

1999 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1260

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1260

House Industry, Business and Labor Committee

Conference Committee

Hearing Date 1-27-99

Tape Number	Side A	Side B	Meter #
1		x	4619 - end
2	x		0 - 1895
Committee Clerk Signature <i>Lisa Horner</i>			

Minutes: **HB 1260**

Rep. Keiser introduced HB 1260 relating to Beer wholesalers and brewer relationships. This is an extremely highly regulated industry and product in our state as well as others. You need to understand that alcohol has three compounds. There's the manufacturer, the wholesaler and the retailer. You can't be any two at any one time.

Janet Seaworth, Executive Director of ND Beer Wholesalers Assoc. testified in support of HB 1260. (See written testimony)

Rep. Severson: Have there ever been any trends set by brewers as to a specific brewer seems to be coercing one wholesaler than others?

Janet Seaworth: At the risk of getting myself in trouble, I can only say that there does appear to be a trend in that there has been more of a consolidation on the brewer level and so the power that the brewers have are more concentrated between a hand full where there used to be a lot



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House Industry, Business and Labor Committee

Bill/Resolution Number Hb1260

Hearing Date 1-27-99

more brewers. Because of that consolidation of power on the brewer level there have been some strong-arm tactics and perhaps a little more gentle coercion than there used to be.

Randy Christianson, President of Beverage Wholesalers, Inc. testified in support of HB 1260.

(See written testimony)

John Olson, representing Phillip Morris, testified in support of HB 1260.

Chairman Berg closed the hearing.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1260 2-2-99

House Industry, Business and Labor

Conference Committee

Hearing Date 2-2-99

Tape Number	Side A	Side B	Meter #
1		x	38.4-54.9
Committee Clerk Signature <i>Lisa Horner</i>			

Minutes: Chairman Berg asked for discussion of HB 1260; relating to beer wholesaler and brewer relationships.

Rep. Severson ; 38.4 The amendments are quite extensive, but I would like everyone to take a close look at them. I will take you through them. These amendments are a compromise and comes up with some new language.

After long discussion, the committee decided to hold the bill until next week.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1260

House Industry, Business and Labor Committee

Conference Committee

Hearing Date 2-8-99

Tape Number	Side A	Side B	Meter #
2	x		23. 53.
Committee Clerk Signature <i>Lisa Horner</i>			

Minutes: **HB 1260**

Chairman Berg opened the discussion of HB 1260.

Rep. Severson handed out and explained the amendments to the committee.

Rep. Keiser made a motion to adopt the amendment.

Rep. Klein second the motion.

The voice vote was 15 yea, 0 nay. The motion carried.

Rep. Severson made a motion for a Do Pass as Amended.

Rep. Brekke second the motion.

The roll call vote was 15 yea, 0 nay. The motion carried.

Rep. Severson will carry the bill.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1260

Page 1, line 1, after "sections" insert "5-04-01,"

Page 1, after line 4, insert:

**"SECTION 1. AMENDMENT.** Section 5-04-01 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**5-04-01. Definitions.** As used in this chapter, unless the context otherwise requires:

1. "Agreement" means one or more of the following:
  - a. A commercial relationship between a licensed beer wholesaler and a licensed brewer of a definite or indefinite duration which is not required to be evidenced in writing.
  - b. A relationship whereby the beer wholesaler is granted the right to offer and sell a brand or brands of beer offered by a brewer.
  - c. A relationship whereby the beer wholesaler, as an independent business, constitutes a component of a brewer's distribution system.
  - d. A relationship whereby the beer wholesaler's business is substantially associated with a brewer's brand or brands, designating the brewer.
  - e. A relationship whereby the beer wholesaler's business is substantially reliant on a brewer for the continued supply of beer.
  - f. A written or oral arrangement for a definite or indefinite period whereby a brewer grants a license to a beer wholesaler to use a brand, trade name, trademark, or service mark, and in which there is a community of interest in the marketing of goods or services at wholesale or retail.
2. "Ancillary business" means a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler, the primary business of which is directly related to the transporting, storing, or marketing of the brewer's products with whom the wholesaler has an agreement.
3. "Beer wholesaler" or "wholesaler" means any licensee, as outlined in section 5-03-01, importing or causing to be imported into this state or purchasing or causing to be purchased within this state, any beer for sale or resale to retailers or wholesalers licensed pursuant to chapter 5-02 or 5-03, without regard to whether the business of the person is conducted under the terms of an agreement with a licensed brewer.
- ~~3.~~ 4. "Brand" means any word, name, group of letters, symbol, or combination thereof, that is adopted and used by a brewer or importer to identify a specific beer product, and to distinguish that beer product from another beer product.

- 4- 5. "Brand extension" is any brand that incorporates all or a substantial part of the unique features of a preexisting brand of the same brewer or importer, and which relies to a significant extent on the goodwill associated with that preexisting brand.
- 5- 6. "Brewer" means every licensed brewer or importer of beer located within or without this state who enters into an agreement with any beer wholesaler licensed to do business in this state.
- 6- 7. "Person" means a natural person, corporation, limited liability company, partnership, trust, agency, or other entity as well as the individual officers, directors, or other persons in active control of the activities of each such entity. "Person" also includes heirs, assigns, personal representatives, conservators, and guardians.
- 7- 8. "Territory" or "sales territory" means the area of primary sales responsibility designated by any agreement between any beer wholesaler and brewer for the brand or brands of any brewer."

Page 1, line 11, remove "enter into"

Page 1, line 12, remove "any agreement or" and overstrike "do any illegal act" and immediately thereafter insert "enter any agreement or take any action that would violate any law or rule of this state"

Page 1, line 19, after "specific" insert ", confidential"

Page 2, line 25, replace "any and all assets" with "the wholesaler's business with respect to the terminated brand or brands", after "including" insert "the value of any", replace "businesses" with "business", and remove "used in"

Page 2, line 26, remove "distributing the brewers' products" and after "business" insert "or ancillary business"

Renumber accordingly

Date: 218  
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1260

House Industry, Business and Labor Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Adopt Am.

