STATE OF NEW YORK: LIQUOR AUTHORITY

2012-00696

Exchange of "out-of-date" products by wine and beer Wholesalers

DECLARATORY RULING

Section 101(1)(c) of the Alcoholic Beverage Control Law states that no manufacturer or wholesaler of alcoholic beverages licensed in New York State may "make any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed under this chapter which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler." This is generally referred to as the "Gifts & Services Law." The statute, as we issue this ruling, provides only one exception to the Gifts & Services Law. That exception allows a manufacturer or wholesaler to entertain a retail licensee at lunch and dinner.

In exercising its judgment under the Gifts and Services Law, the Authority has routinely taken the position that almost any gift or service given by a wholesaler to a retailer is done so with the intent to induce the retailer to purchase the wholesaler's product. Absent some special circumstances, there would appear to be no other justification for a manufacturer or wholesaler to give something of value to a retailer. However, by regulation [Part 86 of the Rules of the Authority] and other directives and rulings, the Authority has created certain exceptions to the general rule that no gifts or services can be given to a retailer by a manufacturer or wholesaler.

Part 86 of the Rules of the Authority allows for certain activities between manufacturers/ wholesalers and retailers. The categories addressed in the regulations are product displays, signs, retailer advertising specialties, consumer advertising specialties, wine lists, educational seminars, contests and refunds, advertisements, wine service decanters, dummy display bottles, equipment, emergency service, money gifts, and stocker services. In each category, the Authority has set forth the extent to which manufacturers and wholesalers can provide those types of gifts or services to retailers.

In 2007, Thomas Donohue, the Counsel to the Authority at the time, was asked to render an opinion as to whether beer retailers could return beer that was damaged, "out-of-code" or seasonal to beer wholesalers without violating the Gifts & Services Law. "Out of code" beer was defined as product bearing a date after the brewer's suggested sale date. On June 1, 2007, Counsel Donohue issued an opinion in which he concluded that wholesalers could take back and replace beer that was damaged (referred to by the industry as "breakage") when delivered to the retailer without violating the Gifts & Services Law. However, Counsel Donohue added that "out-of-code" beer, unsold seasonal beer, or beer damaged after it was delivered to the retailer could not be replaced by wholesalers.

Brewers and beer wholesalers requested that Counsel Donohue reconsider his opinion with respect to "out-of-code" and unsold seasonal beer. The brewers and wholesalers claimed that the return/exchange of "out-of-code" and seasonal beer is not meant to influence the retailer to purchase product from the wholesaler. They argued instead that this practice, which is common elsewhere in the United States, is intended to benefit the customer. As explained by the brewers, they take considerable efforts to insure that the beer available to consumers is as fresh as possible. While properly packaged beer may remain safe to consume even while stored for long periods, the flavor of the product will deteriorate over time. Since beer is a perishable product, brewers and beer wholesalers control the environment of their warehouses, locate

breweries and distribution centers and create shipping patterns to maintain the beer's freshness. In addition, beer wholesalers are often under a contractual obligation with the brewer to rotate product to make sure that out-of-code" beer is not available for retail sale.

With respect to seasonal beer, the brewers and beer wholesalers noted that these products are manufactured and packaged for sale during a particular time period each year. Once that time has come and gone, the quality of the beer would deteriorate significantly by the same time period the following year. The beer wholesalers asked not only to be able to take back beer that is "out-of-code" or beyond the season intended, but to move the beer from one retailer to another so that the product could be sold before it is "out-of-code" or "out-of-season", for lack of a better term.

After considering the arguments made by the brewers and wholesalers, on January 2, 2008 Counsel Donohue issued an opinion in which he stated that the brewers and wholesalers had adequately demonstrated that the reason for replacing "out-of code" and seasonal beer is not meant to influence retailers to purchase product from them, but to maintain quality control over the product that is made available to consumers. Accordingly, Counsel Donohue was of the opinion that such product could be replaced by product that was not "out-of code" (or, in the case of seasonal beer, replacement with other seasonal or non-seasonal products). However, he indicated that wholesalers could not give a credit against a retailer's outstanding balance for out-of-code or seasonal products that were returned to the wholesaler.

Counsel Donohue also addressed the timing of the replacement of the "out-of-code" and unsold seasonal beers and whether the wholesalers could move the product to other retail premises. Provided that such transactions are done without a reasonably time period (30 days) before the beer becomes "out-of-code" or out-of-season", Counsel Donohue offered the opinion that wholesalers could take product that is about to become "out-of-code" or "out of season" from one retailer, replace it with other product, and then sell that beer to another retailer who may be able to resell the product before it becomes "out-of-code."

