

BEER INDUSTRY DISTRIBUTION ACT

1998 GENERAL SESSION

STATE OF UTAH

Sponsor: Leonard M. Blackham

AN ACT RELATING TO ALCOHOLIC BEVERAGES; ENACTING THE BEER INDUSTRY DISTRIBUTION ACT; PROVIDING LEGISLATIVE INTENT; ENACTING DEFINITIONS; PROVIDING LIMITS ON AND PROCEDURES FOR TERMINATION OF A DISTRIBUTORSHIP AGREEMENT; PROHIBITING CERTAIN CONDUCT; REQUIRING COMPENSATION BE PAID FOR CERTAIN ACTS; ADDRESSING ARBITRATION; PROVIDING REQUIREMENTS FOR WHOLESALERS; PROVIDING REMEDIES; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE; AND PROVIDING A COORDINATION CLAUSE.

This act affects sections of Utah Code Annotated 1953 as follows:

ENACTS:

32A-11a-101, Utah Code Annotated 1953

32A-11a-102, Utah Code Annotated 1953

32A-11a-103, Utah Code Annotated 1953

32A-11a-104, Utah Code Annotated 1953

32A-11a-105, Utah Code Annotated 1953

32A-11a-106, Utah Code Annotated 1953

32A-11a-107, Utah Code Annotated 1953

32A-11a-108, Utah Code Annotated 1953

32A-11a-109, Utah Code Annotated 1953

32A-11a-110, Utah Code Annotated 1953

32A-11a-111, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **32A-11a-101** is enacted to read:

CHAPTER 11a. UTAH BEER INDUSTRY DISTRIBUTION ACT

32A-11a-101. Title -- Legislative intent.

(1) This chapter shall be known as the "Utah Beer Industry Distribution Act."

(2) (a) It is the policy of the Legislature to regulate and control the importation, sale, and distribution of beer within the state in the exercise of its powers under the Twenty-first Amendment to the Constitution of the United States and pursuant to the Utah Constitution.

(b) In furtherance of the policy described in Subsection (2)(a), this chapter is enacted to:

(i) promote good faith and fair dealing in the business relationships between suppliers, wholesalers, and retailers of beer; and

(ii) provide for the establishment and maintenance of an orderly system for the distribution of beer in accordance with the laws of the state regulating the sale and distribution of beer to the public.

Section 2. Section **32A-11a-102** is enacted to read:

32A-11a-102. Definitions.

As used in this chapter:

(1) "Affected party" means a supplier or wholesaler who is a party to a distributorship agreement that a terminating party seeks to terminate or not renew.

(2) (a) "Distributorship agreement" means any written contract, agreement, or arrangement between a supplier and a wholesaler pursuant to which the wholesaler has the right to purchase, resell, and distribute in a designated geographical area any brand of beer manufactured, imported, or distributed by the supplier.

(b) A separate agreement between a supplier and a wholesaler that relates to the relationship between the supplier and the wholesaler or the duties of either of them under a distributorship agreement is considered to be part of the distributorship agreement for purposes of this chapter.

(c) A distributorship agreement may be for a definite or indefinite period.

(3) "Good cause" means the material failure by a supplier or a wholesaler to comply with an essential, reasonable, and lawful requirement imposed by a distributorship agreement if the failure occurs after the supplier or wholesaler acting in good faith provides notice of deficiency and an opportunity to correct in accordance with Sections 32A-11a-103 and 32A-11a-104.

(4) "Good faith" is as defined in Section 70A-2-103.

(5) "Retailer" means a person subject to license under Chapter 10, Beer Retailer Licenses.

(6) "Sales territory" means the geographic area of distribution and sale responsibility designated by a distributorship agreement.

(7) "Supplier," notwithstanding Section 32A-1-107, means a brewer or other person who sells beer to a wholesaler for resale in this state.

(8) "Terminating party" means a supplier or wholesaler who:

(a) is a party to a distributorship agreement; and

(b) seeks to terminate or not renew the distributorship agreement.

Section 3. Section **32A-11a-103** is enacted to read:

32A-11a-103. Termination of distributorship agreements.

(1) Except as provided in Subsection (2) or (3), a supplier or wholesaler may not:

(a) terminate a distributorship agreement; or

(b) fail to renew a distributorship agreement.

