

N.D.A.G. Letter to Aas (Aug. 15, 1990)

August 15, 1990

Honorable Lynn A. Aas
State Representative
District 5
1504 10th Avenue SW
Minot, ND 58701

Dear Representative Aas:

Thank you for your April 21, 1990, letter requesting my opinion on several issues concerning the implications of repossession or foreclosure of a liquor licensee and the applicability of N.D. Admin. Code § 84-02-01-11 to those situations.

N.D.C.C. § 5-02-01 provides,

Except as otherwise provided in 5-02-01.1, any person engaging in the sale of alcoholic beverages at retail without first securing an appropriate license from the attorney general and the governing body of any city, or board of county commissioners if said business is located outside corporate limits of a city, is guilty of a class A misdemeanor. This section does not apply to public carriers engaged in interstate commerce.

(Emphasis supplied.)

N.D.C.C. § 5-03-01 provides, in part:

Before any person engages in the sale at wholesale of beer or liquor in this state, that person shall first procure a license from only the state treasurer. That license must only allow sale to licensed retailers, licensed wholesalers, regular retail outlets on federal military reservations, and sale for export from a federally bonded warehouse, or a foreign trade zone, to an export bonded warehouse.

(Emphasis supplied.)

N.D.C.C. chs. 5-02 and 5-03 do not define what constitutes engaging in the "sale at retail" or "sale at wholesale" of alcoholic beverages. Where words are not given a particular definition, they should be understood in their ordinary sense. N.D.C.C. § 1-02-02; Atlas Ready-Mix of Minot, Inc. v. White Properties, Inc., 306 N.W.2d 212 (N.D. 1981). Applying this rule in Atlas, the North Dakota Court consulted a dictionary and concluded that the term "retail" means, "the sale of goods or articles individually or in small quantities directly to the consumer." Id. at 217. Citing the same source, the court stated the term "wholesale"

means, "the selling of goods in relatively large quantities and usually at lower prices than at retail, esp., such selling to retailers for resale to the consumers." Id.

Applying the definitions adopted in Atlas, a financial institution which made sales of an alcoholic beverage "directly to the consumer" has made a sale at retail. If the financial institution sells the inventory or portions of the inventory in "relatively large quantities" at "lower prices than retail" to a wholesaler or retailer, it has made a "sale at wholesale." Whether a sale is made at retail or wholesale would depend on the particular facts and circumstances which surrounded the sale. However, it is difficult to envision a sale which would not come within the purview of either N.D.C.C. § 5-02-01 or § 5-03-01.

One single or isolated sale is considered to be "engaging" in the sale of alcoholic beverages. State v. Panchuck, 207 N.W. 991 (N.D. 1926). A continuous act or acts over a period of days, weeks, or months is not required. Id.

N.D.C.C. chs. 5-02 and 5-03 are an exercise of the state's police power to protect the health, welfare, and morals of the state's citizens through proper licensing, regardless of the number of sales to be made or the manner in which the alcoholic beverages were obtained. Mini Mart Inc. v. City of Minot, 347 N.W.2d 131, 139, 140 (N.D. 1984). It is therefore my opinion that even one isolated sale of an alcoholic beverage is proscribed by N.D.C.C. §§ 5-02-01 and 5-03-01. Thus, no wholesaler may sell liquor to a financial institution which has not obtained a retailer's license. Furthermore, no financial institution may sell liquor as a wholesaler or a retailer unless it has obtained the appropriate license.

With respect to your remaining questions, N.D. Admin. Code § 84-02-01-11 provides, in part:

The normal commercial credit between liquor wholesalers and retailers is thirty days. . . . Any wholesaler having an unpaid retail account for merchandise received which is in excess of 30 days shall notify the wholesaler's competitors and the state treasurer. No sale shall be made by any wholesaler to a retail account who has or had possession of such merchandise until said delinquent account is paid in full and permitted by the state treasurer. A retail account may not be deemed delinquent for any alleged sale in any instance where there exists a bona fide dispute between the licensee and the wholesaler as to the amount owing as a result of the alleged sale.

(Emphasis supplied.)

Thus, N.D. Admin. Code § 84-02-01-11 prohibits a sale to a licensed retailer who has failed to make timely payment of its account with a wholesaler until the delinquent account is paid and the State Treasurer has given permission to make the sale.

In addition to the prohibition contained in N.D. Admin. Code § 84-02-01-11, N.D.C.C. § 5-03-01 provides "that [a wholesaler] license must only allow sale[s] to licensed

retailers." (Emphasis supplied.) Thus, a wholesaler may not sell alcoholic beverages to a financial institution or its assignee if that entity has not secured the appropriate license. Although a liquor license may be transferred with the permission of the licensing authority, it cannot be transferred solely through the enforcement of a mortgage, a contract for deed, or a security interest in the inventory of a licensee. See Federal Savings and Loan Insurance Corporation v. Morque, 372 N.W.2d 872 (N.D. 1985). (Liquor license may be used as loan security, but transfer must be approved by the licensing authority.) Thus, in addition to transfer of the license interest through enforcement of a security interest, a mortgage, or a contract for deed, a financial institution must also obtain the licensing authorities' approval of the license transfer prior to purchasing or selling liquor.

You also ask about the applicability of N.D.C.C. § 41-02-81 to liquor inventories. N.D.C.C. § 41-02-81 provides certain remedies to a seller that discovers a purchaser was insolvent when goods were received on credit. In the situation you describe, if the wholesaler has not exercised its rights under N.D.C.C. § 41-02-81, the State Treasurer cannot require a financial institution which has a perfected security interest in the liquor inventory of a retail liquor licensee to pay the delinquent account. The obligation to pay the account is that of the license holder. However, the State Treasurer could certainly give notice to the financial institution that no further sales may occur until the delinquent account is paid. Under this circumstance, the financial institution would not be precluded from advancing sufficient funds to the licensee to pay the delinquent account.

If the financial institution became the licensee by assuming the assets and liabilities of the license and obtaining the license through a transfer, a wholesaler could not sell to the financial institution until the delinquent account was current and the Treasurer approved the sale.

Finally, I sense in your request an implied question as to which entity, the wholesaler or the financial institution, would have priority to the liquor inventories in question. I make no determination here on that issue because it would require resolution of facts not presented and because to do so would go beyond the scope of my authority to issue opinions .

I trust that I have sufficiently answered your questions. Please do not hesitate to contact me again if I can be of further assistance to you on this matter.

Sincerely,

Nicholas J. Spaeth

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