SESSION 504

Latest Developments in Minnesota's Craft Beverage Industry

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Table of Contents

I. INTRODUCTION

The past several years have been good for Minnesota beer and breweries. "Between 2011 and 2016, the number of licensed breweries in Minnesota more than quadrupled, according to the Department of Public Safety" ("DPS").[1] This boom was largely driven by the passage of legislation which allows production breweries to sell their products on-premise in taprooms and has also led to further legislative reforms, including Sunday on-premise taproom sales and Sunday growler sales (an exception to Minnesota's longstanding ban on off-premise Sunday liquor sales).[2] Further reforms loom on the horizon as Minnesota's liquor laws—much of which are defined by the DPS's Alcohol and Gambling Enforcement Division—undergo annual clarification and revision.[3]

Many of the aforementioned reforms represent exceptions to the "entrenched three-tier distribution system" of alcohol: manufacturers, wholesalers, and retailers. This system, which has existed since Prohibition's repeal in 1933, is maintained largely at the behest of the wholesalers

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[1] Greta Kaul, *The Number of Breweries Launched in Minnesota Went Down in 2016. Has the Brewery Boom Peaked?*, MINNPOST (Jan. 19, 2017), https://www.minnpost.com/business/2017/01/number-breweries-launched-minnesota-went-down-2016-has-brewery-boom-peaked.

[2] *Id.*

[3] *See, e.g.*, Jess Fleming, *Why Can't Minnesota Taprooms Also Serve Cocktails? Local Kickstarter Seeks Changes*, PIONEER PRESS (Dec. 29, 2016), http://www.twincities.com/2016/12/29/bent-brewstillery-launches-kickstarter-to-change-cocktail-room-law/.

who desire to preserve their state-granted monopoly on liquor distribution.[4] As a result, any changes to this system that would benefit breweries face stiff resistance from wholesalers and, in some cases, retailers. Further, the franchise distribution statutes enacted in the 1960s and 1970s have, in this era of craft breweries and consolidation of wholesalers, afforded wholesalers an unequal amount of bargaining power in their contract negotiations with small local breweries.[5] Fortunately, states are recognizing the need to correct this imbalance and creating an avenue for smaller breweries to terminate relationships with their distributors if the relationship is not a good fit.[6] The Minnesota Legislature, however, has yet to enact or even consider such a concept.

II. AN OVERVIEW OF THE THREE-TIER SYSTEM AND ITS EFFECT ON INDUSTRY GROWTH

A. Manufacturers, Wholesalers and Retailers

In 1933, the Twenty-first Amendment to the United States Constitution repealed Prohibition but also gave states the authority to regulate the production, importation, distribution, sale and consumption of alcoholic beverages within their own borders.[7] A new regulatory system known as the "three-tier system was created consisting of suppliers (brewers, vintners, and importers), wholesalers (also known as distributors) and retailers (liquor stores, restaurants, and

[4] DOUGLAS GLEN WHITMAN, STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY 1 (2003).

[5] Bart Watson, *Franchise Laws: Leveling the Playing Field*, BREWERS ASSOCIATION (Dec. 17, 2014), https://www.brewersassociation.org/insights/franchise-laws/.

[6] *See infra* Section III.D.

[7] *See* U.S. CONST. amend. XXI, § 2.

so on)."[8] This system was established to "prevent vertical integration in the industry," *i.e.*, the so called "tied-houses"—saloons owned and operated by the breweries themselves—that some blamed for the "abuses in the pre-Prohibition era."[9] Tied-houses would no longer exist. Instead, beer would be sold through independent distributors.[10]

While each state has its own set of laws governing the three-tier system, the separation of the three tiers by inserting an independent distributor between the brewers and the retailers is a common thread. The three tiers (brewer, distributor, retailer) are also further separated by other laws and regulations prohibiting suppliers and distributors from having any financial interest or influence with retailers. For example, beer sales on credit are not allowed, and consignment sales are banned.[11]

B. Recent Exceptions to the Three-Tier System

Despite opposition from entrenched special interests, Minnesota breweries have fought for and won significant legislative exemptions from the general three-tier rule. The most notable exemptions are self-distribution rights, sales of growlers and 750 milliliter bottles for off-premises consumption, and, of course, the 2011 taproom law.

