

CHAPTER 243

AN ACT concerning alcoholic beverages and supplementing Title 33 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

C.33:1-93.12 Short title.

1. Sections 1 through 9 of this act shall be known and may be cited as the "Malt Alcoholic Beverage Practices Act."

C.33:1-93.13 Findings, declarations relative to malt alcoholic beverages.

2. The Legislature finds and declares that:

a. The distribution and sale of malt alcoholic beverages in this State vitally affects the general economy and revenues of the State, as well as the public interest and public welfare.

b. It is appropriate to recognize the guiding characteristics regarding the distribution of malt alcoholic beverages to foster responsible industry practices involving the moderate and responsible use of these beverages, to provide a framework for the malt alcohol beverage industry that recognizes and encourages the beneficial aspects of competition, to provide trade stability, to maintain the three-tier distribution system, to protect the interests of the consumer regarding product quality and freshness and to achieve all facets of the legislatively declared public policy of this State as set forth in section 4 of P.L.1985, c.258 (C.33:1-3.1).

c. It is therefore fitting and proper to regulate the business relationship between brewers and wholesalers of malt alcoholic beverages and set forth their respective responsibilities to further the public policy of this State and protect beer wholesalers from unreasonable demands and requirements by brewers, while devoting sufficient efforts and resources to the distribution and sale of malt alcoholic beverages.

d. The Legislature also finds and declares that nothing in sections 1 through 9 of this act shall be construed in any manner whatsoever to apply to wholesalers of wines and spirits and that sections 1 through 9 of the act shall be strictly limited to the responsibilities of brewers and wholesalers. But section 10 of this act shall apply to wholesalers of beer, wine and spirits alike.

C.33:1-93.14 Definitions relative to malt alcoholic beverages.

3. As used in sections 1 through 9 of this act:

"Base product" is a malt alcoholic beverage product distributed by a wholesaler.

"Brand extension" means any malt alcoholic beverage product offered for sale in the State, other than on a test market basis in a defined market area, that uses as part of its brand name, logo, packaging or trade dress, including but not limited to, the name of the brewer if the brewer's name is a part of the product name, or that is sold or marketed to the beer trade or to the consumer substantially in association with, a brand name, logo, packaging or trade dress, including, but not limited to, the name of the brewer if the brewer's name is a part of the product name, of a malt alcoholic beverage product then distributed by a wholesaler.

"Brewer" means any person, whether located within or outside the State who:

a. brews, manufactures, imports, markets or supplies malt alcoholic beverages and sells malt alcoholic beverages to a plenary wholesale licensee or a limited wholesale licensee for the purpose of resale;

b. is an agent or broker of such a person who solicits orders for or arranges sales of such person's malt alcoholic beverages to a plenary wholesale licensee or a limited wholesale licensee for the purpose of resale; or

c. is a successor brewer.

"Fair market value" of an asset means the price at which the asset would change hands between a willing seller and a willing buyer when neither is acting under compulsion and when both have knowledge of the relevant facts.

"Good cause" means and is limited to a failure to substantially comply with reasonable terms contained in a contract or agreement between a brewer and wholesaler that contains the same terms as the brewer's contract with similarly situated United States, not including United States territories or possessions, distributors.

"Person" means a natural person, corporation, partnership, trust, or other entity and, in case of an entity, it shall include any other entity, except a natural person, which has a majority interest in such entity or effectively controls such entity.

"Sale or transfer" means any disposition of a contract, agreement or relationship between a brewer and a wholesaler or of any rights to acquire and distribute products of a brewer, or any interest therein, with or without consideration, including, but not limited to, bequest, inheritance, gift, exchange, lease or license.

"Successor brewer" means any person, not under common control with the predecessor brewer, who by any means, including, without limitation, by way of purchase, assignment, transfer, lease, license, appointment, contract, agreement, joint venture, merger, or other disposition of all or part of the business, assets, including trademarks, brands, distribution rights and other intangible assets, or ownership interests of a brewer, acquires the business or malt alcoholic beverage brands of another brewer, or otherwise succeeds to a brewer's interest with respect to any malt alcoholic beverage brands.

"Wholesaler" means a plenary wholesale licensee or a limited wholesale licensee who purchases malt alcoholic beverages from a brewer for the purpose of resale to Class C licensees or State Beverage Distributor Licensees.

C.33:1-93.15 Contract, agreement between brewer and wholesaler.

