

SB 2027

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THE STATE SENATE
Wednesday, February 17, 2010

Senate Bill No. 2027
As Amended

SENATE BILL NO. 2027 - By: Jolley of the Senate and Jackson of the House.

[intoxicating liquors - distribution sales agreements -
codification - effective date -
emergency]

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

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 525A of Title 37, unless there is created a duplication in numbering, reads as follows:

A. For purposes of this act:

1. "Brewer" shall be defined by paragraph 7 of Section 506 of Title 37 of the Oklahoma Statutes;

2. "Nonresident seller" means any person licensed pursuant to Section 524 of Title 37 of the Oklahoma Statutes;

3. "Existing nonresident seller" means a nonresident seller who distributes a particular brand of beer at the time a successor brewer acquires rights to manufacture or import the particular brand of beer;

4. "Fair market value" means the value that would be determined in a transaction entered into without duress or threat and includes all elements of value, including goodwill and going-concern value;

1 5. "Good cause" means:

2 a. failure by the nonresident seller to comply with the

3 provisions of a written agreement or understanding

4 with the brewer, or

5 b. failure by the nonresident seller to comply with the

6 duty of good faith;

7 6. "Good faith" means the duty of each party to any franchise

8 and all officers, employees or agents thereof to act with honesty in

9 fact and within reasonable standards of fair dealing in the trade;

10 7. "Successor brewer" means a primary source of supply, a

11 brewer or an importer that acquires rights to a beer brand from a

12 predecessor brewer; and

13 8. "Successor nonresident seller" means one or more nonresident

14 sellers designated by a successor brewer to replace the existing

15 nonresident seller, for all or part of the existing nonresident

16 seller's territory, in the distribution of the existing beer brand

17 or brands.

18 B. Nothing in this section shall apply to a brewer that

19 produces less than three hundred thousand (300,000) gallons of beer

20 per calendar year.

21 C. 1. Except as provided in subsections D, E and F of this

22 section, no brewer shall terminate a distribution sales agreement

23 with any nonresident seller unless all of the following occur:

- 1 a. the brewer establishes good cause for such
2 termination,
3 b. the nonresident seller receives written notification
4 by certified mail, return receipt requested, from the
5 brewer of an alleged noncompliance with the
6 distribution sales agreement and is afforded no less
7 than sixty (60) days in which to cure such
8 noncompliance,
9 c. the nonresident seller fails to cure such
10 noncompliance within the allotted cure period, and
11 d. the brewer provides written notice by certified mail,
12 return receipt requested, to the nonresident seller of
13 such continued noncompliance. The notification shall
14 contain a statement of the intention of the brewer to
15 terminate or not renew the distribution sales
16 agreement, the reasons for termination or nonrenewal
17 and the date the termination or nonrenewal shall take
18 effect.

19 2. If a nonresident seller cures an alleged noncompliance with
20 a distribution sales agreement within the cure period provided in
21 subparagraph b of paragraph 1 of this subsection, any notice of
22 termination from a brewer to a nonresident seller shall be null and
23 void.

1 D. A brewer may immediately terminate a distribution sales
2 agreement with a nonresident seller, effective upon furnishing
3 written notification to the nonresident seller by certified mail,
4 return receipt requested, for any of the following reasons:

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

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

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

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

22 5. A nonresident seller has been convicted of, found guilty of
23 or pled guilty or nolo contendere to, a charge of violating a law or

1 regulation of the United States or of this state if it materially
2 and adversely affects the ability of the nonresident seller or
3 brewer to continue to sell its beer in this state;

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

11 7. Fraudulent conduct in the nonresident seller's dealings with
12 the brewer or its beer, including the intentional sale of beer
13 outside the brewer's established quality standards; or

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

20 E. The brewer shall have the right to terminate a distribution
21 sales agreement with a nonresident seller at any time by giving the
22 nonresident seller at least ninety (90) days' written notice by
23 certified mail, return receipt requested; provided, the brewer shall

1 give a similar notice to all other nonresident sellers in all other
2 states who have entered into the same distribution sales agreement
3 with the brewer.

4 F. If a particular brand of beer is transferred by purchase or
5 otherwise from a brewer to a successor brewer, the following shall
6 occur:

7 1. The successor brewer shall become obligated to all of the
8 terms and conditions of the distribution sales agreement in effect
9 on the date of succession. This provisions of this subsection shall
10 apply regardless of the character or form of the succession. A
11 successor brewer has the right to contractually require its
12 nonresident seller to comply with operational standards of
13 performance, if the standards are uniformly established for all of
14 the successor brewer's nonresident sellers. A successor brewer may,
15 upon written notice, terminate its distribution sales agreement, in
16 whole or in part, with a nonresident seller of the brewer it
17 succeeded; provided, the successor nonresident seller first pays to
18 the existing nonresident seller the fair market value of the
19 existing nonresident seller's business with respect to the
20 terminated brand or brands;

