GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

SESSION LAW 2012-4
SENATE BILL 745

AN ACT TO PRESERVE THE THREE-TIER DISTRIBUTION SYSTEM FOR MALT BEVERAGES IN NORTH CAROLINA BY CLARIFYING PROVISIONS OF THE BEER FRANCHISE LAW TO PROVIDE: A FRANCHISE AGREEMENT APPLIES TO ALL SUPPLIER PRODUCTS UNDER THE SAME BRAND NAME; A WHOLESALER MUST SELL MALT BEVERAGES TO ALL RETAILERS IN ITS TERRITORY AT THE SAME PRICE AT THE TIME OF DELIVERY; PROHIBITED ACTS OF SUPPLIERS WITH RESPECT TO THEIR DEALINGS WITH WHOLESALERS; GOOD CAUSE FOR TERMINATION MAY NOT BE MODIFIED BY AN AGREEMENT THAT DEFINES GOOD CAUSE IN A MANNER DIFFERENT THAN PROVIDED BY STATE LAW; REVERSION OF SMALL BREWERIES' SELF-DISTRIBUTION RIGHTS UNDER CERTAIN CIRCUMSTANCES; CERTAIN ACTS THAT DO NOT AMOUNT TO GOOD CAUSE FOR TERMINATION OF A FRANCHISE; REMEDIES FOR A SUPPLIER'S WRONGFUL TERMINATION OF A FRANCHISE; INCLUSION OF A WHOLESALER MERGER, THE FACTORS THAT MAY BE CONSIDERED BY THE SUPPLIER IN APPROVING A MERGER OR TRANSFER, AND REMEDIES FOR UNLAWFUL REFUSAL TO APPROVE A MERGER OR TRANSFER; THE BEER FRANCHISE LAW MAY NOT BE WAIVED BY AN AGREEMENT CONTRARY TO STATE LAW; AND MEDIATION OF DISPUTES ARISING UNDER THE BEER FRANCHISE LAW; AND TO ALLOW THE ABC COMMISSION TO GRANT A WAIVER ALLOWING THE GENERAL MANAGER OF A LOCAL BOARD TO ALSO BE THE FINANCE OFFICER.

The General Assembly of North Carolina enacts:

SECTION 1. Article 13 of Chapter 18B of the General Statutes reads as rewritten:

"Article 13.

"Beer Franchise Law.

"...

"§ 18B-1303. Filing of distribution agreement; no discrimination.

(a) Filing. – It is unlawful for a supplier to provide malt beverages to a wholesaler unless the Commission has received notification from the supplier designating the brands of the supplier which the wholesaler is authorized to sell and the territory in which such sales may take place. If the supplier sells several brands, the agreement need not apply to all brands. A franchise agreement applies to all supplier products under the same brand name, and different categories of products manufactured under a common identifying trade name are considered to be the same brand. No supplier may provide by a distribution agreement for the distribution of a brand to more than one wholesaler for the same territory. A wholesaler shall not distribute any brand of malt beverage to a retailer whose premises are located outside the territory specified in the wholesaler's distribution agreement for that brand. A wholesaler may, however, with the approval of the Commission distribute malt beverages outside ~~his~~its designated territory during periods of temporary service interruption when requested to do so by the supplier and the wholesaler whose service is interrupted.

(b) No Discrimination. – A wholesaler shall service all retail permit holders within his designated territory without discrimination and shall make a good faith effort to make available to each retail permit holder in the territory each brand of malt beverage which the wholesaler has been authorized to distribute in that area.

(c) No Price Maintenance. – A franchise agreement shall not, either expressly or by implication or in its operation, establish or maintain the resale price of any brand of malt beverages by a wholesaler.

"**§ 18B-1304. Prohibitions.**

It is unlawful for a supplier, or an officer, agent or representative of a supplier, to:

(1) Coerce or attempt to coerce or persuade a wholesaler to violate any provision of the ABC laws or rules of the Department of ~~Revenue; or~~Revenue.

(2) ~~Alter~~ Except as authorized by G.S. 18B-1305(a1), alter in a material way, terminate, fail to renew, or cause a wholesaler to resign from, a franchise agreement with a wholesaler except for good cause and with the notice required by G.S. 18B-1305.

(3) Withdraw money from or otherwise access a wholesaler's bank accounts without the wholesaler's consent.

(4) Present a franchise agreement, amendment, or renewal to a wholesaler that attempts to waive compliance with any provision of this Article or that requires a wholesaler to waive compliance with any provision of this Article. A wholesaler entering into a franchise agreement containing provisions in conflict with this Article shall not be deemed to waive rights protected by, or in compliance with, any provision of this Article.