4. a. Every brewer shall contract and agree in writing with a wholesaler for all supply, distribution and sale of the products of the brewer in this State, and each contract shall provide and specify the rights and duties of the brewer and the wholesaler with regard to such supply, distribution and sale. The terms and provisions of such contracts shall be reasonable, reflect the parties' mutuality of purpose and community of interest in the responsible sale and marketing of their products, and shall comply with and conform to State law and the terms of this act. The provisions of this act may not be waived or modified by written or oral agreement, estoppel or otherwise, and any provision of a contract or ancillary agreement that directly or indirectly requires or amounts to a waiver of any provision of this act, or that would relieve any person of any obligation or liability under this act, or that imposes unreasonable standards of performance on a wholesaler, shall be a violation of this act and shall be null, void and of no effect.

b. This act shall apply to all contracts, agreements and relationships among any brewers and wholesalers, including contracts, agreements or relationships entered into, renewed, extended or modified after the effective date of this act. Contracts, agreements and relationships existing prior to the effective date of this act that are continuing in nature, have an indefinite term or have no specific duration shall be deemed for purposes of this act to have been renewed 60 days after the effective date of this act.

c. The terms or provisions of a contract or agreement between a brewer and wholesaler shall not permit a brewer, and it shall be a violation of this act for a brewer:

(1) to terminate, cancel or refuse to renew a contract, agreement or relationship with a wholesaler, or to fail or refuse to grant to a wholesaler the right to purchase and resell any brand extension under the same form of agreement as the base product, in part or in whole, except where the brewer establishes that it has acted for good cause and in good faith;

(2) to terminate, cancel or refuse to renew a contract, agreement or relationship with a wholesaler, in part or in whole, because the wholesaler refuses or fails to accept an unreasonable amendment to the contract, agreement or relationship;

(3) to terminate, cancel or refuse to renew a contract, agreement or relationship with a wholesaler, in part or in whole, without first giving the wholesaler written notice setting forth all of the alleged deficiencies on the part of the wholesaler and giving the wholesaler a reasonable opportunity of not more than 120 days to cure the alleged deficiencies; provided, however, that such period for cure may be increased or reduced to a commercially reasonable period by an order of a court in this State in a proceeding in which each party shall bear its own costs and expenses;

(4) to require the brewer's consent to the acquisition, sale or transfer of distribution rights for products other than those of the brewer or of assets unrelated to the distribution of the brewer's products;

(5) to unreasonably withhold consent to a proposed sale or transfer of any ownership interests in the wholesaler to the spouse, children or heirs of existing holders of such ownership interests or to employees of the wholesaler, or to trusts for the benefit of such persons, except

upon a statement of reasonable grounds, provided such transfer does not result in a sale or transfer of effective control, including but not limited to a change in the persons holding the majority voting power, of the wholesaler; or to take more than 30 days to approve or disapprove the proposed sale or transfer after the brewer has received written notice of the proposal from the wholesaler and received all reasonably requested information from the wholesaler to enable the brewer to pass upon the proposed sale or transfer.

(6) to unreasonably withhold consent to a proposed sale or transfer, in part or in whole, of any ownership interests in the wholesaler or the distribution rights for the brewer's products, assets of the wholesaler related to the distribution of the brewer's products, or of ownership interests in the wholesaler to other parties, except upon a statement of reasonable grounds that are based upon reasonable, previously announced, in an agreement with its wholesalers or otherwise, standards of the brewer, relating to the qualifications of such transferee relating to the character, financial ability or business experience of the proposed transferee, or relating to the resulting market combinations or territory to be serviced by the transferee; or to take more than 30 days to approve or disapprove the proposed sale or transfer after the brewer has received written notice of the proposal from the wholesaler and received all reasonably requested information from the wholesaler to enable the brewer to pass upon the proposed sale or transfer, provided that such period may be extended by agreement of the parties; provided, however, that at any time within such 30-day period prior to the date on which the brewer approves or disapproves such a proposed sale or transfer, the brewer shall have the right and option to purchase, and in the event of a brewer's disapproval relating to the resulting market combinations or territory to be serviced by the transferee, the wholesaler shall have the right and option to require the brewer to purchase at the price and on the terms and conditions set forth in the agreement between the wholesaler and the proposed transferee, all of the distribution rights, assets or ownership interest that are the subject of the proposed sale or transfer, at the price and on the terms and conditions set forth in the agreement between the wholesaler and the proposed transferee, subject to the following:

(a) if the proposed transferee is the spouse, children or heirs of existing holders of ownership interests in the wholesaler, then the brewer shall not have the right and option to purchase such ownership interest;

(b) if the proposed transferee is an existing holder of ownership interests in the wholesaler, or is the manager or the successor manager of the wholesaler, then if the brewer exercises its option to purchase under this section, the wholesaler may, instead of selling or transferring to the brewer, rescind the proposed sale or transfer by notice to the brewer; and

(c) the brewer shall complete such purchase within 60 days of its exercise of its right to do so.

