

Plethora of Latent Tied-House Violations are Coming to a Head in Texas

June 29, 2016

Dear Client:

The Texas Alcoholic Beverage Commission (TABC) enforces a “One Share Rule,” which means a single overlapping share of stock ownership between tiers, whether direct or indirect, is in violation of the state’s tied-house laws.

Our WSD team brought this law and the story that follows to light last month with their coverage on Warren Buffett’s food distribution business, McLane Company, and its determination to distribute alcohol in Texas. McLane tried to secure an alcohol distribution permit from the TABC back in 2012, but was subsequently denied for its violation of the One Share Rule. The TABC rejected the permit because McLane’s parent company, Berkshire Hathaway, owns a small (less than 5%) interest in a retailer: Wal-Mart.

McLane smelled something fishy and it’s been investigating the rule and TABC licensing practices ever since. McLane’s conclusion: there are plenty of companies in violation, but the agency only enforces it when they choose to.

On Monday, the Texas Association of Business (TAB) and McLane (a member of the TAB) filed suit against the TABC in federal court in attempt to eliminate the One Share Rule and create a “level playing field” amongst Texas businesses.

TABC FACES SUITS FROM TRIO OF MAJOR CORPORATIONS. McLane isn’t the first company looking to remove the law, they join two other major corporations - Mexican c-store operator OXXO and Wal-Mart - also challenging the rule and TABC’s arbitrary enforcement.

OXXO STARTED THE SHOWDOWN. In 2011, the TABC denied OXXO’s request to sell beer in its Texas c-stores because its parent company, FEMSA, had a 20% stake in Heineken. OXXO fought the decision in various courts for three years, but to no avail. In 2014, the company asked the Texas Supreme Court to review its case, it agreed to do so last month.

MORE ON MCLANE’S RUN-IN; TAB STEPS IN. Following McLane’s denial in 2012, the company sent the TABC a series of Public Information Act requests hoping to better understand its rationale, but the TABC failed to aid them in that endeavor, alleges McLane. As a result, McLane filed two separate lawsuits against the TABC in January and April 2016. After TABC chairman Jose Cuevas declined to meet up with McLane this month, the TAB said it had “no choice” but to ask the Court to declare the One Share Rule and its licensing practices unconstitutional.

“VIRTUALLY EVERY LICENSEE” IS AT RISK; THE TABC ITSELF IS IN VIOLATION. If the TABC really wanted to play by their own rules, “virtually every TABC licensee” would be at risk, per TAB and McLane complaint filed yesterday. 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.

The TAB and McLane label the One Share Rule as an “absurd extreme,” but what’s worse is the TABC does not apply the rule “equally” amongst industry participants, per complaint. According to the TAB, roughly 40 manufacturers, distributors and retailers with overlapping ownership had more than 2,500 permits approved or renewed by the TABC.

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.”

FINAL THOUGHT: TABC FAVORING IN-STATE COMPANIES? Last, is Wal-Mart’s case with the TABC. The agency denied the retailer’s attempt to secure a package store permit because it’s a publicly owned company. Wal-Mart sued the agency last year over the denial, contending that the state makes an arbitrary exception for publicly traded hotels. That case is still playing out. The common thread in all three cases? The Texas Alcoholic Beverage Commission’s alleged discrimination against out-of-state corporations. McLane may be Texas-based, but the TABC’s gripe is with its parent company Nebraska-based Berkshire Hathaway.