(5) Induce or coerce, or attempt to induce or coerce, any wholesaler to assent to any franchise agreement, amendment, or renewal that does not comply with this Article and the laws of this State.

(6) Coerce or attempt to coerce a wholesaler, or its designated or anticipated successor, to sign a franchise agreement, amendment, or renewal to a franchise agreement by threatening to refuse to approve or delay issuing an approval for the sale, transfer, or merger of a wholesaler's business.

(7) Terminate, cancel, or nonrenew or attempt to terminate, cancel, or nonrenew a franchise agreement on the basis that the wholesaler fails to agree or consent to an amendment to the franchise agreement.

(8) Prohibit a wholesaler from distributing the product of any other supplier, except that a supplier may prohibit a wholesaler from distributing the product of another supplier if reasonable grounds exist for prohibiting the wholesaler's acquisition of the product and the acquisition would result in the wholesaler acquiring eighty percent (80%) or more by volume of all malt beverage products sold in the territory being acquired at the time of the acquisition.

(9) Refuse to approve or require a wholesaler to terminate a brand manager or successor manager without good cause. A supplier has good cause only if the person designated for approval by the wholesaler fails to meet reasonable standards and qualifications.

(10) Discriminate in price, allowance, rebate, refund, payment term, commission, discount, or service between wholesalers licensed in North Carolina. As used in this subsection, "discriminate" means the granting of a more favorable price, allowance, rebate, refund, payment term, commission, discount, or service to one North Carolina wholesaler than to another North Carolina wholesaler based on the quantity of malt beverages purchased or for any other reason, but "discriminate" shall exclude the granting of more favorable freight and transportation costs, price promotions on malt beverage products for special events in a particular market not to exceed 14 consecutive days, point-of-sale advertising materials, sponsorships, consumer specialty items, consumer sweepstakes, and novelties. A supplier may, however, offer a lower price or discount in order to match that of a competing supplier on a similar category of malt beverage products in the entire State or in a particular market.

"**§ 18B-1305. Cause for termination of franchise agreement.**

(a) Meaning of Good Cause. – Good cause for altering or terminating a franchise agreement, or failing to renew or causing a wholesaler to resign from such an agreement, exists when the wholesaler fails to comply with provisions of the agreement which are reasonable,

material, not unconscionable, and which are not discriminatory when compared with the provisions imposed, by their terms or in the manner of enforcement, on other similarly situated wholesaler by the supplier. The meaning of good cause set out in this section may not be modified or superseded by provisions in a written franchise agreement prepared by a supplier if those provisions purport to define good cause in a manner different than specified in this section. In any dispute over alteration, termination, failure to renew or causing a wholesaler to resign from a franchise agreement, the burden is on the supplier to establish that good cause exists for the action.

(a1) Termination by a Small Brewery. – A brewery's authorization to distribute its own malt beverage products pursuant to G.S. 18B-1104(7) shall revert back to the brewery, in the absence of good cause, following the fifth business day after confirmed receipt of written notice of such reversion by the brewery to the wholesaler. The brewery shall pay the wholesaler fair market value for the distribution rights for the affected brand. For purposes of this subsection, "fair market value" means the highest dollar amount at which a seller would be willing to sell and a buyer willing to buy at the time the self-distribution rights revert back to the brewery, after each party has been provided all information relevant to the transaction.

(b) Notice of Cause. – At least 90 days before altering, terminating or failing to renew a franchise agreement for good cause, the supplier must give the wholesaler written notice of the intended action and the specific reasons for it. If the cause for the alteration, termination or failure to renew is subject to correction by the wholesaler, and the wholesaler makes such correction within 45 days of receipt of the notice, the notice shall be void.

(c) Termination for Cause without Advance Notice. – A supplier may terminate or fail to renew a franchise agreement for any of the following reasons, and the termination shall be complete upon receipt by the wholesaler of a written notice of the termination and the reason:

(1) Insolvency of the wholesaler, the dissolution or liquidation of the wholesaler, or the filing of any petition by or against the wholesaler under any bankruptcy or receivership law which materially affects the wholesaler's ability to remain in business.

(2) Revocation of the wholesaler's State or federal permit or license for more than 30 days.

(3) Conviction of the wholesaler, or of a partner or individual who owns ten percent (10%) or more of the partnership or stock of the wholesaler, of a felony which might reasonably be expected to adversely affect the goodwill or interest of the wholesaler or supplier. The provisions of this subdivision shall not apply, however, if the wholesaler or its existing partners or stockholders shall have the right to purchase the interest of the offending partner or stockholder, and such purchase is completed within ~~15~~30 days of the conviction.

(4) Fraudulent conduct by the wholesaler in its dealings with the supplier or its products.

(5) Failure of the wholesaler to pay for the supplier's products according to the established terms of the supplier.