Motion Made By Rep. Keiser Seconded By Rep. Severson

Representatives	Yes	No	Representatives	Yes	No
Chair - Berg			Rep. Thorpe		
Vice Chair - Kempenich					
Rep. Brekke					
Rep. Eckstrom					
Rep. Froseth					
Rep. Glassheim					
Rep. Johnson					
Rep. Keiser					
Rep. Klein					
Rep. Koppang					
Rep. Lemieux					
Rep. Martinson					
Rep. Severson					
Rep. Stefonowicz					

Total (Yes) 15 No 0

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: 2/8  
 Roll Call Vote #: 2

**1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 1260**

House Industry, Business and Labor Committee

Subcommittee on \_\_\_\_\_  
 or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken DO PASS AS AMENDED

Motion Made By REP. SEVERSON Seconded By REP. BREKKE

Representatives	Yes	No	Representatives	Yes	No
Chair - Berg	✓		Rep. Thorpe	✓	
Vice Chair - Kempenich	✓				
Rep. Brekke	✓				
Rep. Eckstrom	✓				
Rep. Froseth	✓				
Rep. Glassheim	✓				
Rep. Johnson	✓				
Rep. Keiser	✓				
Rep. Klein	✓				
Rep. Koppang	✓				
Rep. Lemieux	✓				
Rep. Martinson	✓				
Rep. Severson	✓				
Rep. Stefonowicz	✓				

Total (Yes) 15 No 0

Absent Be

Floor Assignment Rep Severson

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1260: Industry, Business and Labor Committee (Rep. Berg, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1260 was placed on the Sixth order on the calendar.

Page 1, line 1, after "sections" insert "5-04-01,"

Page 1, after line 4, insert:

**"SECTION 1. AMENDMENT.** Section 5-04-01 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

**5-04-01. Definitions.** As used in this chapter, unless the context otherwise requires:

1. "Agreement" means one or more of the following:
  - a. A commercial relationship between a licensed beer wholesaler and a licensed brewer of a definite or indefinite duration which is not required to be evidenced in writing.
  - b. A relationship whereby the beer wholesaler is granted the right to offer and sell a brand or brands of beer offered by a brewer.
  - c. A relationship whereby the beer wholesaler, as an independent business, constitutes a component of a brewer's distribution system.
  - d. A relationship whereby the beer wholesaler's business is substantially associated with a brewer's brand or brands, designating the brewer.
  - e. A relationship whereby the beer wholesaler's business is substantially reliant on a brewer for the continued supply of beer.
  - f. A written or oral arrangement for a definite or indefinite period whereby a brewer grants a license to a beer wholesaler to use a brand, trade name, trademark, or service mark, and in which there is a community of interest in the marketing of goods or services at wholesale or retail.
2. "Ancillary business" means a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler, the primary business of which is directly related to the transporting, storing, or marketing of the brewer's products with whom the wholesaler has an agreement.
3. "Beer wholesaler" or "wholesaler" means any licensee, as outlined in section 5-03-01, importing or causing to be imported into this state or purchasing or causing to be purchased within this state, any beer for sale or resale to retailers or wholesalers licensed pursuant to chapter 5-02 or 5-03, without regard to whether the business of the person is conducted under the terms of an agreement with a licensed brewer.
- ~~3.~~ 4. "Brand" means any word, name, group of letters, symbol, or combination thereof, that is adopted and used by a brewer or importer to identify a specific beer product, and to distinguish that beer product from another beer product.



- 4- 5. "Brand extension" is any brand that incorporates all or a substantial part of the unique features of a preexisting brand of the same brewer or importer, and which relies to a significant extent on the goodwill associated with that preexisting brand.
- 5- 6. "Brewer" means every licensed brewer or importer of beer located within or without this state who enters into an agreement with any beer wholesaler licensed to do business in this state.
- 6- 7. "Person" means a natural person, corporation, limited liability company, partnership, trust, agency, or other entity as well as the individual officers, directors, or other persons in active control of the activities of each such entity. "Person" also includes heirs, assigns, personal representatives, conservators, and guardians.
- 7- 8. "Territory" or "sales territory" means the area of primary sales responsibility designated by any agreement between any beer wholesaler and brewer for the brand or brands of any brewer."

Page 1, line 11, remove "enter into"

Page 1, line 12, remove "any agreement or" and overstrike "do any illegal act" and insert immediately thereafter "enter any agreement or take any action that would violate any law or rule of this state"

Page 1, line 19, after "specific" insert ", confidential"

Page 2, line 5, remove the overstrike over ", but is"

Page 2, line 6, remove the overstrike over "not limited to,"

Page 2, line 15, after the underscored period insert "If a wholesaler initiates a civil action, the brewer bears the burden of proving the existence of good cause after a prima facie showing by the wholesaler that good cause does not exist."

Page 2, line 24, remove the overstrike over ", but is not limited to,"

Page 2, line 25, replace "any and all assets" with "the wholesaler's business with respect to the terminated brand or brands", after "including" insert "the value of any", replace "businesses" with "business", and remove "used in"

Page 2, line 26, remove "distributing the brewers' products" and after "business" insert "or ancillary business. The value of the wholesaler's business may not exceed the wholesaler's actual damages"

Renumber accordingly

**1999 SENATE INDUSTRY, BUSINESS AND LABOR**

**HB 1260**

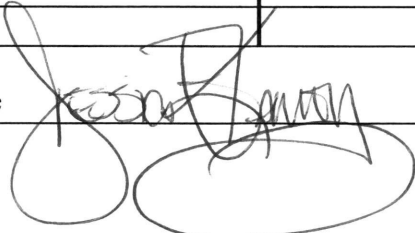
1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1260

Senate Industry, Business and Labor Committee

Conference Committee

Hearing Date March 9, 1999

Tape Number	Side A	Side B	Meter #
1		x	1730-3440
Committee Clerk Signature 			

Minutes:

Senator Mutch opened the hearing on HB1260. All senators were present.

Representative Keiser introduced the bill to the committee. Senator Thompson asked him if an ancillary business would be a truck that hauled a load of potatoes to Missouri and brought back a load of beer. Representative Keiser told him that he did not believe that it would be.

Janet Seaworth, executive director of the North Dakota Beer Wholesalers association, testified in support to HB1260. Her testimony is included.

Rick Bergseth, North Dakota Beer Wholesalers Association, testified in support of HB1260.

Senator Krebsbach asked him if we have experienced problem with threats to cancel. Mr.

Bergseth said that there was a situation in which there was a revised contract that was brought up last year and they were told that if they did not sign, they would not be shipped beer in 1999.

Senator Mutch closed the hearing on HB1260.

Page 2

Senate Industry, Business and Labor Committee

Bill/Resolution Number Hb1260

Hearing Date March 9, 1999

Senator Mathern motioned for a do pass committee recommendation on HB1260. Senator Klein seconded her motion. The motion was successful with a 7-0-0 vote.

Senator Krebsbach will carry the bill.

SR444517

Date: 3/09

Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
HOUSE BILL/RESOLUTION NO. 1260

Senate INDUSTRY, BUSINESS AND LABOR COMMITTEE Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken DO PASS

Motion Made By MATHELN Seconded By KLEIN

Senators	Yes	No	Senators	Yes	No
Senator Mutch	X				
Senator Sand	X				
Senator Krebsbach	X				
Senator Klein	X				
Senator Mathern	X				
Senator Heitkamp	X				
Senator Thompson	X				

Total (Yes) 10 7 No 0

Absent 0

Floor Assignment KREBSBACH

REPORT OF STANDING COMMITTEE (410)  
March 11, 1999 10:04 a.m.

