

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

FILED
U.S. DISTRICT COURT
INDIANAPOLIS DIVISION
2013 MAY 14 AM 8:33
SOUTHERN DISTRICT
OF INDIANA
LAURA A. BRIGGS
CLERK

INDIANA PETROLEUM MARKETERS)
AND CONVENIENCE STORE)
ASSOCIATION,)
THORNTONS INC.,)
RICKER OIL COMPANY INC.,)
FREEDOM OIL, LLC, and)
STEVE E. NOE,)

Plaintiffs,)

v.)

ALEX HUSKEY, in his official capacity)
as Chairman of the Indiana Alcohol and)
Tobacco Commission,)
THE INDIANA ALCOHOL AND)
TOBACCO COMMISSION, and)
THE STATE OF INDIANA)

Defendants.)

Civil Action No.

1:13-cv-0784 RLY-MJD

**COMPLAINT FOR DECLARATORY JUDGEMENT
AND INJUNCTIVE RELIEF**

Indiana statutes and regulations create an irrational and discriminatory regulatory regime that prevents certain qualified retail permit holders – such as grocery and convenience stores – from selling refrigerated beer, while allowing the sales at package liquor stores. This arbitrary distinction among licensed beer sellers does not advance any rational public policy goal. In fact, this discriminatory treatment violates the state and federal constitutions and prevents grocery and convenience stores from participating in the growing market for craft beer sales. Further, the resulting lack of competition hurts consumers who must pay higher prices. The prohibition against cold beer sales should not apply to plaintiffs as a matter of federal and state constitutional law.

PARTIES

1. Plaintiff the Indiana Petroleum Marketers and Convenience Store Association (“IPCA”) is an Indiana association that represents Indiana’s petroleum marketers, lube oil dealers and stores and truck stop operators (“IPCA stores”) and advances the interests of its members through various programs and services.

2. Plaintiff Thorntons Inc. (“Thorntons”) is a Delaware corporation with its principal place of business in Louisville, Kentucky. It is a member of the IPCA and owns and operates stores in Indiana that sell beer under existing regulations as to the temperature of that beer.

3. Plaintiff Ricker Oil Company Inc. (“Ricker”) is an Indiana corporation with its principal place of business in Anderson, Indiana. It is a member of the IPCA and owns and operates stores in Indiana that sell beer under existing regulations as to the temperature of that beer.

4. Plaintiff Freedom Oil, LLC (“Freedom”) is an Indiana limited liability company with its principal place of business in Warsaw, Indiana. It is a member of IPCA and owns and operates stores in Indiana that sell beer under existing regulations as to the temperature of that beer

5. Plaintiff Steve E. Noe is a resident of Wayne County, Indiana.

6. Defendant Alex Huskey is the Chairman of the Indiana Alcohol and Tobacco Commission (“ATC”).

7. The ATC licenses and regulates nearly 10,000 permits for the manufacture or sale of alcoholic beverages at all restaurants, breweries, wineries, grocery stores, hotels, drug stores, package stores, stadiums, civic centers, social and fraternal clubs, horse tracks, and river boats throughout the State of Indiana. The ATC is the only agency in the state that regulates alcoholic

beverages. As Chairman of the ATC, Huskey is the presiding officer at the meetings of the ATC.

8. The ATC is sued in this matter because it is charged with the task of enforcing the laws that the Plaintiffs assert are unconstitutional under the state and federal constitutions.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 2201 in that the Complaint asserts claims arising under the Constitution and laws of the United States, and seeks a declaration of rights and other legal relations under the Constitution and laws of the United States.

10. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the Defendants are located within this district and because a substantial part of the events giving rise to the claims asserted in the Complaint occurred in this district.

HISTORY OF REGULATION

11. In 1935, the Indiana General Assembly passed the Liquor Control Act, which regulated the sale of alcoholic beverages in the State of Indiana. Then, a beer dealer's permit allowed for the sale of alcoholic malt beverages to be consumed off of the premises. Act of March 11, 1935, ch. 226, 1935 Ind. Acts 1105.