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[8] WHITMAN, *supra* note 5, at 1.

[9] *Id.*

[10] *Id.*

[11] *Id.*

1. Self-Distribution Rights[12]

Many states—including Minnesota—permit breweries below a certain production threshold to distribute their product directly to retailers without the use of a distributor. Self-distribution has the advantage of personal, hands-on selling that most beer distributors cannot offer.[13] Self-distribution, however, is very time consuming and resource intensive. In many cases, small brewers start with self-distribution for the first few years to gain good product representation and placement, then turn the distribution over to a beer wholesaler as sales and demand for their beers increase.

While self-distribution can be a viable means around the complex and onerous franchise laws, the time and capital required to operate an effective distribution system is significant and tends to detract from other operations. Further, breweries that grow beyond the production thresholds are forced into the franchise system as they lose their rights of self-distribution.

Minnesota's self-distribution law is codified in Minnesota Statute section 340A.301, subdivision 9(g). It provides that a brewer manufacturing no more than 20,000 barrels of malt liquor or its metric equivalent in a calendar year may own or have an interest in a malt liquor wholesaler that sells only the brewer's products. A brewer manufacturing between 20,000 and 25,000 barrels in any calendar year shall be permitted to continue to own or have an interest in a malt liquor

[12] Appendix sets forth a state-by-state summary of self-distribution laws. *See* Appendix *infra*.

[13] Jeffrey C. O'Brien and Gregory B. Perleberg, *Ten Key Legal Steps You Need to Start Your Own Brewery*, THE GROWLER (Dec. 18, 2012), http://growlermag.com/so-you-want-to-start-your-own-brewery/.

wholesaler that sells only the brewer's products if: (1) that malt liquor wholesaler distributes no more than 20,000 barrels per calendar year; and (2) the brewer has not manufactured 25,000 barrels in any calendar year.[14]

2. Sales of Growlers/750 mL Bottles for Off-Premises Consumption

Under Minnesota law, a brewer who brews not more than 20,000 barrels of its own brands of malt liquor annually may be issued a license by a municipality[15] for off-sale of malt liquor that has been produced and packaged by the brewer at its licensed premises.[16] The Commissioner of the Department of Public Safety must approve the license. A brewer may only have one such license.[17] The amount of malt liquor sold off-sale may not exceed 500 barrels annually.[18] Off-sale of malt liquor shall be limited to the legal hours for off-sale at exclusive liquor stores in the jurisdiction in which the brewer is located. The malt liquor sold off-sale must be removed from the premises before the applicable off-sale closing time at exclusive liquor stores, except that malt

[14] MINN. STAT. §340A.301, subdiv. 9(g).

[15] Note that many of the exceptions noted herein which allow for a brewery to conduct off-premises sales are predicated on a license being issued by the municipality. This is presumably due to Minnesota's statutory allowance of "municipal liquor stores." See MINN. STAT. §340A.601, et. seq. Municipalities which operate such stores generally limit or prohibit private off-premises sales of liquor.

[16] *Id.* § 340A.28, subdiv. 1. *See also Id.* §340A.24, which governs the off-premises sales related to brewpubs.

[17] *Id.* § 340A.28, subdiv. 1.

[18] *Id.*

liquor in growlers may only be sold at off-sale on Sundays.[19] Sunday sales must be approved by the licensing jurisdiction and hours may be established by those jurisdictions.[20]

Section 340A.26 maintains that malt liquor be packaged in 64-ounce "growlers" or in 750 millimeter bottles.[21] The containers need to bear a label identifying them as malt liquor, and include the name of the malt liquor and the address of the brewer. The statute also holds that the malt liquor will be considered intoxicating liquor unless the alcohol content is labeled otherwise on the container.[22]

3. Taprooms

The law provides that a municipality can issue a brewer taproom license to someone who already holds a brewer's license.[23] This brewer taproom license would authorize the brewer to sell malt liquor at the brewery or adjacent to the brewery.[24] The brewer taproom license also allows the brewer to operate a restaurant out of the brewery.

