

STATE OF MICHIGAN

LIQUOR CONTROL COMMISSION

DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH

Michigan Beer and Wine Wholesalers Association
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Commission Meeting
March 4, 2009
Lansing, Michigan

DECLARATORY RULING

The Commission has before it a request from Attorney Anthony S. Kogut on behalf of the Michigan Beer and Wine Wholesalers Association (MBWWA) for a Declaratory Ruling pursuant to Rule 436.1971 of the Michigan Administrative Code (MAC) relative to the applicability of certain provisions of the Michigan Liquor Control Code of 1998, MCL 436.1101 et seq., to specific sections of the MillerCoors, LLC (MillerCoors) distribution agreement with Michigan wholesalers.

STATED FACTS

1. The MBWWA is a trade organization whose membership represents a majority of businesses holding Wholesaler of Beer and Wholesaler of Wine licenses issued by the Commission, including licensed distributors of those brands of beer produced and marketed by MillerCoors.

2. Miller Coors is an outstate seller of beer, which is defined as "a person licensed by the commission to sell beer which has not been manufactured in this state to a wholesaler in this state in accordance with rules promulgated by the commission." MCL 436.1109(7).
3. MillerCoors is requesting its Michigan wholesalers to enter into a new distribution contract (MillerCoors distribution agreement), which is the basis for the MBWWA's request for a Declaratory Ruling.
4. MillerCoors and the MBWWA have stated that Section 4.6, requiring disclosure of financial statements by the wholesaler to MillerCoors, and Section 4.8, requiring the wholesaler to name MillerCoors as an additional insured party on a general comprehensive liability insurance policy, will not be enforced in Michigan.
5. MillerCoors has also agreed to read an inconsistency of Section 8.4 of the MillerCoors distribution agreement so that it reads the same as MCL 436.1404(3)(d).
6. Section 7 of the MillerCoors distribution agreement which addresses the right to approve the wholesaler's choice of managers and Section 8 which gives MillerCoors rights of exclusive negotiation and first refusal if the wholesaler sells its distribution rights are contested by the MBWWA.
7. MillerCoors and the MBWWA have stated that if any provision of the MillerCoors distribution agreement is in conflict with Michigan law, Michigan

law prevails.

ISSUES

Five provisions of the MillerCoors distribution agreement are at issue: Section 4.6 requiring disclosure of financial statements by the wholesaler to MillerCoors; Section 4.8 requiring the wholesaler to name MillerCoors as an additional insured party on a general comprehensive liability insurance policy; Section 7 giving MillerCoors the right to approve the wholesalers' choice of managers, Section 8 giving MillerCoors rights of exclusive negotiation and first refusal if the wholesaler sells its distribution rights, and Section 8.4 restricting the wholesalers ability to undertake any acquisition or assume any contract that will in any way impact MillerCoors' brands.

MillerCoors has consistently argued that a ruling at this time by the Commission on the applicability of provisions of the Michigan Liquor Control Code to certain sections of the MillerCoors distribution agreement is unnecessary, unwarranted or premature, maintaining that there is no controversy in practice upon which to rule inasmuch as there has been no actual dispute that has arisen relative to implementation of any of the provisions of the MillerCoors distribution agreement.

LAW

MCL 436.1603(1) provides:

"(1) Except as provided in subsection (6) and section 605, a manufacturer, mixed spirit drink manufacturer, warehouse, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits

shall not have any financial interest, directly or indirectly, in the establishment, maintenance, operation, or promotion of the business of any other vendor."

MCL 436.1403(3)(l) provides as follows:

"(3) A supplier shall not do any of the following: (l) Require or prohibit any change in the manager or successor manager of any wholesaler who has been approved by the supplier as of June 26, 1984. Should a wholesaler change an approved manager or successor manager, a supplier shall not require or prohibit the change unless the person fails to meet the reasonable written standards for Michigan wholesalers of the supplier which standards have been provided to the wholesaler."

MCL 436.1403(3)(d) provides:

"(3) A supplier shall not do any of the following: (d) Require a wholesaler to assent to any condition, stipulation, or provision limiting the wholesaler's right to sell the brand or brands of beer of any other supplier anywhere in this state unless the acquisition of the brand or brands of another supplier would materially impair the quality of service of the brand or brands of the supplier presently being sold by the wholesaler."

MCL 436.1403(3)(f) provides:

"(3) A supplier shall not do any of the following: (f) Request a wholesaler to submit profit and loss statements, balance sheets, or financial records as a requirement for renewing or retaining an agreement."

