

STATE OF NEW YORK: LIQUOR AUTHORITY

Application of “tied-house” laws on individuals
with ownership interests in foreign manufacturers

DECLARATORY
RULING
2011-03141C

It is the policy of the State of New York “that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for, and obedience to, the law.”¹ Consistent with that policy, the distribution of alcoholic beverages in this state is generally accomplished through what is referred to as the “three tier system”.² With certain exceptions, manufacturers sell their products to wholesalers who, in turn, distribute the products to retailers.

The Alcoholic Beverage Control Law (“ABCL”) contains numerous provisions that regulate the relationships between the three tiers. These restrictions are intended, inter alia, to prohibit manufacturers and wholesalers from having an undue influence over retail licensees. For example, manufacturers and wholesalers may not offer discounts, rebates, etc., to selected retailers.³ While manufacturers may limit which wholesalers sell their product,⁴ each of those wholesalers must be able to purchase the product at the same price from the manufacturer.⁵ A wholesaler must offer the same price, and any discounts, for liquor and wine to all retailers.⁶ With certain exceptions, manufacturers and wholesalers may not provide any gifts or free services to retail licensees.⁷

To further prevent manufacturers and wholesalers from exerting inappropriate control over retail licensees in this state, the ABCL places restrictions on the ability of an entity in one tier from having an interest in an entity

¹ ABCL §2.

² The United States Supreme Court has held that a state, in the exercise of its authority under the Twenty-First Amendment, can mandate a three-tier distribution system. See *North Dakota v. United States*, 495 US 423, 432 (1990).

³ ABCL §101-b(2)(a).

⁴ ABCL §101-b(4-a)(a).

⁵ ABCL §101-b(3)(a).

⁶ ABCL §101-b(3)(b).

⁷ ABCL §101(1)(e).

in another tier of the industry. These restrictions are commonly known as the “tied house” laws. Licensed manufacturers and wholesaler are prohibited from having any interest, direct or indirect, in any premises where alcoholic beverages are sold at retail.⁸ Retail liquor and wine stores may not have an interest in a business that manufactures or wholesales alcoholic beverages.⁹ Those holding a retail on-premises license are banned from having any interest in a business that manufactures or wholesales alcoholic beverages.¹⁰

E. Vincent O’Brien, Esq., on behalf of two clients, seeks a declaratory ruling as to whether two clients would be prohibited, as a result of the tied house laws, from holding a retail liquor license in this state.¹¹ The first client is owned by two companies: an Italian producer of cured meats; and an Italian wine producer that also owns a wine production facility in Virginia. This client has already applied for a retail on-premises license. The second client has an ownership interest in a French winery. Notwithstanding the clear mandate of this state’s tied house laws, Mr. O’Brien argues that, as out-of-state entities, his clients are not subject to the provisions of the ABCL.

It would appear that the issue presented by Mr. O’Brien’s question was resolved almost twenty years ago by the Court of Appeals in *Rihga International USA Inc. vs. State Liquor Authority*, 84 NY2d 876 (1994). In *Rihga*, three foreign breweries each held ownership interest in other companies which held ownership interests in one company. That company owned the applicant company. As a result of these various relationships, each brewer indirectly owned less than 10% of the applicant company.

The Authority issued a declaratory ruling in which it found that the tied house laws prohibited the issuance of the retail license. Reversing the trial court and the intermediate appellate court, the Court of Appeals upheld the Authority’s determination. The Court held that, unlike other provisions of the ABCL which give the Authority discretion as to whether it can issue a license; the tied house laws provide no such power. If the tied house laws apply, the license cannot be

⁸ ABCL §101(1)(a).

⁹ ABCL §105(16). The restriction applies only to those with retail licenses to sell liquor and/or wine for off-premises consumption. It does not apply to retail licensees who are limited to selling beer for off-premises consumption.

¹⁰ ABCL §106(13).

¹¹ Section 98.1 of the Rules of the State Liquor Authority provides that “[a]ny person may apply to the Authority for a declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by the Authority”.

granted. The Court also held that even de minimis ownership is a disqualifying interest under the tied house laws.

Mr. O'Brien contends that *Rihga* does not apply because the Court of Appeals decided the case on a legal point that is not relevant to his clients' situation. According to Mr. O'Brien, the Court only addressed whether a de minimis interest was sufficient to invoke the tied house laws. Mr. O'Brien concedes that his clients' respective interests are sufficient to satisfy the "any interest, direct or indirect" standard contained in each of the tied house statutes.¹² He argues, however, that the Court did not determine whether the tied house laws apply to out-of-state entities. According to Mr. O'Brien, the ABCL does not, and cannot, regulate the activities of out-of-state entities.