4. Effect of Exceptions to Three-Tier System on the Growth of Minnesota's Brewing Industry

Each of the aforementioned exceptions to the three-tier system—self-distribution, growler sales and taprooms—has created a system which allows small breweries to operate without being

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[19] *Id.*

[20] *Id.*

[21] *Id.* § 340A.285(a).

[22] *Id.*

[23] *See* Kaul, *supra* note 2.

[24] MINN. STAT. § 340A.26, subdiv. 1(a).

forced to engage a distributor and thereby be governed by the franchise termination rules. Particularly after the passage of the taproom law in 2011, the number of breweries in Minnesota increased exponentially. Local media site GoMN reported that "[i]n 2011 . . . there were 20 breweries in Minnesota,"[25] and that five years later, the number of breweries receiving their licenses (16) almost equaled the total number of breweries open in 2011, and the total number of licensed brewers in Minnesota as of mid-December, 2016, was 107 (not including brewpubs, which run under a different liquor license).[26]

Many of the newest breweries, at least at the outset, rely almost entirely on self-distribution, growler sales, and a taproom to generate revenue. Some breweries continue to eschew the use of distributors well beyond their initial launch. An example of this style of brewery is Dangerous Man Brewing in Minneapolis,[27] which only makes its beer available in its taproom, in growlers, and in 750 mL bottles. It does not distribute its products to other bars, restaurants or liquor stores. Dangerous Man is hailed as one of the Twin Cities' finest breweries and, in this author's opinion, has become a model for small breweries throughout the state.[28]

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[25] Melissa Turtinen, *Minnesota's Breweries Really Started to 'Grow Up' in 2016*, GOMN (Dec. 30, 2016, 12:39 PM), http://www.gomn.com/news/minnesotas-breweries-really-started-to-grow-up-in-2016.

[26] *Id*.

[27] DANGEROUS MAN BREWING CO, http://dangerousmanbrewing.com (last visited Mar. 26, 2017). Note: The author serves as Dangerous Man Brewing's legal counsel.

[28] *See Best Taproom in the Metro – Dangerous Man Brewing Company – Best of MN 2014*, STAR TRIB. (May 16, 2014, 11:22 AM), http://www.startribune.com/best-taproom-in-the-metro-

C. The State of Minnesota Law: "Public Safety" vs. Protectionism

III. REGULATORY OBSTACLES TO ACQUISITIONS AND EXPANSION

A. Brewery Taproom Restrictions

BREWER TAPROOMS.

Subdivision 1. **Brewer taproom license**. (a) A municipality, including a city with a municipal liquor store, may issue the holder of a brewer's license under section 340A.301, subdivision 6, clause (c), (i), or (j), a brewer taproom license. A brewer taproom license authorizes on-sale of malt liquor produced by the brewer for consumption on the premises of or adjacent to one brewery location owned by the brewer. Nothing in this subdivision precludes the holder of a brewer taproom license from also holding a license to operate a restaurant at the brewery. Section 340A.409 shall apply to a license issued under this subdivision. All provisions of this chapter that apply to a retail liquor license shall apply to a license issued under this subdivision unless the provision is explicitly inconsistent with this subdivision.

(b) ***A brewer may only have one taproom license under this subdivision, and may not have an ownership interest in a brew pub.***

Subd. 2. **Prohibition.** A municipality may not issue a brewer taproom license to a brewer if the brewer seeking the license, or any person having an economic interest in the brewer seeking the license or exercising control over the brewer seeking the license, is a brewer that brews more than 250,000 barrels of malt liquor annually or a winery that produces more than 250,000 gallons of wine annually.[29]

B. What Does "Micro" Mean?'

Cocktail room license. (a) A municipality, including a city with a municipal liquor store, may issue the holder of a microdistillery license under this chapter a microdistillery cocktail room license. A microdistillery cocktail room license authorizes on-sale of distilled liquor produced by the distiller for consumption on the premises of or adjacent to one distillery location owned by the distiller. Notwithstanding section 340A.504,