(7) to allow more than one wholesaler to sell any of the brewer's product lines or brands within the same territory or area at the same time. This paragraph shall not apply to contracts or agreements entered into prior to the effective date of this act, or future renewals of such contracts or agreements, to the extent that, as permitted under the existing contract or agreement and the future renewals allow, as of the effective date of this act, different wholesalers to sell certain but not all of the brewer's brands or brand extensions within the same territory or area at the same time;

(8) to unreasonably fail to consent to the wholesaler's designation of an individual as the wholesaler's manager or successor-manager in accordance with previously announced non-discriminatory and reasonable qualifications and standards;

(9) to withdraw approval of an individual as the wholesaler's manager or successor-manager unless in good faith and with just cause based upon deficiencies in the performance of the manager or successor-manager, which in the case of the manager shall be material deficiencies;

(10) to prohibit, directly or indirectly, the right of free association among wholesalers for any lawful purpose; or

(11) to fail to act, during the term of the contract, agreement or relationship between them in a manner consistent with the covenant of good faith and fair dealing implicit in State contract law.

A wholesaler also shall act in a manner consistent with the covenant of good faith and fair dealing implied in State contract law.

d. It shall not be a violation of this act for a successor brewer to:

(1) terminate, in whole or in part, its contract, agreement or relationship with a wholesaler, or the contract, agreement or relationship with a wholesaler of the brewer it succeeded, for the purpose of transferring the distribution rights in the wholesaler's territory for the malt alcoholic beverage brands to which the successor brewer succeeded, to a wholesaler or wholesalers that then distributes other products of the successor brewer in such territory, provided that the successor brewer or the second wholesaler or wholesalers first pays to the first wholesaler the fair market value of the first wholesaler's business with respect to the terminated brand or brands; provided, however, that such termination shall not be permitted, and may be enjoined, where it may cause irreparable injury to the first wholesaler and the standards for injunctive relief are otherwise met; and provided further that a rebuttable presumption of such irreparable injury shall be inferred when the terminated brand or brands represent 20% or more of the first wholesaler's gross sales; or

(2) to assume and continue the contract, agreement or relationship of the brewer it succeeded with a wholesaler in the wholesaler's territory for the malt alcoholic beverage brands to which it succeeded, notwithstanding that the successor brewer distributes other products in such territory through another wholesaler.

e. Whether the terms of a contract, agreement or relationship conform with the provisions of this section shall be determined by a court of this State in the context of a specific case or controversy among wholesalers and brewers only, and not by generally applicable rule, regulation or otherwise. In any such determination proper consideration should be given to relevant precedents provided under the "Franchise Practices Act," P.L.1971, c.356 (C.56:10-1 et seq.), and the fact that a term of a contract, agreement or relationship may be a term of the kind described in section 9 of this act shall not be considered in making such determination.

C.33:1-93.16 Termination of contract, agreement by brewer, conditions.

5. Notwithstanding the provisions of paragraphs (1) through (3) of subsection c. of section 4 of this act, a brewer may immediately terminate a contract or agreement with a wholesaler, to the extent provided in reasonable terms of the contract or agreement that contains the same terms as the brewer's contract with similarly situated United States, not including United States territories or possessions, distributors, if any of the following occur:

a. The assignment or attempted assignment by the wholesaler for the benefit of creditors, the institution of proceedings in bankruptcy by or against the wholesaler, the dissolution or liquidation of the wholesaler, the insolvency of the wholesaler or the wholesaler's failure to pay for malt alcoholic beverages in accordance with the agreed terms;

b. Failure of any owner to sell his ownership interest in a wholesaler within 120 days after the:

(1) owner has been convicted of a felony or crime of the third degree or higher which, in the reasonable judgment of the brewer, may adversely affect the goodwill or interests of the wholesaler or the brewer and the brewer notifies the wholesaler that it requires such sale; or

(2) brewer learns of such conviction and notifies the wholesaler that it requires such sale because, in the reasonable judgment of the brewer, it may adversely affect the goodwill or interests of the wholesaler or the brewer and the brewer notifies the wholesaler that it requires such sale;

c. Fraudulent conduct of the wholesaler, in any of its dealings with the brewer or the brewer's products, that is known to, or should have been known to the senior management or the owners of the wholesaler;

d. Revocation or suspension for more than 31 days of the wholesaler's federal basic permit or of any state or local license required of a wholesaler for the normal operation of its business;

e. Intentional sale, directly or indirectly, of malt alcoholic beverages by a wholesaler outside the sales territory prescribed by the brewer; or

f. Without brewer consent, the wholesaler engages in changes in ownership, the establishment of trusts or other ownership interests, enters into buy-sell agreements, or grants

an option to purchase an ownership interest; this provision will not apply if the wholesaler establishes that the brewer's failure to consent, after having received notice as provided in paragraph (5) or (6) of subsection c. of section 4 of this act, was in violation of this act.

