

1 **SENATE FLOOR VERSION**

2 February 26, 2015

3 COMMITTEE SUBSTITUTE
4 FOR

5 SENATE BILL NO. 688

6 By: Jolley of the Senate

7 and

8 O'Donnell of the House

9 An Act relating to low-point beer; amending 37 O.S.
10 2011, Sections 163.18B and 163.18E, which relate to
11 duties of manufacturer and termination of agreement
12 with wholesaler; defining terms; requiring certain
13 agreements to have certain provisions for brand
14 extensions; allowing retention of certain rights to
15 distribute certain beer; providing for compensation
16 to certain sellers under certain condition; setting
17 compensation by fair market value; changing quantity
18 of beer applicable to manufacturer; prohibiting
19 acceptance of inducements for distribution sales
20 agreement; modifying reference; and providing an
21 effective date.

22 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

23 SECTION 1. AMENDATORY 37 O.S. 2011, Section 163.18B, is
24 amended to read as follows:

Section 163.18B. A. For purposes of this section:

1. "Brand" means any word, name, group of letters, symbol or
combination thereof, that is adopted and used by a licensed
manufacturer to identify a specific beer or low-point beer product

1 and to distinguish that product from another beer or low-point beer
2 product;

3 2. "Brand extension" means any brand that:

4 a. incorporates all or a substantial part of the unique
5 features of a preexisting brand of the same licensed
6 manufacturer, and

7 b. relies to a significant extent on the goodwill
8 associated with that preexisting brand.

9 3. "Beer" means beer defined in paragraph 5 or 15 of Section
10 506 of this title which has not previously been sold in a licensed
11 wholesaler's exclusive territory.

12 B. Every manufacturer of low-point beer licensed by the
13 Oklahoma Tax Commission authorizing the licensee to sell its low-
14 point beer in this state shall:

15 1. Enter into an agreement with a licensed wholesaler to sell
16 the designated brands of the licensed manufacturer which designates
17 the sales territory of that licensed wholesaler and the designated
18 brands to be sold by the licensed wholesaler. All such agreements
19 shall specifically authorize the sale of the designated brands by a
20 licensed wholesaler within that sales territory. All such
21 agreements shall further provide that the licensed manufacturer who
22 assigns a brand extension of a low-point beer must assign the low-
23 point beer brand extension to the licensed wholesaler to whom the

1 licensed manufacturer granted the exclusive sales territory to the
2 brand from which the brand extension resulted;

3 2. Sell its registered and approved designated brands only to a
4 licensed wholesaler with whom that licensed manufacturer has an
5 agreement designating the sales territory of the licensed wholesaler
6 and the designated brands to be sold by the licensed wholesaler;

7 3. Authorize only one licensed wholesaler for each designated
8 sales territory. Such licensed wholesaler shall be the only
9 licensed wholesaler for the designated brands of the authorizing
10 licensed manufacturer within that designated sales territory; and

11 4. Designate who is responsible for the distribution of its
12 designated brands.

13 C. Any and all licensed wholesalers possessing the rights to
14 distribute a low-point beer brand in a specific territory prior to
15 the introduction of that low-point beer's correlating beer brand in
16 that specific territory shall retain the right to distribute the
17 low-point beer.

18 D. Should a change in law in this state concerning the
19 distribution and sale of low-point beer or the distribution and sale
20 of beer materially impair the distribution rights of a licensed low-
21 point beer wholesaler or result in a material reduction in sales or
22 the elimination of a low-point beer in such licensed wholesaler's
23 specific territory, a manufacturer of beer shall assign the
24 exclusive right to distribute a beer brand to the low-point

1 distributor who has been assigned the exclusive distribution rights
2 to the beer brand's correlating low-point beer. If the beer brand
3 was being sold by a nonresident seller licensed under Section 524 of
4 this title at the time of impairment, reduction in sales or
5 elimination of the low-point beer, the licensed wholesaler must
6 compensate the nonresident seller for the loss of the beer brand.
7 Compensation for the purposes of this provision shall be the fair
8 market value of the existing nonresident seller's business with
9 respect to the beer within that specific territory. Fair market
10 value shall be determined as set forth in paragraphs 3 and 4 of
11 subsection E of Section 163.18E of this title.

