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LIQUOR WHOLESALER PROTECTION

The biennial state budget act (1999 Wisconsin Act 9), passed by the legislature and signed by Governor Tommy Thompson on October 27, 1999, clarifies the protection provided by the Wisconsin Fair Dealership Law as it applies to wholesalers of intoxicating liquors. (The law does not apply to distributors of wine or fermented malt beverages, such as beer.)

BACKGROUND

When the 21st Amendment to the U.S. Constitution repealed Prohibition in 1933, it granted states the authority to regulate liquor business within their borders. Wisconsin adopted a 3-tier distribution system consisting of manufacturers (distillers, brewers, and vintners); wholesalers (distributors); and retailers (taverns, liquor stores, and restaurants with licenses to serve alcohol beverages). Alcohol beverages are taxed at the wholesale level, and liquor containers are required to have stamps affixed, certifying that taxes have been paid.

Chapter 179, Laws of 1973, created the Wisconsin Fair Dealership Law (Chapter 135, Wisconsin Statutes), which prohibits the grantor of a franchise or a right to distribute goods or services from terminating, cancelling, failing to renew, or substantially changing the competitive circumstances of a dealership agreement without good cause.

The manufacturer, franchisor, or other grantor of the dealership arrangement has the burden of proving good cause for terminating or changing the dealership relationship. Good cause is defined as:

- 1) failure by the dealer to comply substantially with essential and reasonable requirements imposed by the manufacturer, franchisor, or other dealer if the requirements are not discriminatory when compared with requirements imposed on similarly situated dealers or
- 2) bad faith by the dealer in carrying out the terms of the dealership.

The courts have ruled that "good cause" may include cases in which a grantor loses substantial money or experiences economic duress or a dealer fails to achieve reasonable sales goals.

Prior to passage of Act 9, the courts had ruled liquor wholesalers were eligible for protection under the dealership law if their livelihood was imperiled because a "large proportion" of their revenues were derived from the dealership or they had made sizable investments related to the grantor's goods or services, such as dealer-financed advertising and promotional activities. The level of revenues that constituted a "large proportion" was not statutorily defined.

ACT 9 – CLARIFYING THE LAW REGARDING LIQUOR DISTRIBUTORS

In Act 9, the legislature stated that "a balanced and healthy 3-tier system for distributing intoxicating liquor is in the best interests of this state and its citizens;" it "ensures a level system between the manufacturer and wholesale tiers;" and "it provides an efficient and effective means for tax collection." It found further that the number of wholesalers in Wisconsin "is in significant decline," and "this decline threatens the health and stability of the wholesale tier." It concluded regulation of liquor dealerships was necessary.

Act 9 provides that the Fair Dealership Law applies to a wholesale liquor dealer if its sales of all of the manufacturer's brands account for at least 5% of the dealer's total net revenues

from the sale of liquor in the most recent fiscal year. (A wholesaler with lower sales may be protected in certain circumstances.) Under the previous law, the level of revenues necessary to make the dealership eligible for protection was undefined. Under Act 9, a manufacturer who has not produced more than 200,000 gallons of intoxicating liquor in any year is not subject to the Fair Dealership Law.

The effective date of Act 9 is October 29, 1999, but its application regarding the modification or nonrenewal of contracts that existed on that date is uncertain. A provision in Act 9 which would have made the law retroactively effective as of October 1, 1999, was vetoed by the governor due to concerns about the constitutionality of imposing new standards on preexisting contracts. He also vetoed the inclusion of wine distribution under the law and the law's application to subsequent owners of a wholesale business or to assets or activities of a distiller's liquor business when it is transferred to another person.

NOTICE AND LEGAL REMEDIES

A manufacturer must provide at least 90 days' written notice prior to termination, cancellation, nonrenewal, or substantial change in a dealership relationship, stating the reasons for taking the action. The dealer then has 60 days in which to rectify any claimed deficiency. Notice is not required in the case of insolvency or bankruptcy. If the reason for the adverse action is because the dealer owes money due under the relationship, the dealer has 10 days from the delivery of the written notice to remedy the default. If the manufacturer terminates the relationship, the dealer may require the repurchase of all unsold inventories at the fair wholesale market value.

The Department of Justice or a district attorney may prosecute a manufacturer for violation of the law, seeking actual damages and a permanent injunction against unlawful termination, cancellation, nonrenewal, or substantial change in competitive circumstances. A temporary injunction to forestall irreparable injury while awaiting the court's final ruling may also be granted. If the state chooses not to litigate a particular case, a dealer may privately sue for money damages, court costs, attorney fees, and temporary and permanent injunctive relief.