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dangerous-man-brewing-company-best-of-mn-2014/257987121/; *see also Best Taproom Dangerous Man Brewing Co.*, CITYPAGES: BEST OF THE TWIN CITIES 2014, http://www.citypages.com/best-of/2014/food-and-drink/dangerous-man-brewing-co-7365912 (last visited Mar. 26, 2017). The author, who represents Dangerous Man, often hears the taproom-only business model referred to by others as the "Dangerous Man model."

[29] MINN. STAT. § 340A.26, Subd. 2.

subdivision 3, a cocktail room may be open and may conduct on-sale business on Sundays if authorized by the municipality. Nothing in this subdivision precludes the holder of a microdistillery cocktail room license from also holding a license to operate a restaurant at the distillery. Section 340A.409 shall apply to a license issued under this subdivision. All provisions of this chapter that apply to a retail liquor license shall apply to a license issued under this subdivision unless the provision is explicitly inconsistent with this subdivision.[30]

Microdistillery. "Microdistillery" is a distillery operated within the state producing premium, distilled spirits in total quantity not to exceed 40,000 proof gallons in a calendar year.[31]

C. Beer Franchise Laws

A distribution agreement governs the relationship between a brewer and its distributor/wholesaler. State distribution laws – sometimes referred to as "beer franchise laws" or "franchise termination laws", oftentimes contain provisions which override the parties' negotiated contract terms. These state distribution laws, which some commentators refer to as "monopoly protection laws," are critical to the maintenance of the three-tier system.[32] Distribution laws vary between states.[33] However, at the heart of most of these laws is a requirement that the supplier show "good cause" for termination or nonrenewal of a contract even when the contracts in question specifically provide otherwise.[34]

What qualifies as *good cause* differs from state to state, but often the term is taken to rule out economic considerations that might typically prompt a brewery to terminate its relationship with a wholesaler, such as the wholesaler's failure to meet contractual sales quotas or failure to ensure proper quality control of the beer once the wholesaler takes

[30] MINN. STAT. § 340A.22, Subd. 2(a).
[31] MINN. STAT. § 340A.101, Subd. 17a.
[32] *Id.* at 2.

[33] See Appendix *infra* for a summary of each state's distribution law.

[34] Whitman, *supra* note 5, at 2.

possession of the beer. The laws also typically require advance notice of termination, give wholesalers a month or more to cure any supposed problems, and prevent any contractual waiver of the law's mandates. In addition, they provide for exclusive wholesaler territories.[35]

D. Minnesota's Beer Distribution Law

1. Creation of the Distribution Agreement

The Minnesota Beer Brewers and Wholesalers Act (the "Act") is codified at Minnesota Statutes Chapter 325B. Despite several challenges brought against the Act by brewers since its passage, courts have consistently upheld the constitutionality of the Act and have found that it has the legitimate purposes of "prohibit[ing] brewers from fixing wholesale prices, coercing wholesalers to accept delivery of unordered products, or discriminating among wholesalers."[36]

The Act is particularly favorable to wholesalers by virtue of the fact that it allows for a distribution agreement to be created between a brewer and wholesaler without so much as a written contract.[37] Thus an unwitting brewer could find itself to have inadvertently created a

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[35] *Id*. (alteration in original).

[36] Arneson Distrib. Co., Inc. v. Miller Brewing Co., 117 F. Supp.2d 905, 909 (D. Minn. 2000)*; see* Crowley Beverage Co., Inc. v. Miller Brewing Co., 862 F.2d 688, 691 (8th Cir. 1988). Note, however, that courts did find retroactive application of the Act to be unconstitutional. Jacobsen v. Anheuser-Busch Inc., 392 N.W.2d 868, 875 (Minn. 1986).