12. Beer dealer's permits could be issued to proprietors of drug stores, grocery stores or confectioneries, or "to the proprietor of any store in good repute . . . which deals in such other merchandise that the sale of alcoholic malt beverages is not incompatible therewith, or likely to contravene . . . the policies and purposes of this act." *Id.* at 1106. There is no mention in the 1935 Acts at which temperature the holders of a beer dealer's permit may or may not sell beer. *See id.* at 1105-06.

13. The Liquor Control Act of 1935 also allowed for a liquor dealer's permit. *Id.* at 1129. A liquor dealer's permit allowed for the sale of alcoholic spirituous beverages to be consumed off of the premises. *Id.* A liquor dealer's permit could be issued to the proprietor of a drug store, as long as the drug store held a permit issued by the Indiana Board of Pharmacy. *Id.* A liquor dealer's permit could also be issued to the proprietor of a package liquor store. *Id.* The Liquor Control Act of 1935 defined a package liquor store as "a place or establishment, the exclusive business of which shall be the sale in the original package of alcoholic spirituous and vinous beverages." *Id.* at 1130. Thus, under the Liquor Control Act of 1935, package liquor stores could only sell wine or hard alcohol, not beer. *See id.*

14. In 1941, the Indiana General Assembly amended the language of the beer dealer's permit to prohibit the holder of the permit from selling alcoholic malt beverages that had been iced or cooled by the permit holder before or at the time of sale. Act of March 14, 1941, ch. 237, 1941 Ind. Acts 952-53. The 1941 Acts also created the Alcoholic Beverage Commission of Indiana. *Id.* at 927. There is no language in the Acts of 1941 that amends the rights of package liquor stores allowing them to sell beer at any temperature. *See id.* at 952-55.

15. The Indiana General Assembly amended the rights of package liquor store dealers in the 1953 Acts. In the 1953 Acts, package liquor store owners were permitted for the first time to sell alcoholic malt beverages, upon obtaining a beer dealer's permit. *See* Act of March 4, 1953, ch. 56, 1953 Ind. Acts 179. However, since the prohibition on the sale of cold or iced alcoholic malt beverages was still in effect, package liquor stores could still not sell cold alcoholic malt beverages. *Id.* at 180; Act of March 14, 1941, ch. 237, 1941 Ind. Acts 952-53.

16. On July 26, 1963 the Indiana Alcoholic Beverage Commission issued Bulletin #149, which stated that effective August 1, 1963, package liquor store dealers would be

authorized to sell cold beer for consumption off the premises. *State ex rel. Harris v. Superior Court of Marion Cty. (Room No. 4)*, 197 N.E.2d 634, 637 (Ind. 1964). The Indiana Supreme Court upheld the decision to allow the sale of iced and cold beer by packaged liquor stores in 1964 in *State ex rel. Harris v. Superior Court of Marion Cty. (Room No. 4)*. *Id.* at 646.

17. Bulletin #149 provided that package liquor stores would be permitted to sell cold beer for consumption off premises, “provided that such package liquor store dealer is located in a metropolitan area which, in the discretion of the Commission, is such as to afford full and adequate opportunity to police the sale of such cold beer and thereby protect the health, safety and welfare of the people of the state of Indiana.” Indiana Alcoholic Beverage Commission Bulletin #149, July 26, 1963.

18. As such, the Bulletin allowed some cold beer sales based on the metropolitan location of the permit-holder’s business.

19. The Indiana General Assembly later incorporated the language of Bulletin #149 into the 1979 Acts, allowing package liquor store dealers to offer cold beer for sale which is currently codified in Ind. Code § 7.1-3-5-3.

20. Despite the stated purpose in the Bulletin (which was later incorporated into the statute) of allowing cold beer sales only in “metropolitan” areas, many package liquor stores throughout Indiana operate in isolated rural areas that are not regularly policed in the same way as a metropolitan neighborhood.