Module No: SR-44-4517  
Carrier: Krebsbach  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

HB 1260, as engrossed: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1260 was placed on the Fourteenth order on the calendar.

**1999 TESTIMONY**

**HB 1260**

**Testimony of Janet Demarais Seaworth  
Executive Director  
North Dakota Beer Wholesalers Association**

**House Industry Business and Labor Committee  
HB 1260**

Mr. Chairman, members of the committee, my name is Janet Seaworth, I'm the executive Director of the North Dakota Beer Wholesalers Association. Our association is comprised of twenty family owned and operated beer wholesalers. We appear in support of HB 1260.

HB 1260 was introduced at the request of North Dakota's beer wholesalers to clarify current law relating to beer wholesaler and brewer relationships. The relationship between brewers and beer wholesalers is governed by both state and federal law, which mandates a three-tier system of alcohol distribution. The three-tier system was put into place after the repeal of prohibition. At that time, it was determined that in order to avoid the abuses which lead to prohibition, the manufacturer and retailer should forever be separated. And so, the law mandated that a wholesaler be inserted between the two tiers. The strength of the three-tier system thus depends upon the health and stability of the the wholesaler. In order to assure the stability of the wholesale tier, states have enacted laws that govern the beer wholesaler and brewer relationship. One key law - the franchise law - protects wholesalers from arbitrary termination by brewers, thereby ensuring a strong wholesale tier. HB 1260 seeks to clarify our existing franchise law and thereby ensure the stability of the wholesale tier.

**SECTION 1.** Amends section 5-04-02, to provide that a brewer may not coerce a beer wholesaler to enter any agreement by threatening to amend, cancel, terminate, or refuse to renew an existing agreement. No brewer should be allowed to affect the termination of an existing agreement by forcing a beer wholesaler to enter a new (and oftentimes less favorable agreement) by threatening to terminate the wholesaler. We believe that the state's interest in maintaining a strong three-tier system and stable wholesale tier requires that this type of coercion be specifically prohibited.

Section 1 also amends the law to provide that no brewer may require a wholesaler to submit specific information regarding competitive brands as a condition of renewal or continuation of an agreement. A recent brewer's contract included a provision which would require wholesalers to provide information about competitive brands. This information is proprietary, and as one Attorney General has stated, providing this information could lead to antitrust concerns. Recently, Coors Brewing Company has advised its wholesalers that if they supply such information to another brewer, the wholesaler would be in violation of its agreement with Coors. Other states have used this same language to provide that wholesalers may not be required to furnish such information.

**SECTION 2.** Amends section 5-04-04 to provide that in any dispute involving an amendment, cancellation, termination, or non renewal, the brewer shall bear the burden of proving the existence of good cause. Current law provides that a brewer may terminate a wholesaler for good cause. It follows then that



the brewer should bear the burden of proving that good cause exists; rather than requiring a wholesaler to "guess" as to the reasons for termination, and then be required to prove that those reasons did not amount to good cause. Other states already provide that the brewer must bear the burden of proving good cause for termination.

**SECTION 3.** Amends subsection 1 of section 5-04-07 to clarify that the value of a wholesaler's business includes all assets used in distributing the brewers products, including assets held in an ancillary business. Current law requires a brewer to pay reasonable compensation for the value of the wholesaler's business upon termination. HB 1260 clarifies that the value includes assets held in ancillary businesses that are used in distributing the brewers' products. For example, for tax purposes, and in order to reduce liability, some wholesalers have their warehouses and beer trucks in separate corporations. HB 1260 clarifies that those assets are part of the beer wholesalers' business, even if they are held in a separate corporation. Other states have used the very same language to make the same clarification, in an effort to alleviate any questions that may arise as a result of a beer wholesaler's assets being held in several different corporations.

**SECTION 4.** Amends section 5-04-08 to provide that any legal action taken under the franchise law or pursuant to a distributor agreement shall be filed in a North Dakota court. Current law provides that a wholesaler may bring suit under the franchise law, and it is implied that the suit would be filed in North Dakota. However, recently, some brewers have attempted to provide by contract that all disputes must be litigated in, for example, Milwaukee. The wholesaler would then be effectively denied its rights under the franchise law, and the state would be denied its rights under the 21st Amendment to the Constitution to regulate the distribution of alcoholic beverages. The amendment makes it clear that all litigation under the franchise law shall take place in North Dakota.

**SECTION 5.** Amends section 5-04-13 to provide that no provision of any distributor agreement may require the law of any state other than North Dakota to govern the relationship of the parties. Again, this assures that the state of North Dakota has the right to regulate alcoholic beverages within its borders and wholesalers have the benefit of the franchise law in disagreements with brewers.

In sum, the amendments proposed by HB 1260 seek to clarify and strengthen existing law. We think the amendments proposed are fair. We urge you to support the bill and give it a Do Pass recommendation.

Thank you.



STATE OF NORTH DAKOTA  
OFFICE OF THE STATE TREASURER

December 22, 1998

Ms. Janet Seaworth  
Executive Director  
North Dakota Beer Wholesalers Association  
Box 7401  
Bismarck, North Dakota 58507-7401

Dear Janet,

I have reviewed the wholesaler's agreement that Miller Brewing Company has asked the North Dakota beer wholesalers to sign. I have also discussed this issue with the Attorney General.

I am concerned that there are provisions in the Miller Brewing Company contracts that violate North Dakota law with regard to the three-tier system. There also appears to be antitrust concerns, that the agreement violates the franchise law, and that the parties cannot contract away the State's interest in regulating alcoholic beverages by providing venue in Wisconsin.

Further, these provisions would implicate the North Dakota beer wholesalers right of free association under North Dakota Century Code 5-04-16.

It is my opinion that the beer wholesaler must be protected in his franchise with the brewer by state law. Likewise, because the regulation of the wholesale beer industry is a very important state issue, I will, in conjunction with the Attorney General's Office enforce all the provisions of North Dakota law that conflicts with the proposed Miller Brewing Company contracts.

If you should have any question, please call me.

Sincerely,

A handwritten signature in black ink, appearing to read "Kathi Gilmore", written over a horizontal line.

Kathi Gilmore  
State Treasurer

Wednesday, January 27, 1999

**HB 1260**

A bill introduced by the North Dakota Beer Wholesalers Association to clarify and amend current law relating to Beer Wholesaler and Brewer relationships.

My name is Randy Christianson, President of Beverage Wholesalers, Inc., a beer distributor and recycler with warehouse locations in Fargo, Wahpeton and Oakes, North Dakota. We employ approximately 75 people company-wide and have three operating divisions doing business as Beverage Wholesalers, Inc., Weatherhead Distributing Company and Minnkota Recycling.

