VERMONT BREWERS ASSOCIATION

Franchise Law Basics for Vermont and other States

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Holland & Knight

Meet the Speaker

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JASON H. BARKER is a corporate and regulatory attorney whose multidisciplinary practice involves complex corporate transactions and alcohol beverage regulatory matters. Mr. Barker has a deep industry knowledge involving owners, operators and investors within the alcohol beverage and cannabis industries. He represents clients located throughout the United States and who also operate internationally.

Mr. Barker's client engagements involve:

- complex merger, acquisition and joint venture representation
- alcohol beverage regulatory advice for craft breweries and distilleries, as well as national brand owners and wholesalers of wine and distilled spirits (including advice regarding contract production, advertising, beverage operations, equipment procurement and financing, franchise protection, licensing, pricing, trade practices and tied house matters)
- serving as outside general counsel to startup and emerging growth companies, including ongoing advice regarding corporate financing, governance, incubation, loss prevention and operational strategy
- U.S. representation of foreign breweries and wineries (advice regarding importation, distribution and licensing matters)
- advice to family office, private equity and hedge fund investors regarding threshold legalities and risks of cannabis investments and operations within cannabidiol (CBD) and recreational markets

In addition, Mr. Barker is a visiting professor at the University of Miami School of Law and teaches courses regarding the regulation of alcoholic beverages and cannabis to upper-level law students. Mr. Barker was recognized by Chambers USA Guide 2024 as Up and Coming for Food & Beverages: Alcohol -Nationwide.

Agenda

- Introduction to Beer Franchise Laws
- Evolution of Franchise Laws
- Market Analytics and Key Features
- Vermont Overview
  - Pre-2018
  - The Basics
  - Small Manufacturers
- What is “good cause” for termination?
- Contractual Provisions
- Where are we now?

Introduction to Beer Franchise Laws

- Purpose of Beer Franchise Laws
  - Protect beer wholesalers from overreaching by breweries
  - Ensure balanced bargaining power between wholesalers and breweries
- Historical Context
  - Emerged in the 1970s
  - Response to consolidating beer industry and inequalities in bargaining power
- Structure and Key Provisions
  - Modeled after franchise laws for more generic commodities
  - Good faith and fair dealing requirements for breweries
  - Protections for wholesalers regarding territory, termination, change of control, and dispute resolution
  - Concept is to make wholesalers whole after having expended resources to ‘make a market’ for a brewery's product

Evolution of Franchise Law

- Typically, expedited termination process for extraordinary events
- Carveouts for smaller breweries
  - Examples include New York Vermont and Washington
- Now applicable to adjacent products
  - Low proof spirits products
  - Hard seltzers and RTDs
- Vermont
  - Applies to ready-to-drink spirits products (up to 12% ABV)
  - Can only terminate franchise for cause and with 120 days' prior written notice

Market Analyics and Key Features

- Beer franchise laws: 92% (48/52)
- Exclusivity Requirement: 67% (35/42)
- Termination Payment: 62% (32/52)
- Key Features
  - Agreements in writing
  - Termination only for “good cause”
  - Territorial exclusivity
  - Payment required for termination without good cause

Vermont Overview

- Pre-2018
  - One size fits all—number of barrels produced is irrelevant
  - Franchise may only be terminated for "good cause" with 120 days' prior written notice and opportunity to cure
  - Upon petition, the Superior Court decides whether good cause exits

- Franchise law amendments
  - Some relief for Small Manufacturers in form of payment option to terminate without "good cause"
  - Small Manufacturer =
    - (1) produces a total annual volume of not more than 50,000 barrels of malt beverages **and**

    - (2) brewer's products comprise three percent or less of a wholesaler's total annual sales of malt beverages by volume.

Vermont Overview (cont.)

- Revised Vermont Franchise Law
  - Retains: Franchise may only be terminated for "good cause" with 120 days' prior written notice and opportunity to cure
  - Retains: Upon petition, the Superior Court decides whether good cause exits
  - New: Small Manufacturer may terminate without good cause by providing wholesaler 30 days' notice prior to date of termination and paying compensation to wholesaler
  - New: Compensation = cost of wholesaler's laid-in inventory + 5X average annual gross profits earned by wholesaler
    - Gross profits equals revenue earned by wholesaler on the sale of products *less* the wholesaler's costs for the products sold, including shipping and taxes

What is "good cause" for termination?

- Not defined under Vermont's franchise law and no real clear direction under case law
- Best defense is a good offense
- Specifiy in franchise agreement parameters for good cause
- Specify reasonable qualifications for successor wholesaler in case of change of control of wholesaler
- Tie failure of wholesaler's performance to "good cause" basis for termination in agreement

Contratual Provisions

- Specific Distribution Goals: “Wholesaler agrees to participate in meetings with Brewer to set annual sales goals. Wholesaler shall then use its best efforts to sell and market the Products in the Territory and to achieve the specific distribution goals agreed to by the Parties as more specifically described in Exhibit X (the “Distribution Goals”), and which goals are essential, reasonable and commercially acceptable requirements of this Agreement.”
- This can be based upon draft and package sales and also on sales to on versus off-premises accounts
- If difficult to determine sales goals it is possible to use year-over-year improvement as a percentage.
- Other Specific Wholesaler Requirements:
  - Maintenance of licenses
  - No violation of law by wholesaler
  - Bankruptcy or insolvency of wholesaler

Contratual Provisions (cont.)

- Make it Obvious: Agreement should be clear that termination for specific reasons constitutes “good cause” for termination.
- Change of Control: Include language requiring that any successor wholesaler have at least the same number of dedicated sales personnel and account experience as the selling wholesaler.
- Other Thoughts:
  - Smaller wholesalers have more protection (> 3% of sales)
  - Also applies to out-of-state breweries holding Certificates of Approval

Where are we now?

- Craft beer in a slump overall (flat or down for 7-8 years)
- Vermont franchise termination multiple (5X) currently above market
- Brand protection more important than ever
- Brewers should continue to consider further legislative action and policy change
- Most states use a “reasonable compensation” concept that effectively adjusts to meet market multiples
- Need to maximize wholesaler relationships
- Brewers and wholesalers both succeed if craft beer is successful
- Wholesalers are crictical to the success of craft brewing