

1 STATE OF OKLAHOMA

2 1st Session of the 52nd Legislature (2009)

3 COMMITTEE SUBSTITUTE

4 FOR

5 HOUSE BILL NO. 1513

6 By: Jackson

7 COMMITTEE SUBSTITUTE

8 An Act relating to intoxicating liquors; amending 37
9 O.S. 2001, Sections 163.2 and 163.18E, which relate
10 to low-point beer and the Low-Point Beer Distribution
11 Act; adding definitions; providing exemption;
12 prohibiting the termination of certain agreements
13 between certain manufacturers and wholesalers unless
14 certain conditions are met; providing certain
15 exceptions; providing for when such termination is
16 null and void; providing reasons for such
17 termination; authorizing termination; requiring
18 certain notice; providing procedures for transfer of
19 a particular brand of low-point beer from a
20 manufacturer to a successor manufacturer; making a
21 successor manufacturer obligated to certain terms and
22 conditions; making certain provisions applicable;
23 giving a successor manufacturer certain right to
24 contractually require a wholesaler to comply with
certain standards of performance; allowing certain
termination agreement for certain purpose under
certain circumstances; requiring certain notice;
providing for certain negotiations on fair market
value; authorizing certain distribution under certain
circumstances; providing for certain arbitration;
providing for notice of arbitration, conclusion,
location, arbitrator, award, cost and written
decision; making certain decision final and binding;
providing for enforcement of award; prohibiting
certain appeal; providing for nonparticipation in
arbitration; authorizing certain actions if
settlement or award is not paid; prohibiting certain
wholesaler from receiving certain award or
settlement; providing for recovery of damages for
certain violations and settlement of certain

1 disputes; construing provisions; prohibiting certain
2 waiver compliance; making act applicable to certain
3 agreements or contracts; and declaring an emergency.

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5 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

6 SECTION 1. AMENDATORY 37 O.S. 2001, Section 163.2, is
7 amended to read as follows:

8 Section 163.2 In the administration of Section 163.1 et seq. of
9 this title, the following words and phrases are given the meanings
10 respectively indicated:

11 1. "Low-point beer" means and includes beverages containing
12 more than one-half of one percent (1/2 of 1%) alcohol by volume, and
13 not more than three and two-tenths percent (3.2%) alcohol by weight,
14 including but not limited to beer or cereal malt beverages obtained
15 by the alcoholic fermentation of an infusion of barley or other
16 grain, malt or similar products;

17 2. "Person" means and includes an individual, a trust or
18 estate, a partnership, an association or a corporation;

19 3. "Manufacturer" means and includes any person who prepares
20 for human consumption by the use of raw materials or other
21 ingredients any low-point beer, as defined herein, upon which a
22 license fee and a tax are imposed by any law of this state;

1 4. "Wholesaler" means and includes any person who sells any
2 low-point beer, as defined herein, to a licensed retail dealer, as
3 hereinafter defined, for resale;

4 5. "Retail dealer" means and includes any person who sells any
5 low-point beer, as defined herein, at retail for consumption or use,
6 and such definitions include state and county fair associations, and
7 special licenses may be issued for the sale of low-point beer, as
8 herein defined, by such associations, and to other persons for the
9 sale of such low-point beer at rodeos, picnics, or other organized
10 temporary assemblages of people. The term "retail dealer" also
11 includes railways for the sale of such beverages, and licenses may
12 be issued for each dining car or railway train, which railways and
13 dining cars shall pay the same license fees as regular retail
14 dealers;

15 6. "Sale" or "sales", for the purpose of the collection of the
16 taxes imposed by any law of the state upon low-point beer, as
17 defined herein, is hereby defined to mean and include all sales by
18 all wholesalers within this state, for money or any other valuable
19 consideration, to retail dealers for resale; and, also, the term
20 "sale" or "sales" taxable under Section 163.1 et seq. of this title
21 means and includes all sales from manufacturers or wholesalers from
22 outside this state, to retail dealers for resale to consumers or
23 otherwise. The term "sale" or "sales" shall also include sales from
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1 manufacturers without the state to wholesalers located within the
2 state;