21. As just two examples, package liquor stores in rural areas in Nineveh (Johnson County) and Leesburg (Kosciusko County) sell cold beer despite their rural location. Photographs of these stores are included below:



22. Full-size, true and accurate color copies of these photographs are attached hereto as **Exhibits A and B**, respectively.

CURRENT ALCOHOL REGULATIONS

23. Indiana's current statute prohibiting the sale of cold beer is Ind. Code § 7.1-5-10-11 which states, "[i]t is unlawful for the holder of a beer dealer's permit to offer or display for sale, or sell, barter, exchange or give away a bottle, can, container, or package of beer that was iced or cooled by the permittee before or at the time of the sale, exchange, or gift." Ind. Code § 7.1-5-10-11.

24. Indiana is the only state to regulate the temperature at which beer may be sold.

25. The temperature of beer does not control or alter its alcohol content.

26. Indiana allows holders of a beer dealer's permit to sell warm, non-cooled beer for consumption off of the premises. Ind. Code § 7.1-3-5-3.

27. Currently, drug stores, grocery stores, and package liquor stores may sell beer under an Indiana beer dealer's permit. Ind. Code § 7.1-3-5-2.

28. Included in the definition of grocery stores are convenience stores and food marts that are primarily engaged in selling goods that include bread, milk, soda, and snacks and can include the sale of automotive fuel. Ind. Code § 7.1-1-3-18.5 ("Licensed Grocery Stores").

29. Indiana's current statutes and regulations do not make a distinction between treatments of beer dealer's permits in incorporated or unincorporated areas.

30. A liquor dealer's permit allows the holder of the permit to sell liquor to customers for sale off the premises. Ind. Code § 7.1-3-10-7.

31. A wine dealer's permit allows the holder of either a beer dealer's or liquor dealer's permit to sell wine to customers for consumption off the premises. Ind. Code § 7.1-3-15-2; Ind. Code § 7.1-3-15-3.

32. Notwithstanding Ind. Code § 7.1-5-10-11, package liquor stores are permitted to sell cold beer for off-premises consumption under an exemption granted by Ind. Code § 7.1-3-5-3.

33. This gives package liquor stores an arbitrary and unfair advantage, which allows package liquor stores to sell cold beer at a premium price. It also prevents certain craft beer – which often must be cold pursuant to a brewer's specifications as to temperature – from being sold anywhere but at package liquor stores.

34. In many instances, package liquor stores selling cold beer operate in close proximity with Licensed Grocery Stores that are forbidden from doing so.

35. For instance, a package store operating in Anderson near Interstate 69 may sell cold beer yet a Licensed Grocery Store at the same location may not despite the fact that the two businesses share a wall and that the package liquor store is almost directly in front of the gas pumps maintained by the Licensed Grocery Store, as demonstrated by the following photograph.



36. A full-size, true and accurate color copy of this photograph is attached hereto as **Exhibits C.**

37. The ATC may issue a brewer's permit to a brewery that manufactures fewer than 30,000 barrels of beer in a calendar year for sale or distribution in Indiana, and the holder of this permit may sell and deliver beer to a person holding a beer retailer's or beer dealer's permit. Ind. Code § 7.1-3-2-2

38. However, these smaller breweries typically make specialized craft beer which must be kept cold for quality control purposes. This limits the market for smaller breweries and forces them to sell, outside of their breweries, through a more expensive and less effective distribution network.

39. Under current Indiana law, Licensed Grocery Stores may sell refrigerated wine and wine coolers that often have alcohol content higher than that of most types of beer.

40. In some cases, these refrigerated wine products can have almost three times the amount of alcohol as what is contained in most types of beer.

FACTS SPECIFIC TO IPCA

41. IPCA members' stores – including those operated by Thorntons, Ricker and Freedom – are grocery stores that provide convenient one-stop shopping for their customers (the “IPCA Member Stores”).

42. Because the IPCA Member Stores are designed to provide convenience, the stores are by their nature small. Because of the small size of the stores, the IPCA Member Stores cannot offer the same scope of products offered at, for instance, a supermarket.