We are in favor of HB1260

The state has an interest in maintaining a strong wholesale tier. A strong wholesale tier is key to the viability of the three-tier system of alcohol distribution, which was put into place after the repeal of prohibition. The three-tier system requires that the activities of suppliers, wholesalers, and retailers are kept separate. One key law – the franchise law – supports the three-tier system. Franchise laws protect wholesalers from arbitrary termination by brewers, thereby ensuring a strong wholesale tier.

Brewers should not be allowed to coerce a beer wholesaler into entering any agreement by threatening to amend, cancel, terminate, or refuse to renew an existing agreement. Any brewer may terminate a wholesaler for good cause, but no brewer should be allowed to force a beer wholesaler into entering a new agreement, (usually less favorable to the wholesaler) by threatening to terminate the wholesaler. The state's interest in maintaining a strong three-tier system and stable wholesale tier requires that this type of coercion be prohibited.

A wholesaler should not be required to submit proprietary information regarding competitive brands. Recent brewers' contracts have included provisions, which would

require wholesalers to provide this information. This information is proprietary, and providing this information could lead to antitrust concerns.

Wholesalers should not be required to waive their rights under North Dakota law and the State should not be deprived of its right to regulate alcoholic beverages within its borders. Some brewers have attempted to provide by contract that all disputes must be litigated in, for example, Milwaukee. HB1260 makes it clear that any legal action taken under the franchise law or pursuant to a distributor agreement shall be filed in a North Dakota court, and that no distributor agreement may require the law of any state other than North Dakota to govern the relationship of the parties. This assures that the state of North Dakota is not deprived of its right to regulate alcoholic beverages within its borders and wholesalers have the benefit of the franchise law.

Testimony to the Senate Industry Business and Labor Committee  
On: March 9, 1999  
By: Richard D. Bergseth  
701-232-8818

Mr. Chairman, Members of the Committee:

HB1260 is a bill favored by the North Dakota Beer Wholesalers Association to clarify and amend current law (5-04) relating to beer wholesaler and brewer relationships.

The State has an interest in maintaining a strong wholesale tier. A strong wholesale tier is key to the viability of the three-tier system of alcohol distribution, since the repeal of prohibition. The three-tier system requires that the activities of suppliers, wholesalers, and retailers are kept separate. The franchise law - 5-04 - is the one key law that supports the three-tier system. Franchise laws protect wholesalers from arbitrary termination by brewers, thereby ensuring a strong wholesale tier.

Brewers should not be allowed to coerce a beer wholesaler into entering any agreement by threatening to amend, cancel, terminate, or refuse to renew an existing agreement.

A wholesaler should not be required to submit proprietary information regarding competitive brands. Recent brewer contracts have included provisions which would require wholesalers to provide this information. While these brewers expect information about their brands to be kept confidential, they are not shy in requesting competitive information. This information is proprietary, and providing same could lead to antitrust concerns.

**Testimony of Janet Demarais Seaworth  
Executive Director  
North Dakota Beer Wholesalers Association**

**Senate Industry Business and Labor Committee  
March 9, 1999  
HB 1260**

Mr. Chairman, members of the committee, my name is Janet Seaworth, I'm the executive Director of the North Dakota Beer Wholesalers Association. Our association is comprised of twenty family owned and operated beer wholesalers. We appear in support of HB 1260.

HB 1260 was introduced at the request of North Dakota's beer wholesalers to clarify current law relating to beer wholesaler and brewer relationships. The relationship between brewers and beer wholesalers is governed by both state and federal law, which mandates a three-tier system of alcohol distribution. The three-tier system was put into place after the repeal of prohibition. At that time, it was determined that in order to avoid the abuses which lead to prohibition, the manufacturer and retailer should forever be separated. And so, the law mandated that a wholesaler be inserted between the two tiers. The strength of the three-tier system thus depends upon the health and stability of the the wholesaler. In order to assure the stability of the wholesale tier, states have enacted laws that govern the beer wholesaler and brewer relationship. One key law - the franchise law - protects wholesalers from arbitrary termination by brewers, thereby ensuring a strong wholesale tier. HB 1260 seeks to clarify our existing franchise law and thereby ensure the stability of the wholesale tier.

**SECTION 1.** Amends section 5-04-01, to provide a definition for ancillary business. An ancillary business means a business owned by a wholesaler which is directly related to the transporting, storing, or marketing of the brewer's products. For example, many wholesalers, for liability and tax purposes, have their beer trucks and warehouses in corporations separate from the corporation that holds the wholesale license. This definition refers to the amendment in Section 4 of the bill, which provides that the value of the wholesaler's business shall include the value of any ancillary business.

**SECTION 2.** Amends section 5-04-02, to provide that a brewer may not coerce a beer wholesaler to enter any agreement or take any action that would violate any law or rule of this state by threatening to amend, cancel, terminate, or refuse to renew an existing agreement. No brewer should be allowed to affect the termination of an existing agreement by forcing a beer wholesaler to enter a new (and oftentimes less favorable agreement) by threatening to terminate the wholesaler. We believe that the state's interest in maintaining a strong three-tier system and stable wholesale tier requires that this type of coercion be specifically prohibited.

Section 2 also amends the law to provide that no brewer may require a wholesaler to submit specific confidential information regarding competitive brands as a condition of renewal or continuation of an agreement. A recent brewer's contract included a provision which would require wholesalers to provide

information about competitive brands. This information is proprietary, and as one Attorney General has stated, providing this information could lead to antitrust concerns. Recently, Coors Brewing Company has advised its wholesalers that if they supply such information to another brewer, the wholesaler would be in violation of its agreement with Coors. Other states have used this same language to provide that wholesalers may not be required to furnish such information.

**SECTION 3.** Amends section 5-04-04 to provide that in any dispute involving an amendment, cancellation, termination, or non renewal, the brewer shall bear the burden of proving the existence of good cause. Current law provides that a brewer may terminate a wholesaler for good cause. It follows then that the brewer should bear the burden of proving that good cause exists; rather than requiring a wholesaler to "guess" as to the reasons for termination, and then be required to prove that those reasons did not amount to good cause. Other states already provide that the brewer must bear the burden of proving good cause for termination.

**SECTION 4.** Amends subsection 1 of section 5-04-07 to clarify that the value of a wholesaler's business includes all assets used in distributing the brewers products, including assets held in an ancillary business. Current law requires a brewer to pay reasonable compensation for the value of the wholesaler's business upon termination. HB 1260 clarifies that the value includes assets held in ancillary businesses that are used in distributing the brewers' products. For example, for tax purposes, and in order to reduce liability, some wholesalers have their warehouses and beer trucks in separate corporations. HB 1260 clarifies that those assets are part of the beer wholesalers' business, even if they are held in a separate corporation. Other states have used the very same language to make the same clarification, in an effort to alleviate any questions that may arise as a result of a beer wholesaler's assets being held in several different corporations.