3 7. "Meals" means foods commonly ordered at lunch or dinner and
4 at least part of which is cooked on the licensed premises and
5 requires the use of dining implements for consumption. Provided,
6 that the service of only food such as appetizers, sandwiches, salads
7 or desserts shall not be considered "meals"; ~~and~~

8 8. "Motion picture theater" means a place where motion pictures
9 are exhibited and to which the general public is admitted, but does
10 not include a place where meals, as defined by this section, are
11 served, if only persons twenty-one (21) years of age or older are
12 admitted;

13 9. "Existing wholesaler" means a wholesaler who distributes a
14 particular brand of low-point beer at the time a successor
15 manufacturer acquires rights to manufacture or import the particular
16 brand of low-point beer;

17 10. "Fair market value" means the value that would be
18 determined in a transaction entered into without duress or threat of
19 termination of the existing wholesaler's right and shall include all
20 elements of value, including goodwill and going-concern value;

21 11. "Good cause" means:

22 a. failure by the wholesaler to comply with the
23 provisions of a written agreement or understanding
24 with the manufacturer, or

1 b. use of bad faith or failure to observe reasonable
2 commercial standards of fair dealing in the trade;

3 12. "Good faith" means the duty of each party to any franchise
4 and all officers, employees or agents thereof to act with honesty in
5 fact and within reasonable standards of fair dealing in the trade;

6 13. "Successor manufacturer" means a primary source of supply,
7 a brewer or an importer that acquires rights to a low-point beer
8 brand from a predecessor manufacturer; and

9 14. "Successor wholesaler" means one or more wholesalers
10 designated by a successor manufacturer to replace the existing
11 wholesaler, for all or part of the existing wholesaler's territory,
12 in the distribution of the existing low-point beer brand or brands.

13 SECTION 2. AMENDATORY 37 O.S. 2001, Section 163.18E, is
14 amended to read as follows:

15 Section 163.18E ~~A licensed~~ A. Nothing in this section shall
16 apply to a manufacturer that produces less than three hundred
17 thousand (300,000) gallons of low-point beer per calendar year.

18 B. 1. Except as provided in subsections C, D and E of this
19 section, no manufacturer may shall terminate, cancel, or refuse to
20 continue to provide designated brands pursuant to a designated sales
21 territory an agreement with any licensed wholesaler who has sold
22 low point beer supplied by that licensed manufacturer in violation
23 of the provisions of the Low Point Beer Distribution Act. Such
24 termination, cancellation, or refusal to supply shall be effective

1 ~~immediately upon receipt of written notification by the offending~~
2 ~~licensed wholesaler unless all of the following occur:~~

3 a. the manufacturer establishes good cause for such
4 termination,

5 b. the wholesaler receives written notification by
6 certified mail, return receipt requested, from the
7 manufacturer of the alleged noncompliance and is
8 afforded no less than sixty (60) days in which to cure
9 such noncompliance,

10 c. the wholesaler fails to cure such noncompliance within
11 the allotted sixty-day cure period, and

12 d. the manufacturer provides written notice by certified
13 mail, return receipt requested, to the wholesaler of
14 such continued failure to comply with the agreement.

15 The notification shall contain a statement of the
16 intention of the manufacturer to terminate or not
17 renew the agreement, the reasons for termination or
18 nonrenewal and the date the termination or nonrenewal
19 shall take effect.

20 2. If a wholesaler cures an alleged noncompliance within the
21 cure period provided in subparagraph b of paragraph 1 of this
22 subsection, any notice of termination from a manufacturer to a
23 wholesaler shall be null and void.

1 C. A manufacturer may immediately terminate an agreement with a
2 wholesaler, effective upon furnishing written notification to the
3 wholesaler by certified mail, return receipt requested, for any of
4 the following reasons:

5 1. The wholesaler's failure to pay any account when due and
6 upon written demand by the manufacturer for such payment, in
7 accordance with agreed payment terms;

8 2. The assignment or attempted assignment by the wholesaler for
9 the benefit of creditors, the institution of proceedings in
10 bankruptcy by or against the wholesaler, the dissolution or
11 liquidation of the wholesaler or the insolvency of the wholesaler;

12 3. The revocation or suspension of, or the failure to renew for
13 a period of more than fourteen (14) days, a wholesaler's state,
14 local or federal license or permit to sell low-point beer in this
15 state;