[37] *See* MINN. STAT. § 325B.01, subdiv. 2 (2016) ("Agreement" means one or more of the following: (a) a commercial relationship between a beer wholesaler and a brewer of a definite or

distribution relationship by taking such seemingly innocuous actions as providing a wholesaler with product for sampling to retailers or an exchange of emails, and the "agreement" with the wholesaler would be silent as to the wholesaler's marketing and/or quality control obligations.

2. Termination Restrictions

Most, if not all, state beer distribution laws significantly restrict the brewer's ability to terminate its distribution agreement. The Act provides:

> Notwithstanding the terms, provisions or conditions of any agreement, no brewer shall amend, cancel, terminate or refuse to continue to renew any agreement, or cause a wholesaler to resign from an agreement, unless the brewer . . . has satisfied the notice and opportunity to cure requirements of [Minnesota Statutes] Section 325B.05; has acted in good faith; and has good cause for the cancellation, termination, nonrenewal, discontinuance, or forced resignation.[38]

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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 to a beer wholesaler a license 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.").

[38] *Id.* § 325B.04, subdiv. 1.

The termination restrictions which the Act imposes upon brewers are significant because, in ordinary situations, if one party to a contract is not performing its obligations as outlined within the contract, the other party often has the ability to terminate the contract as a remedy for the non-performance. In the case of a brewer, however, if its wholesaler fails to adequately perform per the parties' distribution agreement – and provided that the nonperformance rises to the level of "good cause" per the Act – the brewer is prohibited under the Act from simply terminating the agreement without any further obligation.

3. What Constitutes "Good Cause"?

> "Good cause" includes, but is not limited to, the following: (1) revocation of the wholesaler's license . . . ; (2) the wholesaler's bankruptcy or insolvency; (3) assignment of the assets of the wholesaler for the benefit of creditors, or a similar disposition of the wholesaler's assets; or (4) a failure by the wholesaler to substantially comply, without reasonable excuse or justification, with any reasonable and material requirement imposed on the wholesaler by the brewer, where the failure was discovered by the brewer not more than one year before the date on which the brewer gave notice to the wholesaler under section 325B.05.[39]

"'Good cause' does not," however, "include the sale or purchase of a brewer."[40]

Very few cases have been decided under the Act, and those cases offer minimal guidance on the issue of what constitutes "good cause."[41] In *Arneson Distributing Co. v. Miller Brewing*

[39] *Id.* § 325B.04, subdiv. 2(a).

[40] *Id.* § 325B.04, subdiv. 2(b).

[41] *See, e.g.*, *Arneson,* 117 F. Supp.2d at 910 ("A brewer's legitimate business reason is not consistent with examples of 'good cause' given by the statute.").

Co.,[42] the United States District Court for the District of Minnesota suggests that "good cause" sufficient to trigger a brewer's right to terminate its distribution agreement must be tied to the wholesaler's performance.[43] The good cause requirement is significant because, without a showing of "good cause", the Act requires a brewer to pay its wholesaler "reasonable compensation for the value of the wholesaler's business with relationship to the terminated brand or brands."[44] Given that the Act fails to define "reasonable compensation", the brewer is thus left with the choice of paying the wholesaler's ransom to release its brands or to engage in a costly arbitration proceeding to ultimately ascertain the amount to be paid by the brewer to the wholesaler to release its brands.[45]

4. Notice Requirement

> Notwithstanding any provision to the contrary in any agreement between a brewer and a wholesaler, a brewer who intends to terminate, cancel, discontinue, or refuse to renew an agreement with a wholesaler must furnish written notice to that effect to the wholesaler not less than 90 days before the effective date of the intended action and must provide the wholesaler with a bona fide opportunity to substantially cure any claimed deficiency within the 90 days.[46]

"The notice must be sent by certified mail and must contain, at a minimum, (1) the effective date of the intended action, and (2) a statement of the nature of the intended action and the brewer's reasons therefor."[47] "In no event may a termination, cancellation, discontinuance, or nonrenewal

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[42] *Id.*

[43] *Id.*

[44] MINN. STAT. § 325B.07, subdiv. 1.
[45] MINN. STAT. § 325B.07, subdiv. 2.
[46] MINN. STAT. § 325B.05, subdiv. 1(a).

