More on the Corporations Challenging TABC's Unchecked Power

June 28, 2016

If you've ever done business in Texas, you know the Texas Alcoholic Beverage Commission (TABC) has long operated with little involvement from the government. But change is afoot in the Lone Star State as three major corporations--Mexican c-store chain OXXO, McLane Company and Wal-mart--are taking the agency to task for protectionist behavior in enforcing its tied-house laws.

Yesterday, we broke the news that the Texas Association of Businesses (TAB) and McLane Company have filed a federal lawsuit against the TABC for "arbitrarily" enforcing the state's "One Share Rule." We will get into the details of that suit, but to understand the much bigger picture of the allegations against TABC, we need to take a look at a couple of other related cases first.

TABC BLOCKS MEXICAN C-STORE CHAIN FROM SELLING ALCOHOL. This tied-house dispute began with Mexican c-store operator OXXO wanting to sell beer in its Texas stores. The TABC denied its application for a permit in 2011 because its parent company, FEMSA, had a 20% stake in Heineken, thus violating the TABC's One Share Rule. In December 2012, Travis County Judge Samuel Biscoe reviewed the case made against Cadena Commercial USA (d.b.a OXXO) and determined the TABC was correct in denying the permit.

In September 2014, the company attempted to appeal the Judge's decision. Unfortunately for OXXO, the Texas Court of Appeals affirmed the lower court's decision [see BBD 09-10-2014]. That wasn't the end of it though. OXXO then asked the Texas Supreme Court to review its case in December 2014, which it agreed to do just last month.

[Note, TAB and McLane have filed two letters, one in January and one in June 2015, in support of OXXO's appeal.]

HOW MCLANE GOT INVOLVED. McLane is a Texas-based subsidiary of Berkshire Hathaway that provides grocery and foodservice solutions to many of the nation's largest c-stores, mass merchants and chain restaurants. In 2011, the distributor decided it wanted to try its hand at distributing alcohol as well. But the TABC denied it a permit because parent company Berkshire Hathaway owns "less than 5%" interest in a retailer that sells alcohol, which violates the One Share Rule.

The decision really lit a fire under McLane, which began investigating the One Share Rule and other licensing practices "in order to better understand its rationale... and to assist in determining whether [they] should re-apply," Neftali Garcia, McLane Co.'s vp of government affairs and corporate comms, told WSD last month [see WSD 05-24-2016].

During its research process, McLane sent the TABC Public Information Act (PIA) requests, which are now central to ongoing lawsuits between the two entities. Basically, McLane tried to get its hands on any and all information it could relating to tied-house laws, the One Share Rule, how those laws are implemented, recent violations etc., but it says the TABC was unhelpful.

As a result, McLane filed two separate lawsuits against the TABC in January and April 2016 after the agency failed to comply with the majority of its PIA requests. For each suit, McLane is seeking a writ of mandamus (to order TABC to fulfill its requests); a jury trial for all issues triable; and monetary relief of $100,000 or less, plus the requested documents.

TAB FILES SUIT OVER ONE SHARE RULE. On June 10, McLane says it requested to meet with TABC chairman Jose Cuevas, Jr., but on June 21 the chairman declined to meet him. As result, TAB (which McLane is a member of) said it had "no choice" but to ask the Court to declare the One Share Rule and its licensing practices unconstitutional under the Equal Protection Clause, the Due Process Clause, and the Dormant Commerce Clause of the United States Constitution. The organization's ceo Bill Hammond tells WSD this is a rare scenario for TAB.

In its complaint filed yesterday to the US District Court for Western Texas, TAB claims if the TABC followed the letter of the law exactly, it would endanger "virtually every TABC licensee." If you want to get technical, companies in violation would include any licensees whose shares are publicly owned by a mutual fund or pension fund, and licensees that are not publicly traded, but provide pension funds for their own employees, are also likely in violation.

In fact, all TABC employees themselves are in violation of the rule through their retirement investments. "The TABC cannot seriously maintain and defend a legal theory that is violated by every single employee and officer of its own agency," writes TAB.

But those are drastically different ownership scenarios compared to McLane's. Two similarly situated scenarios include Vanguard Group Inc., which owns 7.2% of Core-Mark (wholesaler), 8.4% of Bed Bath & Beyond (retailer), and 9.3% of Molson Coors (manufacturer); and JP Morgan Chase, which owns 0.9% of Core-Mark (wholesaler), 5% of Bed Bath & Beyond (retailer), and 8.8% of Molson Coors (manufacturer). Interestingly, Vanguard owns more share of Wal-mart than McLane does, which McLane has pointed out to the TABC to no avail.

AN UNEQUAL STANDARD. But the real problem according to TAB is not the law, but that TABC does not apply its One Share Rule "equally" amongst industry participants, per the complaint. You will recall, TABC will not approve McLane's application for an alcohol wholesaler permit because Berkshire Hathaway Inc. owns stock in major retailers despite the exemptions provided to the aforementioned companies.

TAB claims the TABC has attempted to defend its selective application of the One Share Rule by invoking the principle of prosecutorial discretion. "But this is not a case of prosecutorial discretion," writes TAB, "It is a case of licensing. And selective licensing is fundamentally different from selective prosecution or enforcement."

TAB continues: "The TABC is engaged in a blatant policy of selective licensing, favoring incumbents that demonstrably violate the One Share Rule, while rejecting new entrants under that same rule. The TABC has offered no rationale to support its selective licensing practice, and none is apparent, other than naked economic protectionism."

IN STATE VS. OUT OF STATE ARGUMENT. There is also Wal-mart's case against the TABC to consider. Recall, Wal-mart sued the agency in 2015 for denying it a package store permit. The reason for the denial was because Wal-mart is a publicly owned company, but the retailer has argued in court that the state makes an arbitrary exception for publicly traded hotels [see WSD 01-22-2016]. That case is still ongoing as well.

Wal-mart's case is worth mentioning because it calls attention to a bigger issue that all three of these cases are fighting against: the Texas Alcoholic Beverage Commission's alleged discrimination against out-of-state corporations. (Yes, McLane is based in Texas, but the TABC's sticking point is with its parent company Nebraska-based Berkshire Hathaway.) These cases will likely be coming to a head soon as the Courts sort through them. And let's not count out the possibility that the state legislature could weigh in on the matter when its next session begins in six months.