

GENERAL ASSEMBLY OF NORTH CAROLINA
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SENATE BILL 745*
PROPOSED COMMITTEE SUBSTITUTE S745-PCS35253-MA-25

Short Title: Beer Franchise Law Clarifications.

(Public)

Sponsors:

Referred to:

April 20, 2011

A BILL TO BE ENTITLED

AN ACT TO PRESERVE THE THREE-TIER DISTRIBUTION SYSTEM FOR MALT BEVERAGES IN NORTH CAROLINA BY CLARIFYING PROVISIONS OF THE BEER FRANCHISE LAW TO PROVIDE: A FRANCHISE AGREEMENT APPLIES TO ALL SUPPLIER PRODUCTS UNDER THE SAME BRAND NAME; A WHOLESALER MUST SELL MALT BEVERAGES TO ALL RETAILERS IN ITS TERRITORY AT THE SAME PRICE AT THE TIME OF DELIVERY; PROHIBITED ACTS OF SUPPLIERS WITH RESPECT TO THEIR DEALINGS WITH WHOLESALERS; GOOD CAUSE FOR TERMINATION MAY NOT BE MODIFIED BY AN AGREEMENT THAT DEFINES GOOD CAUSE IN A MANNER DIFFERENT THAN PROVIDED BY STATE LAW; REVERSION OF SMALL BREWERIES' SELF-DISTRIBUTION RIGHTS UNDER CERTAIN CIRCUMSTANCES; CERTAIN ACTS THAT DO NOT AMOUNT TO GOOD CAUSE FOR TERMINATION OF A FRANCHISE; REMEDIES FOR A SUPPLIER'S WRONGFUL TERMINATION OF A FRANCHISE; INCLUSION OF A WHOLESALER MERGER, THE FACTORS THAT MAY BE CONSIDERED BY THE SUPPLIER IN APPROVING A MERGER OR TRANSFER, AND REMEDIES FOR UNLAWFUL REFUSAL TO APPROVE A MERGER OR TRANSFER; THE BEER FRANCHISE LAW MAY NOT BE WAIVED BY AN AGREEMENT CONTRARY TO STATE LAW; AND MEDIATION OF DISPUTES ARISING UNDER THE BEER FRANCHISE LAW.

The General Assembly of North Carolina enacts:

SECTION 1. Article 13 of Chapter 18B of the General Statutes reads as rewritten:

"Article 13.

"Beer Franchise Law.

...

"§ 18B-1303. Filing of distribution agreement; no discrimination.

(a) Filing. – It is unlawful for a supplier to provide malt beverages to a wholesaler unless the Commission has received notification from the supplier designating the brands of the supplier which the wholesaler is authorized to sell and the territory in which such sales may take place. If the supplier sells several brands, the agreement need not apply to all brands. A franchise agreement applies to all supplier products under the same brand name, and different categories of products manufactured under a common identifying trade name are considered to be the same brand. No supplier may provide by a distribution agreement for the distribution of



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1 a brand to more than one wholesaler for the same territory. A wholesaler shall not distribute
2 any brand of malt beverage to a retailer whose premises are located outside the territory
3 specified in the wholesaler's distribution agreement for that brand. A wholesaler may, however,
4 with the approval of the Commission distribute malt beverages outside ~~hisits~~ designated
5 territory during periods of temporary service interruption when requested to do so by the
6 supplier and the wholesaler whose service is interrupted.

7 (b) No Discrimination. – A wholesaler shall ~~servicesell~~ sell malt beverages to all retail
8 permit holders within ~~hisits~~ designated territory without discrimination with respect to the sale
9 price at the time of delivery and shall make a good faith effort to make available to each retail
10 permit holder in the territory each brand of malt beverage which the wholesaler has been
11 authorized to distribute in that area.

12 (c) No Price Maintenance. – A franchise agreement shall not, either expressly or by
13 implication or in its operation, establish or maintain the resale price of any brand of malt
14 beverages by a wholesaler.

