says, referring to beer's four main ingredients: water, hops, grain and yeast. "I was a naysayer in my mind, thinking it was going to taste too medicinal, or not smell like weed. But it's potent. It's aromatic. When we first sipped it, we were like, 'Holy s---.' " Andrewlevich began serving cannabis terpenes beer in January at the Jupiter Craft Brewers Festival, and has since kegged 15 different beers, including Contact Hive, a New England-style IPA punched with honey and an oil strain sold by the Boynton Beach-based supplier Terpene Station.

The allure of cannabis beers is its marijuanalike flavor, agrees Chip Breighner, owner of Devour Brewing, who scuttled plans for a 420-themed party when his cease-and-desist letter arrived last week. The tap list would have included Munchin' on Cookies, a coconut-milk stout flavored with Girl Scout Cookie terpenes oil; and TJ Express, a milkshake India Pale Ale with notes of pineapple, vanilla beans, agave and Pineapple Express terpenes.

"People love cannabis - to smoke it, to try the edibles," says Breighner, who last November became the first South Florida brewer to experiment with marijuana beer. "So if they can have a beer that gives them the sense, the smell, the flavor, people want to try it." Kyle Jones, owner of the Fort Lauderdale brewery LauderAle, says he didn't receive a cease-and-desist letter from the TTB, and on Friday plans to host Project Terpene, a festival featuring four beers with cannabis terpenes oils.

"You can't deny it's a trend right now and everyone's doing it," Jones says. "For people who've never drank it, they can experience flavors they never experienced before. It's a really great meeting of molecules."

Supreme Court Halts Claim Against Hotel in Alcohol Death

By GARY D. ROBERTSON, Associated Press

RALEIGH, N.C. (AP) - The estate of a woman who died after a night of heavy drinking while celebrating with her husband at a hotel restaurant cannot successfully sue the owners because her actions contributed to her death, the North Carolina Supreme Court ruled Friday.

In a 4-3 ruling , the justices reversed a state Court of Appeals ruling that found operators of the Crowne Plaza Tennis & Golf Resort in Asheville had violated their duty to stop serving Lisa Mary Davis in October 2012 when she became visibly intoxicated. That court decided that Davis' husband - the estate's administrator - could seek monetary damages under a so-called "dram shop" claim.

But the majority of justices agreed the factual allegations in the complaint establish his wife's contributory negligence, which essentially canceled out any

liability by the owners and operators of the resort and Milligan's restaurant.

"The events leading up to the decedent's death are undeniably tragic," Associate Justice Barbara Jackson wrote for the majority. "However, in this state contributory negligence precludes recovery for a plaintiff when, as here, the complaint alleges facts that demonstrate the plaintiff's decedent exhibited the same level of negligence as the defendant."

Thomas and Lisa Mary Davis had traveled from Charlotte to celebrate their 10th wedding anniversary at the resort. In 4½ hours over dinner at Mulligan's, the couple ordered 24 liquor drinks, of which Lisa Mary Davis consumed at least 10, according to the lawsuit.

She fell down in a hallway after leaving the restaurant and was so intoxicated that an employee used a wheelchair to move her to the couple's room, the lawsuit said. The next morning, her husband found her dead on the floor. Acute alcohol poisoning was the cause of death, Friday's decision said.

In the dissenting opinion, Associate Justice Robin Hudson wrote the majority had used the wrong legal standard.

A jury should be allowed to determine whether "gross negligence" by the restaurant staff had occurred - marked by reckless actions that had disregarded safety, Hudson wrote. In contrast, the factual allegations in the case don't appear to show Lisa Mary Davis' actions reach a similar level of gross negligence that would bar the claim, she wrote.

"I am unaware of any decision from this court holding that drinking to the point of intoxication in a safe location, absent accompanying allegations of impaired driving or other conduct, constitutes gross negligence as a matter of law," Hudson wrote.

On the dram shop claim, a trial court judge initially sided with the defendants listed in the lawsuit, which included Hulsing Enterprises LLC and Hulsing Hotels Inc. Other claims also were dismissed after a jury trial.

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