C.33:1-93.17 Representation of brewer by wholesaler, standards.

6. During the term of a contract or agreement between a brewer and a wholesaler subject to this act, the wholesaler shall, in accordance with the reasonable standards of such contract or agreement, as reasonably relied upon by the wholesaler, enforced without discriminatory intent and in good faith, and uniformly applicable to similarly situated distributors, maintain physical facilities, equipment and personnel so that the product and brand of the brewer are properly represented in the territory of the wholesaler, the reputation and trade name of the brewer are reasonably protected, and the public is served.

C.33:1-93.18 Actions against brewer, remedies.

7. a. Any brewer or wholesaler may bring an action against a brewer for violation of this act, or against a successor brewer in connection with a termination pursuant to paragraph (1) of subsection d. of section 4 of this act, in the Superior Court of the State of New Jersey. Any brewer who violates any provision of this act, and any successor brewer who terminates a contract, agreement or relationship with a wholesaler pursuant to paragraph (1) of subsection d. of section 4 of this act, shall pay the injured wholesaler all reasonable damages sustained by it as a result of the brewer's violations. Injunctive and other equitable relief also shall be available in appropriate circumstances under the applicable standards for such relief under State law. Injunctive equitable relief shall be granted against an actual or threatened unlawful failure or refusal to grant a wholesaler the right to purchase and resell a brand extension. The wholesaler or brewer who sues alleging a violation of this act shall, if successful, also be entitled to the costs of the action including, but not limited to, reasonable attorney's fees.

b. Without limiting the provisions of subsection a. of this section, if a brewer violates paragraph (1), (2) or (3) of subsection c. of section 4 of this act, the injured wholesaler's reasonable damages shall include the fair market value of the wholesaler's business with respect to the terminated brand or brands.

c. If a brewer terminates or fails to renew, in whole or in part, a contract, agreement or relationship with a wholesaler for good cause and in good faith, other than terminations or failures to renew properly based upon grounds for immediate termination under section 5 of this act, the brewer shall pay to the wholesaler reasonable compensation, which may be established by a reasonable liquidated damages provision in a written contract or written agreement between the brewer and the wholesaler. Payment for inventory and other tangible assets owned and used by the wholesaler in its operation as a wholesaler for the brewer's products as provided for under the standards of a written contract or written agreement, as well as a payment determined by multiplying by two the wholesaler's pre-tax net income attributable to the sale of the brewer's brand or brands for the wholesaler's most recently completed fiscal year preceding the year in which the termination occurs, is deemed to be a reasonable liquidated damages provision under this act for such a termination of the right to distribute brands representing more than 20% of the wholesaler's revenues. This payment shall not be deemed reasonable compensation in any other circumstance or to represent a basis for calculating fair market value. In particular and without limitation, in the case of brands representing 20% or less of a wholesaler's revenues, which may not require significant incremental expenses for delivery, sales and service, making a net income standard inappropriate, such payment shall not be deemed to be a reasonable liquidated damages provision under this act.

d. In the event of a termination under section 5 of this act, payment for inventory in the manner prescribed under the reasonable standards of a contract or agreement is reasonable compensation under this act.

e. Nothing in this act shall be deemed to give a right of action for violation of this act to any third party to the relationship between a brewer and a wholesaler, except for a brewer adversely affected by another brewer's violation of this act with respect to a common wholesaler.

C.33:1-93.19 Nonseverability of act, application or not of Franchise Practices Act.

8. If any material provision within any section of this act is held invalid, the remainder of this act and the act as a whole shall be held invalid; provided that if the application of any material provision within any section of this act to any person or circumstance is held invalid, then the remainder of this act and the act as a whole shall be held invalid as to such person or circumstance. The "Franchise Practices Act," P.L.1971, c. 356 (C.56:10-1 et seq.) shall not apply to those agreements subject to this act; provided, however, that as the material provisions of this act are not severable, this section shall not be severable from the provisions of sections 3, 4 and 7 of this act, and in the event that any provision thereof is held invalid, then the "Franchise Practices Act" shall be fully applicable to the extent it would otherwise apply as if this act had not been enacted, and if the application of any provision thereof to any person or circumstance is held invalid, then the "Franchise Practices Act" shall be fully applicable to such person or circumstance to the extent it would otherwise apply as if this act had not been enacted with respect to such person or circumstance.