43. Often, the IPCA Member Stores are located in areas where these larger stores are not as readily available to serve the local community.

44. The IPCA Member Stores have a ready-made distribution network that would allow convenient, low-cost distribution of its products through a central network.

45. Customers of the IPCA Member Stores expect to be able to purchase products such as bread, milk, soda, snacks, gas, beer, and other products all in the same place and at the same time when they frequent these establishments.

46. Under current regulations, the IPCA Member Stores are able to sell beer under a beer dealer's permit only if it is not refrigerated.

47. The IPCA Member Stores consistently demonstrate that they are more effective than liquor stores at obeying Indiana's alcohol laws, including preventing sales to minors. Between 2007 and 2012 (which represent the latest data available), Indiana package liquor stores

were 138 percent more likely to violate Indiana liquor laws than were Licensed Grocery Stores (including convenience stores) and pharmacies. Similarly, restaurants and bars – which may also sell refrigerated beer – were 1,376 percent more likely to violate Indiana liquor law than grocery stores or pharmacies over the same period of time.

48. IPCA

Member Stores take seriously their commitment to comply with Indiana's liquor laws and to encourage responsible consumption of alcohol, a commitment not always shared by other permit holders who may sell cold beer.

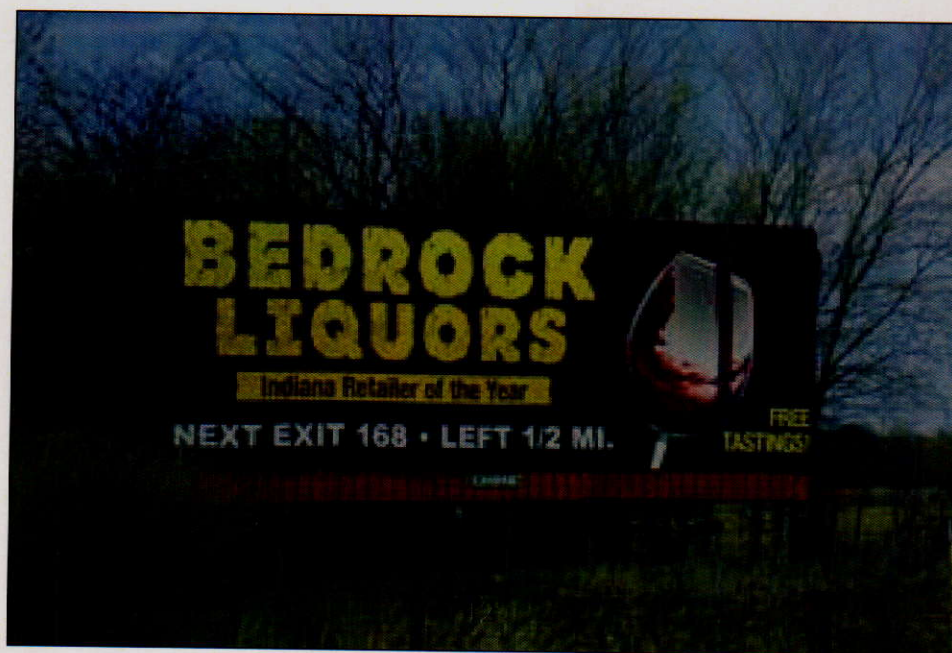
49. For instance, a package liquor store (which is able to sell cold beer) in South Bend, Indiana near the campus of the University of Notre Dame includes a sign encouraging patrons to "Drink Like A Champion Today," a play



on a slogan used by the Notre Dame football team,

50. A full-size, true and accurate color copy of this photograph is attached hereto as **Exhibit D.**

51. Similarly, other package liquors stores advertise along Indiana's roadways, encouraging Indiana drivers to purchase their products – including cold beer – while driving. Indeed, one such package liquor store boasts of having “the coldest beer” to passing motorists:



52. True and accurate copies of these photographs **Exhibit E** and **Exhibit F**.

53. The IPCA Member Stores lose a significant amount of revenue as a result of not being able to sell cold beer to their customers. This includes revenue lost when customers near Indiana's borders cross state lines to purchase cold beer and revenue lost by virtue of the fact that customers do not purchase additional items their other similar items at the same time out of convenience.