15 **"§ 18B-1304. Prohibitions.**

16 It is unlawful for a supplier, or an officer, agent or representative of a supplier, to:

- 17 (1) Coerce or attempt to coerce or persuade a wholesaler to violate any
18 provision of the ABC laws or rules of the Department of ~~Revenue;~~
19 ~~or~~Revenue.
- 20 (2) ~~Alter~~ Except as authorized by G.S. 18B-1305(a1), alter in a material way,
21 terminate, fail to renew, or cause a wholesaler to resign from, a franchise
22 agreement with a wholesaler except for good cause and with the notice
23 required by G.S. 18B-1305.
- 24 (3) Withdraw money from or otherwise access a wholesaler's bank accounts
25 without the wholesaler's consent.
- 26 (4) Present a franchise agreement, amendment, or renewal to a wholesaler that
27 attempts to waive compliance with any provision of this Article or that
28 requires a wholesaler to waive compliance with any provision of this Article.
29 A wholesaler entering into a franchise agreement containing provisions in
30 conflict with this Article shall not be deemed to waive rights protected by, or
31 in compliance with, any provision of this Article.
- 32 (5) Induce or coerce, or attempt to induce or coerce, any wholesaler to assent to
33 any franchise agreement, amendment, or renewal that does not comply with
34 this Article and the laws of this State.
- 35 (6) Coerce or attempt to coerce a wholesaler, or its designated or anticipated
36 successor, to sign a franchise agreement, amendment, or renewal to a
37 franchise agreement by threatening to refuse to approve or delay issuing an
38 approval for the sale, transfer, or merger of a wholesaler's business.
- 39 (7) Terminate, cancel, or nonrenew or attempt to terminate, cancel, or nonrenew
40 a franchise agreement on the basis that the wholesaler fails to agree or
41 consent to an amendment to the franchise agreement.
- 42 (8) Prohibit a wholesaler from distributing the product of any other supplier,
43 except that a supplier may prohibit a wholesaler from distributing the
44 product of another supplier if reasonable grounds exist for prohibiting the
45 wholesaler's acquisition of the product and the acquisition would result in
46 the wholesaler acquiring eighty percent (80%) or more by volume of all malt
47 beverage products sold in the territory being acquired at the time of the
48 acquisition.
- 49 (9) Refuse to approve or require a wholesaler to terminate a brand manager or
50 successor manager without good cause. A supplier has good cause only if

1 the person designated for approval by the wholesaler fails to meet reasonable
2 standards and qualifications.

- 3 (10) Discriminate in price, allowance, rebate, refund, commission, discount, or
4 service between wholesalers licensed in North Carolina. As used in this
5 subsection, "discriminate" means the granting of a more favorable price,
6 allowance, rebate, refund, commission, discount, or service to one North
7 Carolina wholesaler than to another North Carolina wholesaler.

8 **"§ 18B-1305. Cause for termination of franchise agreement.**

9 (a) Meaning of Good Cause. – Good cause for altering or terminating a franchise
10 agreement, or failing to renew or causing a wholesaler to resign from such an agreement, exists
11 when the wholesaler fails to comply with provisions of the agreement which are reasonable,
12 material, not unconscionable, and which are not discriminatory when compared with the
13 provisions imposed, by their terms or in the manner of enforcement, on other similarly situated
14 wholesaler by the supplier. The meaning of good cause set out in this section may not be
15 modified or superseded by provisions in a written franchise agreement prepared by a supplier if
16 those provisions purport to define good cause in a manner different than specified in this
17 section. In any dispute over alteration, termination, failure to renew or causing a wholesaler to
18 resign from a franchise agreement, the burden is on the supplier to establish that good cause
19 exists for the action.

20 (a1) Termination by a Small Brewery. – A brewery's authorization to distribute its own
21 malt beverage products pursuant to G.S. 18B-1104(7) shall revert back to the brewery, in the
22 absence of good cause, if the brewery pays the wholesaler fair market value for the distribution
23 rights for each affected brand. For purposes of this subsection, "fair market value" means the
24 highest dollar amount at which a seller would be willing to sell and a buyer willing to buy at
25 the time the self-distribution rights revert back to the brewery, after each party has been
26 provided all information relevant to the transaction. No brewery's authorization to
27 self-distribute shall revert back to the brewery until the brewery and the wholesaler have agreed
28 in writing on the fair market value for the distribution rights for each affected brand and the
29 wholesaler has received compensation from the brewery for the value of the distribution rights.