12 SECTION 2. AMENDATORY 37 O.S. 2011, Section 163.18E, is
13 amended to read as follows:

14 Section 163.18E. A. Nothing in this section shall apply to a
15 manufacturer that produces less than ~~three hundred thousand~~
16 ~~(300,000) gallons~~ ten thousand (10,000) barrels of low-point beer
17 per calendar year.

18 B. 1. Except as provided in subsections C, D and E of this
19 section, no manufacturer shall terminate an agreement with any
20 wholesaler unless all of the following occur:

- 21 a. the manufacturer establishes good cause for such
22 termination,
- 23 b. the wholesaler receives written notification by
24 certified mail, return receipt requested, from the

1 manufacturer of the alleged noncompliance and is
2 afforded no less than sixty (60) days in which to cure
3 such noncompliance,

4 c. the wholesaler fails to cure such noncompliance within
5 the allotted cure period, and

6 d. the manufacturer provides written notice by certified
7 mail, return receipt requested, to the wholesaler of
8 such continued noncompliance. The notification shall
9 contain a statement of the intention of the
10 manufacturer to terminate or not renew the agreement,
11 the reasons for termination or nonrenewal and the date
12 the termination or nonrenewal shall take effect.

13 2. If a wholesaler cures an alleged noncompliance within the
14 cure period provided in subparagraph b of paragraph 1 of this
15 subsection, any notice of termination from a manufacturer to a
16 wholesaler shall be null and void.

17 C. A manufacturer may immediately terminate an agreement with a
18 wholesaler, effective upon furnishing written notification to the
19 wholesaler by certified mail, return receipt requested, for any of
20 the following reasons:

21 1. The wholesaler's failure to pay any account when due and
22 upon written demand by the manufacturer for such payment, in
23 accordance with agreed payment terms;

1 2. The assignment or attempted assignment by the wholesaler for
2 the benefit of creditors, the institution of proceedings in
3 bankruptcy by or against the wholesaler, the dissolution or
4 liquidation of the wholesaler or the insolvency of the wholesaler;

5 3. The revocation or suspension of, or the failure to renew for
6 a period of more than fourteen (14) days, a wholesaler's state,
7 local or federal license or permit to sell low-point beer in this
8 state;

9 4. Failure of a wholesaler to sell his or her ownership
10 interest in the distribution rights to the manufacturer's low-point
11 beer within one hundred twenty (120) days after such a wholesaler
12 has been convicted of a felony that, in the manufacturer's sole
13 judgment, adversely affects the goodwill of the wholesaler or
14 manufacturer;

15 5. A wholesaler has been convicted of, found guilty of or pled
16 guilty or nolo contendere to, a charge of violating a law or
17 regulation of the United States or of this state if it materially
18 and adversely affects the ability of the wholesaler or manufacturer
19 to continue to sell its low-point beer in this state;

20 6. Any attempted transfer of ownership of the wholesaler, stock
21 of the wholesaler or stock of any parent corporation of the
22 wholesaler, or any change in the beneficial ownership or control of
23 any entity, without obtaining the prior written approval of the
24 manufacturer, which approval shall not be unreasonably withheld,

1 except as may otherwise be permitted pursuant to a written agreement
2 between the parties;

3 7. Fraudulent conduct in the wholesaler's dealings with the
4 manufacturer or its low-point beer, including the intentional sale
5 of low-point beer outside the manufacturer's established quality
6 standards;

7 8. The wholesaler ceases to conduct business for five (5)
8 consecutive business days, unless conducting the business is
9 prevented or rendered impractical due to events beyond the
10 wholesaler's reasonable control as a result of an act of God, an
11 insured casualty, war, or a condition of national, state or local
12 emergency; or

13 9. Any sale of low-point beer, directly or indirectly, to
14 customers located outside the territory assigned to the wholesaler
15 by the manufacturer unless expressly authorized by the manufacturer.

