

MICHIGAN LIQUOR CONTROL CODE OF 1998 (EXCERPT)
Act 58 of 1998

436.1403 Beer industry; purpose of section; reasons for regulation; definitions; prohibited conduct; termination, cancellation, nonrenewal, or discontinuance of agreement; burden; notice; test marketing; sales and distribution; additional agreement prohibited; transfer of wholesaler's business; compensation for diminished value of wholesaler's business; arbitration; costs; default; waiver; good faith dispute settlement; agreement binding on successor to supplier; agreements to which section applicable; civil action for actual damages; liability; action for declaratory judgment; exemplary damages; injunctive relief; procedure for resolving violations.

Sec. 403.

(1) The purpose of this section is to provide a structure for the business relations between a wholesaler of beer and a supplier of beer. Regulation in this area is considered necessary for the following reasons:

- (a) To maintain stability and healthy competition in the beer industry in this state.
 - (b) To promote and maintain a sound, stable, and viable 3-tier system of distribution of beer to the public.
 - (c) To promote the public health, safety, and welfare.
- (2) As used in this section, unless the context requires otherwise:

(a) "Agreement" means any agreement between a wholesaler and a supplier, whether oral or written, whereby a wholesaler is granted the right to offer and sell a brand or brands of beer sold by a supplier.

(b) "Ancillary business" means a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler the primary purpose of which is directly related to the transporting, storing, or marketing of the brand or brands of beer of a supplier with whom the wholesaler has an agreement; or a business owned by a wholesaler, a stockholder of a wholesaler, or a partner of a wholesaler which recycles empty returnable beverage containers.

(c) "Designated member" means the spouse, child, grandchild, parent, brother, or sister of a deceased individual who owned an interest in a wholesaler, who is entitled to inherit the deceased individual's ownership interest in the wholesaler under the terms of the deceased individual's will, or who has otherwise been designated in writing by the deceased individual to succeed the deceased individual in the wholesaler's business, or is entitled to inherit such ownership interest under the laws of intestate succession of this state. With respect to an incapacitated individual owning an ownership interest in a wholesaler, the term means the person appointed by a court as the conservator of such individual's property. The term also includes the appointed and qualified personal representative and the testamentary trustee of a deceased individual owning an ownership interest in a wholesaler.

(d) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade, as defined and interpreted under section 2103 of the uniform commercial code, 1962 PA 174, MCL 440.2103.

(e) "Master distributor" means a wholesaler who acts in the same or similar capacity as a brewer or outstate seller of beer for a brand or brands of beer to other wholesalers on a regular basis in the normal course of business.

(f) "Reasonable qualifications" means the average standard of the criteria used by the respective supplier for wholesalers that entered into or renewed an agreement with the supplier during a period of 24 months prior to the proposed transfer of the wholesaler's business.

(g) "Retaliatory action" means action which includes, but is not limited to, the refusal to continue an agreement, or a material reduction in the quality of service or quantity of products available to a wholesaler under an agreement, which refusal or reduction is not made in good faith.

(h) "Sales territory" means an area of exclusive sales responsibility for the brand or brands of beer sold by a supplier as designated by an agreement.

(i) "Successor" means a supplier who obtains, in any manner from any person, including a person who is not a supplier, the distribution rights of 1 or more brands of beer which a licensed Michigan wholesaler has distributed in this state pursuant to an agreement with another supplier who previously had the distribution rights for the brand or brands.

(j) "Supplier" means a brewer, an outstate seller of beer, or a master distributor.

(k) "Transfer of a wholesaler's business" means the voluntary sale, assignment, or other transfer of the business or control of the business of the wholesaler, including the sale or other transfer of stock or assets by merger, consolidation, or dissolution.

(3) A supplier shall not do any of the following:

(a) Coerce, or attempt to coerce, any wholesaler to accept delivery of any beer or other commodity which has not been ordered by the wholesaler. However, a supplier may impose reasonable inventory requirements upon a wholesaler if the requirements are made in good faith and are generally applied to other wholesalers having an agreement with the supplier.

(b) Coerce, or attempt to coerce, any wholesaler to accept delivery of any beer or other commodity ordered by a

wholesaler if the order was properly canceled by the wholesaler in accordance with the procedures agreed upon by the supplier and wholesaler.

(c) Coerce, or attempt to coerce, any wholesaler to do any illegal act by threatening to amend, cancel, terminate, or refuse to renew any agreement existing between the supplier and wholesaler.

(d) Require a wholesaler to assent to any condition, stipulation, or provision limiting the wholesaler's right to sell the brand or brands of beer of any other supplier anywhere in this state unless the acquisition of the brand or brands of another supplier would materially impair the quality of service of the brand or brands of the supplier presently being sold by the wholesaler.