MCL 436.1403(16) provides:

"A supplier shall not withhold consent to any transfer of a wholesaler's business if the proposed transferee meets the material and reasonable qualifications and standards required by the supplier. A wholesaler shall give the supplier written notice of intent to transfer the wholesaler's business. A supplier shall not unreasonably delay a response to a request for a proposed transfer of a wholesaler's business. However, a transfer of a wholesaler's business which is not approved by the supplier shall be null and void. A supplier shall not interfere with, or prevent, the transfer of the wholesaler's business if the proposed transferee is a designated member."

MCL 436.1403(33) provides:

"The procedure for resolving any violation of subsection (3)(a), (b), (c), (e), (f), (h), (i), (j), (k), (l), or (4) shall be the procedure prescribed by this act and the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Any other violation of or dispute regarding this section, unless the dispute is resolved pursuant to subsections (18) to (24), shall only be resolved by a civil action in court as provided in this section and not by the commission."

MCL 436.1609 provides:

"Except as provided in section 605, a manufacturer, mixed spirit drink manufacturer, warehouse, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not aid or assist any other vendor by gift, loan of money or property of any description, or other valuable thing, or by the giving of premiums or rebates, and a vendor shall not accept the same. However, if manufacturers of spirits reduce the price of their products, the manufacturer of spirits may refund the amount of the price reductions to specially designated distributor licensees in a manner prescribed by the commission."

RULING

The Commission will first address the argument of MillerCoors that a Declaratory Ruling is not warranted at this time. The courts of this state have held that declaratory adjudication is justified in order to avoid problems associated with a future application of relevant and material facts.

The Michigan Supreme Court in *Merkel v. Long*, 368 Mich.1, 11 (1962) held that "the rights to be determined by a declaratory ... decree may be and perhaps usually are rights not *in praesenti*, but rights which are to come into full fruition or ... at some future time." Moreover, "to avoid needless hazards or possible losses ... then there is actual need of and justification for declaratory adjudication."

Therefore, the Commission concludes that a Declaratory Ruling at this time is both justified and appropriate.

Section 13.2 of the MillerCoors distribution agreement is a choice of law provision and provides:

"This agreement shall be governed by the valid applicable laws of the State and other subordinate jurisdictions in which Distributor's Principal Place of Business within the Territory is located, without regard for any provisions regarding conflicts or choice of law. Except for any provisions prohibiting or restricting agreements to refer to disputes to binding arbitration, the laws, rules, and regulations of such jurisdiction existing as of the effective date are incorporated in this Agreement only to the extent such laws, rules and regulations are lawfully required to be so incorporated, and to such extent shall supersede any conflicting provisions of this agreements."

MillerCoors and the MBWWA have agreed that Section 13.2 of the agreement will be interpreted, and enforced by both parties, to mean that if any provisions of the MillerCoors distribution agreement are in conflict with Michigan law, then Michigan law prevails.

Even though MillerCoors has agreed not to enforce Section 4.6 and Section 4.8 of the MillerCoors distribution agreement, Section 4.6 and Section 4.8 are in violation of the Michigan Liquor Control Code and are unenforceable by MillerCoors in Michigan. Section 4.6 requires a wholesaler to submit financial statements to MillerCoors, which is prohibited by MCL 436.1403(3)(f). Section 4.8 requires a wholesaler to name MillerCoors as an additional insured party under a general comprehensive liability policy, which has previously been declared by the Commission to be a violation of MCL 436.1603, MCL 436.1609 and R 436.1035.

Section 4.6 of the MillerCoors distribution agreement provides, in part:

Distributor shall maintain and submit to MillerCoors at least annually ... and more frequently as requested by MillerCoors, complete and accurate

financial statements prepared in accordance with generally accepted accounting principles, including a balance sheet as of the end of such year or other period and related statements of income and cash flows, together with comprehensive notes and explanations....

MCL 436.1403(3)(f) prohibits a supplier such as MillerCoors from requesting a wholesaler to submit financial statements. Section 4.6 of the MillerCoors distribution agreement requires a wholesaler to provide financial statements to MillerCoors. Therefore, Section 4.6 of the MillerCoors distribution agreement is unenforceable by MillerCoors in Michigan because it is in violation of the MCL 436.1403(3)(f).

Section 4.8 of the MillerCoors distribution agreement provides:

Distributor must secure and maintain General Comprehensive Liability insurance naming MillerCoors as an additional insured and with minimum policy limits as set for in the Standards. Distributor shall provide MillerCoors with copies of certificates reflecting such coverage annually with the financial statements provided under 4.6 above, or as otherwise specified by MillerCoors.