(2) A supplier or wholesaler may take an action prohibited by Section (1) if:

(a) the supplier or wholesaler has good cause for the action; and

(b) if notification is required by Section 32A-11a-104:

(i) the terminating party provides the affected party prior notification in accordance with Section 32A-11a-104; and

(ii) the affected party has not eliminated the reasons specified in the notification as the reasons for the action within 90 days after the date the notification is mailed in accordance with Section 32A-11a-104.

(3) A supplier may terminate or not renew a distributorship agreement if:

(a) the supplier gives the wholesaler 30 days written notice before termination or nonrenewal;

(b) the supplier discontinues production or discontinues distribution throughout the state of all brands of beer sold by the supplier to the wholesaler; and

(c) the termination or nonrenewal does not violate the distributorship agreement.

Section 4. Section **32A-11a-104** is enacted to read:

32A-11a-104. Notice of termination.

(1) Except as provided in Subsection (3), a terminating party may not take an action described in Subsection 32A-11a-103(1) unless the terminating party provides prior notification in accordance with Subsection (2) to the affected party.

(2) The notification required under Subsection (1) shall:

(a) be in writing;

(b) be mailed by registered mail, return receipt requested, to the affected party not less than 90 days before the date on which the distributorship agreement will be terminated or not renewed;

(c) state the intention to terminate or not renew;

(d) state the reasons for the termination or nonrenewal; and

(e) state the date, not less than 90 days from the date of mailing, on which the termination or nonrenewal shall take effect if the reasons for the action are not eliminated by that date.

(3) A supplier or wholesaler may take an action described in Subsection 32A-11a-103(1) without furnishing any prior notification if:

(a) the affected party is insolvent, bankrupt, in dissolution, or in liquidation;

(b) the affected party makes an assignment for the benefit of creditors or similar disposition of substantially all of the assets of the affected party's business;

(c) the affected party or a person owning more than 10% of the stock or other ownership interest in the affected party:

(i) is convicted of, pleads guilty to, or pleads no contest to a felony under the laws of the United States or this state that in the reasonable, good faith judgment of the terminating party materially and adversely affects the good will or business of the terminating party;

(ii) has its license or permit revoked or suspended for a period of 31 days or more; or

(iii) engages in intentional fraudulent conduct in its dealings with the terminating party that in the reasonable, good faith judgment of the terminating party materially and adversely affects the good will or business of the terminating party.

(4) Subsection (3)(c)(iii) does not apply to conduct by a non-owner employee or representative of the affected party if the conduct occurred without the prior knowledge or consent

of an owner of the affected party.

(5) Notwithstanding Subsection (3)(c)(i), a supplier may not take an action under Subsection (3)(c)(i) because of a conviction or plea by an owner of the affected party, if:

(a) any other approved owner of the affected party purchases the ownership interest of the offending owner;

(b) the offending owner was not materially involved in the management of the affected party; and

(c) the purchase described in Subsection (5)(a) is completed within 90 days after the conviction or plea.

Section 5. Section **32A-11a-105** is enacted to read:

32A-11a-105. Prohibited conduct of supplier.

(1) A supplier may not:

(a) induce, coerce, or attempt to induce or coerce, any wholesaler to engage in any illegal act or course of conduct;

(b) impose a requirement that is discriminatory by its terms or in the methods of enforcement as compared to requirements imposed by the supplier on similarly situated wholesalers;

(c) prohibit a wholesaler from selling the product of any other supplier;

(d) fix or maintain the price at which a wholesaler may resell beer;

(e) fail to execute with each wholesaler of its brands a written distributorship agreement;

(f) require any wholesaler to accept delivery of any beer or any other item that is not voluntarily ordered by the wholesaler;

(g) restrict or inhibit, directly or indirectly, the right of a wholesaler to participate in an organization representing interests of wholesalers for any lawful purpose;

(h) require a wholesaler to participate in or contribute to any local, regional, or national advertising fund or other promotional activity that:

(i) is not used for advertising or promotional activities in the wholesaler's sales territory; or

(ii) would require contributions by the wholesaler in excess of the amounts specified in the distributorship agreement;

(i) retaliate against a wholesaler that files a complaint with the department or the applicable federal agency regarding an alleged violation by the supplier of a state or federal law or administrative rule;

(j) require without good cause any change in the manager of a wholesaler who has previously been approved by the supplier;

(k) if a wholesaler changes its approved manager, prohibit the change unless the new manager fails to meet the reasonable standards for similarly situated wholesalers of the supplier as stated in the distributorship agreement; or

(l) refuse to deliver beer products covered by a distributorship agreement to the wholesaler:

(i) in reasonable quantities; and

(ii) within a reasonable time after receipt of the wholesaler's order.

