

N.D.A.G. Letter to Hanson (Dec. 20, 1989)

December 20, 1989

Hon. Robert Hanson
State Treasurer
Office of the State Treasurer
State Capitol
Bismarck, ND 58505

Hon. Jack Ingstad
State Senator
P.O. Box 5068
Grand Forks, ND 58206-5068

Dear Mr. Hanson and Senator Ingstad:

Thank you for your June 23, July 14, and August 22, 1989, letters requesting my opinion on several issues regarding N.D.C.C. § 5-01-11. I apologize for the delay in responding.

Mr. Hanson raised three questions in his July 14, 1989, letter. First, whether N.D.C.C. § 5-01-11 prohibits alcoholic beverage retailers from having any financial interest in, or being engaged in, the wholesale or manufacture of alcoholic beverages. The second question is whether N.D.C.C. § 5-01-11 prohibits alcoholic beverage wholesalers from having any financial interest in, or being engaged in, the manufacture of alcoholic beverages. The final question is what is the meaning of the term "any financial interest" as used in N.D.C.C. § 5-01-11.

In his June 23 letter, Senator Ingstad requested my opinion on whether N.D.C.C. § 5-01-11 prohibits the Dakota Brewing Company (a proposed beer manufacturer) from selling shares in the company to individuals who own an interest in a wholesale or retail alcoholic beverage business.

Mr. Hanson inquired in his August 22, 1989, letter, whether an owner or officer of a licensed alcoholic beverage retailer may also be an employee of either an alcoholic beverage wholesaler or manufacturer.

N.D.C.C. § 5-01-11, which is part of North Dakota's triple-tiered alcoholic beverage distribution and licensing scheme, provides, in pertinent part:

5-01-11. Unfair competition -- Penalty. No manufacturer may engage in any wholesale alcoholic beverage business, nor may any manufacturer or wholesaler have any financial interest in any retail alcoholic beverage establishment.

Statutes such as N.D.C.C. § 5-01-11, commonly referred to as "tied house" statutes, are designed to prevent the control of retail alcoholic beverage dealers by alcoholic beverage manufacturers and wholesalers. See Pickerill v. Schott, 55 So.2d 716, 718 (Fla. 1951), cert. denied, 344 U.S. 815 (1952); Weisberg v. Taylor, 409 Ill. 384, _____, 100 N.E.2d 748, 750 (1951). The "tied house" statutes are aimed at the prevention of two practical dangers: "the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns." California Beer Wholesaler's Ass'n, Inc. v. Alcoholic Beverage Control Appeals Bd., 5 Cal. 3d 402, 407, 487 P.2d 745, 748, 96 Cal. Rptr. 297, 300 (1971) (citations omitted).

N.D.C.C. § 5-01-11 prohibits alcoholic beverage manufacturers and wholesalers from having any financial interest in retail alcoholic beverage establishments. However, it does not expressly prohibit retailers from having a financial interest in alcoholic beverage manufacturers and wholesalers.

The Missouri Supreme Court addressed the issue of whether a retailer may have a financial interest in a wholesaler, in the absence of a clear statutory prohibition, in Tom Boy, Inc. v. Quinn, 431 S.W.2d 221 (Mo. 1968). In that case, a wholesale grocer sought appellate review of a city's order denying the grocer's application to renew its beer wholesale license. The city denied the renewal application, in part, because it found the wholesaler had a financial interest in a chain of retail grocers that sold beer. *Id.* at 224. The city code in question provided that "manufacturers, distillers, wholesalers, wine makers, brewers or their employees, officers or agents shall not, under any circumstances, directly or indirectly, have any financial interest in the retail business for the sale of intoxicating liquor" *Id.* at 223. Like N.D.C.C. 5-01-11, the city code did not expressly prohibit the retailer from having a financial interest in a manufacturer or wholesaler.