[47] *Id.* § 325B.05, subdiv. 1(b).

be effective until at least 90 days from the wholesaler's receipt of written notice under this section, unless the wholesaler has consented in writing to a shorter period."[48] This lengthy cure period, particularly in relation to a failure by the wholesaler to "substantially comply, without reasonable excuse or justification, with any reasonable and material requirement", provides the wholesaler with ample time to remedy most, if not all, performance related violations. Hence, the "good cause" prerequisite for a brewer's termination of its wholesaler essentially acts to create a lifetime relationship between brewer and wholesaler.

5. Reasonable Compensation

Minnesota statute defines reasonable compensation:

> Any brewer which . . . terminates, or refuses to continue or renew any beer agreement . . . unless for good cause shown as defined in section 325B.04, from an agreement . . . shall pay the wholesaler reasonable compensation for the value of the wholesaler's business with relationship to the terminated brand or brands.[49] The value of the wholesaler's business shall include, but not be limited to, its good will, if any.[50]

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[48] *Id.* § 325B.05, subdiv. 1(c). Note, however, that pursuant to Minn. Stat. § 325B.05, subdiv. 2, "a brewer may terminate or refuse to renew an agreement on not less than 15 days' written notice to the wholesaler, upon any of the following occurrences: (1) the bankruptcy or insolvency of the wholesaler; (2) an assignment of the wholesaler's assets for the benefit of creditors, or a similar disposition of those assets; (3) revocation of the wholesaler's license under section 340A.304; or (4) conviction or a plea of guilty or no contest to a charge of violating any state or federal law, where the violation materially affects the wholesaler's right to remain in business."

[49] *Id.* § 325B.07, subdiv. 1.

[50] *Id.*

Determination of value is a complicated task, as the Act provides no guidance whatsoever as to how value is to be determined, and in practice wholesalers have significant discretion in setting the termination price for the brewer.

State law also mandates the proper form of arbitration if a brewer and wholesaler cannot determine reasonable compensation:

> In the event that the brewer and the beer wholesaler are unable to mutually agree on the reasonable compensation to be paid for the value of the wholesaler's business, as defined herein, the matter shall be submitted to a neutral arbitrator to be selected by the parties, or if they cannot agree, by the chief judge of the district court.[51] All of the costs of the arbitration shall be paid one-half by the wholesaler and one-half by the brewer.[52] The award of the neutral arbitrator shall be final and binding on the parties.[53]

As a result of these decidedly pro-wholesaler termination provisions – termination only for "good cause", good cause narrowly defined within the Act and the requirement that a brewer pay "reasonable compensation" to the wholesaler –the entry into a beer distribution agreement essentially amounts to a lifetime arrangement.

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[51] *Id.* at subdiv. 2.

[52] *Id.*

[53] *Id.* As of February 4, 2017, no cases exist interpreting what constitutes "reasonable compensation" under MINN. STAT. § 325B.07, subdiv. 2.

III. LEGISLATIVE "WISH LIST" FOR MINNESOTA'S BREWERIES, DISTILLERIES AND WINERIES

A. 2019 Legislative Proposals

The following is a list of the various reform proposals sought by Minnesota breweries, distilleries and wineries during the 2019 Legislative Session – all of which were excluded from the omnibus liquor bill[54]:

House File	Senate File	Short Description
HF 0159	SF 0191	Liquor producers allowed to provide liquor to nonprofit organization for tasting events
HF 0347	SF 0158	Single entities ownership of a cocktail room and taproom license permitted.
HF 1477	SF 1854	Brew pubs permitted to produce hard cider.
HF 1712		Commercial wineries limited self-distribution allowed
HF 1790	SF 1781	Exclusive liquor stores permitted to refill growlers
HF 1799	SF 1737	Brewer off-sale allowable container sizes expanded
HF 1800	SF 1780; SF 2064	Brewer taprooms limited sale of collaboration malt liquor permitted
HF 1802	SF 1737	Brewer off-sale license condition modified
HF 1827		Microdistillery requirements modified, on-sale license authorized, liquor and tasting-related services provision authorized, and money appropriated.

