

STATE OF NEW YORK
LIQUOR AUTHORITY

TO: All industry members and agency staff

SUBJECT: Application of “tied-house” laws to an entity with “brewpub” operations in other states

Introduction

The purpose of this Advisory is to give guidance to the industry and agency staff regarding the policy of the Authority with respect to retail licensees in this state who have retail establishments in other states. In particular, this Advisory addresses the situation where a retail on-premises licensee in this state also operates a “brewpub” in another state. For purposes of this Advisory, and as used hereinafter in this ruling, we define “brewpub” as an establishment: that serves food and beverages (including alcoholic beverages) for on-premises consumption, such as a restaurant or tavern; with brewing facilities located within the establishment; and that is operated pursuant to one or more licenses to sell and/or manufacture alcoholic beverages issued by the state or appropriate municipality where the establishment is located.

Tied House Laws

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 liquor and wine manufacturers may authorize only certain wholesalers to 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

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)

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 in another tier of the industry. These restrictions are commonly known as the “tied house” laws. Licensed manufacturers and wholesalers 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 also banned from having any interest in a business that manufactures or wholesales alcoholic beverages.¹⁰ The New York State Court of Appeals has held that even de minimis ownership is a disqualifying interest under the tied house laws.¹¹

New York’s Restaurant-brewer’s license

The “restaurant-brewer” license was created in 1997.¹² It allows a business to operate a restaurant with a “full” (liquor, wine and beer) license while also being able to brew a limited amount of beer.¹³ Prior to 2012, a person could hold up to five restaurant-brewer licenses,¹⁴ but could not have an interest in any other business that manufactured or sold alcoholic beverages.¹⁵ Nor could a retailer, wholesaler or manufacturer have any interest in a business with a restaurant-brewer license. Essentially, the restaurant-brewer license became a fourth tier that was separate and apart from the other three tiers of the industry.

In 2012 the ABCL statute was amended to ease the tied house restrictions associated with the restaurant-brewer license.¹⁶ The existing prohibition against an interest in any business that manufactured or sold alcoholic beverages was modified to allow a restaurant-brewer licensee to have an interest in other retail establishments and for other retail licensees to have an interest in a restaurant-brewer business.¹⁷ Manufacturers and wholesalers are still prohibited from having an interest in an establishment with a restaurant-brewer license.¹⁸

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.

¹⁰ ABCL §106(13)

¹¹ *Rihga International USA Inc. vs. State Liquor Authority*, 84 NY2d 876 (1993)

¹² Chapter 538, subdivision 1 of the Laws of 1997

¹³ ABCL §64-c(5)

¹⁴ See former ABCL §64-c(7)

¹⁵ See former ABCL §64-c(10)

¹⁶ Chapter 366 of the Laws of 2012

¹⁷ ABCL §64-c(10)(a)

¹⁸ ABCL §64-c(10)(b)

Application of tied-house laws on out-of-state brewpubs

The net result of the 2012 changes to the restaurant-brewer license is that a person holding such a license can hold a retail license in this, or any other state, without violating the tied-house laws. The question left unanswered by the 2012 statutory amendment is whether a retail licensee in this state (including a restaurant-brewer licensee) could hold a “brewpub” license in another state. Arguably, since a “brewpub” does manufacture alcoholic beverages, a retail on-premises licensee in this state would be precluded from having an interest in such a business.¹⁹

However, there are other states that provide for “brewpub” establishments, and treat them as retail businesses for tied house purposes. For example, in Arizona a person can obtain a domestic microbrewery license²⁰ and an on-premises restaurant license for the same location.²¹ The person can also hold retail on-premises licenses at other locations in the state provided that the person “is not otherwise engaged in the business of a distiller, vintner, brewer, rectifier, blender or other producer of spirituous liquor in any jurisdiction.”²²

As in Arizona, Texas allows for the operation of a brewpub through the issuance of multiple licenses or permits. A person can obtain a “brewpub” license to manufacture a limited amount of beer and sell that beer at retail from the establishment.²³ However, the person must also obtain one of the licenses or permits that allow for on-premises sales.²⁴ A Texas brewpub licensee is considered to be a retailer under that state’s law and is prohibited from having any interest in any business with a Texas license or permit to manufacture or wholesale alcoholic beverages.²⁵

California has a “brewpub-restaurant” license that, similar New York’s restaurant-brewer license, allows for the on-premises sales at the restaurant along with limited production of beer.²⁶ The license is specifically identified as a retail license,²⁷ thus prohibiting a manufacturer or wholesaler from having any interest in the business.²⁸ Colorado also has a license available to operate a brewpub.²⁹ As in New York, Arizona, Texas and California, the holder of a Colorado brewpub license may hold other retail licenses in the state.³⁰

¹⁹ This would not be the case for a retail off-premises beer licensee. The tied house law applicable to off-premises retail licensees prohibits off-premises liquor and/or wine licensees from holding an interest in a business that manufactures or wholesales alcoholic beverages. See ABCL §105(16). Retail off-premises beer licensees are not subject to the tied house laws.

²⁰ Arizona Revised Statutes §4-205.08

²¹ Arizona Revised Statutes §4-205.08(D)(4)

²² Arizona Revised Statutes §4-205.08(E)

²³ Texas Alcoholic Beverage Code §74.01(a)

²⁴ Texas Alcoholic Beverage Code §74.01(c)

²⁵ Texas Alcoholic Beverage Code §74.01(d)

²⁶ California Business and Professions Code §23396.3(a)

²⁷ California Business and Professions Code §23396.3(a)

²⁸ California Business and Professions Code §25500(1)(a)

²⁹ Colorado Liquor Code §12-47-415

³⁰ Colorado Liquor Code §12-47-415(3)(b)

It would appear, therefore, that notwithstanding the ability to produce a limited amount of beer, a brewpub, as defined in this Advisory, is generally considered to be a retail business. Accordingly, for purposes of this state's tied-house laws, it is the policy of the Authority that a brew pub in another state shall be considered a retail business, and a person having an interest in such a business shall not be prohibited from holding a retail license in this state, provided that: such person may not have any other interest, direct or indirect, in any business where alcoholic beverages are manufactured or sold at wholesale;³¹ the state where the brewpub is located allows such person to hold retail licenses at other locations; and the other state's license and/or scheme for the brewpub must be the most restrictive means available (at the time the brewpub began operations) by which a person in that state can operate an establishment that is allowed to sell/serve food and beverages (including alcoholic beverages) for on-premises consumption, such as a restaurant or tavern, and also brew beer at such establishment.

Whether or not a brewpub in a particular state shall be considered as a retail licensee for purposes of New York's tied house laws shall be considered on an individual basis by the Authority, based on a review of the other's state's relevant laws. However, given the Authority's review of laws of other states for purposes of this advisory, the brewpub licenses discussed above from Arizona, Texas, California and Colorado shall be considered retail licenses for the purpose of our tied house laws.

³¹ ABCL §64-c(10) & ABCL §106(13)