Section 4.8 of the MillerCoors distribution agreement requires a wholesaler to secure and maintain general comprehensive liability insurance naming MillerCoors as an additional insured party under the policy. The Commission, in a previous Declaratory Ruling dated March 2, 1994, declared that MCL 436.1609, MCL 436.1603 and R 436.1035 prohibited the business practice of requiring a licensee to name another licensee on a separate tier of Michigan's three-tiered distribution system as an additional insured party on an insurance policy. Therefore, Section 4.8 of the MillerCoors distribution agreement is in violation of the Michigan Liquor Control Code and Rules and is unenforceable by MillerCoors in Michigan.

Section 7.1.1 of the MillerCoors distribution agreement provides:

"Distributor shall designate and secure MillerCoors written approval of an Operating Manager who shall (a) have the authority to act on behalf of the ownership with respect to the Distributorship and its operations, (b) be responsible for and have control of Distributor's day-to-day operation and compliance with its obligations under the Agreement, the Standards, and the Business Plan, and (c) serve as MillerCoors primary point of contact for communications relating to Distributor's relationship with MillerCoors. Unless MillerCoors shall otherwise agree in writing, the Operating Manager's primary business location shall be at Distributor's Principal Place of Business in the Territory, as listed on the Distributor Date Sheet."

Section 7.3 of the MillerCoors distribution agreement provides:

In the event MillerCoors has concerns about the performance of any Manager, MillerCoors will bring them to Distributor's attention for resolution. In the event that MillerCoors concerns are not resolved within a reasonable time, MillerCoors shall have the right to withdraw its approval of any or all of the Managers required under Section 7.1 by notifying Distributor of the reasons for such withdrawal, which reasons may include material deficiencies in the Manager's performance or Distributor's material failure to comply with this Agreement, the Standards, or the Business Plan.

Section 7.1.1 and Section 7.3 of the MillerCoors distribution agreement are in conflict with MCL 436.1403(3)(l). Section 7 of the MillerCoors distribution agreement essentially gives MillerCoors the right to hire and fire a wholesaler's managers by requiring written approval and maintaining the right to withdraw that approval when a wholesaler selects a manager. Since MCL 436.1403(3)(l) expressly forbids a supplier from requiring or prohibiting a change in the manager of a wholesaler, Sections 7.1.1 and 7.3 are in violation of the Liquor Control Code and are unenforceable by MillerCoors in Michigan.

Not only are Section 7.1.1 and Section 7.3 of the MillerCoors distribution

agreement in conflict with MCL 436.1403(3)(l), but Section 7 is also in conflict with MCL 436.1603(1). MCL 436.1603(1) prohibits MillerCoors from having a direct or indirect financial interest in the operations of a wholesaler, and the authority granted to MillerCoors in the hiring process of a wholesaler's manager gives MillerCoors a direct or indirect financial interest in the operations of a wholesaler. Therefore, the Commission concludes that the relevant provisions of Section 7 of the MillerCoors distribution agreement are in violation of MCL 436.1603(1) and 436.1403(3)(l) and are unenforceable by MillerCoors in Michigan.

Sections 8.5 through 8.11 of the MillerCoors distribution agreement involve changes in ownership of a wholesaler. Similar to Sections 7.1.1 and 7.3 of the MillerCoors distribution agreement, many of the provisions of Section 8 of the MillerCoors distribution agreement are contrary to the provisions of MCL 436.1603(1).

Section 8.5 of the MillerCoors distribution agreement provides, in part:

any sale, transfer, conveyance, or other disposition of any portion of Distributor's business that includes any transfer of (i) distribution rights relating to any or all of the Products in any or all of the Territory or (ii) ownership of Distributor itself (either or both, a "Sale Transaction"), whether in the form of sale of assets, stock, membership or partnership interests, merger, or otherwise, including transfers by operation of law, shall be subject to all of the procedures, terms and MillerCoors rights set forth in Sections 8.5, 8.6, 8.7, and 8.8 and to MillerCoors prior express written approval of the prospective purchaser(s) or successor(s) as provided in Section 8.9.

Section 8.7 of the MillerCoors distribution agreement provides, in part:

MillerCoors shall, at its election, have the right to negotiate exclusively with Distributor for the Sale Transaction that is contemplated by the Sale Notice.