[54] *See* "Minnesota's Craft Brewers Are Left High and Dry by the Omnibus Liquor Bill", John Phelan, Center of the American Experiment, April 5, 2019; *see also* "Buzzkills: the Minnesota Legislature makes booze bills boring again", Peter Callaghan, MinnPost, April 5, 2019.

B. Small Brewer Exemptions to State Distribution Laws

While previously created exemptions have helped, the core issue—namely, the onerous effect that the franchise laws have on small brewers—has been ignored in Minnesota. In effect, Minnesota law has chosen to put a "Band-Aid" on a broken leg. The time has come to address the disparate bargaining power which distributors have in contractual negotiations resulting from a legislatively created and maintained leg-up on brewers.

In response to the continued consolidation of beer wholesalers in the U.S. and the imbalance in negotiations between larger wholesalers and small craft brewers, several states have created exemptions within their distribution laws for "small brewers" relative to the onerous termination provisions:

- Arkansas: Small brewers within the state are fully exempt from any remedies under the state's franchise act.[55] An Arkansas statute defines a small brewery as a "licensed facility . . . that manufactures fewer than forty-five thousand (45,000) barrels[56] of beer, malt beverage, and hard cider per year for sale or consumption."[57]
- Colorado: None of the state's franchise protections are enforceable against small manufacturers.[58] Specifically, the applicable statute exempts manufacturers that

[55] ARK. CODE ANN. §§ 3-5-1102(12)(B); 3-5-1403(8)(A) (West 2015).

[56] Author's Note: A barrel (Bbl) is the standard method for measuring kegs of beer. 1 barrel = 31 gallons.

[57] § 3-5-1403(8)(A).

[58] *See* COLO. REV. STAT. § 12-47-406.3(8) (2007).

produce "less than three hundred thousand gallons of malt beverages per calendar year."[59]

- Illinois: The state's franchise provisions allow small brewers whose annual volume of beer products supplied represents ten percent or less of the wholesaler's entire business to terminate upon payment of reasonable compensation to the wholesaler.[60] If the parties cannot agree as to what constitutes reasonable compensation, the matter is referred to binding arbitration.[61]
- Nevada: The state's good cause franchise protection against terminations is not enforceable against small suppliers in-state and out-of-state.[62] Specifically, the statute exempts suppliers that sell "less than 2,000 barrels of malt beverages . . . in this state in any calendar year."[63]
- New Jersey: A brewer from within or without the state who succeeds another brewer is exempt from a rebuttable presumption that favors an injunction preventing termination of the preexisting wholesaler when the affected brands

[59] *Id.*

[60] 815 ILL. COMP. STAT. 720/7(1.5) (2012).

[61] *Id.* at 720/7(2). Note that Minnesota's Act already contains a similar provision for instances where a brewer "amends, cancels, terminates, or refuses to continue or renew any beer agreement, or causes a wholesaler to resign, unless for good cause." *See* MINN. STAT. § 325B.07 (2016).

[62] NEV. REV. STAT. § 597.160(2) (2013).

[63] *Id.*

represent a small portion (*i.e.*, less than twenty percent) of the terminated wholesaler's gross sales, the terminated wholesaler receives compensation, and the brewer assigns the brands to a wholesaler that already distributes its other brands.[64]

- New York: A small brewer whose annual volume is less than 300,000 barrels produced in the state or outside of the state and who represents only a small amount (*i.e.*, no more than three percent) of a wholesaler's total annual sales volume, measured in case equivalent sales of twenty-four twelve ounce units, may terminate a wholesaler upon payment of compensation for only the distribution rights lost or diminished by the termination.[65] The statute defines "annual volume" as "the aggregate number of barrels of beer" brewed by or on behalf of the brewer under trademarks owned by the brewery, or the aggregate number of barrels of beer brewed by or on behalf of any person controlled by or under common control with the brewer, "during the measuring period, on a worldwide basis."[66]
- North Carolina: A small brewer may terminate a wholesaler upon payment of compensation for the distribution rights with five days' written notice without establishing good cause.[67] North Carolina's alcoholic beverage statutes define a small brewer as "a brewery that sells, to consumers at the brewery, to wholesalers,

[64] *See* N.J. STAT. ANN. § 33:1-93.15(11)(d)(1) (West, Westlaw through L. 2016, c. 83 and J.R. No. 11).

