

1 STATE OF OKLAHOMA

2 2nd Session of the 52nd Legislature (2010)

3 SENATE BILL 2027

By: Jolley

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5
6 AS INTRODUCED

7 An Act relating to intoxicating liquors; defining
8 terms; exempting certain brewers of certain beer
9 volume from certain provisions; making provisions for
10 distribution sales agreements for beer in excess of
11 3.2% alcohol by weight; prohibiting the termination
12 of certain agreements between certain brewers and
13 nonresident sellers unless certain conditions are
14 met; providing certain exceptions; providing for when
15 such termination is null and void; providing reasons
16 for such termination; authorizing termination;
17 requiring certain notice; providing procedures for
18 transfer of a particular brand of beer from a brewer
19 to a successor brewer; making a successor brewer
20 obligated to certain terms and conditions; making
21 certain provisions applicable; giving a successor
22 brewer certain right to contractually require a
23 nonresident seller to comply with certain standards
24 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, costs 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
nonresident seller from receiving certain award or
settlement; providing for recovery of damages for
certain violations and settlement of certain
disputes; providing exception; construing provisions;
prohibiting certain waiver compliance; making act

1 applicable to certain agreements or contracts;
2 providing for codification; providing an effective
3 date; and declaring an emergency.
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5 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

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

9 A. For purposes of this act:

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

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

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

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

21 5. "Good cause" means:

22 a. failure by the nonresident seller to comply with the
23 provisions of a written agreement or understanding
24 with the brewer, or

1 b. failure by the nonresident seller to comply with the
2 duty of good faith;

3 6. "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 7. "Successor brewer" means a primary source of supply, a
7 brewer or an importer that acquires rights to a beer brand from a
8 predecessor brewer; and

9 8. "Successor nonresident seller" means one or more nonresident
10 sellers designated by a successor brewer to replace the existing
11 nonresident seller, for all or part of the existing nonresident
12 seller's territory, in the distribution of the existing beer brand
13 or brands.

14 B. Nothing in this section shall apply to a brewer that
15 produces less than three hundred thousand (300,000) gallons of beer
16 per calendar year.

17 C. 1. Except as provided in subsections D, E and F of this
18 section, no brewer shall terminate a distribution sales agreement
19 with any nonresident seller unless all of the following occur:

20 a. the brewer establishes good cause for such
21 termination,

22 b. the nonresident seller receives written notification
23 by certified mail, return receipt requested, from the
24 brewer of an alleged noncompliance with the

1 distribution sales agreement and is afforded no less
2 than sixty (60) days in which to cure such
3 noncompliance,

4 c. the nonresident seller fails to cure such
5 noncompliance within the allotted cure period, and

6 d. the brewer provides written notice by certified mail,
7 return receipt requested, to the nonresident seller of
8 such continued noncompliance. The notification shall
9 contain a statement of the intention of the brewer to
10 terminate or not renew the distribution sales
11 agreement, the reasons for termination or nonrenewal
12 and the date the termination or nonrenewal shall take
13 effect.

14 2. If a nonresident seller cures an alleged noncompliance with
15 a distribution sales agreement within the cure period provided in
16 subparagraph b of paragraph 1 of this subsection, any notice of
17 termination from a brewer to a nonresident seller shall be null and
18 void.

19 D. A brewer may immediately terminate a distribution sales
20 agreement with a nonresident seller, effective upon furnishing
21 written notification to the nonresident seller by certified mail,
22 return receipt requested, for any of the following reasons:
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1 1. The nonresident seller's failure to pay any account when due
2 and upon written demand by the brewer for such payment, in
3 accordance with agreed payment terms;

4 2. The assignment or attempted assignment by the nonresident
5 seller for the benefit of creditors, the institution of proceedings
6 in bankruptcy by or against the nonresident seller, the dissolution
7 or liquidation of the nonresident seller or the insolvency of the
8 nonresident seller;

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

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

18 5. A nonresident seller has been convicted of, found guilty of
19 or pled guilty or nolo contendere to, a charge of violating a law or
20 regulation of the United States or of this state if it materially
21 and adversely affects the ability of the nonresident seller or
22 brewer to continue to sell its beer in this state;

23 6. Any attempted transfer of ownership of the nonresident
24 seller, stock of the nonresident seller or stock of any parent

1 corporation of the nonresident seller, or any change in the
2 beneficial ownership or control of any entity, without obtaining the
3 prior written approval of the brewer, except as may otherwise be
4 permitted pursuant to a written distribution sales agreement between
5 the parties;

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

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

15 E. The brewer shall have the right to terminate a distribution
16 sales agreement with a nonresident seller at any time by giving the
17 nonresident seller at least ninety (90) days' written notice by
18 certified mail, return receipt requested; provided, the brewer shall
19 give a similar notice to all other nonresident sellers in all other
20 states who have entered into the same distribution sales agreement
21 with the brewer.