C.33:1-93.20 Justification for input by brewer into operations of wholesaler; conditions, terms.

9. The Legislature finds that where a brewer's products represent more than 20% of a wholesaler's gross sales and the brewer and wholesaler have a community of interest in the marketing of the brewer's products, there is a justification for certain input by the brewer into the operations of the wholesaler, but that such input from numerous brewers representing smaller percentages of a wholesaler's gross sales might subject wholesalers to inconsistent obligations, create uncertainty as to those obligations, and interfere unreasonably with the wholesaler's ability to operate its business. Accordingly, consistent with the legislatively declared public policy of this State in section 4 of P.L.1985, c.258 (C.33:1-3.1), the use of the following terms in any agreement or contract, including agreements or contracts existing on the effective date of this act, between manufacturers of malt alcoholic beverages and wholesalers, shall not be construed to grant such manufacturer or wholesaler an interest in another manufacturer or wholesaler under the relevant provisions of Title 33 of the Revised Statutes or any rule or regulation promulgated thereunder provided that the brewer's products represent more than 20% of the wholesaler's gross sales and the brewer and wholesaler have a community of interest in the marketing of the brewer's products:

- a. Terms providing brewers the ability to give reasonable consent to wholesaler ownership and management changes, including successor management;
- b. Terms setting forth quality, operational, marketing and sales standards designed to properly represent the products, brands, reputation and trade name of the brewer, in the territory and at retail, including terms under which a wholesaler commits to provide certain efforts and resources toward a brewer's products;
- c. Terms concerning ordering and inventory methods with respect to the brewer's products; and
- d. Terms requiring wholesalers to provide financial information to a brewer related to sales and operations of the brewer's products, and reasonable aggregated financial information related to the sales and operations of all other malt alcoholic beverage products distributed by the wholesaler.

C.33:1-43.2 Services, items, equipment, availability to retailers, conditions.

10. a. Manufacturers, importing entities or wholesalers, as these terms are defined in R.S.33:1-1, or third parties at the direction of manufacturers, importing entities or wholesalers, may sell, lease or provide services, items or equipment to retailers that are intended to enhance or protect the quality, display, availability or marketing of their products to consumers, including:

- (1) Cleaning and needed repairs of dispensing systems for alcoholic beverage products, including draught systems for malt alcoholic beverages, powered decanter systems for wine and pouring systems, and decanter racks or blending machines for distilled spirits.
- (2) Certain equipment, such as tap handles, filters, faucets, tavern heads, regulators, and similar ancillary equipment, that protects the quality or taste of the alcoholic beverage

products produced or supplied by the appropriate licensee, subject to the provisions of R.S.33:1-43.1. Substantial equipment such as complete draught or refrigeration systems, or coolant shall only be sold at no less than fair market value; however nothing in this subsection shall be construed to prevent a licensee from renting or providing such substantial equipment to a retailer on a short-term temporary basis for special events.

(3) Delivery of alcoholic beverages into a retail account at the number of locations as mutually agreed upon by the wholesaler and the retailer.

(4) Occasional, unscheduled placing, and stocking of alcoholic beverages sold by the wholesaler within a retail accounts' premises, to ensure the alcoholic beverages will be available for consumers to purchase, as mutually agreed upon by the wholesaler and retailer, and regular rotation of alcoholic beverages sold by the wholesaler as necessary to ensure the freshness of those products with a limited shelf life.

(5) Shelf management, marketing and pricing recommendations, and implementation of shelf management decisions and resets of a manufacturer's supplier's, wholesaler's, or third party's own products as mutually agreed upon by the wholesaler and the retailer.

(6) Building product displays, including price signs denoting prices established by the retailer, sweepstakes prizes for customers as part of a display and advertising items such as point of sale advertising and consumer novelties, as mutually agreed upon by the wholesaler and retailer.

b. A licensee may provide reasonable entertainment to another licensee, such as engaging in sporting activities, taking a licensee to an entertainment or sports event, or providing meals and beverages to the licensee. The licensee shall not condition the provision of such services, equipment, consumer sweepstakes prizes or entertainment on an agreement to sell the alcoholic beverage products of a manufacturer, supplier or wholesaler. A retailer shall not request the provision of such services, equipment, consumer sweepstakes prizes or entertainment as a condition for selling the alcoholic beverage products of a manufacturer, supplier or wholesaler.

11. This act shall take effect on the first day of the third month after enactment.

Approved December 15, 2005.