21 2. If the successor brewer decides to terminate its
22 distribution sales agreement with the existing nonresident seller
23 for purposes of transfer, the successor brewer shall notify the

1 existing nonresident seller in writing of the successor brewer's
2 intent not to appoint the existing nonresident seller. The
3 successor brewer shall mail the notice of termination by certified
4 mail, return receipt requested, to the existing nonresident seller.
5 The successor brewer shall include in the notice the names,
6 addresses and telephone numbers of the successor nonresident seller
7 or nonresident sellers;

8 3. The successor nonresident seller shall negotiate with the
9 existing nonresident seller to determine the fair market value of
10 the existing nonresident seller's right to distribute the beer. The
11 successor nonresident seller and the existing nonresident seller
12 shall negotiate the fair market value in good faith. The existing
13 nonresident seller shall continue to distribute the beer in good
14 faith until payment of the compensation agreed to under this
15 paragraph, or awarded under paragraph 4 of this subsection, is
16 received; and

17 4. If the successor nonresident seller and the existing
18 nonresident seller fail to reach a written agreement on the fair
19 market value within thirty (30) days after the existing nonresident
20 seller receives the notice required pursuant to paragraph 2 of this
21 subsection, the successor nonresident seller or the existing
22 nonresident seller shall send a written notice to the other party
23 requesting arbitration pursuant to Sections 801 et seq. of Title 15

1 of the Oklahoma Statutes. Arbitration shall be held for the purpose
2 of determining the fair market value of the existing nonresident
3 seller's right to distribute the beer.

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

11 Any arbitration held pursuant to this subsection shall be
12 conducted in a city within this state that:

- 13 a. is closest to the existing nonresident seller, and
- 14 b. has a population of more than twenty thousand (20,000)
15 people.

16 Any arbitration held pursuant to this paragraph shall be
17 conducted before one impartial arbitrator to be selected by the
18 American Arbitration Association or its successor. The arbitration
19 shall be conducted in accordance with the rules and procedures of
20 Sections 801 et seq. of Title 15 of the Oklahoma Statutes.

21 An arbitrator's award in any arbitration held pursuant to this
22 paragraph shall be monetary only and shall not enjoin or compel

1 conduct. Any arbitration held pursuant to this paragraph shall be
2 in lieu of all other remedies and procedures.

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

7 The arbitrator in any arbitration held pursuant to this
8 paragraph shall render a written decision not later than thirty (30)
9 days after the conclusion of the arbitration, unless this time is
10 extended by mutual agreement of the parties and the arbitrator. The
11 decision of the arbitrator is final and binding on the parties. The
12 arbitrator's award may be enforced by commencing a civil action in
13 any court of competent jurisdiction. The decision of the arbitrator
14 may be appealed as authorized in Sections 801 et seq. of Title 15 of
15 the Oklahoma Statutes.

16 An existing nonresident seller or successor nonresident seller
17 who fails to participate in the arbitration hearings in any
18 arbitration held pursuant to this paragraph waives all rights the
19 existing nonresident seller or successor nonresident seller would
20 have had in the arbitration and is considered to have consented to
21 the determination of the arbitrator.

22 If the existing nonresident seller does not receive payment from
23 the successor nonresident seller of the settlement or arbitration

1 award required under paragraph 2 or 3 of this subsection within
2 thirty (30) days after the date of the settlement or arbitration
3 award:

- 4 a. the existing nonresident seller shall remain the
5 nonresident seller of the beer in the existing
6 nonresident seller's territory to at least the same
7 extent that the existing nonresident seller
8 distributed the beer immediately before the successor
9 brewer acquired rights to the beer, and
- 10 b. the existing nonresident seller is not entitled to the
11 settlement or arbitration award.

12 G. 1. Any nonresident seller or brewer who is aggrieved by a
13 violation of any provision of subsections C and E of this section
14 shall be entitled to recovery of damages caused by the violation.
15 Except for a dispute arising under subsection E of this section,
16 damages shall be sought in a civil action in any court of competent
17 jurisdiction.

18 2. Any dispute arising under subsections C and E of this
19 section may also be settled by such dispute resolution procedures as
20 may be provided by a written distribution sales agreement between
21 the parties.

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

4 I. Nothing in this section shall be construed to give an
5 existing nonresident seller or a successor nonresident seller any
6 right to compensation if a distribution sales agreement with the
7 existing nonresident seller or successor nonresident seller is
8 terminated by a successor brewer pursuant to subsections C, D and E
9 of this section.

10 J. No brewer shall require any nonresident seller to waive
11 compliance with any provision of this section.

12 K. This section shall apply to any distribution sales agreement
13 entered into, and any renewals, extensions, amendments, or conduct
14 constituting a modification of an agreement, by a brewer on or after
15 the effective date of this act.

16 SECTION 2. This act shall become effective July 1, 2010.

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

21 COMMITTEE REPORT BY: COMMITTEE ON BUSINESS & LABOR, dated 2-15-10 -
22 DO PASS, As Amended and Coauthored.