16 D. The manufacturer shall have the right to terminate an
17 agreement with a wholesaler at any time by giving the wholesaler at
18 least ninety (90) days' written notice by certified mail, return
19 receipt requested; provided, that the manufacturer shall give a
20 similar notice to all other wholesalers in all other states who have
21 entered into the same distribution agreement with the manufacturer.

22 E. If a particular brand of low-point beer is transferred by
23 purchase or otherwise from a manufacturer to a successor
24 manufacturer, the following shall occur:

1 1. The successor manufacturer shall become obligated to all of
2 the terms and conditions of the agreement in effect on the date of
3 succession. This subsection applies regardless of the character or
4 form of the succession. A successor manufacturer has the right to
5 contractually require its wholesaler to comply with operational
6 standards of performance, if the standards are uniformly established
7 for all of the successor manufacturer's wholesalers. A successor
8 manufacturer may, upon written notice, terminate its agreement, in
9 whole or in part, with a wholesaler of the manufacturer it
10 succeeded, for the purpose of transferring the distribution rights
11 in the wholesaler's territory to a new wholesaler, provided that the
12 successor wholesaler first pays to the existing wholesaler the fair
13 market value of the existing wholesaler's business with respect to
14 the terminated brand or brands;

15 2. If the successor manufacturer decides to terminate its
16 agreement with the existing wholesaler for purposes of transfer, the
17 successor manufacturer shall notify the existing wholesaler in
18 writing of the successor manufacturer's intent not to appoint the
19 existing wholesaler for all or part of the existing wholesaler's
20 territory for the low-point beer. The successor manufacturer shall
21 mail the notice of termination by certified mail, return receipt
22 requested, to the existing wholesaler. The successor manufacturer
23 shall include in the notice the names, addresses and telephone
24 numbers of the successor wholesaler or wholesalers;

1 3. a. The successor wholesaler shall negotiate with the
2 existing wholesaler to determine the fair market value
3 of the existing wholesaler's right to distribute the
4 low-point beer in the existing wholesaler's territory.
5 The successor wholesaler and the existing wholesaler
6 shall negotiate the fair market value in good faith.

7 b. The existing wholesaler shall continue to distribute
8 the low-point beer in good faith until payment of the
9 compensation agreed to under subparagraph a of this
10 paragraph, or awarded under paragraph 4 of this
11 subsection, is received; and

12 4. a. If the successor wholesaler and the existing
13 wholesaler fail to reach a written agreement on the
14 fair market value within thirty (30) days after the
15 existing wholesaler receives the notice required
16 pursuant to paragraph 2 of this subsection, the
17 successor wholesaler or the existing wholesaler shall
18 send a written notice to the other party requesting
19 arbitration pursuant to the Uniform Arbitration Act,
20 Part 2 of Article 22 of Title 13, C.R.S. Arbitration
21 shall be held for the purpose of determining the fair
22 market value of the existing wholesaler's right to
23 distribute the low-point beer in the existing
24 wholesaler's territory.

1 b. Notice of intent to arbitrate shall be sent, as
2 provided in subparagraph a of this paragraph, not
3 later than forty (40) days after the existing
4 wholesaler receives the notice required pursuant to
5 paragraph 2 of this subsection. The arbitration
6 proceeding shall conclude not later than sixty (60)
7 days after the date the notice of intent to arbitrate
8 is mailed to a party, unless this time is extended by
9 mutual agreement of the parties and the arbitrator.

10 c. Any arbitration held pursuant to this subsection shall
11 be conducted in a city within this state that:

12 (1) is closest to the existing wholesaler, and

13 (2) has a population of more than twenty thousand
14 (20,000) people.