**SECTION 5.** Amends section 5-04-08 to provide that any legal action taken under the franchise law or pursuant to a distributor agreement shall be filed in a North Dakota court. Current law provides that a wholesaler may bring suit under the franchise law, and it is implied that the suit would be filed in North Dakota. However, recently, some brewers have attempted to provide by contract that all disputes must be litigated in, for example, Milwaukee. The wholesaler would then be effectively denied its rights under the franchise law, and the state would be denied its rights under the 21st Amendment to the Constitution to regulate the distribution of alcoholic beverages. The amendment makes it clear that all litigation under the franchise law shall take place in North Dakota.

**SECTION 6.** Amends section 5-04-13 to provide that no provision of any distributor agreement may require the law of any state other than North Dakota to govern the relationship of the parties. Again, this assures that the state of North Dakota has the right to regulate alcoholic beverages within its borders and wholesalers have the benefit of the franchise law in disagreements with brewers.

In sum, the amendments proposed by HB 1260 seek to clarify and strengthen existing law. We worked hard with the brewers on the bill, and they are in agreement. We urge you to support the bill and give it a Do Pass recommendation.



Coors Brewing Company  
Golden, Colorado 80401-0030

December 16, 1998

Randolph E. Christianson  
Weatherhead Distributing Company  
701 4th Avenue North  
Fargo, ND 58102

*12/23/98*

Dear Randy:

We've had a chance to review the wholesaler agreement that the Miller Brewing Company has asked you to sign and want to share some observations about this document *vis a vis* the Coors Brewing Company agreement that you have previously accepted.

In several instances, the Miller contract will put you in a position that may be incompatible with your agreement with Coors. Most notably:

- Miller's demand for expenditures, etc., on Miller brands directly proportionate to these brands' percentage of your total volume may compromise your ability to "actively and aggressively" support and sell Coors' (in most cases, higher-margin) brands.

Also, we would object strenuously to any sharing of information of your or our spending on Coors' brands with other suppliers, including Miller.

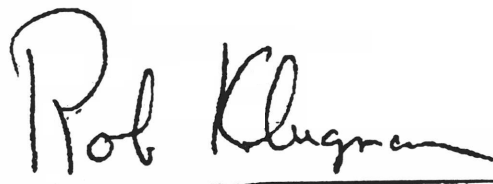
- You have agreed to follow our stipulated procedure, beginning with immediate notification of Coors, if and when you contemplate a sale of your business. The steps the Miller contract demands could be in conflict with your Coors agreement.

We respect and, indeed, support your selling of other beer brands that enhance your portfolio and economic position in the marketplace. But at the same time, we would point out that the presence of these brands and your agreements with their suppliers should not and cannot diminish your efforts behind Coors' brands and your compliance with our contract.

Thank you. Please call your AVP or me (303-277-3705), Pete Betka (303-277-2653), or Neal Peters (303-277-2613) with any questions.

Sincerely,

COORS BREWING COMPANY

BY 

Rob Klugman  
Senior Vice President  
Corporate Development







# STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

Office of the Attorney General  
Columbia 29211

December 9, 1998

The Honorable James H. Harrison  
Member, House of Representatives  
512 Blatt Building  
Columbia, South Carolina 29211

Dear Representative Harrison:

You have referenced to me the problems which beer wholesalers in South Carolina are having with the proposed Miller Brewing Company's Distributor Agreement and Performance Standards. As I understand it, the proposed Agreement would replace a longstanding Agreement with Miller. I am advised that "[p]arts of this agreement attempt to supercede our existing Franchise Law, and effectively eliminate any rights of the wholesaler." In addition, it is indicated that "[t]his agreement also requires the wholesaler to litigate any disputes in Wisconsin without the benefit ... of a jury." As I understand it, Miller has threatened to terminate any wholesalers on December 31, 1998 who have not signed the Agreement and, thus, the new Agreement has been presented to the wholesalers as a "take it or leave it" arrangement. You wish to know whether South Carolina law controls where in conflict with the proposed Agreement. You further seek advice as to whether Miller may terminate a wholesaler based upon his failure to agree to the exclusive venue clause.

## Law / Analysis

First, a summary of the proposed Agreement between Miller and its distributors is in order. Paragraph 1.3 purports to give Miller the right to sell directly to retailers or consumers who are located in a distributor's territory where the retail sale or consumption is outside that area. Section 4 of the Agreement deals with the wholesaler's manager. Paragraph 4.1 requires the distributor at all times to have a manager which has been approved by Miller. Such provision does away with the concept of a successor manager. New duties and responsibilities for the manager are also established in this Section. Paragraph 4.3(b) reserves the right to Miller to withdraw its approval of any manager.

Section 5 deals with the proprietary rights of Miller. Pursuant to Paragraph 5.1(b), if an owner dies without an approved ownership transfer notification, or there is a default under the ownership transfer notification, Miller is given the right and option to purchase the distributor's Miller business. Such option may be assigned. No consent by Miller is required (pursuant to Paragraph 5.1(c)) if the distributorship is being transferred to a family member unless such transfer causes a substantial adverse financial effect on the business or the distributor does not have a manager approved by Miller. Miller reserves the right to designate a third party to whom Miller may delegate its option to purchase.

Pursuant to Paragraph 5.2(c), Miller is given the irrevocable right and option to purchase the distributor's business where such distributor has secured an offer from another buyer. Paragraph 5.4 authorizes Miller, in deciding whether to approve a proposed transfer, to consider the qualifications of the proposed purchaser, the effects of the resulting business combination, the resulting territory configuration, the potential advantages of alternative market combinations and other circumstances which Miller might deem pertinent. Pursuant to Paragraph 5.4(c), Miller may also consider whether or not the transferee will be engaged in selling competing products of malt beverages or other products.

In the area of termination of the distributorship, a number of provisions are relevant. Paragraph 7.1 deals with termination with cure. This paragraph requires a distributor to provide a plan of corrective action within 30 days of receipt of termination notice and provides the distributor 60 days to cure. Paragraph 7.1(b) purports to limit the amount of Miller's liability in the event of a termination where the distributor failed to cure. Under Paragraph 7.2 a number of circumstances are enumerated wherein Miller may terminate immediately without cure. Pursuant to Paragraph 7.3, Miller may terminate all Miller wholesalers throughout the country without cause and without payment to a wholesaler.

The venue and jurisdiction clause is found at Paragraph 16.8. It requires a distributor to litigate any disputes exclusively before the United States District Court for the Eastern District of Wisconsin. Such Paragraph requires the distributor to waive the right to change venue to another court. Where the United States District Court does not possess subject matter jurisdiction of a particular matter, the Agreement requires that "such matters shall be litigated solely and exclusively before the appropriate state court of competent jurisdiction located in Milwaukee, Wisconsin, and the parties consent to the personal jurisdiction of such courts for the purpose of such litigation." Paragraph 16.10 purports to waive the distributor's right to a jury trial.