54. Indiana residents can drive across the state border to Illinois, Michigan, and Kentucky to purchase cold beer from grocery stores. In Ohio, they can not only buy cold beer at grocery stores, but they can buy it from drive through windows.

55. The inability of IPCA Member Stores to sell refrigerated beer impacts economic development in that owners of such stores can and do choose to locate stores in other states in part because of the loss revenue from cold beer sales (and accompanying purchases) and the unfair competitive advantage current laws give to package liquor stores.

56. For instance, Thorntons has not constructed a new store in Indiana since 2006. The lost investment for each new store that could be constructed runs in the millions of dollars.

57. Thorntons invests tens of millions of dollars in new stores each year, but has chosen not to do so in Indiana since 2006 because of the restriction on cold beer sales. Indiana has lost millions of dollars in investments for each new store that would have otherwise been built. Indiana residents also lose the opportunity for employment in store construction, management and operation.

58. The inability for the IPCA Member Stores to sell cold beer is arbitrary and serves no legitimate purpose.

59. The IPCA's members have standing to bring this Complaint in their own right.

60. Ricker, Thorntons, and Freedom have standing to bring this Complaint in their own right given the impact that Indiana's arbitrary restriction on the sale of cooled beer has on their business.

61. Ricker, Thorntons, and Freedom have been injured by the acts of the Defendants in regulating the temperature of the beer they sell in an arbitrary manner that violates the state and federal constitution.

62. This Complaint is brought by the IPCA under its stated goal of advancing the interests of its members, in this case selling cold beer, through various programs and services.

63. Neither the claims asserted in this Complaint, nor the relief requested requires the participation of individual IPCA stores.

FACTS SPECIFIC TO NOE

64. Like millions of Hoosiers, Noe occasionally enjoys drinking an alcoholic beverage, including beer.

65. Noe does not drink while driving and has never been arrested for an alcohol related offense.

66. Noe would purchase cold beer from convenience and grocery stores in Indiana if he had the opportunity.

67. Noe occasionally purchases cold beer from convenience stores in nearby New Paris, Ohio.

68. As recently as May 11, 2013, Noe was able to purchase a 12 pack of Bud Light beer from a Richmond package liquor store for \$13.36. This beer was chilled.

69. He purchased a 12 pack of Bud Light from a convenience store for \$10.69. Because of Indiana's liquor laws prohibiting the sale of cold beer at Licensed Grocery Stores, this beer was sold warm.

70. He purchased a 12 pack of Bud Light at a New Paris, Ohio convenience store for \$11.76. This beer was chilled.

71. Because of the virtual monopoly on the sale of cold beer enjoyed by package liquor stores that Indiana liquor law creates, the customers seeking cold beer must pay a premium to obtain cold beer from package liquor stores or, in areas near the state's borders, purchase cold beer from another source.

72. Many Indiana cities and towns are located near bordering states that allow the sale of cold beer in convenience stores and groceries.

73. In addition to Richmond, these locations include population centers such as Evansville, New Albany, Terre Haute, Gary, Fort Wayne, South Bend, Lawrenceburg and many others.

74. Like Noe, many customers in these areas may simply cross the border to purchase cold beer.

75. Indiana loses millions of dollars of revenue by the fact that these sales occur out-of-state.

COUNT I - VIOLATION OF EQUAL PROTECTION

76. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-72 as though fully set forth herein.

77. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

78. The Equal Protection Clause directs that all persons similarly situated should be treated alike.

79. Ind. Code §§ 7.1-3-5-3, and 7.1-5-10-11 together treat holders of an Indiana beer dealer’s permit who are not package liquor stores differently from all similarly situated lawful third-party beer sellers in all other states of the United States by prohibiting the sale of beer based upon the beer’s temperature at the time of sale.