16 4. Failure of a wholesaler to sell his or her ownership
17 interest in the distribution rights to the manufacturer's low-point
18 beer within one hundred twenty (120) days after such a wholesaler
19 has been convicted of a felony that, in the manufacturer's sole
20 judgment, adversely affects the goodwill of the wholesaler or
21 manufacturer;

22 5. A wholesaler has been convicted of, found guilty of or pled
23 guilty or nolo contendere to, a charge of violating a law or
24 regulation of the United States or of this state if it materially

1 and adversely affects the ability of the wholesaler or manufacturer
2 to continue to sell its low-point beer in this state;

3 6. Any attempted transfer of ownership of the wholesaler, stock
4 of the wholesaler or stock of any parent corporation of the
5 wholesaler, or any change in the beneficial ownership or control of
6 any entity, without obtaining the prior written approval of the
7 manufacturer, except as may otherwise be permitted pursuant to a
8 written agreement between the parties;

9 7. Fraudulent conduct in the wholesaler's dealings with the
10 manufacturer or its low-point beer, including the intentional sale
11 of low-point beer outside the manufacturer's established quality
12 standards;

13 8. The wholesaler ceases to conduct business for five (5)
14 consecutive business days, unless such cessation is the result of an
15 act of God, war, or a condition of national, state or local
16 emergency; or

17 9. Any sale of low-point beer, directly or indirectly, to
18 customers located outside the territory assigned to the wholesaler
19 by the manufacturer unless expressly authorized by the manufacturer.

20 D. The manufacturer shall have the right to terminate an
21 agreement with a wholesaler at any time by giving the wholesaler at
22 least ninety (90) days' written notice by certified mail, return
23 receipt requested; provided, that the manufacturer shall give a

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1 similar notice to all other wholesalers in all other states who have
2 entered into the same distribution agreement with the manufacturer.

3 E. If a particular brand of low-point beer is transferred by
4 purchase or otherwise from a manufacturer to a successor
5 manufacturer, the following shall occur:

6 1. The successor manufacturer shall become obligated to all of
7 the terms and conditions of the agreement in effect on the date of
8 succession. This subsection applies regardless of the character or
9 form of the succession. A successor manufacturer has the right to
10 contractually require its wholesaler to comply with operational
11 standards of performance, if the standards are uniformly established
12 for all of the successor manufacturer's wholesalers. A successor
13 manufacturer may terminate its agreement, in whole or in part, with
14 a wholesaler of the manufacturer it succeeded, for the purpose of
15 transferring the distribution rights in the wholesaler's territory
16 to a new wholesaler, provided that the successor wholesaler first
17 pays to the existing wholesaler the fair market value of the
18 existing wholesaler's business with respect to the terminated brand
19 or brands;

20 2. The successor manufacturer shall notify the existing
21 wholesaler of the successor manufacturer's intent not to appoint the
22 existing wholesaler for all or part of the existing wholesaler's
23 territory for the low-point beer. The successor manufacturer shall
24 mail the notice of termination by certified mail, return receipt

1 requested, to the existing wholesaler. The successor manufacturer
2 shall include in the notice the names, addresses and telephone
3 numbers of the successor wholesalers;

4 3. a. The successor wholesaler shall negotiate with the
5 existing wholesaler to determine the fair market value
6 of the existing wholesaler's right to distribute the
7 low-point beer in the existing wholesaler's territory.
8 The successor wholesaler and the existing wholesaler
9 shall negotiate the fair market value in good faith.

10 b. The existing wholesaler shall continue to distribute
11 the low-point beer in good faith until payment of the
12 compensation agreed to under subparagraph a of this
13 paragraph, or awarded under paragraph 4 of this
14 subsection, is received; and

15 4. a. If the successor wholesaler and the existing
16 wholesaler fail to reach a written agreement on the
17 fair market value within thirty (30) days after the
18 existing wholesaler receives the notice required
19 pursuant to paragraph 2 of this subsection, the
20 successor wholesaler or the existing wholesaler shall
21 send a written notice to the other party requesting
22 arbitration pursuant to the Uniform Arbitration Act,
23 Part 2 of Article 22 of Title 13, C.R.S. Arbitration
24 shall be held for the purpose of determining the fair

1 market value of the existing wholesaler's right to
2 distribute the low-point beer in the existing
3 wholesaler's territory.