30 (b) Notice of Cause. – At least 90 days before altering, terminating or failing to renew a
31 franchise agreement for good cause, the supplier must give the wholesaler written notice of the
32 intended action and the specific reasons for it. If the cause for the alteration, termination or
33 failure to renew is subject to correction by the wholesaler, and the wholesaler makes such
34 correction within 45 days of receipt of the notice, the notice shall be void.

35 (c) Termination for Cause without Advance Notice. – A supplier may terminate or fail
36 to renew a franchise agreement for any of the following reasons, and the termination shall be
37 complete upon receipt by the wholesaler of a written notice of the termination and the reason:

- 38 (1) Insolvency of the wholesaler, the dissolution or liquidation of the
39 wholesaler, or the filing of any petition by or against the wholesaler under
40 any bankruptcy or receivership law which materially affects the wholesaler's
41 ability to remain in business.
42 (2) Revocation of the wholesaler's State or federal permit or license for more
43 than 30 days.
44 (3) Conviction of the wholesaler, or of a partner or individual who owns ten
45 percent (10%) or more of the partnership or stock of the wholesaler, of a
46 felony which might reasonably be expected to adversely affect the goodwill
47 or interest of the wholesaler or supplier. The provisions of this subdivision
48 shall not apply, however, if the wholesaler or its existing partners or
49 stockholders shall have the right to purchase the interest of the offending
50 partner or stockholder, and such purchase is completed within ~~15~~30 days of
51 the conviction.

- 1 (4) Fraudulent conduct by the wholesaler in its dealings with the supplier or its
2 products.
- 3 (5) Failure of the wholesaler to pay for the supplier's products according to the
4 established terms of the supplier.
- 5 (6) Assignment, sale or transfer of the wholesaler's business or control of the
6 wholesaler without the written consent of the supplier, except as provided in
7 G.S. 18B-1307.
- 8 (d) Absence of Good Cause. – Good cause for alteration, termination or failure to renew
9 a franchise agreement does not include:
- 10 (1) The failure or refusal of the wholesaler to engage in any trade practice,
11 conduct or activity which would violate federal or State law.
- 12 (2) The failure or refusal of the wholesaler to take any action which would be
13 contrary to the provisions of this Article.
- 14 (3) A change in the ownership of the supplier or the acquisition by another
15 supplier of the brewery, brand or trade name or trademark, or acquisition of
16 the right to distribute a product, from the original supplier.
- 17 (4) Sale or transfer of the rights to manufacture, distribute, or use the trade name
18 of the brand to a successor supplier.
- 19 (5) Failure of the wholesaler to meet standards of operation or performance
20 which have been imposed or revised unilaterally by the supplier without a
21 fair opportunity for the individual wholesaler to bargain as to the terms.
- 22 (6) The establishment of a franchise agreement between a wholesaler and
23 another supplier, or similar acquisition by a wholesaler of the right to
24 distribute a brand of another supplier.
- 25 (7) The desire of a supplier to consolidate its franchises.

26 **"§ 18B-1306. Remedies for wrongful termination.**

27 (a) Injunctive Relief. – A wholesaler whose franchise agreement is altered, terminated
28 or not renewed in violation of this Article may bring an action to enjoin such unlawful
29 alteration, termination or failure to renew. The action may be brought in the county in which
30 the wholesaler has its principal place of business or in any county in which the wholesaler
31 receives or distributes the products in issue. Any injunction issued pursuant to this subsection
32 shall require the wholesaler to supply the customers in its territory with their reasonable retail
33 requirements and to otherwise serve the territory.