80. There is no rational basis for distinguishing between holders of a beer dealer’s permit who are package liquor stores and holders of a beer dealer’s permit who are not package liquor stores for the purposes of selling cold beer to customers.

81. There is no rational basis for distinguishing between holders of a beer dealer’s permit in Indiana who are prohibited from selling cold beer unless they are a package liquor store and similarly situated beer retailers in any other state in the United States, who are not prohibited from selling beer based upon the beer’s temperature at the time of sale. Indeed, grocery stores may already sell cold beverages other than beer even though these beverages contain a greater alcohol content than beer.

82. Such differential treatment is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

COUNT II - VIOLATION OF EQUAL PRIVILEGES

83. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-79 as though fully set forth herein.

84. The United States Constitution provides that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2, cl. 1.

85. Ind. Code § 7.1-3-5-3 treats package liquor store holders of a beer dealer’s permit differently from all other similarly situated holders of a beer dealer’s permit in Indiana.

86. Ind. Code § 7.1-3-5-3 treats package liquor store holder of a beer dealer’s permit differently from all other similarly situated beer dealer’s permit holders in all other states in the United States.

87. Ind. Code § 7.1-5-10-11, treats beer dealer’s permit holders, that are not package liquor stores, in Indiana differently from all other similarly situated beer dealer’s permit holders in the United States by prohibiting the sale of beer based upon the temperature of the beer at the time of sale.

88. There is no rational basis for this differential treatment.

89. Ind. Code §§ 7.1-3-5-3, 7.1-5-10-11 violate Article IV, Section 2 of the United States Constitution.

COUNT III - VIOLATION OF INDIANA EQUAL PRIVILEGES CLAUSE

90. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1- 79 as though fully set forth herein.

91. The Indiana Constitution provides that “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” Ind. Const. art I, § 23.

92. Ind. Code § 7.1-3-5-3 treats package liquor store holders of a beer dealer’s permit differently from all other similarly situated holders of a beer dealer’s permit in Indiana.

93. Ind. Code § 7.1-5-10-11, treats beer dealer's permit holders, that are not package liquor stores in Indiana differently from all other similarly situated beer dealer's permit holders in Indiana that are package liquor stores by prohibiting the sale of beer based upon the temperature of the beer at the time of sale.

94. There is no rational basis for this differential treatment.

95. Ind. Code §§ 7.1-3-5-3, 7.1-5-10-11 violate Article I, Section 23 of the Indiana Constitution.

COUNT IV - VIOLATION OF INDIANA CONSTITUTION ARTICLE I, SECTION 1

96. Plaintiffs repeat, reallege and incorporate the allegations in paragraphs 1-85 as though fully set forth herein.

97. The Indiana Constitution provides, "That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." Ind. Const. art I, § 1.

98. The Indiana Supreme Court has determined that "the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each compos mentis individual, of selecting what he will eat and drink." *Herman v. State*, 8 Ind. 545, 558 (Ind. 1855).

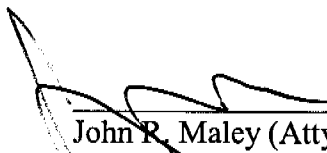
99. Ind. Code §§ 7.1-3-5-3, 7.1-5-10-11 interfere with an individual's right to select what they eat and drink, by not allowing a consumer of legal age to purchase beer based solely on the temperature at which it is sold.

100. Ind. Code §§ 7.1-3-5-3, 7.1-5-10-11 violate Article I, Section 1 of the Indiana Constitution.

WHEREFORE, Plaintiff respectfully requests the Court to enter a judgment:

- (a) declaring that Ind. Code §7.1-5-10-11 is invalid as applied to Plaintiffs;
- (b) enjoining Defendant on a preliminary and permanent basis, from enforcing or threatening to enforce any prohibition of cold beer sales against Plaintiff;
- (c) awarding Plaintiff a reasonable attorney's fee and costs pursuant to 42 U.S.C. § 1988(b); and
- (d) granting such other and further relief as the Court may deem equitable and just.

Respectfully submitted,



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