(2) Notwithstanding Subsection (1)(l), the supplier may refuse to deliver products if the refusal is due to:

(a) the wholesaler's failure to pay the supplier pursuant to the distributorship agreement;

(b) an unforeseeable event beyond the supplier's control;

(c) a work stoppage or delay due to a strike or labor problem;

(d) a bona fide shortage of materials; or

(e) a freight embargo.

Section 6. Section **32A-11a-106** is enacted to read:

32A-11a-106. Prohibited conduct of wholesaler.

(1) A wholesaler may not:

(a) induce, coerce, or attempt to induce or coerce, any retailer to engage in any illegal act or course of conduct;

(b) impose a requirement that is discriminatory by its terms or in the methods of enforcement as compared to requirements imposed by the wholesaler on similarly situated retailers;

(c) prohibit a retailer from selling the product of any other wholesaler;

(d) fix or maintain the price at which a retailer may resell beer;

(e) require any retailer to accept delivery of any beer or any other item that is not voluntarily

ordered by the retailer;

(f) restrict or inhibit, directly or indirectly, the right of a retailer to participate in an organization representing interests of retailers for any lawful purpose;

(g) require a retailer to participate in or contribute to any local, regional, or national advertising fund or other promotional activity;

(h) retaliate against a retailer that files a complaint with the department or the applicable federal agency regarding an alleged violation by the wholesaler of a state or federal law or administrative rule;

(i) refuse to deliver beer products carried by the wholesaler to a properly licensed retailer who resides within the wholesaler's sales territory:

(i) in reasonable quantities; and

(ii) within a reasonable time after receipt of the retailer's order.

(2) Notwithstanding Subsection (1)(i), the wholesaler may refuse to deliver products if the refusal is due to:

(a) the retailer's failure to pay the wholesaler pursuant to Subsection 32A-12-603(17);

(b) an unforeseeable event beyond the wholesaler's control;

(c) a work stoppage or delay due to a strike or labor problem;

(d) a bona fide shortage of materials; or

(e) a freight embargo.

Section 7. Section **32A-11a-107** is enacted to read:

32A-11a-107. Sale or transfer of business assets or ownership.

(1) Without the prior written approval of a sale or transfer by the supplier:

(a) a wholesaler may not sell or transfer its business, or any portion of its business, including the distributorship agreement to a successor in interest; and

(b) the owner of an interest in a wholesaler may not sell or transfer all or part of the owner's interest in the wholesaler to a successor in interest.

(2) A supplier may not unreasonably withhold or delay its approval of a sale or transfer, including the wholesaler's rights and obligations under the terms of the distributorship agreement.

if the person to be substituted meets reasonable standards that are imposed:

(a) by the supplier pursuant to the distributorship agreement; and

(b) on other wholesalers of that supplier of the same general class, taking into account the size and location of the sales territory and market to be served.

(3) Notwithstanding Subsection (1), a wholesaler may not assign or transfer its license in violation of Subsection 32A-11-106(1)(g).

Section 8. Section **32A-11a-108** is enacted to read:

32A-11a-108. Reasonable compensation -- Arbitration.

(1) If a supplier violates Section 32A-11a-103 or 32A-11a-107, the supplier shall be liable to the wholesaler for the laid-in cost of inventory of the affected brands plus any diminution in the fair market value of the wholesaler's business with relation to the affected brands. In determining fair market value, consideration shall be given to all elements of value, including good will and going concern value.

(2) (a) A distributorship agreement may require that any or all disputes between a supplier and a wholesaler be submitted to binding arbitration. In the absence of an applicable arbitration provision in the distributorship agreement, either the supplier or the wholesaler may request arbitration if a supplier and a wholesaler are unable to mutually agree on:

(i) whether or not good cause exists for termination or nonrenewal;

(ii) whether or not the supplier unreasonably withheld approval of a sale or transfer under Section 32A-11a-107; or

(iii) the reasonable compensation to be paid for the value of the wholesaler's business in accordance with Subsection (1).