The Missouri Supreme Court rejected the city's finding that the wholesaler had a financial interest in the retail establishments. More importantly, the court found that the retailers had a financial interest in the wholesaler but "[t]he ordinance does not prohibit the retailer from having such interest in the wholesaler." 431 S.W.2d at 226.

The Missouri Supreme Court did not consider your argument that once an alcoholic beverage retailer acquires a financial interest in an alcoholic beverage wholesaler or manufacturer, the retailer simultaneously becomes a wholesaler or manufacturer and immediately violates the statutory prohibition against downward integration. Resolution of this issue depends on whether the terms "wholesaler" and "manufacturer," as used in N.D.C.C. § 5-01-11, include the owners or other financial stakeholders of the "wholesaler" or manufacturer." If so, N.D.C.C. § 5-01-11 would prohibit, as a practical matter, an alcoholic beverage retailer from ever acquiring a financial interest in an alcoholic beverage wholesaler or manufacturer.

N.D.C.C. ch. 5-01 does not define the terms "manufacturer" or "wholesaler." The

available legislative history provides no indication of the Legislature's intent regarding the scope of the words. N.D.C.C. § 1-02-02 provides that words and phrases used in a statute must be understood in their ordinary sense unless a contrary intention is plainly apparent.

The Dictionary of Finance and Investment Terms, 471 (1985), defines the word "wholesaler" as a "middleman or distributor who sells mainly to retailers, jobbers, other merchants, and industrial, commercial and institutional users as distinguished from consumers." A "manufacturer" is a "person, enterprise, or entity that manufactures, esp[ecially] the owner or operator of a factory." The American Heritage Dictionary of the English Language 764 (New Coll. ed. 1982).

It is my understanding that every liquor and beer wholesaler in North Dakota is a corporation. In addition, out-of-state manufacturers are typically, if not always, organized as corporations. A corporation has a legal existence distinct and separate from its underlying owners. Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 602 (N.D. 1983).

An Ohio court recognized the fundamental difference between a corporate wholesaler and a shareholder of the wholesaler in Cushman v. Flanagan, 90 Ohio L. Abs. 364, 186 N.E.2d 512 (Ct. Common Pleas 1962). In that case, the court held that an officer and stockholder of a corporate wholesale beer distributor was not a wholesale distributor and, therefore, did not violate a statute prohibiting a manufacturer or wholesaler from financially assisting a retail seller. 186 N.E.2d at 514. The court reasoned that "when [the Legislature] wants to include the stockholders of a corporation in a prohibitory clause it knows how to do so." *Id.*

If the terms wholesaler and manufacturer are understood in their ordinary sense, the license-holding corporate entity, rather than the individual shareholders, would be viewed as the wholesaler or manufacturer.

Nevertheless, the legislative purpose underlying N.D.C.C. § 5-01-11 is to prevent the integration of the manufacturing, wholesale, and retail tiers of the liquor industry in North Dakota. The legislative policy of preserving economic independence among the three tiers would be defeated if an individual or corporation that "controls" an entity at one level is permitted to acquire a "controlling" interest in an entity at another level. It is my opinion, therefore, that the terms "wholesaler" and "manufacturer" as used in N.D.C.C. § 5-01-11 include any corporate shareholder who has a "controlling" interest in the "wholesaler" or "manufacturer." Thus, a retailer cannot acquire a 'Controlling' interest in a "wholesaler" or "manufacturer" because the retailer would then simultaneously become a "wholesaler" or "manufacturer" and immediately violate N.D.C.C. § 5-01-11. Whether a particular party "controls" an entity doing business at any level of the three tiers will generally be a question of fact for which I cannot render a formal legal opinion.

The analysis presented above is equally relevant to the issue of whether N.D.C.C. § 5-01-11 prohibits alcoholic beverage wholesalers from having any financial interest in the manufacturer of alcoholic beverages. If a wholesaler acquires a "controlling" interest in

a manufacturing entity, the wholesaler would then be considered a manufacturer and would violate the statutory prohibition against a manufacturer engaging in the wholesale alcoholic beverage business. Therefore, it is my opinion that N.D.C.C. § 5-01-11 prohibits an alcoholic beverage wholesaler from acquiring a "controlling" interest in a manufacturer of alcoholic beverages.