4 b. Notice of intent to arbitrate shall be sent, as
5 provided in subparagraph a of this paragraph, not
6 later than forty (40) days after the existing
7 wholesaler receives the notice required pursuant to
8 paragraph 2 of this subsection. The arbitration
9 proceeding shall conclude not later than sixty (60)
10 days after the date the notice of intent to arbitrate
11 is mailed to a party, unless this time is extended by
12 mutual agreement of the parties and the arbitrator.

13 c. Any arbitration held pursuant to this subsection shall
14 be conducted in a city within this state that:
15 (1) is closest to the existing wholesaler, and
16 (2) has a population of more than twenty thousand
17 (20,000) people.

18 d. Any arbitration held pursuant to this paragraph shall
19 be conducted before one impartial arbitrator to be
20 selected by the American Arbitration Association or
21 its successor. The arbitration shall be conducted in
22 accordance with the rules and procedures of the
23 Uniform Arbitration Act, Part 2 of Article 22 of Title
24 13, C.R.S.

1 e. An arbitrator's award in any arbitration held pursuant
2 to this paragraph shall be monetary only and shall not
3 enjoin or compel conduct. Any arbitration held
4 pursuant to this paragraph shall be in lieu of all
5 other remedies and procedures.

6 f. The cost of the arbitrator and any other direct costs
7 of an arbitration held pursuant to this paragraph
8 shall be equally divided by the parties engaged in the
9 arbitration. All other costs shall be paid by the
10 party incurring them.

11 g. The arbitrator in any arbitration held pursuant to
12 this paragraph shall render a written decision not
13 later than thirty (30) days after the conclusion of
14 the arbitration, unless this time is extended by
15 mutual agreement of the parties and the arbitrator.
16 The decision of the arbitrator is final and binding on
17 the parties. The arbitrator's award may be enforced
18 by commencing a civil action in any court of competent
19 jurisdiction. Under no circumstances may the parties
20 appeal the decision of the arbitrator.

21 h. An existing wholesaler or successor wholesaler who
22 fails to participate in the arbitration hearings in
23 any arbitration held pursuant to this paragraph waives
24 all rights the existing wholesaler or successor

1 wholesaler would have had in the arbitration and is
2 considered to have consented to the determination of
3 the arbitrator.

4 i. If the existing wholesaler does not receive payment
5 from the successor wholesaler of the settlement or
6 arbitration award required under paragraph 2 or 3 of
7 this subsection within thirty (30) days after the date
8 of the settlement or arbitration award:

9 (1) the existing wholesaler shall remain the
10 wholesaler of the low-point beer in the existing
11 wholesaler's territory to at least the same
12 extent that the existing wholesaler distributed
13 the low-point beer immediately before the
14 successor wholesaler acquired rights to the low-
15 point beer, and

16 (2) the existing wholesaler is not entitled to the
17 settlement or arbitration award.

18 F. 1. Any wholesaler or manufacturer who is aggrieved by a
19 violation of any provision of subsections B and D of this section
20 shall be entitled to recovery of damages caused by the violation.
21 Except for a dispute arising under subsection E of this section,
22 damages shall be sought in a civil action in any court of competent
23 jurisdiction.

1 2. Any dispute arising under subsections B and D of this
2 section may also be settled by such dispute resolution procedures as
3 may be provided by a written agreement between the parties.

4 G. Nothing in this section shall be construed to limit or
5 prohibit good-faith settlements voluntarily entered into by the
6 parties.

7 H. Nothing in this section shall be construed to give an
8 existing wholesaler or a successor wholesaler any right to
9 compensation if an agreement with the existing wholesaler or
10 successor wholesaler is terminated by a successor manufacturer
11 pursuant to subsections B, C and D of this section.

12 I. No manufacturer shall require any wholesaler to waive
13 compliance with any provision of this section.

14 J. This section shall apply to any agreement entered into, and
15 any renewals, extensions, amendments, or conduct constituting a
16 modification of an agreement, by a manufacturer on or after the
17 effective date of this act.

18 SECTION 3. It being immediately necessary for the preservation
19 of the public peace, health and safety, an emergency is hereby
20 declared to exist, by reason whereof this act shall take effect and
21 be in full force from and after its passage and approval.

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