(b) If a supplier or wholesaler requests arbitration under Subsection (2)(a) and the other party agrees to submit the matter to arbitration, an arbitration panel shall be created with the following members:

(i) one member selected by the supplier in a writing delivered to the wholesaler within ten business days of the date arbitration was requested under Subsection (2)(a);

(ii) one member selected by the wholesaler in a writing delivered to the supplier within ten

business days of the date arbitration was requested under Subsection (2)(a); and

(iii) one member selected by the two arbitrators appointed under Subsections (2)(b)(i) and (ii).

(c) If the arbitrators selected under Subsection (2)(b)(iii) fail to choose a third arbitrator within ten business days of their selection, a judge of a district court in the county in which the wholesaler's principal place of business is located shall select the third arbitrator.

(d) Arbitration costs shall be divided equally between the wholesaler and the supplier.

(e) The award of the arbitration panel is binding on the parties unless appealed within 20 days from the date of the award.

(f) Subject to the requirements of this chapter, arbitration and all proceedings on appeal shall be governed by Title 78, Chapter 31a, Utah Arbitration Act.

Section 9. Section **32A-11a-109** is enacted to read:

32A-11a-109. Sale or transfer of supplier's business.

(1) (a) A successor to a supplier that after July 1, 1998, acquires a supplier's products or brands in this state shall be bound by all of the terms and conditions of each distributorship agreement with a wholesaler in this state that was in effect on the date on which the successor received the assets or rights of the previous supplier.

(b) Notwithstanding Subsection (1)(a), a successor may contractually require its wholesalers to:

(i) execute a new distributorship agreement; and

(ii) comply with the successor's operational standards of performance if:

(A) the operational standards of performance are consistent with this chapter;

(B) the operational standards of performance are uniformly imposed by the successor on similarly situated wholesalers; and

(C) the successor provides the wholesaler at least one year to:

(I) execute a new distributorship agreement; and

(II) comply with the operational standards of performance.

(2) (a) For purposes of this section, "successor" means a supplier who obtains the

distribution rights of a brand that a wholesaler distributes in this state pursuant to a distributorship agreement with another supplier who previously had the distribution rights of the brand.

(b) For purposes of Subsection (2)(a), the successor may obtain the distribution right:

(i) by any means, including:

(A) merger;

(B) purchase of corporate shares; or

(C) purchase of assets; and

(ii) from:

(A) a supplier; or

(B) a person acting in an official capacity who is not a supplier including a nominee, representative, or fiduciary.

Section 10. Section **32A-11a-110** is enacted to read:

32A-11a-110. Judicial remedies.

(1) A supplier or wholesaler who is a party to a distributorship agreement may maintain a civil action against the supplier or wholesaler in a court of competent jurisdiction in the county in which the wholesaler's principal place of business is located if:

(a) the supplier or wholesaler violates this chapter; or

(b) (i) the supplier and wholesaler are not able to mutually agree on reasonable compensation under Section 32A-11a-108; and

(ii) the parties do not agree to submit the matter to arbitration in accordance with Section 32A-11a-108 prior to or within 20 days following service of process on the electing party in the civil action.

(2) (a) The prevailing party in any action under Subsection (1) shall recover:

(i) actual damages, including the value of the wholesaler's business as specified in Section 32A-11a-108 if applicable; and

(ii) reasonable attorneys' fees and court costs.

(b) In addition to the amount awarded under Subsection (2)(a), the court may grant such relief in law or equity as the court determines to be necessary or appropriate considering the purposes

of this chapter.

(3) If either party elects arbitration under Subsection (1)(b)(ii) following service of process, the civil action is stayed pending a decision by the arbitration panel.

Section 11. Section **32A-11a-111** is enacted to read:

32A-11a-111. Modifying statutory requirements not permitted.

(1) Nothing in this chapter is intended to restrict the right of a supplier to contractually require its wholesaler to comply with the supplier's operational standards of performance that are:

(a) consistent with this chapter; and

(b) uniformly established for its wholesalers according to the supplier's good faith business judgment.

(2) Notwithstanding Subsection (1), the requirements of this chapter may not be modified by agreement.

(3) Any agreement that by its terms modifies the requirements of this chapter is void and unenforceable to the extent it attempts to modify the requirements of this chapter.

Section 12. **Severability clause.**

If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act is given effect without the invalid provision or application.

Section 13. **Effective date.**

This act takes effect on July 1, 1998.

Section 14. **Coordination clause.**

It is the intent of the Legislature that the Office of Legislative Research and General Counsel, as part of enrolling, shall:

(1) renumber the sections as whole numbers; and

(2) correspondingly change the cross references to the sections renumbered by this coordinating clause.