The above analysis is equally applicable to the question of whether N.D.C.C. § 5-01-11 prohibits individuals owning an interest in an alcoholic beverage wholesale or retail business from purchasing shares of stock in Dakota Brewing Company. If the individual in question owns a "controlling" interest in a "retailer" or "wholesaler" (and is therefore considered a "retailer" or "wholesaler"), that person cannot acquire a "controlling" interest in a manufacturer.

Although N.D.C.C. § 5-01-11 permits some integration of the alcoholic beverage liquor distribution system by allowing retailers and wholesalers to have a financial interest in the business of a higher tier, I want to emphasize that this office will investigate, pursuant to the Uniform State Antitrust Act, N.D.C.C. ch. 51-08.1, any transaction that tends to monopolize trade in a relevant market. If further barriers restricting the financial integration among the three tiers of North Dakota's liquor distribution system are necessary, it is a legislative responsibility.

You also ask whether a wholesaler or retailer may engage in the business of another tier. N.D.C.C. § 5-01-11 expressly prohibits a manufacturer from engaging in the wholesale alcoholic beverage business. It is my further opinion that N.D.C.C. § 5-01-11 also prohibits a wholesaler from engaging in the business of manufacturing alcoholic beverages. A wholesaler who acquires a manufacturer's license and engages in the business of manufacturing alcoholic beverages is a manufacturer. Therefore, the arrangement would immediately violate the statutory prohibition against vertical integration by the manufacturer into the wholesale tier.

Likewise, a retailer who acquires a license to manufacture alcoholic beverages and engages in the manufacturing business is a manufacturer. Therefore, this arrangement would immediately violate the statutory prohibition against a manufacturer having a financial interest in a retail alcoholic beverage establishment. The same reasoning prevents a retailer from acquiring a wholesale license and engaging in the wholesale alcoholic beverage business.

You also ask whether an owner or officer of a licensed alcoholic beverage retailer may be an employee of either an alcoholic beverage wholesaler or manufacturer. There is no statute that expressly or impliedly prohibits an owner or officer of a licensed alcoholic beverage retailer from also being an employee of an alcoholic beverage wholesaler or manufacturer. Accordingly, it is my opinion that an owner or officer of a licensed alcoholic beverage retailer may also be an employee of an alcoholic beverage wholesaler or manufacturer. This assumes, however, an "arms-length" relationship is maintained between the owner or officer of the alcoholic beverage retail establishment and the wholesaler or manufacturer. Absent an "arms-length" transaction in which the wholesaler

or manufacturer is paying no more than the prevailing market rate for the individual's services, it is possible that the retail establishment is being furnished something of value beyond what is expressly permitted in N.D.C.C. § 5-01-11. Whether an "arms-length" transaction exists in each case will generally be a question of fact for which I cannot provide a legal opinion.

The final question concerns the meaning of "any financial interest" as used in N.D.C.C. § 5-01-11. The term "any financial interest" is not defined in North Dakota law. Therefore, its definition is determined by analyzing the common meaning of the words that make up the term. See N.D.C.C. § 1-02-02.

The word "any" means "some, no matter how much or how little, how many, or what kind." Webster's New World Dictionary 62 (2d Coll. ed. 1978). A "Financial interest" is "[a]n interest equated with money or its equivalent." Black's Law Dictionary, 568 (abr. 5th ed. 1983). Thus, the term "any financial interest" means ownership of a legal or equitable interest, however small, which is equated with money or its equivalent. Whether a particular alcoholic beverage wholesaler or manufacturer has "any financial interest" in an alcoholic beverage retailer will generally be a question of fact for which I cannot render a formal legal opinion.

I hope this discussion has been of assistance to you.

Sincerely,

Nicholas J. Spaeth

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