(e) Require a wholesaler to purchase 1 or more brands of beer in order for the wholesaler to purchase another brand or brands of beer for any reason. However, a wholesaler that has agreed to distribute a brand or brands before June 26, 1984 shall continue to distribute the brand or brands in conformance with this section.

(f) Request a wholesaler to submit profit and loss statements, balance sheets, or financial records as a requirement for renewing or retaining an agreement.

(g) Withhold delivery of beer ordered by a wholesaler, or change a wholesaler's quota of a brand or brands if the withholding or change is not made in good faith.

(h) Require a wholesaler by any means to participate in or contribute to any local or national advertising fund controlled directly or indirectly by a supplier.

(i) Fail to provide each wholesaler of the supplier's brand or brands with a written agreement which contains, in total, the supplier's agreement with each wholesaler and which designates a specific sales territory. Any agreement which is in existence on June 26, 1984 shall be renewed consistent with this section, except that this section may be incorporated by reference in the agreement.

(j) Fix, maintain, or establish the price at which a wholesaler shall sell any beer.

(k) Take any retaliatory action against a wholesaler that files a complaint regarding an alleged violation by the supplier of state or federal law or an administrative rule.

(l) Require or prohibit any change in the manager or successor manager of any wholesaler who has been approved by the supplier as of June 26, 1984. Should a wholesaler change an approved manager or successor manager, a supplier shall not require or prohibit the change unless the person fails to meet the reasonable written standards for Michigan wholesalers of the supplier which standards have been provided to the wholesaler.

(m) Require by a provision of any agreement or other instrument in connection with the agreement that any dispute arising out of or in connection with that agreement be determined through the application of any other state's laws, be determined in federal court sitting in a state other than Michigan, or be determined in a state court of a state other than the state of Michigan. A provision contained in any agreement or other instrument in connection with the agreement which contravenes this subdivision shall be null and void.

(4) A wholesaler shall not sell or deliver beer to a retail licensee located outside the sales territory designated by the supplier of a particular brand or brands of beer. However, during periods of temporary service interruptions impacting a particular sales territory, a wholesaler who normally services the impacted sales territory shall file with the commission a written notice designating the specific wholesaler or wholesalers who will service the sales territory during the period of temporary service interruption and the approximate length of time of the service interruption. When the temporary service interruption is over, the wholesaler who normally services the sales territory shall notify in writing the commission and the wholesaler, or wholesalers, which is servicing the sales territory on a temporary basis of this fact and any wholesaler servicing the sales territory on a temporary basis shall cease servicing the sales territory upon receipt of the notice.

A wholesaler who is designated to service the impacted sales territory during the period of temporary service shall not be in violation of this subsection.

A wholesaler who has been designated to service the impacted sales territory during the period of temporary service interruption shall not have any of the rights provided under subsections (6) to (12).

(5) A supplier or wholesaler shall not restrict or inhibit, directly or indirectly, the right of free association among suppliers or wholesalers for any lawful purpose.

(6) Notwithstanding the terms, provisions, or conditions of any agreement, a supplier shall not amend any agreement unless the supplier is acting in good faith in making the amendment.

(7) Notwithstanding any agreement and except as otherwise provided for in this section, a supplier shall not cause a wholesaler to resign from an agreement; or cancel, terminate, fail to renew, or refuse to continue under an agreement unless the supplier has complied with all of the following:

(a) Has satisfied the applicable notice requirements of subsection (10).

(b) Has acted in good faith.

(c) Has good cause for the cancellation, termination, nonrenewal, discontinuance, or forced resignation.

(8) Notwithstanding any agreement, good cause shall exist for the purposes of a termination, cancellation, nonrenewal, or discontinuance under subsection (7)(c) when all of the following occur:

(a) There is a failure by the wholesaler to comply with a provision of the agreement which is both reasonable and of material significance to the business relationship between the wholesaler and the supplier.

(b) The supplier first acquired knowledge of the failure described in subdivision (a) not more than 2 years before

the date notification was given pursuant to subsection (7).

(c) The wholesaler was given written notice by the supplier of failure to comply with the agreement.

(d) The wholesaler was afforded a reasonable opportunity to assert good faith efforts to comply with the agreement within the time limits as provided for in subdivision (e).

(e) The wholesaler has been afforded 30 days in which to submit a plan of corrective action to comply with the agreement and an additional 90 days to cure such noncompliance in accordance with the plan.

(9) For each termination, cancellation, nonrenewal, or discontinuance, the supplier shall have the burden of showing that it has acted in good faith, that the notice requirements under this section have been complied with, and that there was good cause for the termination, cancellation, nonrenewal, or discontinuance.

