

STATE OF NEW YORK: LIQUOR AUTHORITY

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

DECLARATORY
RULING
2013-00357

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 licenses. 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 licenses.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 to have an interest in an entity 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

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)(c).

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.

banned from having any interest in a business that manufactures or wholesales alcoholic beverages.¹⁰

Elke Hoffman, Esq., on behalf of a client seeking an on-premises beer and wine license, seeks a declaratory ruling as to whether the client, who has an ownership interest in foreign manufacturers would be prohibited, as a result of the tied house laws, from holding a retail liquor license in this state.¹¹ As set forth in Ms. Hoffman's request, the client represents that, if it obtained the retail license, it would not sell products manufactured by the foreign wineries at the retail establishment.

It would appear that the issue presented by Ms. Hoffman was resolved almost twenty years ago by the Court of Appeals in *Rihga International USA Inc. vs. State Liquor Authority*, 84 NY2d 876 (1993). In *Rihga*, three foreign breweries each held ownership interest in other companies which then 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 finding that, given the brewers' ownership interest, a retail license could not be granted to the applicant. The applicant commenced an Article 78 proceeding to challenge the Authority's determination. The New York County Supreme Court annulled the Authority's determination. On appeal, the First Department [198 AD2d 16] affirmed the lower court's decision, finding that each brewery's separate interest in the applicant corporation was de minimis. In the view of the appellate court, in light of those de minimis interests, together with the applicant's agreement not to sell the breweries products, the denial of the license did not fulfill the objectives of the tied house laws.

The Authority was granted leave to appeal. In a unanimous decision, the Court of Appeals reversed the First Department's ruling and dismissed the Article 78 petition. The Court made two points which require the Authority to advise Ms. Hofmann that her client cannot obtain a retail license. First, 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 granted. Second, even de minimis ownership is a disqualifying interest under the tied house laws.

On two recent occasions the Members of the Authority have been asked to address whether an ownership interest in a foreign manufacturer of alcoholic beverages disqualifies an applicant from obtaining a retail license. In a declaratory ruling request submitted by E. Vincent O'Brien, Esq., the Authority was also presented with applicants who had an ownership interest in foreign wineries. The Members of the Authority followed the *Rihga* decision and held that it had no discretion to issue a retail license to Mr. O'Brien's clients.

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".

In the second matter, the Members of the Authority were asked to allow a foreign brewer to obtain retail off-premises beer licenses. As in the scenarios suggested by Ms. Hofmann, the brewer (represented by William Schreiber, Esq.) agreed that its products would not be sold in the retail stores. However, as noted at the time, there was never a need for Mr. Schreiber's client to obtain a waiver (for lack of a better term) from the tied house laws. While ABCL §105(16) subjects off-premises liquor and wine licensees to the tied house laws, off-premises beer licensees are not included in the prohibition.

Ms. Hoffman contends that the tied-house laws should not apply because her client would agree, and the Authority could direct as a condition of the retail license, that the client's retail business would not buy wine manufactured by the client's foreign wineries. However, as the Court of Appeals found in *Rihga*, the Authority has no discretion to create exception to the tied-house laws. Such action must come through amendments to the law.

Applying the relevant statutory and case law to the facts presented by Ms. Hoffman, the Authority determines that issuance of a retail license to her client is prohibited by the ABCL's tied house laws. As with those other entities that have faced this situation, the client's 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 January 30, 2013.


Jacqueline Held
Secretary to the Authority