The Authority finds no merit in Mr. O'Brien's argument that the *Rihga* decision is not controlling with respect to his request. The facts in *Rihga* are remarkably similar to the situations involving both of Mr. O'Brien's clients. In all three matters, a foreign producer of alcoholic beverages seeks to hold a retail license in this state. Neither the trial court¹³; the intermediate appellate court¹⁴; nor the Court of Appeals questioned the Authority's ruling that the tied house laws would be applicable to a foreign manufacturer seeking a retail license. Mr. O'Brien has not offered any plausible distinction between the applicant in *Rihga* and his clients.

Relying on case law and references in the ABCL, Mr. O'Brien presents a valid claim that the Authority has no power to control the activities of out-of-state manufacturers that are not doing business in this state. There is, however, a fatal flaw in Mr. O'Brien's argument. The tied house laws do not regulate the activities of those businesses. Instead, these statutes impose restrictions on those who hold a license issued by this state to traffic in alcoholic beverages.

Mr. O'Brien's clients seek to hold retail licenses in this state. Accordingly, they must meet all the statutory qualifications to hold such licenses. Compliance with the tied house laws is one of those qualifications. Since it is not disputed that

¹² Although the ABCL does not define "interest", the three tied house statutes each prohibit the licensee from having "interest directly or indirectly... by stock ownership, interlocking directors, mortgage or lien or any personal or real property, or by any other means." Even if Mr. O'Brien had not conceded the issue, the Authority finds that each client's respective ownership of a manufacturer is an "interest" under the tied house laws.

¹³ Unreported decision of the New York County Supreme Court, dated March 11, 1993.

¹⁴ 198 AD2d 161 (First Dept., 1993).

his clients, if licensed, would each have an interest in a business that manufactures alcoholic beverages, the tied house laws prevent the Authority from issuing retail licenses to either of Mr. O'Brien's clients.

Alternatively, Mr. O'Brien argues that, assuming the tied house laws apply to his clients, the authority should exempt them from the strict prohibition of the law. In support of his proposition, Mr. O'Brien notes that numerous exceptions have already been made in this state to the tied house laws to allow manufacturers or wholesalers to obtain retail licenses.¹⁵ He also cites several examples of exceptions that have been made to California's tied house laws to allow for similar licensing arrangements.

Mr. O'Brien claims that, when the tied house laws were first enacted in 1934, there was no need to distinguish between in-state and out-of-state manufacturers because out-of-state manufacturers were "not on the radar". He states that tied house laws need to accommodate new business situations. On behalf of his clients, he offers to limit the ownership of the foreign manufacturers to fifteen percent of their respective retail businesses.

The problem with Mr. O'Brien's proposal is that all of the examples he relies were created as a result of statutory amendments to the tied house laws. He has not offered one example of a situation where the Authority granted a licensee relief from the tied house laws. As noted above, the Court of Appeals made clear that the Authority does not have the discretion to issue a license that would result in a tied house law violation.

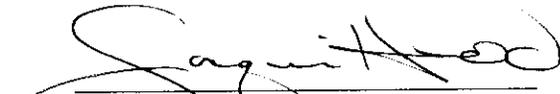
With respect to his argument that the tied house laws may be outdated, the Court of Appeals addressed a similar claim in the *Rihga* case. The Court noted the statutory amendments that have been made to the tied house law to allow certain entities to obtain licenses. In light of those amendments, the Court stated that "any argument that [the tied house laws have] merely escaped the attention of the Legislature is without merit. Moreover, even if the [tied house laws were] adopted some years ago, it is for the Legislature, not [the Authority] or the courts, to update its provisions and restrictions."¹⁶

¹⁵ For example, see ABCL §101(1)(a)(i); §101(1)(a)(ii); §101(1)(a)(iii); §101(1)(a)(iv); and §106(13).

¹⁶ *Rihga International USA Inc. vs. State Liquor Authority*, 84 NY2d at 879.

Applying the relevant statutory and case law to the facts presented by Mr. O'Brien, the Authority determines that issuance of retail licenses to both of his clients is prohibited by the ABCL's tied house laws. As with those other entities that have faced this situation, their remedy lies in the legislative process.

The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on October 27, 2011.



Jacqueline Held
Secretary to the Authority