(10) Notwithstanding any agreement and except as otherwise provided in this section, the supplier shall furnish written notice of the termination, cancellation, nonrenewal, or discontinuance of an agreement to the wholesaler not less than 15 days before the effective date of the termination, cancellation, nonrenewal, or discontinuance. The notice shall be by certified mail and shall contain all of the following:

(a) A statement of intention to terminate, cancel, not renew, or discontinue the agreement.

(b) A statement of the reason for the termination, cancellation, nonrenewal, or discontinuance.

(c) The date on which the termination, cancellation, nonrenewal, or discontinuance takes effect.

(11) Notwithstanding subsections (7) and (10), a supplier may terminate, cancel, fail to renew, or discontinue an agreement upon written notice given in the manner and containing the information required by subsection (10) if any of the following occur:

(a) Insolvency of the wholesaler, the filing of any petition by or against the wholesaler under any bankruptcy or receivership law, or the dissolution or liquidation of the wholesaler which materially affects the wholesaler's ability to remain in business.

(b) Revocation of the wholesaler's license by the commission whereby the wholesaler cannot service the wholesaler's sales territory for more than 60 days.

(c) The wholesaler, or an individual who owns more than 10% of the stock of a corporate wholesaler, has been convicted of a felony. As used in this subdivision, "felony" means a felony under the United States Code or the Michigan Compiled Laws. However, an existing approved stockholder or stockholders shall have the right to purchase the stock of the offending stockholder prior to the conviction of the offending stockholder and, if the sale is completed prior to conviction, the provisions of this subdivision shall not apply.

(12) Notwithstanding subsections (7), (10), and (11), upon not less than 15 days' prior written notice given in the manner and containing the information required by subsection (10), a supplier may terminate, cancel, fail to renew, or discontinue an agreement if any of the following events occur:

(a) There was fraudulent conduct on the part of the wholesaler in dealings with the supplier.

(b) The wholesaler failed to confine its sales of a brand or brands to the assigned sales territory. This subdivision does not apply if there is a dispute between 2 or more wholesalers as to the boundaries of the assigned territory, and the boundaries cannot be determined by a reading of the description contained in the agreements between the supplier and the wholesalers.

(c) The sale by the wholesaler of any brand or brands sold by the supplier to the wholesaler and known by the wholesaler to be ineligible for sale prior to the actual sale to the retailer. The supplier shall repurchase the ineligible product from the wholesaler when the ineligibility is caused by the supplier. The supplier must give the wholesaler written notice specifying the ineligible product. This subdivision does not apply when a supplier ships a brand or brands to a wholesaler that must be removed within 60 days of the deadline for retail sale of the product. This 60-day period shall commence upon receipt of the product by the wholesaler.

(13) Notwithstanding subsections (7), (10), (11), and (12), a supplier may terminate, cancel, not renew, or discontinue an agreement upon not less than 30 days' prior written notice if the supplier discontinues production or discontinues distribution in this state of all the brands sold by the supplier to the wholesaler. Nothing in this section shall prohibit a supplier upon not less than 30 days' notice to discontinue the distribution of any particular brand or package of beer. This subsection does not prohibit a supplier from conducting test marketing of a new brand of beer or from conducting the test marketing of a brand of beer which is not currently being sold in this state provided that the supplier has notified the commission in writing of its plans to test market. The notice shall describe the market area in which the test shall be conducted; the name or names of the wholesaler or wholesalers who will be selling the beer; the name or names of the brand of beer being tested; and the period of time during which the testing will take place. A market testing period shall not exceed 18 months.

(14) The wholesaler shall devote reasonable efforts and resources to sales and distribution of all the supplier's products which the wholesaler has been granted the right to sell and distribute and shall maintain reasonable sales levels.

(15) A brewer, an outstate seller of beer, or a master distributor that has designated a sales territory for a wholesaler shall not enter into an additional agreement with any other wholesaler for the same brand or brands of beer in the same territory or any portion of that territory.

(16) A supplier shall not withhold consent to any transfer of a wholesaler's business if the proposed transferee meets the material and reasonable qualifications and standards required by the supplier. A wholesaler shall give the

supplier written notice of intent to transfer the wholesaler's business. A supplier shall not unreasonably delay a response to a request for a proposed transfer of a wholesaler's business. However, a transfer of a wholesaler's business which is not approved by the supplier shall be null and void. A supplier shall not interfere with, or prevent, the transfer of the wholesaler's business if the proposed transferee is a designated member.