(6) Assignment, sale or transfer of the wholesaler's business or control of the wholesaler without the written consent of the supplier, except as provided in G.S. 18B-1307.

(d) Absence of Good Cause. – Good cause for alteration, termination or failure to renew a franchise agreement does not include:

(1) The failure or refusal of the wholesaler to engage in any trade practice, conduct or activity which would violate federal or State law.

(2) The failure or refusal of the wholesaler to take any action which would be contrary to the provisions of this Article.

(3) A change in the ownership of the supplier or the acquisition by another supplier of the brewery, brand or trade name or trademark, or acquisition of the right to distribute a product, from the original supplier.

(4) Sale or transfer of the rights to manufacture, distribute, or use the trade name of the brand to a successor supplier.

(5) Failure of the wholesaler to meet standards of operation or performance that have been imposed or revised unilaterally by the supplier without a fair opportunity for the individual wholesaler to bargain as to the terms, unless

the supplier has implemented the standards on a national basis and those standards are consistently applied to all similarly situated North Carolina wholesalers in a nondiscriminatory manner.

(6) The establishment of a franchise agreement between a wholesaler and another supplier, or similar acquisition by a wholesaler of the right to distribute a brand of another supplier.

(7) The desire of a supplier to consolidate its franchises.

"§ 18B-1306. Remedies for wrongful termination.

(a) Injunctive Relief. – A wholesaler whose franchise agreement is altered, terminated or not renewed in violation of this Article may bring an action to enjoin such unlawful alteration, termination or failure to renew. The action may be brought in the county in which the wholesaler has its principal place of business or in any county in which the wholesaler receives or distributes the products in issue. Any injunction issued pursuant to this subsection shall require the wholesaler to supply the customers in its territory with their reasonable retail requirements and to otherwise serve the territory.

(b) Monetary Damages. – In lieu of injunctive relief, a wholesaler whose franchise agreement is altered, terminated or not renewed in violation of this Article shall be entitled to recover monetary damages from the supplier. The amount to which the wholesaler is entitled shall be the value of the wholesaler's business distributing the supplier's products, including:

(1) The laid-in costs to the wholesaler of the inventory of the supplier's products, including any State and local taxes paid on the inventory by the wholesaler, plus a reasonable charge for handling of the products upon surrender of the inventory to the supplier.

(2) The fair market value of all assets, including ancillary businesses of the wholesaler used in distributing the supplier's products. The total compensation to be paid to the wholesaler shall be reduced, however, by any amount received by the wholesaler from sale of assets of the business used in distributing the supplier's products as well as by the value such assets have to the wholesaler unrelated to the supplier's products. "Fair market value" means the highest dollar amount at which a seller would be willing to sell and a buyer willing to buy at a time prior to the alteration, termination or failure to renew, when each possesses all information relevant to the transaction.

"§ 18B-1307. Transfer or merger of wholesaler's business.

(a) Right of Transfer to Designated Family Member upon Death. – Upon the death of a wholesaler, that individual's interest in the wholesaler business, including the rights under the franchise agreement with the supplier, may be transferred or assigned to a designated family member. The transfer or assignment shall not be effective until written notice is given to the supplier, but the supplier's consent is not required for the transfer or assignment. "Designated family member" means the deceased wholesaler's spouse, child, grandchild, parent, brother or sister, who is entitled to inherit the deceased wholesaler's ownership interest under the terms of the deceased wholesaler's will or other testamentary device or under the laws of intestate succession. With respect to an incapacitated individual having an ownership interest in a wholesaler, the term "designated family member" also means the person appointed by the court as the conservator of such individual's property. The term also includes the appointed and qualified personal representative and the testamentary trustee of a deceased wholesaler.

(b) Approval of Certain ~~Transfers.~~Transfers and Mergers. – Upon notice to and approval by the supplier, an individual owning an interest in a wholesaler may sell, assign or transfer that interest, including the wholesaler's rights under its franchise agreement with the supplier, to any qualified person. Likewise, a wholesaler may merge with another wholesaler in the State, transferring to the new wholesaler entity the merging wholesaler's existing franchise rights. Within 30 days of receipt of notice of the intended sale, ~~assignment or transfer,~~ assignment, transfer, or merger, the supplier shall request any additional relevant, material information reasonably necessary for deciding whether to approve the transaction. The supplier shall have 30 days from receipt of that information to object to the sale, ~~assignment or transfer.~~ assignment, transfer, or merger. The supplier may object only if the proposed ~~transferee~~ transferee, or the wholesalership resulting from the merger, fails to meet qualifications and standards that are nondiscriminatory, material, reasonable and consistently applied to North Carolina wholesalers by the supplier. The burden shall be upon the supplier to prove that the

proposed transferee or merged wholesaler is not qualified. In determining whether the proposed transferee or merged wholesaler is a qualified person, the supplier shall consider, but is not limited to, the following factors:

(1) Whether the proposed transferee has the financial capacity to purchase the wholesaler or the specified interest upon terms that will not jeopardize the future operation of the business, or whether the new entity resulting from a merger will have such financial capacity to operate successfully, and whether under such ownership the wholesaler will be able to provide financial support necessary to the successful operation of the business, including market spending, capital expenditures, and any equity capitalization or refinancing requirements.

