

September 30, 2013

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RE: Territorial Agreement

Dear Mr. Zeller:

ISSUES: Your September 3, 2013 letter requesting an Advisory Opinion has been forwarded to this office by Senator John C. Rafferty, Jr. In your letter, you have asked for an Advisory Opinion on behalf of the Brewers of Pennsylvania (“BOP”), an industry trade group which represents many of the entities that hold brewery and brewery pub licenses issued by the Board. BOP took part in a hearing before the House Liquor Control Committee on August 29, 2013. As a result of that meeting, you have now requested an Advisory Opinion on the following two (2) questions:

1. Is a distribution agreement between an importing distributor and a manufacturer perpetual, so long as the manufacturer does not have “good cause” to terminate the agreement?
2. If a territorial agreement does have a specific end date, would that end date be enforceable under section 431 of the Liquor Code (assuming that the manufacturer does not have any other good cause to terminate the agreement)?

OPINION: Initially, it should be noted while the Liquor Code explicitly states that an Advisory Opinion issued by the Board or this Office may form a defense against any citation issued by the Pennsylvania State Police, Bureau of Liquor Control Enforcement, (“BLCE”) *i.e.*, the Opinions of this Office are essentially binding on the State Police and the Office of the Administrative Law Judge, there are no similar provisions binding other tribunals to the opinions of this Office. I specifically note this since disagreements between manufacturers and importing distributors typically do not result in the issuance of a citation by BLCE, but rather litigation between the parties in either state or federal court. That being said, this office will address your questions.

As you know, the distribution of malt beverages within Pennsylvania is governed primarily by section 4-431 of the Liquor Code [47 P.S. § 4-431]. Pursuant to section 431(d) of the Liquor Code, all out-of-state manufacturers whose products are sold and delivered in Pennsylvania are required to give distribution rights for their products to importing distributors (“IDs”), authorizing them to sell malt or brewed beverages (“beer”) in a specific geographic area within Pennsylvania. [47 P.S. § 4-431(b)]. ID licensees may then in turn sell the beer to other IDs within their assigned geographic territory, as long as the primary ID has entered into a written agreement with the secondary ID, setting forth the terms and conditions under which beer may be resold. In addition, ID licensees may sell directly to other licensees of the Board as well as to the public.

With regard to in-state license manufacturers, such manufacturers may choose to function as their own primary distributor, or, may name a distributor or importing distributor, as the primary or original supplier of their products. [47 P.S. § 4-431(d)(5)].

As to the distribution agreements themselves, section 492(19) of the Liquor Code makes it unlawful for a manufacturer to modify, cancel, terminate, rescind, or not renew without good cause any distribution agreement. [47 P.S. § 4-492(19)]. Further, prior to the modification, cancellation, termination, rescission, or non-renewal of such agreements written notice of such modification, cancellation, termination, rescission, or non-renewal must be provided to the affected party and the Board by certified mail. Such written notice must be provided at least ninety (90) days prior to the effective date of the proposed modification, cancellation, termination, rescission, or non-renewal. The notice should state all reasons for the proposed modification, cancellation, termination, rescission, or non-renewal of the distribution agreement. If the D or ID who has been put on notice of the potential end of the distribution agreement rectifies the deficiencies noted in the letter, then the proposed modification, cancellation, termination, rescission, or non-renewal shall be null and void. Further, while this section states that the parties may choose to waive some or all of the requirements in section 492(19), if they do so in writing, it is somewhat unclear whether the waiver provision applies to the notice requirement or whether the parties may agree in writing to waive the “good cause” requirement.

The Liquor Code defines “good cause” as “the failure by any party to the agreement, without reasonable excuse or justification, to comply substantially with an essential, reasonable and commercially acceptable requirement imposed by the other party under the terms of an agreement.” [47 P.S. § 4-431(d)(1)].

Finally, section 431 of the Liquor Code, grants to the Court of Common Pleas of the county wherein the ID is located, the authority to enjoin the modification, rescission, cancellation or termination of a distribution agreement, at the request of the affected ID. Unlike section 492(19) of the Liquor Code, that section does not specifically reference the non-renewal of a distribution agreement.

Therefore, as to your first question - whether a distribution agreement which does not have a specific end date continues to exist until “good cause” is established - it appears that such would be the case under section 492(19) of the Liquor Code.

As to your second question - whether a territorial agreement with a specific end date may be ended at that date - such would be the case if the waiver provision of section 492(19) of the Liquor Code is read to allow for waiver of both the ninety (90) day notice requirement and the “good cause” requirement. Conversely, if the waiver provision of section 492(19) of the Liquor Code is read to only allow for waiver of the ninety (90) day notice requirement, then a territorial agreement with a specific end date must be renewed absent good cause. Again, this is an area of the law that specifically allows the aggrieved ID to seek immediate redress in the Courts of Common Pleas. Therefore, you and your clients may wish to discuss the matter with other private attorneys who have had to litigate such matters.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

**FAITH S. DIEHL
CHIEF COUNSEL**

cc: Senator John C. Rafferty, Jr.
Pennsylvania State Police, Bureau of Liquor Control Enforcement

LCB Advisory Opinion No. 13-429