Section 11.1 permits Miller to amend the Agreement unilaterally, resulting in termination if the wholesaler does not accept such amendment within 90 days. Moreover,

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Section 3.2 authorizes Miller to alter the performance standards, again permitting termination if the wholesaler does not agree.

Section 12 of the Agreement mandates compliance with the governing state law. Section 12 states as follows:

[t]he illegality or enforceability of any provisions of this Agreement shall not impair the legality or enforceability of any other provision. The laws, rules and regulations of the jurisdiction in which Distributor conducts its business are hereby incorporated in this Agreement to the extent that such laws, rules and regulations are required to be so incorporated and shall supersede any conflicting provision of this Agreement. If required by applicable law, Miller and Distributor may enter into an amendment of this Agreement for the sole purpose of complying with such law.

#### General Governing Principles

Pursuant to the Twenty-First Amendment of the United States Constitution, the states possess almost absolute power to prohibit or regulate alcoholic beverages. Wide latitude as to choice of the means to accomplish such prohibition or regulation is accorded to the state and its regulatory agencies. Op. Atty. Gen., February 27, 1985, referencing Oklahoma v. Burris, 626 P.2d 1316, 1317-18, 20 ALR 4th 593, 596 (Okla. 1980). Pursuant to its broad constitutional power, the transfer of beer within the State of South Carolina is highly regulated by the General Assembly. Op. Atty. Gen., July 3, 1991. In South Carolina, the "... intended policy of the state relative to beer and wine is that of regulation rather than prohibition." See State v. Langley, 236 S.C. 583, 11 S.E.2d 308 (1960), cited in Op. Atty. Gen., Op. No. 4272 (February 26, 1976). The General Assembly is thus concerned "with promoting the fair and efficient distributors of beer throughout the state . . . and in providing for the regulation of that distribution . . ." Op. Atty. Gen., May 20, 1991.

#### State Statutory Scheme of Regulation of Beer

S. C. Code Ann. Sec. 61-4-10 declares that all beers, ales, porter and other similar malt or fermented beverages not in excess of five percent of alcohol by weight and all wines containing not in excess of twenty-one percent of alcohol by volume to be nonalcoholic and nonintoxicating beverages. As part of its regulatory scheme, the General Assembly has constructed so-called a "three tier" scheme of regulation, regulating beer at the brewer, wholesale and retail level. Section 61-4-300 defines a "producer" as a "brewery or winery,

manufacturer, bottler, or importer of beer or wine into the United States." Pursuant to § 61-4-340, no "person other than a registered producer may ship, move, or cause to be shipped or moved, beer, ale, porter, malt beverage, or wine from outside the States to a point in the State, and only in accordance with the provision of this chapter. . . ."

Section 61-4-940 governs the relationship between a brewer and beer wholesaler. Subsection (A) provides that

[a] manufacturer or brewer of beer, ale, porter, or other malt beverages or a person who imports these products produced outside the United States must not sell, barter, exchange, transfer, or deliver for resale beer to a person not having a wholesale permit issued under Section 61-4-500, and a holder of a wholesale permit must not sell, barter, exchange, transfer, or deliver for resale beer to a person not having a retail or wholesale permit.

Subsection (D) of § 61-4-940 regulates the ownership by a person in one tier of a business in the other tier. Such Section states:

[a] manufacturer, brewer, and importer of beer are declared to be in business on one tier, a wholesaler on another tier, and a retailer on another tier. A person or an entity in the beer business on one tier, or a person acting directly or indirectly on his behalf, may not have ownership or financial interest in the beer business operation on another tier. This limitation does not apply to the interest held on July 1, 1980, by the holder of a wholesale permit in a business operated by the holder of a retail permit at premises other than where the wholesale business is operated. For purposes of this subsection, ownership or financial interest does not include the ownership of less than one percent of the stock in a corporation with a class of voting shares registered with the Securities and Exchange Commission or other federal agency under Section 12 of the Securities and Exchange Act of 1934, as amended, or a consulting agreement under which the consultant has no control over business decisions and whose compensation is unrelated to the profits of the business. (emphasis added).

Section 61-4-1100 governs the agreement between the producer and the wholesaler. This provision reads as follows:

(1) It is unlawful for a producer who holds a certificate of registration from the department (hereinafter "registered producer") or an officer, agent, or representative of a registered producer:

(a) to coerce, attempt to coerce, or persuade a person holding a permit to sell beer, ale, porter, and other similar malt or fermented beverages at wholesale (hereinafter "beer wholesaler") to enter into an agreement to take any action which would violate a provision of this article or any ruling or regulation in accordance therewith; or

(b) to unfairly, without due regard to the equities of the beer wholesaler or without just cause or provocation, cancel or terminate a written or oral agreement or contract, franchise, or contractual franchise relationship of the wholesaler existing on May 1, 1974, or thereafter entered into, to sell beer manufactured by the registered producer; this provision is a part of a contractual franchise relationship, written or oral, between a beer wholesaler and a registered producer doing business with the beer wholesaler, just as though the provision had been specifically agreed upon between the beer wholesaler and the registered producer. However, notice of intention to cancel the agreement or contract, written or oral, franchise, or contractual franchise relationship must be given in writing at least sixty days before the date of the proposed cancellation or termination. The notice must contain (i) assurance that the agreement or contract, written or oral, franchise, or contractual franchise relationship is being terminated in good faith and for material violation of one or more provisions which are relevant to the effective operation of the agreement, or contract, written or oral, franchise, or contractual franchise relationship, if any, and (ii) a list of the specific reasons for the termination or cancellation.

(2) It is unlawful for a beer wholesaler:

(a) to enter into an agreement or take any action which would violate or tend to violate a provision of this article or any rule or regulation promulgated pursuant thereto;

(b) to unfairly, without due regard for the equities of a registered producer or without just cause or provocation, cancel or terminate a written or oral agreement or contract, franchise, or contractual franchise relationship of the registered producer existing on May 1, 1974, or thereafter entered into, to sell beer manufactured by the registered producer; this provision becomes a part of a contractual franchise relationship, written or oral, between a beer wholesaler and a registered producer doing business with the beer wholesaler, just as though this provision had been specifically agreed upon between the beer wholesaler and the registered producer. However, notice of intention to cancel the agreement or contract, written or oral, franchise, or contractual franchise relationship must be given in writing at least sixty days prior to the date of the proposed cancellation or termination. The notice must contain (i) assurance that the agreement or contract, written or oral, franchise, or contractual franchise relationship is being terminated in good faith and for material violation of one or more provisions which are relevant to the effective operation of the agreement or contract, written or oral, franchise, or contractual franchise relationship, if any, and (ii) a list of the specific reasons for the termination or cancellation;

(c) to refuse to sell to a licensed retailer whose place of business is within the geographical limits specified in a distributorship agreement between the beer wholesaler and the registered producer for the brands involved; or

(d) to store or warehouse beer or other malt beverages to be sold in the State in a warehouse located outside the State. (emphasis added).

