STATE OF OKLAHOMA

1st Session of the 55th Legislature (2015)

COMMITTEE SUBSTITUTE
FOR ENGROSSED
SENATE BILL NO. 688 By: Jolley of the Senate

and

O'Donnell of the House

COMMITTEE SUBSTITUTE

[ low-point beer - duties of manufacturer and termination of agreement with wholesaler - certain provisions for brand extensions - compensation - inducements for distribution sales agreement - effective date ]

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

SECTION 1. AMENDATORY 37 O.S. 2011, Section 163.18B, is amended to read as follows:

Section 163.18B A. For purposes of this section:

1. "Brand" means any word, name, group of letters, symbol or combination thereof, that is adopted and used by a licensed manufacturer to identify a specific beer or low-point beer product

and to distinguish that product from another beer or low-point beer product;

2. "Brand extension" means any brand that:

a. incorporates all or a substantial part of the unique features of a preexisting brand of the same licensed manufacturer, and

b. relies to a significant extent on the goodwill associated with that preexisting brand; and

3. "Beer" means beer defined in paragraph 5 or 15 of Section 506 of this title which has not previously been sold in a licensed wholesaler's exclusive territory.

B. Every manufacturer of low-point beer licensed by the Oklahoma Tax Commission authorizing the licensee to sell its low-point beer in this state shall:

1. Enter into an agreement with a licensed wholesaler to sell the designated brands of the licensed manufacturer which designates the sales territory of that licensed wholesaler and the designated brands to be sold by the licensed wholesaler. All such agreements shall specifically authorize the sale of the designated brands by a licensed wholesaler within that sales territory. All such agreements shall further provide that the licensed manufacturer who assigns a brand extension of a low-point beer must assign the low-point beer brand extension to the licensed wholesaler to whom the

licensed manufacturer granted the exclusive sales territory to the brand from which the brand extension resulted;

2. Sell its registered and approved designated brands only to a licensed wholesaler with whom that licensed manufacturer has an agreement designating the sales territory of the licensed wholesaler and the designated brands to be sold by the licensed wholesaler;

3. Authorize only one licensed wholesaler for each designated sales territory. Such licensed wholesaler shall be the only licensed wholesaler for the designated brands of the authorizing licensed manufacturer within that designated sales territory; and

4. Designate who is responsible for the distribution of its designated brands.

C. Any and all licensed wholesalers possessing the rights to distribute a low-point beer brand in a specific territory prior to the introduction of that low-point beer's correlating beer brand in that specific territory shall retain the right to distribute the low-point beer.

D. Should a change in law in this state concerning the distribution and sale of low-point beer or the distribution and sale of beer materially impair the distribution rights of a licensed low-point beer wholesaler or result in a material reduction in sales or the elimination of a low-point beer in such licensed wholesaler’s specific territory, a manufacturer of beer shall assign the exclusive right to distribute a beer brand to the low-point

distributor who has been assigned the exclusive distribution rights to the beer brand's correlating low-point beer. If the beer brand was being sold by a nonresident seller licensed under Section 524 of this title at the time of impairment, reduction in sales or elimination of the low-point beer, the licensed wholesaler must compensate the nonresident seller for the loss of the beer brand. Compensation for the purposes of this provision shall be the fair market value of the existing nonresident seller's business with respect to the beer within that specific territory. Fair market value shall be determined as set forth in paragraphs 3 and 4 of subsection E of Section 163.18E of this title.

SECTION 2. AMENDATORY 37 O.S. 2011, Section 163.18E, is amended to read as follows:

Section 163.18E A. Nothing in this section shall apply to a manufacturer that produces less than ~~three hundred thousand (300,000) gallons~~ twenty-five thousand (25,000) barrels of low-point beer per calendar year.

B. 1. Except as provided in subsections C, D and E of this section, no manufacturer shall terminate an agreement with any 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, <u>which approval shall not be unreasonably withheld,</u>

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. This act shall become effective November 1, 2015.

55-1-7347 GRS 04/07/15