Section 8.8 of the MillerCoors distribution agreement provides, in part:

If MillerCoors does not timely elect to exercise its right of exclusive negotiation under Section 8.7, or MillerCoors does so elect and such good faith negotiations do not result in the closing of a transaction between Distributor and MillerCoors, and Distributor then negotiates for a Sale Transaction with a third party under Section 8.7.3, Distributor shall deliver to MillerCoors a bona fide nonbinding letter of intent (the "Letter of Intent") within 5 days of signing the Letter of Intent and in any event at least 90 days prior to the proposed closing of any Sale Transaction with a third party. ... [8.8.3] Upon receipt of the Letter of Intent, MillerCoors shall have the irrevocable right and option to purchase that portion of Distributor's business that is the subject of the Letter of Intent upon those terms and conditions and for the purchase price ... contained in such Letter of Intent. MillerCoors shall have 30 days after receipt of the Letter of Intent and the information MillerCoors may reasonably request to exercise its right and option, which exercise shall occur when written notice is given to Distributor. If MillerCoors exercises its right and option, Distributor shall promptly execute all documents reasonably required to complete the transfer of that portion of Distributor's business subject to the option to MillerCoors.

Section 8.11 of the MillerCoors distribution agreement provides:

MillerCoors may, in its sole discretion, assign any or all of its rights under Sections 8.6, 8.7, and 8.8, to a third party of its choosing, without recourse to MillerCoors.

Sections 8.5, 8.7, 8.8 and 8.11 of the MillerCoors distribution agreement are in conflict with MCL 436.1603(1). These sections of the MillerCoors distribution agreement give MillerCoors an exclusive right of negotiation and the right of first refusal in the event of any transfer of distribution rights or transfer in ownership of a wholesaler. MCL 436.1603(1) prohibits a supplier such as MillerCoors from having a direct or indirect financial interest in the establishment, maintenance or operation of the business of a wholesaler. Transferring distribution rights or

ownership and the negotiations pursuant to such a transfer are an integral part of the establishment, maintenance and operation of a wholesaler, contrary to the provisions of MCL 436.1603(1). Therefore, the relevant provisions of Section 8 are in conflict with MCL 436.1603(1) and, the Commission concludes, are unenforceable by MillerCoors in Michigan.

Section 8.4 of the MillerCoors distribution agreement provides.

Distributor shall not undertake any acquisition or assume any contract that will in **any way** impair Distributor's ability to maintain focus and devotion of assets, efforts, and resources to its obligations under this Agreement, the Standards, or the Business Plan, to ensuring the Products' uncompromising quality, and to the growth of MillerCoors brands, Failure to comply with the provisions will subject Distributor to [termination]. (Emphasis supplied)

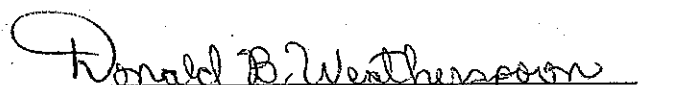
While Section 8.4 of the MillerCoors distribution agreement is not in direct violation of MCL 436.1403(3)(d), the contract provision and the Michigan Liquor Control Code provision address the same issue but contain an inconsistency. MillerCoors, in its February 27, 2009 letter to the Commission, has agreed that Section 8.4 of the MillerCoors distribution agreement will be read to reflect the language contained in MCL 436.1403(3)(d). Therefore, Section 8.4 of the MillerCoors distribution agreement should be interpreted using the word "materially" instead of "in any way" so that Section 8.4 of the MillerCoors distribution agreement is the same as MCL 436.1403(3)(d).

Therefore, based on the foregoing, the Commission concludes that several provisions of the MillerCoors distribution agreement are inconsistent with the Michigan Liquor Control Code and are unenforceable by MillerCoors in Michigan.

The relevant provisions of Section 7 of the MillerCoors distribution agreement pertaining to changes in management are in conflict with MCL 436.1403(3)(1) and MCL 436.1603(1). Furthermore, the relevant provisions of Section 8 of the MillerCoors distribution agreement regarding changes in ownership are in conflict with MCL 436.1603(1). Lastly, as agreed upon by MillerCoors, the language of Section 8.4 of the MillerCoors agreement, which is almost identical to MCL 436.1403(3)(d), should be interpreted using the language contained in MCL 436.1403(3)(d).


Nida R. Samona, Chairman

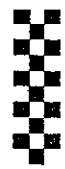

Pat Gagliardi, Commissioner


Donald B. Weatherspoon, Commissioner

Colleen A. Pobur, Commissioner


Edward J. Gaffney, Commissioner

Dated: March 4, 2009



MICHIGAN LIQUOR CONTROL COMMISSION

PROXY

Due to illness, I am unable to attend the March 4, 2009 Quarterly Meeting of the Michigan Liquor Control Commission.

Therefore, this letter authorizes Commissioner Pat Gagliardi to cast my proxy vote in support of the Declaratory Ruling regarding the MillerCoors Distribution Agreement with Michigan Wholesalers which request was submitted by Attorney Anthony Kogut on behalf of the Michigan Beer and Wine Wholesalers Association.

Colleen A. Pobur

Dated: 3/4/09