(2) Whether the proposed transferee, or the new entity resulting from a merger, has the proven business experience to hire and maintain a management team to successfully operate the business.

(3) If the proposed transferee does not have experience in the beer business, whether the transferee has other experience to enable it to operate a distributorship successfully and whether the transferee is willing to participate in training provided by the supplier.

(4) Whether the proposed transferee, or a party to the merger, already is a wholesaler for the supplier in a different territory and, if so, whether sufficient time and attention can be devoted to an additional market area.

In determining whether a proposed transferee, or the entity resulting from a merger, is a qualified person, a supplier must consider the business on its own merits and may not designate a specifically identified person as the only purchaser who will be approved. Nothing in this subsection is intended to or should be construed to interfere with a supplier's right to match and reassign to a designee the right to purchase the ownership interest, subject to the designee purchasing the ownership interest at the price and on the conditions applicable to the purchase proposed by the transferee.

(c) Damages. – A supplier who disapproves or prevents a proposed assignment or change of ownership or merger in violation of this section shall be liable to the wholesaler who proposed to make the sale, ~~assignment or transfer~~assignment, transfer, or merger for the difference between the disapproved sale price and a subsequent actual price of a sale of the same assets completed within a reasonable period. If, however, the proposed transfer or sale was to a business associate at a bargain price, the amount of compensation shall be at least the fair market value of the interest proposed to be sold or transferred, minus the proceeds of an actual sale of the interest completed within a reasonable time.

"**§ 18B-1308. Article part of all franchise agreements.**

The provisions of this Article shall be part of all franchise agreements as defined in G.S. 18B-1302 and may not be altered by the parties. A wholesaler's rights under this Article may not be waived or superseded by the provisions of a written franchise agreement prepared by a supplier that are in any way inconsistent with or contrary to any part of this Article. The rights of a wholesaler under this Article shall remain in effect regardless of a provision in a written franchise agreement prepared by a supplier that purports to require arbitration of a franchise dispute or that purports to require legal remedies to be sought in a different jurisdiction.

"**§ 18B-1309. Mediation at direction of Alcoholic Beverage Control Commission.**

If a dispute arises between a wholesaler and supplier under this Article, and such dispute appears likely to lead to litigation, the Commission, upon request of any party or on its own initiative, may require the parties to participate in mediation in an effort to resolve the dispute. This authority shall be in addition to the Commission's authority to issue declaratory rulings pursuant to G.S. 150B-4. The Commission may designate the mediator, in which case the Commission shall pay the mediator's fee, or the Commission may direct the parties to agree upon and share the costs of a mediator. If the parties then cannot agree upon a mediator, the Commission shall designate the mediator, and the fees shall be divided evenly by the parties. The Commission shall direct that the mediation be completed within a specified period of time. Except for injunctive relief, no lawsuit or other legal action concerning the dispute may be filed until the mediation is completed and is unsuccessful, unless necessary to avoid expiration of a statute of limitation."

SECTION 2. G.S. 18B-702(j) reads as rewritten:

"(j) Finance Officer. – Except as otherwise provided, the local board shall designate (i) a part-time or full-time employee of the board other than the general manager or (ii) the finance officer of the appointing authority with consent of the appointing authority to be the finance officer for the local board. The Commission, for good cause shown, may grant a waiver to allow the general manager of a board also to be the finance officer. Good cause includes, but is not limited to, the fact that the board operates no more than two stores, and any approval for the general manager also to be the finance officer shall apply until the board operates more than two stores; in any event, the approval shall be effective for 36 months. The Commission may grant one or more waivers to a board."

SECTION 3. The provisions of this act are severable and, if any phrase, clause, sentence, or provision is declared to be unconstitutional, is preempted by federal law or regulation, or is otherwise invalid, the validity of the remainder of this act shall not be affected thereby.

SECTION 4. The provisions of G.S. 18B-1304, as amended by this act, become effective October 1, 2012. The remainder of this act is effective when it becomes law and applies to all transactions on or after that date.

In the General Assembly read three times and ratified this the 24th day of May, 2012.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 3:31 p.m. this 4th day of June, 2012