

March 6, 2015

Charles Caputo, Esquire
Caputo, Caputo & Regan, P.C.
VIA E-MAIL: info@caputolawoffice.com

RE: 12-Packs as Single Original Containers

Dear Mr. Caputo:

ISSUE: This correspondence is in response to your inquiry on behalf of FYBOMAX, INC., holder of Brewery License No. G-391 (LID 57763), for use by it at premises located at 312 Center Road, Monroeville, Pennsylvania 15146-1322. In your letter, you indicated that you were requesting an Advisory Opinion, pursuant to section 211.1 of the Liquor Code. 47 P.S. § 2-211.1. That section requires this office to issue an Advisory Opinion upon the written request of a licensee. FYBOMAX intends to prepare a single large container of malt or brewed beverages consisting of twelve (12) smaller containers, each holding approximately twelve (12) fluid ounces, designed to be sold as a single unit. The unit will be at least one hundred twenty-eight (128) ounces in size and will either be shrink-wrapped or securely held together by another container made of cardboard, plastic or paperboard. The unit will be held together by heat or adhesive and will not be separated until purchased by the ultimate consumer. You inquire whether such large containers could be sold individually by distributors and importing distributors, even though they do not meet the definition of a “case” found in the Liquor Code.

Subsequently, on December 19, 2014, your client and others filed an action in the Commonwealth Court against the Board in an attempt to have the Board issue an opinion. On March 2, 2015, this office received letters from you on behalf of Save-Mor Beer & Pop Warehouse, Inc., holder of Distributor License No. D-3866 (LID 29477) and Nancy Pistella, holder of Distributor License No. D-2476 (LID 4707). Both letters asked for an advisory opinion on the same questions set forth above. As a result, this office is compelled to issue an opinion at this time.

OPINION: The holder of a brewery license, also referred to as a manufacturing license, may sell malt or brewed beverages produced and owned by the brewery to individuals for off-premises consumption in containers or packages of unlimited quantity and of any volume. See 47 P.S. § 4-440. Sales to other licensees must be in one of two configurations; such sales must be in “case” quantities or they must be in original containers containing one hundred twenty-eight (128) ounces or more. See 47 P.S. § 4-431.

Similarly, licensed distributors and importing distributors are authorized to sell and deliver malt or brewed beverages in one of two configurations; they can sell in “case” quantities or they can sell in original containers, as prepared for the market by the manufacturer, containing one hundred twenty-eight (128) ounces or more. See 47 P.S. § 4-431(b).

Section 102 of the Liquor Code defines a “case” as “a package prepared by the manufacturer for sale or distribution of twelve or more original containers totaling two hundred sixty-four or more fluid ounces of malt or brewed beverages excepting those packages containing twenty-four or more original containers each holding seven fluid ounces or more.” 47 P.S. § 1-102. Twelve (12) containers, each holding approximately twelve (12) fluid ounces, would not meet the definition of a “case.”

An “original container” means “all bottles, casks, kegs *or other suitable containers* that have been securely capped, sealed or corked by the manufacturer. . . .” 47 P.S. § 1-102 (emphasis added). A “container” is defined as “any receptacle, vessel or form of package, tank, vat, cask, barrel, drum, keg, can, bottle or conduit used or capable of use for holding, storing, transferring or shipment of alcohol, liquor or malt or brewed beverages.” [Id].

As noted above, breweries are authorized to sell malt or brewed beverages to other licensees in “original containers” containing one hundred twenty-eight (128) ounces or more. Given that the single large container of malt or brewed beverages which FYBOMAX intends to manufacture and prepare for the market consists of smaller containers totaling more than one hundred twenty-eight (128) ounces, the proposed package would constitute an “original container.” Therefore, it would be permissible for FYBOMAX to market and sell such an “original container” to other licensees.

The Board's interpretation of "original container" is further supported by the Commonwealth Court's decision in the case of Red Sky v. Pennsylvania State Police, 654 A.2d 143 (Pa. Cmwlth. 1995), *affirmed*, Red Sky v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 543 Pa. 496, 673 A.2d 323 (1996). In that case, the Commonwealth Court held that the term "original container" refers not only to the container that is in contact with the malt or brewed beverages, but also to the overall sealed package being offered for sale by the manufacturer. Though inquiries involving specific configurations of beer in the context of the definition of an "original container" are infrequently submitted to this office, the case is indeed applicable in this particular inquiry.

This opinion does not, in any way, alter the statutory definition of a "case" as set forth in the Liquor Code. The holder of a brewery license may continue to sell its products to licensees in "case" quantities, or it may choose to sell in "original containers" comprising at least one hundred twenty-eight (128) ounces of malt or brewed beverages.

However, if purchased by a distributor or importing distributor, the "original container" cannot be broken down into smaller containers, since section 441(a)(1) of the Liquor Code requires that all malt and brewed beverages sold by a distributor or an importing distributor be "in the original containers as prepared for the market by the manufacturer at the place of manufacture." [47 P.S. § 4-441(a)(1)]. Put another way, the distributor or importing distributor may not alter the brewery's "original container."

Further, the distributor or importing distributor may not break down a case, sold to it by a manufacturer as a case, and reconfigure it into two (2) or more smaller containers, each of which is the approximate size as the aforementioned large container. Again, this is because section 441(a)(1) of the Liquor Code requires that all malt and brewed beverages sold by a distributor or an importing distributor be "in the original containers as prepared for the market by the manufacturer at the place of manufacture." [Id.].

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

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BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE
PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

cc: Pennsylvania State Police, Bureau of Liquor Control Enforcement
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 15-077