Jurisdiction for the settlement of disputes between producer and wholesaler regarding the franchise agreement is specified in § 61-4-1120. Such Section provides as follows:



[t]he court of common pleas has jurisdiction and power to enjoin the cancellation or termination of a franchise or agreement between a beer wholesaler and a registered producer upon the application of a beer wholesaler or producer who is or might be adversely affected by the cancellation or termination; and in granting an injunction, the court must make provisions necessary to protect the beer wholesaler or registered producer while the injunction is in effect including, but not limited to, a provision that the registered producer must not supply the customers of the beer wholesaler by servicing the customers through other distributors or means or a provision that the beer wholesaler must continue to supply to his customers the products of the registered producer. Application may be made by the beer wholesaler or producer to the appropriate court in the county in which the business of the wholesaler is located. The court may require a bond to be posted by the party seeking the injunction, securing the party enjoined for damages in an amount in the court's discretion.

Finally, § 61-4-1130 regulates the sale of a beer wholesale interest. That provision states:

(1) Except as hereinafter provided, a proposed sale of an interest in the business carried on by a beer wholesaler which under the laws of this State would require that the purchaser obtain a permit to operate as a beer wholesaler is subject to the department's approval of the purchaser as an applicant for a permit authorizing the sale of beer. If the application of the prospective purchaser for the permit is approved, it is unlawful, notwithstanding the terms, provisions, or conditions of a written or oral contract or the franchise agreement between the beer wholesaler and the registered producer, for a registered producer to fail or refuse to approve the transfer or change of ownership.

(2) Except as hereinafter provided, a proposed voluntary transfer of an interest in the business carried on by a beer wholesaler or a transfer of ownership in the business by reason of death is subject to the registered producer's approval of the prospective transferee. This approval must not be unreasonably withheld. If the registered producer does not give notice of

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disapproval by certified mail within sixty days after receipt of notification of the proposed voluntary transfer or within sixty days after the death of the owner of the interest, the right of disapproval may not thereafter be exercised.

Of course, a contract or agreement may not conflict with or vary state law or state statutory provisions. It is well recognized that a contract to do an act which is prohibited by statute or which is contrary to public policy is void and cannot be enforced. Grant v. Butt, 298 S.C. 298, 17 S.E.2d 689 (1942). "A brewer may not circumvent the [State] Termination Statute by contract." Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975 (Ind. 1993).

In addition, our courts recognize that unconscionable contracts will not be enforced. Unconscionability is characterized by absence of meaningful choice on the part of one of the parties due to one-sided contract provisions, together with terms so oppressive that no reasonable person would make them and no fair and honest person would accept them. Lackey v. Green Tree Financial Corp., 330 S.C. 388, 498 S.E.2d 898 (1998). In other words, there must be a true "meeting of the minds" between the parties, not an illusory one. The South Carolina courts will not enforce a contract or provision thereof where such is contrary to the law of the state where it is to be enforced. Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533 (1961). Every contract must be deemed to include the law of force at its date. Lewis v. Dunlap, 112 S.C. 544, 100 S.E. 170 (1919). The General Assembly clearly had in mind the preservation of an equal footing relationship between brewer and wholesaler in its adoption of § 61-4-1100, which insured that South Carolina law as well as equity and fairness would be made a part of every franchise agreement.

Of course, only a court may void a specific provision of a contract which conflicts with State law or public policy. The proposed Miller contract which you have provided this Office, however, is troubling in light of its potential inconsistency with state law. I find particularly problematical a number of provisions enunciated in the proposed Agreement which at least appear to run counter to this State's "three tier" and franchise provisions in the Code. Moreover, any attempt to remove jurisdiction and venue from South Carolina courts when State law specifically provides for such jurisdiction could well be deemed by a court to be in conflict with our governing statutes as well as with South Carolina public policy concerning the regulation of beer. Furthermore, failure to agree to the exclusive venue provision and waiver of jury trial paragraph cannot, in my judgment, validly serve as grounds for termination of a franchise as such would not constitute "just cause or provocation."



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I will not attempt to specify herein each and every provision in the Agreement where a court could find inconsistency with State law. Several different areas of concern are particularly bothersome, however.

First, South Carolina law does not permit a business operating on one tier to "have ownership or financial interest in the beer business operation on another tier." Section 61-4-940 (D). Our Supreme Court emphasized an earlier version of this prohibition in Yahnis v. Stroh Brewery, 295 S.C. 243, 368 S.E.2d 64 (1988). There, the Court determined that then § 61-9-315 (b) [now codified in another version in § 61-4-940] prevailed over an earlier statute that authorized a brewer to exercise a preemptive right or purchase. Analyzing the issue in accord with general rules of statutory construction, the Court concluded:

[h]ere, § 61-9-315 (b), in plain language, prohibits a producer from having "any interest whatsoever" in a wholesale beer business. It is in direct conflict with that portion of § 61-9-1040 (1) which gives the producer the preemptive right to acquire the interest of a wholesaler. By implication, § 61-9-315 (b) repealed § 61-9-1040 (1) to the extent of this conflict.

295 S.C. at 246. As noted above, 5.2(c) gives Miller a preemptive right of first refusal "in the event that the distributor has secured an offer from another buyer." Section 5.1(b) also gives Miller a right to purchase upon certain contingencies. Thus, based upon the reasoning in Yahnis, a court could well conclude that the foregoing provisions are in conflict with South Carolina's "three tier" law.

With respect to those provisions in the Agreement governing termination of the franchise, § 61-4-1100 (b) prohibits a producer from "...unfairly, without due regard to the equities of the beer wholesaler or without just cause or provocation, cancel[ing] or terminat[ing] a written or oral agreement or contract, franchise, or contractual franchise relationship of the wholesaler existing on May 1, 1974, or thereafter entered into, to sell beer manufactured by the registered producer. . . ." As referenced above, a number of provisions in the proposed Agreement deal with termination of the franchise agreement, including Paragraph 7.3 which provides for contemporaneous termination of all wholesalers without cause. Additionally, is Paragraph 11.1 allowing Miller to amend unilaterally followed by termination if the wholesaler does not agree within 90 days. Likewise, pursuant to Paragraph 3.2, Miller may alter the performance standards and then terminate if the wholesaler does not meet the new standards. The Court in Miller Brewing, supra held that provisions similar to § 61-4-1100 (b) must be read into any franchise agreement. Thus, any termination must give "due regard to the equities of the beer wholesaler" and be based upon "just cause or

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provocation . . ." Again, a court could determine that these provisions of the Agreement conflict with the state statute, or at least read the Franchise Law into the Agreement..