[65] N.Y. ALCO. BEV. CONT. LAW § 55-c(4)(c)(i) (McKinney 2017).

[66] N.Y. ALCO. BEV. CONT. LAW § 55-c(4)(c)(iv) (McKinney 2017).

[67] *See* N.C. GEN. STAT. ANN. § 18B-1305(a1) (West 2017).

to retailers, and to exporters, fewer than 25,000 barrels . . . of malt beverages produced by it per year."[68]

- Pennsylvania: Although not a small brewer carve-out, the state's franchise provisions exempt in-state manufacturers whose principal place of business is in the state, "unless they name or constitute [or have named or constituted] a distributor or importing distributor as a primary or original supplier of their products."[69] Note, however, that the protections afforded solely to in-state manufacturers may constitute a violation of the Commerce Clause of the U.S. Constitution[70].
- Rhode Island: Although also not a small brewer carve-out, like Pennsylvania, Rhode Island's franchise laws exempt Rhode Island-licensed manufacturers.[71]

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[68] N.C. GEN. STAT. ANN. § 18B-1104(8) (West, Westlaw through 2016 Reg. Sess. of the Gen. Assemb.).

[69] 47 PA. STAT. AND CONS. STAT. ANN. § 4-431(d)(5) (West, Westlaw through 2016 Reg. Sess. Acts 1 to 169 and 171 to 175).

[70] Under the legal doctrine known as the dormant Commerce Clause, the Commerce Clause's grant of the power to regulate commerce between the states to Congress under Article I of the U.S. Constitution implies a negative converse—a restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce. Under the dormant Commerce Clause doctrine, discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually per se rule of invalidity," See e.g., *City of Philadelphia v. New Jersey* 437 U.S. 617 (1978), *Dean Milk Co. v. City of Madison, Wisconsin*, 340 U.S. 349 (1951), *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977) which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose, *Maine v. Taylor*, 477 U.S. 131(1986). See also *Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573 (1986).

[71] 3 R.I. GEN. LAWS ANN. § 3-13-1(5) (West, Westlaw through Chapter 542 of the Jan. 2016 session).

Again, like Pennsylvania's statute, this protection for in-state manufacturers may pose problems under the Commerce Clause of the United States Constitution[72].

- Washington: Small brewers holding certificates of approval are excluded from the state's franchise protections.[73] Specifically, Washington's franchise law excludes from the definition of "supplier" "any brewer or manufacturer of malt liquor producing less than two hundred thousand [200,000] barrels of malt liquor annually."[74]

The State of Massachusetts has previously considered a similar exemption, and State Treasurer Deborah Goldberg recently announced that she is creating a "task force to create a more cohesive set of rules that 'deals with the 21st century,'" including changes to Massachusetts' distribution law, which would presumably make it easier for small brewers to terminate their distribution agreements.[75]

Small brewer exemptions serve the purpose of relieving small craft brewers from some of the more onerous franchise termination provisions of beer distribution laws while preserving the

[72] See Footnote 70, infra.

[73] *See* WASH. REV. CODE § 19.126.020(10) (2016) (definition of supplier excludes smaller breweries).

[74] *Id.*

[75] Dan Adams, *"Everything is on the Table" in Sweeping Review of State Alcohol Rules*, BOS. GLOBE (Jan. 18, 2017), http://www.bostonglobe.com/business/2017/01/18/everything-table-sweeping-review-state-alcohol-rules/acNHYjCrymSx0fVbppC6QO/story.html?event=event25.

protections afforded to distributors who are susceptible to strong-arm tactics from large “macro” breweries such as AB InBev.