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Senate Bill 868 (Substitute S-3 as passed by the Senate)  
Sponsor: Senator Kevin Hertel  
Committee: Regulatory Affairs

Date Completed: 8-29-24

## **RATIONALE**

Generally, the Michigan Liquor Control Code requires a distiller, wine maker, brewer, or other alcohol supplier, including an out-of-state supplier, to provide to each of its wholesalers as part of an agreement a sales territory in which the wholesaler is the sole distributor of the manufacturers' specified brand or brands, including brand extensions. Reportedly, these provisions were enacted to protect investments that distributors made in their brands. Testimony before the Senate Committee on Regulatory Affairs indicates that many small, local alcohol suppliers struggle to compete with large suppliers, including those from out-of-state. As such, breweries, distilleries, and wineries have been forced to innovate, such as by investing in ready-to-drink (RTD) spirits and flavored malt beverages. As suppliers create and market these products, confusion has grown about what constitutes a brand extension. As a result, some distributors have put markings on products that potentially result in unfair business advantages, such as one distributor encroaching on another distributor's sales territory by selling similarly-branded products. Accordingly, it has been suggested that the definitions of branding and brand extensions be modified to prevent this practice.

## **CONTENT**

**The bill would amend the Michigan Liquor Control Code to modify the definitions of "brand" and "brand extension" for certain alcoholic beverages. Specifically, a brand would include various names of the supplier, and the bill would specify that new products using similar branding to an existing product would be considered a brand extension.**

Under the Code, "brand" means any word, name, group of letters, symbol, trademark, or combination thereof adopted and used by a supplier to identify a specific beer, malt beverage, wine, mixed wine drink, or mixed spirit drink product and to distinguish that product from another beer, malt beverage, wine, mixed wine drink, or mixed spirit product.

("Supplier" means a brewer, a micro brewer, an outstate seller of beer, a wine maker, a small wine maker, an outstate seller of wine, a manufacturer of a mixed wine drink, an outstate seller of a mixed wine drink, a mixed spirit manufacturer, and an outstate seller of a mixed spirit drink.)

Under the bill, "brand" would mean any group of words, letter, group of letters, symbol, group of symbols, or combination thereof adopted and used by a supplier to name, identify, or trademark a specific beer, malt beverage, wine, mixed wine drink, or mixed spirit drink product. The bill would specify that a supplier's legal name, assumed name, trade name, or any doing-business-as name would be considered a brand name, identifier, or trademark if it were used on the front of the container or packaging of the alcoholic beverage described above to market the product. The name would not be considered a brand name, identifier, or trademark if it were used on the back of the container solely for any of the following purposes:

- Identifying the supplier that had manufactured the alcoholic beverage described above.
- Identifying the supplier that had bottled the alcoholic beverage described above.
- Identifying the supplier that had imported the alcoholic beverage described above.

Additionally, if the alcoholic beverage included two or more brands of different suppliers, the supplier that registered the product with the Liquor Control Commission would have to appoint the wholesaler or wholesalers that had rights to that supplier's underlying brand.

Currently, "brand extension" means any brand that incorporates all or a substantial part of the unique features of a preexisting brand, regardless of whether the extension is beer, wine, mixed wine drink, or mixed spirit drink. Instead, under the bill, the term would mean any beer, wine, mixed wine drink, or mixed spirit drink, that is marketed in any manner, using the same name, identifier, or trademark, associated with a brand that has preceded it in being sold or offered for sale in the State or a derivative or portion of the name, identifier, or trademark regardless of any of the following:

- The addition of words or letters in a word.
- The addition of a name, identifier, or trademark.
- The addition of a symbol.
- Any differences in the packaging, formulation, or production of the alcoholic beverage described above or the shape, size, or type of container in which that alcoholic beverage was sold.
- Changes to the alcohol category used in the brand extension.
- The manufacturer, importer, or licensed outstate seller of the brand extension being different from the manufacturer, importer, or licensed outstate seller of the underlying brand the extension was based on.

The bill would preserve distribution rights in effect as of the bill's effective date; however, it would apply to a beer, wine, mixed wine drink, or mixed spirit drink that would be considered a brand extension after the bill's effective date that was based on a brand that was in existence *before* the bill's effective date.

"Alcohol category" would mean a beer category, wine category, a mixed wine drink category, or mixed spirit category.

MCL 436.1105

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

The bill would clarify the definition of brand and brand extension to alleviate confusion, disputes, and potential litigation. Testimony before the Senate Committee on Regulatory Affairs indicates that the Code's current definitions lack clarity and contain loopholes, which some suppliers may take advantage of. This lack of clarity has led to varied interpretations of the Code, as well as disputes and litigation. For example, in 2021 the company Great Lakes Wine and Spirits entered a distribution agreement with the supplier Jim Beam to serve as the sole distributor of certain products throughout Michigan, including the RTD mixed spirit drink Jim Beam Highball. In 2023, Jim Beam released a new line of RTD products, the Kentucky Coolers, and gave distribution rights to its partner Boston Beer. Great Lakes Wine and Spirits took Jim Beam to court, arguing in *Great Lakes Wine and Spirits LLC v. Jim Bream Brands Co et al.* (2024) that Jim Beam was a brand and that the Kentucky Coolers product constituted

a brand extension, based on 1) the use of the Jim Beam trade name, trademark, and other symbol, 2) their similar containers and labels, and 3) that both were RTDs<sup>1</sup>; however, Jim Beam refuted these arguments, alleging that the products in question constituted a new brand, the Kentucky Coolers brand. The bill would clarify the definitions of brand and brand extension to reduce confusion and litigation and to ensure that statute regarding brands and brand extensions was followed.

### **Opposing Argument**

The bill's definition of brand extension would apply too broadly, potentially hindering suppliers' abilities to innovate, compete, and make a profit. What constitutes a brand, and therefore a brand extension, varies between products and suppliers. Brand extensions should be evaluated on a case-by-case basis, as there is no one-size-fits-all solution. The broad definition included in the bill would unfairly penalize suppliers by limiting their distributors and market access points. Additionally, the bill could stifle the future creativity and innovation of suppliers and discourage out-of-state suppliers from entering Michigan markets.

The bill also would make it more difficult for alcohol suppliers to partner with new distributors. Testimony before the Senate Committee on Regulatory Affairs indicates that small alcohol suppliers may suffer in partnerships with large wholesalers, who may not invest in their brands. Suppliers may find it easier to create new products and partner with other distributors rather than leave certain distribution agreements; however, the bill's broad definition of brand extension would hinder these efforts. The bill could trap small suppliers in unprofitable distribution agreements. Overall, the bill would prioritize the interests of distributors at the expense of suppliers, impeding their ability to profit.

### **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

Analyst: Nathan Leaman

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<sup>1</sup> Complaint, p. 5, *Great Lakes Wine and Spirits, LLC v. Jim Beam Brands Co.*, No. 23-0393-CB (Cir. Ct. Ingham Cnty).

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.