Paragraph 16.8 of the Agreement raises a potential "red flag" as well. Such provision purports to require a distributor to litigate any disputes exclusively before the United States District Court for the Eastern District of Wisconsin. The Agreement also requires the distributor to waive the right to change venue to another court. Where the United States District Court does not have subject matter jurisdiction, the Agreement requires that the matter be litigated "solely and exclusively" before "the appropriate state court of competent jurisdiction located in Milwaukee, Wisconsin." As referenced, § 61-4-1120 bestows upon the South Carolina Court of Common Pleas the jurisdiction to enjoin the cancellation or termination of a franchise or agreement between a beer wholesaler and a registered producer upon the application of a beer wholesaler or producer who is or might be adversely affected by the cancellation or termination.

It is, of course, well understood that forum selection clauses are prima facie valid and enforceable when made at arm's length by sophisticated business entities, absent a compelling reason for abrogation. Republic Leasing Co. Inc. v. Haywood, 329 S.C. 562, 495 S.E.2d 804 (Ct. App. 1998). However, such clauses will not be enforced by the courts if unreasonable or unjust. Id. See also, Sterling Forest Assoc. v. Barnett-Range Corp., 840 F.2d 249 (4th Cir. 1988); Mercury Coal & Coke v. Mannesmann Pipe and Steel, 696 F.2d 315 (4th Cir. 1982); Scott v. Guardsmark Security, 874 F.Supp. 117 (D.S.C. 1995). Courts have been particularly wary of upholding such clauses where the State's interest in regulating alcoholic beverages are concerned.

For example, in High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. 1992), the Supreme Court of Missouri refused to enforce a "forum selection clause" which required that a franchise termination be litigated in Kentucky. There, the Court opined:

[w]e must also consider whether enforcement of the forum selection clause in this particular case would be unreasonable. The controlling substantive issue in this litigation, the application of § 407.413 to the liquor distribution franchise agreement between Brown-Forman, as the supplier, and High Life, as the licensed distributor, involves a matter of important public policy to the state of Missouri. In general, the control of liquor distribution is an important state interest in Missouri. See Vaughan v. EMS, 744 S.W.2d 542, 547 (Mo.App.1988), and May Department Stores v. Supervisor of Liquor Control, 530 S.W.2d 460, 468 (Mo.App.1975). Liquor distribution is an area that has

always been heavily regulated by state government; moreover, the methods of distribution and extent of regulation vary enormously from state to state. It is evident that in this area what one state may approve and even encourage, another state may prohibit and declare illegal. This principle even has constitutional endorsement by reason of the Twenty-First Amendment to the United States Constitution repealing Prohibition. Thus, the interest that a particular state has in construing and applying liquor control legislation in its own state is apparent.

[i]t is very much within the interest of the state of Missouri to protect its licensed liquor distributors from unwarranted or unjustified termination of their franchise. Section 407.413 does just this by providing that no such franchise shall be terminated except for good cause. Both the general subject of liquor control and the specific statutory protection of a holder of a liquor distribution franchise carry heightened public policy considerations that outweigh any public policy considerations involved in the enforcement of a forum selection clause. (emphasis added).

The Court then proceeded to point out why it is so important in alcoholic beverage regulatory matters that the jurisdiction of the Missouri courts not be abrogated by a "forum selection clause". Concluded the Court,

[s]o it is with Missouri's statute concerning termination of liquor franchises; its importance to the public policy of the state, evidenced in part by the fact that any effort to waive or modify its provisions is unenforceable, dictates that this Court should not abrogate the responsibility of interpreting this important statute to the Kentucky courts. We hold that enforcement of the forum selection clause under these circumstances would be unreasonable and, therefore, even under the rule we adopt today, the issues in this case should be decided by the courts in Missouri.

823 S.W.2d at 499-500. Section 61-4-1100 makes it clear that "this provision is a part of a contractual franchise relationship, written or oral, between a beer wholesaler and/or registered producer doing business with the beer wholesaler, just as though the provision had been specifically agreed upon between the beer wholesaler and the registered producer."

There are a number of other areas of concern with respect to the Agreement as well. Pursuant to Paragraph 5.4, Miller may consider certain criteria in deciding whether to approve a proposed transfer. Again, Miller retains a right of first refusal for any proposed sale and a right to assign its right to a third party. It could be argued that these provisions also conflict with § 61-4-1130, which states that "[i]f the application of the prospective purchaser for the permit is approved [by the Department of Revenue], it is unlawful, notwithstanding the terms, provisions, or conditions of a written or oral contract or the franchise agreement between the beer wholesaler and the registered producer, for a registered producer to fail or refuse to approve the transfer or change of ownership." Likewise, whereas the Agreement in Paragraph 5.1(b) purports to give Miller the right of option to purchase the distributor's business upon the death of the owner, §61-4-1130 (2) gives the brewer a right of approval, but one which may not be reasonably withheld and one which disappears if the notice provisions therein are not met. As referenced above, such Paragraph could also be deemed to conflict with § 61-4-940 (D) which prohibits ownership by a person operating in one tier of a business in another tier.

Finally, Miller requires the distributor to have at all times a manager approved by Miller. In the event that Miller does not approve a manager within 180 days after a vacancy has occurred, Miller has the right to terminate the agreement under the "termination without cause" provisions of the Agreement. In effect, these provisions could be perceived as enabling Miller to exercise virtual control over the wholesaler. Again, this could be deemed to conflict with the "three tier" law and its regulatory scheme of separation between the tiers. The manager's loyalty would be divided, thereby blurring the separation between brewer and wholesaler. Such may be deemed by a court to run counter to the "equity and fairness" language of the General Assembly in § 61-4-1100. The legislative purpose of the "three tier" law and protection of this franchise would also be severely undermined by this approach.

### Conclusion

It is my opinion that the General Assembly clearly intended that the beer wholesaler must be protected in his franchise with the brewer by the various provisions of state law referenced above. The proposed Miller Agreement which you have referenced contains a number of provisions which a court may conclude contradict and conflict with the Legislature's intent as well as with various provisions of state law. Such provisions cause considerable concern in this regard.

In my judgment, a court will enforce this State's beer law and provisions of the State Code where there is indeed any conflict in the Agreement therewith. Moreover, Section 12 of the Agreement also requires that State law shall "supersede any conflicting provision of this Agreement." Further, in my opinion, South Carolina courts cannot be ousted of jurisdiction and venue by such Agreement. A brewer, such as Miller, could not terminate a wholesaler for

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failure to agree to an exclusive venue provision as such failure would not constitute "just cause or provocation" for termination. Likewise, notwithstanding the Agreement's terms, because the regulation of beer is such an important State interest, South Carolina courts still possess jurisdiction over and will enforce all provisions of State law where such provisions conflict with any terms of the proposed Agreement.

Sincerely,



Charles M. Condon  
Attorney General

CMC/ph