34 (b) Monetary Damages. – ~~In lieu of addition to~~ injunctive relief, a wholesaler whose
35 franchise agreement is altered, terminated or not renewed in violation of this Article shall be
36 entitled to recover monetary damages from the supplier. ~~The amount to which the wholesaler is~~
37 ~~entitled shall be the value of the wholesaler's business distributing the supplier's products,~~
38 ~~including:~~ If the wholesaler retains its franchise rights through injunctive relief, the monetary
39 damages to which the wholesaler is entitled shall include the losses suffered by the wholesaler
40 from disruption of its business and harm to its reputation, plus the costs of litigation, including
41 attorneys' fees. If the wholesaler elects to receive or is otherwise found to be entitled to
42 monetary damages only, and not injunctive relief, the damages shall be the value of the
43 wholesaler's business distributing the supplier's brands, including:

- 44 (1) The laid-in costs to the wholesaler of the inventory of the supplier's
45 products, including any State and local taxes paid on the inventory by the
46 wholesaler, plus a reasonable charge for handling of the products upon
47 surrender of the inventory to the supplier.
- 48 (2) The fair market value of all assets, including ancillary businesses of the
49 wholesaler used in distributing the supplier's products. The total
50 compensation to be paid to the wholesaler shall be reduced, however, by any
51 amount received by the wholesaler from sale of assets of the business used

1 in distributing the supplier's products as well as by the value such assets
2 have to the wholesaler unrelated to the supplier's products. "Fair market
3 value" means the highest dollar amount at which a seller would be willing to
4 sell and a buyer willing to buy at a time prior to the alteration, termination or
5 failure to renew, when each possesses all information relevant to the
6 transaction.

7 **"§ 18B-1307. Transfer or merger of wholesaler's business.**

8 (a) Right of Transfer to Designated Family Member upon Death. – Upon the death of a
9 wholesaler, that individual's interest in the wholesaler business, including the rights under the
10 franchise agreement with the supplier, may be transferred or assigned to a designated family
11 member. The transfer or assignment shall not be effective until written notice is given to the
12 supplier, but the supplier's consent is not required for the transfer or assignment. "Designated
13 family member" means the deceased wholesaler's spouse, child, grandchild, parent, brother or
14 sister, who is entitled to inherit the deceased wholesaler's ownership interest under the terms of
15 the deceased wholesaler's will or other testamentary device or under the laws of intestate
16 succession. With respect to an incapacitated individual having an ownership interest in a
17 wholesaler, the term "designated family member" also means the person appointed by the court
18 as the conservator of such individual's property. The term also includes the appointed and
19 qualified personal representative and the testamentary trustee of a deceased wholesaler.

20 (b) Approval of Certain ~~Transfers~~. Transfers and Mergers. – Upon notice to and
21 approval by the supplier, an individual owning an interest in a wholesaler may sell, assign or
22 transfer that interest, including the wholesaler's rights under its franchise agreement with the
23 supplier, to any qualified person. Likewise, a wholesaler may merge with another wholesaler in
24 the State, transferring to the new wholesaler entity the merging wholesaler's existing franchise
25 rights. Within 30 days of receipt of notice of the intended sale, ~~assignment or transfer,~~
26 assignment, transfer, or merger, the supplier shall request any additional relevant, material
27 information reasonably necessary for deciding whether to approve the transaction. The supplier
28 shall have 30 days from receipt of that information to object to the sale, ~~assignment or transfer,~~
29 assignment, transfer, or merger. The supplier may object only if the proposed ~~transferee~~
30 transferee, or the wholesalership resulting from the merger, fails to meet qualifications and
31 standards that are nondiscriminatory, material, reasonable and consistently applied to North
32 Carolina wholesalers by the supplier. The burden shall be upon the supplier to prove that the
33 proposed transferee or merged wholesaler is not qualified.

34 (b1) Factors That May Be Considered. – In determining whether the proposed transferee
35 or merged wholesaler is a qualified person, the supplier shall consider, but is not limited, to the
36 following factors:

- 37 (1) Whether the proposed transferee has the financial capacity to purchase the
38 wholesaler or the specified interest upon terms that will not jeopardize the
39 future operation of the business, or whether the new entity resulting from a
40 merger will have such financial capacity to operate successfully, and
41 whether under such ownership the wholesaler will be able to provide
42 financial support necessary to the successful operation of the business,
43 including market spending, capital expenditures, and any equity
44 capitalization or refinancing requirements.
- 45 (2) Whether the proposed transferee, or the new entity resulting from a merger,
46 has the proven business experience to hire and maintain a management team
47 to successfully operate the business.
- 48 (3) If the proposed transferee does not have experience in the beer business,
49 whether the transferee has other experience to enable it to operate a
50 distributorship successfully and whether the transferee is willing to
51 participate in training provided by the supplier.