In 2010, Jean Marie Cho, then the Counsel to the Authority, received an inquiry from E. Vincent O'Brien, Esq., on behalf of a licensed wine wholesaler, as to whether the January 2008 opinion from Counsel Donohue could be extended to include "Bag-in-the-Box" wines. As described by Mr. O'Brien, "Bag-in-the-Box" wines are sold in 3 and 5 liter boxes containing an inside bag that collapses with use. Similar to the system used by brewers, each box bears a statement that the wine should be consumer on or before a specific date. By letter dated July 25, 2011, Counsel Cho advised Mr. O'Brien that, in her view, the January 2008 opinion was also applicable to the "Bag-in-the-Box" wines and that the products could be replaced, consistent with that opinion, by wine wholesalers.

The 2008 Counsel Donohue opinion and the 2011 Counsel Cho opinion both included a disclaimer that the views set forth by the respective Counsels to the Authority were not binding upon the Members of the Authority. Mr. O'Brien now seeks confirmation that his client may rely on Counsel Cho's July 2011 opinion. We consider Mr. O'Brien's request as an application for a declaratory ruling. Under section 98.1 of the Rules of the Authority, "any 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." Given that Counsel Cho's 2011 opinion referenced and relied on Counsel Donohue's 2008 opinion, we shall address the extent to which we shall adopt either or both opinions.

Based on the arguments made by the brewers and beer wholesalers to Counsel Donohue, we concur with and adopt his opinion that the practice of replacing "out-of code" and

seasonal beer is not meant to influence retailers to purchase product from them, but to maintain quality control over the product that is made available to consumers. We also adopt the guidelines suggested by Counsel Donohue with respect to the timing of the replacement of such beer, namely that such transactions must be done without a reasonably time period (30 days) before the beer becomes "out-of-code" or "out-of-season." We also adopt Counsel Donohue's opinion that wholesalers can take product that is about to become "out-of-code" or "out of season" from one retailer, replace it with other product and then sell that beer to another retailer who may be able to resell the product before it becomes "out-of-code".

However, we are not convinced that we should expand the scope of the 2008 opinion to include boxed wine, such as described by Mr. O'Brien. Wine, and for that matter liquor as well, is treated differently, both under the law and in practice, from beer. Wine must be price posted and, unlike beer, there are additional restrictions in place to prevent wine manufacturers and wholesalers from engaging in conduct that might influence a retailer's decision to purchase product. For example, wine must be price posted and offered to all retailers at the same price, while a wholesaler can charge different prices to different retailers. Beer wholesaler are allowed to stock shelves for retailers while wine wholesalers must, essentially, take a "hands off" position once the product is delivered to the retailer.

It has been claimed that the proposed exchange is allowed in other jurisdictions. In fact, it has been suggested that New York may be the only state that prohibits exchanges of "out-of-code" boxed wine. While statutes and regulations were provided to us in support of this argument, a reading of that material demonstrates that most of the states that do allow for these exchanges limit the practice to situations involving damaged, defective or deteriorated wine. Mr. O'Brien does not claim that the "out-of-code" boxed wine is damaged, defective or deteriorated wine. The concern is that the boxed wine, if sold after the recommended date, will not be of the same quality as "newer" boxed wine.

As a practical matter, we are being asked to allow the wine wholesaler to become a guarantor for the retailer. The retailer bears no risk if it is unable to sell the particular boxed wine by the recommended date. Unlike beer, where (by adopting the 2009 opinion of Counsel) any wholesaler can exchange out-of-code beer, allowing exchanges of boxed wine would only be applicable to Mr. O'Brien's client, thus providing it with a competitive advantage, and a benefit it could pass on to its retailer customers. That, in our view, is inconsistent with the intent of the Alcoholic Beverage Control Law with respect to the provisions regarding the relationship between manufacturers and wholesalers on the one hand and retailers on the other.

Accordingly, we hold that the guidance offered by the 2011 Counsel Cho opinion must not be relied on by wine manufacturers, wholesalers and retailers. However, this ruling is not intended to prevent those parties from obtaining relief in specific situations. The parties remain able to request approval from the Authority of a particular exchange of boxed wine provided good cause is demonstrated. As noted above, we also adopt, as part of this ruling, the guidance offered in the 2008 Counsel Donohue opinion.

The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on February 15, 2012.

Jacqueline Held
Secretary to the Authority