

ENROLLED SENATE
BILL NO. 1146

By: Jolley of the Senate

and

Jackson of the House

An Act relating to intoxicating liquors; amending 37 O.S. 2001, Sections 163.2 and 163.18E, which relate to low-point beer and the Low-Point Beer Distribution Act; adding definitions; providing exemption; prohibiting the termination of certain agreements between certain manufacturers and wholesalers unless certain conditions are met; providing certain exceptions; providing for when such termination is null and void; providing reasons for such termination; authorizing termination; requiring certain notice; providing procedures for transfer of a particular brand of low-point beer from a manufacturer to a successor manufacturer; making a successor manufacturer obligated to certain terms and conditions; making certain provisions applicable; giving a successor manufacturer certain right to 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 disputes; construing provisions; prohibiting certain waiver compliance; making act applicable to certain agreements or contracts; and declaring an emergency.

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

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

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

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

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

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

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

5. "Retail dealer" means and includes any person who sells any low-point beer, as defined herein, at retail for consumption or use, and such definitions include state and county fair associations, and

special licenses may be issued for the sale of low-point beer, as herein defined, by such associations, and to other persons for the sale of such low-point beer at rodeos, picnics, or other organized temporary assemblages of people. The term "retail dealer" also includes railways for the sale of such beverages, and licenses may be issued for each dining car or railway train, which railways and dining cars shall pay the same license fees as regular retail dealers;

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

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

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

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

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

11. "Good cause" means:

- a. failure by the wholesaler to comply with the provisions of a written agreement or understanding with the manufacturer, or
- b. failure by the wholesaler to comply with the duty of good faith;

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

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

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

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

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

B. 1. Except as provided in subsections C, D and E of this section, no manufacturer ~~may~~ shall terminate, cancel, or refuse to continue to provide designated brands pursuant to a designated sales territory an agreement with any licensed wholesaler who has sold low point beer supplied by that licensed manufacturer in violation of the provisions of the Low Point Beer Distribution Act. Such termination, cancellation, or refusal to supply shall be effective immediately upon receipt of written notification by the offending licensed wholesaler unless all of the following occur:

- a. the manufacturer establishes good cause for such termination,

- b. the wholesaler receives written notification by certified mail, return receipt requested, from the manufacturer of the alleged noncompliance and is afforded no less than sixty (60) days in which to cure such noncompliance,
- c. the wholesaler fails to cure such noncompliance within the allotted cure period, and
- d. the manufacturer provides written notice by certified mail, return receipt requested, to the wholesaler of such continued noncompliance. The notification shall contain a statement of the intention of the manufacturer to terminate or not renew the agreement, the reasons for termination or nonrenewal and the date the termination or nonrenewal shall take effect.

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

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

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

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

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

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

5. A wholesaler has been convicted of, found guilty of or pled guilty or nolo contendere to, a charge of violating a law or regulation of the United States or of this state if it materially and adversely affects the ability of the wholesaler or manufacturer to continue to sell its low-point beer in this state;

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

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

8. The wholesaler ceases to conduct business for five (5) consecutive business days, unless conducting the business is prevented or rendered impractical due to events beyond the wholesaler's reasonable control as a result of an act of God, an insured casualty, war, or a condition of national, state or local emergency; or

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

D. The manufacturer shall have the right to terminate an agreement with a wholesaler at any time by giving the wholesaler at least ninety (90) days' written notice by certified mail, return receipt requested; provided, that the manufacturer shall give a similar notice to all other wholesalers in all other states who have entered into the same distribution agreement with the manufacturer.

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

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

2. If the successor manufacturer decides to terminate its agreement with the existing wholesaler for purposes of transfer, the successor manufacturer shall notify the existing wholesaler in writing of the successor manufacturer's intent not to appoint the existing wholesaler for all or part of the existing wholesaler's territory for the low-point beer. The successor manufacturer shall mail the notice of termination by certified mail, return receipt requested, to the existing wholesaler. The successor manufacturer shall include in the notice the names, addresses and telephone numbers of the successor wholesaler or wholesalers;

3. a. The successor wholesaler shall negotiate with the existing wholesaler to determine the fair market value of the existing wholesaler's right to distribute the low-point beer in the existing wholesaler's territory. The successor wholesaler and the existing wholesaler shall negotiate the fair market value in good faith.
- b. The existing wholesaler shall continue to distribute the low-point beer in good faith until payment of the compensation agreed to under subparagraph a of this

paragraph, or awarded under paragraph 4 of this subsection, is received; and

4. a. If the successor wholesaler and the existing wholesaler fail to reach a written agreement on the fair market value within thirty (30) days after the existing wholesaler receives the notice required pursuant to paragraph 2 of this subsection, the successor wholesaler or the existing wholesaler shall send a written notice to the other party requesting arbitration pursuant to the Uniform Arbitration Act, Part 2 of Article 22 of Title 13, C.R.S. Arbitration shall be held for the purpose of determining the fair market value of the existing wholesaler's right to distribute the low-point beer in the existing wholesaler's territory.
- b. Notice of intent to arbitrate shall be sent, as provided in subparagraph a of this paragraph, not later than forty (40) days after the existing wholesaler receives the notice required pursuant to paragraph 2 of this subsection. The arbitration proceeding shall conclude not later than sixty (60) days after the date the notice of intent to arbitrate is mailed to a party, unless this time is extended by mutual agreement of the parties and the arbitrator.
- c. Any arbitration held pursuant to this subsection shall be conducted in a city within this state that:
- (1) is closest to the existing wholesaler, and
 - (2) has a population of more than twenty thousand (20,000) people.
- d. Any arbitration held pursuant to this paragraph shall be conducted before one impartial arbitrator to be selected by the American Arbitration Association or its successor. The arbitration shall be conducted in accordance with the rules and procedures of the Uniform Arbitration Act, Part 2 of Article 22 of Title 13, C.R.S.

- e. An arbitrator's award in any arbitration held pursuant to this paragraph shall be monetary only and shall not enjoin or compel conduct. Any arbitration held pursuant to this paragraph shall be in lieu of all other remedies and procedures.
- f. The cost of the arbitrator and any other direct costs of an arbitration held pursuant to this paragraph shall be equally divided by the parties engaged in the arbitration. All other costs shall be paid by the party incurring them.
- g. The arbitrator in any arbitration held pursuant to this paragraph shall render a written decision not later than thirty (30) days after the conclusion of the arbitration, unless this time is extended by mutual agreement of the parties and the arbitrator. The decision of the arbitrator is final and binding on the parties. The arbitrator's award may be enforced by commencing a civil action in any court of competent jurisdiction. Under no circumstances may the parties appeal the decision of the arbitrator.
- h. An existing wholesaler or successor wholesaler who fails to participate in the arbitration hearings in any arbitration held pursuant to this paragraph waives all rights the existing wholesaler or successor wholesaler would have had in the arbitration and is considered to have consented to the determination of the arbitrator.
- i. If the existing wholesaler does not receive payment from the successor wholesaler of the settlement or arbitration award required under paragraph 2 or 3 of this subsection within thirty (30) days after the date of the settlement or arbitration award:
 - (1) the existing wholesaler shall remain the wholesaler of the low-point beer in the existing wholesaler's territory to at least the same extent that the existing wholesaler distributed

the low-point beer immediately before the successor manufacturer acquired rights to the low-point beer, and

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

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

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

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

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

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

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

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

Passed the Senate the 30th day of April, 2009.

Presiding Officer of the Senate

Passed the House of Representatives the 1st day of April, 2009.

Presiding Officer of the House
of Representatives