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

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

15 2. If the successor brewer decides to terminate its
16 distribution sales agreement with the existing nonresident seller
17 for purposes of transfer, the successor brewer shall notify the
18 existing nonresident seller in writing of the successor brewer's
19 intent not to appoint the existing nonresident seller. The
20 successor brewer shall mail the notice of termination by certified
21 mail, return receipt requested, to the existing nonresident seller.
22 The successor brewer shall include in the notice the names,
23 addresses and telephone numbers of the successor nonresident seller
24 or nonresident sellers;

1 3. The successor nonresident seller shall negotiate with the
2 existing nonresident seller to determine the fair market value of
3 the existing nonresident seller's right to distribute the beer. The
4 successor nonresident seller and the existing nonresident seller
5 shall negotiate the fair market value in good faith. The existing
6 nonresident seller shall continue to distribute the beer in good
7 faith until payment of the compensation agreed to under this
8 paragraph, or awarded under paragraph 4 of this subsection, is
9 received; and

10 4. If the successor nonresident seller and the existing
11 nonresident seller fail to reach a written agreement on the fair
12 market value within thirty (30) days after the existing nonresident
13 seller receives the notice required pursuant to paragraph 2 of this
14 subsection, the successor nonresident seller or the existing
15 nonresident seller shall send a written notice to the other party
16 requesting arbitration pursuant to Sections 801 et seq. of Title 15
17 of the Oklahoma Statutes. Arbitration shall be held for the purpose
18 of determining the fair market value of the existing nonresident
19 seller's right to distribute the beer.

20 Notice of intent to arbitrate shall be sent, as provided in this
21 paragraph, not later than forty(40) days after the existing
22 nonresident seller receives the notice required pursuant to
23 paragraph 2 of this subsection. The arbitration proceeding shall
24 conclude not later than sixty (60)days after the date the notice of

1 intent to arbitrate is mailed to a party, unless this time is
2 extended by mutual agreement of the parties and the arbitrator.

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

5 a. is closest to the existing nonresident seller, and

6 b. has a population of more than twenty thousand (20,000)
7 people.

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

13 An arbitrator's award in any arbitration held pursuant to this
14 paragraph shall be monetary only and shall not enjoin or compel
15 conduct. Any arbitration held pursuant to this paragraph shall be
16 in lieu of all other remedies and procedures.

17 The cost of the arbitrator and any other direct costs of an
18 arbitration held pursuant to this paragraph shall be equally divided
19 by the parties engaged in the arbitration. All other costs shall be
20 paid by the party incurring them.

21 The arbitrator in any arbitration held pursuant to this
22 paragraph shall render a written decision not later than thirty (30)
23 days after the conclusion of the arbitration, unless this time is
24 extended by mutual agreement of the parties and the arbitrator. The

1 decision of the arbitrator is final and binding on the parties. The
2 arbitrator's award may be enforced by commencing a civil action in
3 any court of competent jurisdiction. The decision of the arbitrator
4 may be appealed as authorized in Sections 801 et seq. of Title 15 of
5 the Oklahoma Statutes.

6 An existing nonresident seller or successor nonresident seller
7 who fails to participate in the arbitration hearings in any
8 arbitration held pursuant to this paragraph waives all rights the
9 existing nonresident seller or successor nonresident seller would
10 have had in the arbitration and is considered to have consented to
11 the determination of the arbitrator.

12 If the existing nonresident seller does not receive payment from
13 the successor nonresident seller of the settlement or arbitration
14 award required under paragraph 2 or 3 of this subsection within
15 thirty (30) days after the date of the settlement or arbitration
16 award:

- 17 a. the existing nonresident seller shall remain the
18 nonresident seller of the beer in the existing
19 nonresident seller's territory to at least the same
20 extent that the existing nonresident seller
21 distributed the beer immediately before the successor
22 brewer acquired rights to the beer, and
- 23 b. the existing nonresident seller is not entitled to the
24 settlement or arbitration award.

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

7 2. Any dispute arising under subsections C and E of this
8 section may also be settled by such dispute resolution procedures as
9 may be provided by a written distribution sales agreement between
10 the parties.

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

14 I. Nothing in this section shall be construed to give an
15 existing nonresident seller or a successor nonresident seller any
16 right to compensation if a distribution sales agreement with the
17 existing nonresident seller or successor nonresident seller is
18 terminated by a successor brewer pursuant to subsections C, D and E
19 of this section.

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

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

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

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

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