15 d. Any arbitration held pursuant to this paragraph shall
16 be conducted before one impartial arbitrator to be
17 selected by the American Arbitration Association or
18 its successor. The arbitration shall be conducted in
19 accordance with the rules and procedures of the
20 Uniform Arbitration Act, Part 2 of Article 22 of Title
21 13, C.R.S.

22 e. An arbitrator's award in any arbitration held pursuant
23 to this paragraph shall be monetary only and shall not
24 enjoin or compel conduct. Any arbitration held

1 pursuant to this paragraph shall be in lieu of all
2 other remedies and procedures.

3 f. The cost of the arbitrator and any other direct costs
4 of an arbitration held pursuant to this paragraph
5 shall be equally divided by the parties engaged in the
6 arbitration. All other costs shall be paid by the
7 party incurring them.

8 g. The arbitrator in any arbitration held pursuant to
9 this paragraph shall render a written decision not
10 later than thirty (30) days after the conclusion of
11 the arbitration, unless this time is extended by
12 mutual agreement of the parties and the arbitrator.
13 The decision of the arbitrator is final and binding on
14 the parties. The arbitrator's award may be enforced
15 by commencing a civil action in any court of competent
16 jurisdiction. Under no circumstances may the parties
17 appeal the decision of the arbitrator.

18 h. An existing wholesaler or successor wholesaler who
19 fails to participate in the arbitration hearings in
20 any arbitration held pursuant to this paragraph waives
21 all rights the existing wholesaler or successor
22 wholesaler would have had in the arbitration and is
23 considered to have consented to the determination of
24 the arbitrator.

1 i. If the existing wholesaler does not receive payment
2 from the successor wholesaler of the settlement or
3 arbitration award required under paragraph 2 or 3 of
4 this subsection within thirty (30) days after the date
5 of the settlement or arbitration award:

6 (1) the existing wholesaler shall remain the
7 wholesaler of the low-point beer in the existing
8 wholesaler's territory to at least the same
9 extent that the existing wholesaler distributed
10 the low-point beer immediately before the
11 successor manufacturer acquired rights to the
12 low-point beer, and

13 (2) the existing wholesaler is not entitled to the
14 settlement or arbitration award.

15 F. 1. Any wholesaler or manufacturer who is aggrieved by a
16 violation of any provision of subsections B and D of this section
17 shall be entitled to recovery of damages caused by the violation.
18 Except for a dispute arising under subsection E of this section,
19 damages shall be sought in a civil action in any court of competent
20 jurisdiction.

21 2. Any dispute arising under subsections B and D of this
22 section may also be settled by such dispute resolution procedures as
23 may be provided by a written agreement between the parties.
24

1 G. Nothing in this section shall be construed to limit or
2 prohibit good-faith settlements voluntarily entered into by the
3 parties.

4 H. Nothing in this section shall be construed to give an
5 existing wholesaler or a successor wholesaler any right to
6 compensation if an agreement with the existing wholesaler or
7 successor wholesaler is terminated by a successor manufacturer
8 pursuant to subsections B, C and D of this section.

9 I. No manufacturer shall require any wholesaler to waive
10 compliance with any provision of this section.

11 J. No manufacturer shall charge or accept any money, property,
12 gratuity, discount, rebate, free goods, allowances or other
13 inducement from a wholesaler in exchange for entering into a
14 distribution sales agreement with a wholesaler.

15 ~~J. This~~ K. On and after the effective date of this act, this
16 section shall apply to any agreement entered into, and any renewals,
17 extensions, amendments, or conduct constituting a modification of an
18 agreement, by a manufacturer ~~on or after the effective date of this~~
19 ~~act.~~

20 SECTION 3. This act shall become effective November 1, 2015.

21 COMMITTEE REPORT BY: COMMITTEE ON BUSINESS AND COMMERCE
22 February 26, 2015 - DO PASS AS AMENDED
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