(17) A supplier that has amended, canceled, terminated, or refused to renew any agreement; has caused a wholesaler to resign from an agreement; or has withheld consent to any assignment or transfer of a wholesaler's business, except as provided for in this section, shall pay the wholesaler reasonable compensation for the diminished value of the wholesaler's business or of any ancillary business which has been negatively affected by the act of the supplier, or both. The value of the wholesaler's business or ancillary business shall include, but not be limited to, its good will.

(18) Either party may, at any time, determine that mutual agreement on the amount of reasonable compensation cannot be reached. Should such a determination be made, the supplier or the wholesaler shall send written notice to the other party declaring their intention to proceed with arbitration. Arbitration shall proceed only by mutual agreement of both parties.

(19) The matter of determining the amount of compensation under arbitration may, by agreement of the parties, be submitted to a 5-member arbitration panel consisting of 2 representatives selected by the supplier but unassociated with the affected supplier, 2 wholesaler representatives selected by the wholesaler but unassociated with the wholesaler, and an impartial arbitrator.

(20) Not more than 10 days after the notice to enter into arbitration has been sent, each party shall request, in writing, a list of 5 arbitrators from the American arbitration association. Not more than 10 days after the receipt of the list of 5 choices, the wholesaler arbitrators and the supplier arbitrators may strike and disqualify up to 2 names each from the list. Should either party fail to respond within the 10 days or should more than 1 name remain, the American arbitration association shall make the selection of the impartial arbitrator.

(21) Not more than 30 days after the list of arbitrators is received, the wholesaler and supplier shall exchange in writing the names of their respective arbitration panel representatives.

(22) Not more than 30 days after the final selection of the arbitration panel is made, the arbitration panel shall convene to decide the dispute. The panel shall render a decision by majority vote of the participants within 20 days from the conclusion of the arbitration.

(23) The cost of the impartial arbitrator, the stenographer, and the meeting site shall be equally divided between the wholesaler and the supplier. All other costs shall be paid by the party incurring them. The award of the arbitration panel shall be final and binding on the parties.

(24) After both parties have agreed to arbitrate should either party fail to abide by the time limitations as prescribed in subsections (20), (21), and (22), or fail or refuse to make the selection of any arbitrators, or fail to participate in the arbitration hearings, the other party shall make the selection of their arbitrators and proceed to arbitration. The party who has failed or refused to comply as prescribed in this subsection shall be considered to be in default. Any party considered to be in default pursuant to this subsection shall have waived any and all rights the party would have had in the arbitration and shall be considered to have consented to the determination of the arbitration panel.

(25) A wholesaler shall not waive any of the rights granted in any provision of this section. Nothing in this section shall be construed to limit or prohibit good faith dispute settlements voluntarily entered into by the parties.

(26) A successor to a supplier that continues in business as a brewer, an outstate seller of beer, or a master distributor shall be bound by all terms and conditions of each agreement of the supplier with a wholesaler licensed in this state that were in effect on the date on which the successor received the distribution rights of the previous supplier.

(27) This section shall apply to agreements in existence on June 26, 1984, as well as agreements entered into or renewed after that date.

(28) If a supplier engages in conduct prohibited under this section, a wholesaler with which the supplier has an agreement may maintain a civil action against the supplier to recover actual damages reasonably incurred as the result of the prohibited conduct. If a wholesaler engages in conduct prohibited under this section, a supplier with which the wholesaler has an agreement may maintain a civil action against the wholesaler to recover actual damages reasonably incurred as the result of the prohibited conduct.

(29) A supplier that violates any provision of this section is liable for all actual damages and all court costs and reasonable attorney fees incurred by a wholesaler as a result of that violation. A wholesaler that violates any provision of this section is liable for all actual damages and all court costs and reasonable attorney fees incurred by the supplier as a result of that violation.

(30) A supplier or wholesaler may bring an action for declaratory judgment for determination of any controversy arising pursuant to this section.

(31) Except as otherwise provided in this section, if a court finds that a supplier has not acted in good faith in effecting an amendment, termination, cancellation, or nonrenewal of any agreement; or has unreasonably withheld its consent to any assignment, transfer, or sale of a wholesaler's business, it may award exemplary damages, as well as actual damages, court costs, and reasonable attorney fees to the wholesaler who has been damaged by the action

of the supplier.

(32) Upon proper application to the court, a supplier or wholesaler may obtain injunctive relief against any violation of this section. If the court grants injunctive relief or issues a temporary restraining order, bond shall not be required to be posted.

(33) The procedure for resolving any violation of subsection (3)(a), (b), (c), (e), (f), (h), (i), (j), (k), (l), or (4) shall be the procedure prescribed by this act and the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Any other violation of or dispute regarding this section, unless the dispute is resolved pursuant to subsections (18) to (24), shall only be resolved by a civil action in court as provided in this section and not by the commission.

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