1 (4) Whether the proposed transferee, or a party to the merger, already is a
2 wholesaler for the supplier in a different territory and, if so, whether
3 sufficient time and attention can be devoted to an additional market area.

4 (b2) Business Considered on Own Merits. – In determining whether a proposed
5 transferee, or the entity resulting from a merger, is a qualified person, a supplier must consider
6 the business on its own merits and may not designate a specifically identified person as the only
7 purchaser who will be approved.

8 (c) Damages.—ARemedies. – A wholesaler may seek injunctive relief to enforce the
9 provisions of this section. In addition to any such injunctive relief, a supplier who disapproves
10 or prevents a proposed assignment or change of ownership or merger in violation of this section
11 shall be liable to the wholesaler who proposed to make the sale, assignment or
12 transferassignment, transfer, or merger for the difference between the disapproved sale price
13 and a subsequent actual price of a sale of the same assets completed within a reasonable period.
14 If, however, the proposed transfer or sale was to a business associate at a bargain price, the
15 amount of compensation shall be at least the fair market value of the interest proposed to be
16 sold or transferred, minus the proceeds of an actual sale of the interest completed within a
17 reasonable time. The supplier also shall be liable for any damages suffered by the wholesaler in
18 its business if, because of the supplier's unlawful refusal to approve a sale, transfer, or merger,
19 the wholesaler is unable to complete a sale, transfer, or merger and remains in business.

20 **"§ 18B-1308. Article part of all franchise agreements.**

21 The provisions of this Article shall be part of all franchise agreements as defined in
22 G.S. 18B-1302 and may not be altered by the parties. A wholesaler's rights under this Article
23 may not be waived or superseded by the provisions of a written franchise agreement prepared
24 by a supplier that are in any way inconsistent with or contrary to any part of this Article. The
25 rights of a wholesaler under this Article shall remain in effect regardless of a provision in a
26 written franchise agreement prepared by a supplier that purports to require arbitration of a
27 franchise dispute or that purports to require legal remedies to be sought in a different
28 jurisdiction.

29 **"§ 18B-1309. Mediation at direction of Alcoholic Beverage Control Commission.**

30 If a dispute arises between a wholesaler and supplier under this Article, and such dispute
31 appears likely to lead to litigation, the Commission, upon request of any party or on its own
32 initiative, may require the parties to participate in mediation in an effort to resolve the dispute.
33 This authority shall be in addition to the Commission's authority to issue declaratory rulings
34 pursuant to G.S. 150B-4. The Commission may designate the mediator, in which case the
35 Commission shall pay the mediator's fee, or the Commission may direct the parties to agree
36 upon and share the costs of a mediator. If the parties then cannot agree upon a mediator, the
37 Commission shall designate the mediator, and the fees shall be divided evenly by the parties.
38 The Commission shall direct that the mediation be completed within a specified period of time.
39 Except for injunctive relief, no lawsuit or other legal action concerning the dispute may be filed
40 until the mediation is completed and is unsuccessful, unless necessary to avoid expiration of a
41 statute of limitation."

42 **SECTION 2.** The provisions of this act are severable and, if any phrase, clause,
43 sentence, or provision is declared to be unconstitutional, is preempted by federal law or
44 regulation, or is otherwise invalid, the validity of the remainder of this act shall not be affected
45 thereby.

46 **SECTION 3.** This act is effective when it becomes law, and its provisions shall
47 apply to all existing franchise agreements. A supplier's shipment of malt beverages to a
48 wholesaler in North Carolina following the effective date of this act shall constitute acceptance
49 by the supplier of the terms of this act, which shall be considered incorporated into the
50 agreement between the supplier and wholesaler.