

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1991

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SENATE BILL 430
Alcoholic Beverage Control Committee Substitute Adopted 5/14/91

Short Title: Wine Dist. Agreements Act.

(Public)

Sponsors:

Referred to:

April 1, 1991

A BILL TO BE ENTITLED
AN ACT TO AMEND THE WINE DISTRIBUTION AGREEMENTS ACT.
The General Assembly of North Carolina enacts:

Section 1. G.S. 18B-1200 is amended by adding a new subsection to read:
"(d) This Article does not give standing to a wholesaler or any other person who is seeking to purchase the business of a wine wholesaler who is in a relationship covered and protected by this Article."

Sec. 2. G.S. 18B-1201 reads as rewritten:
"§ 18B-1201. Definitions.

As used in this Article, unless the context requires otherwise:

- (1) 'Agreement' means a commercial relationship between a wine wholesaler and a winery. The agreement may be of a definite or indefinite duration and is not required to be in writing. Any of the following constitutes prima facie evidence of an 'agreement' within the meaning of this definition:
 - a. A relationship whereby the wine wholesaler is granted the right to offer and sell a brand offered by a winery;
 - b. A relationship whereby the wine wholesaler, as an independent business, constitutes a component of a winery's distribution system;
 - c. A relationship whereby the wine wholesaler's business is substantially associated with a brand offered by a winery;

- 1 d. A relationship whereby the wine wholesaler's business is
2 substantially reliant on a winery for the continued supply of
3 wine;
4 e. The shipment, preparation for shipment, or acceptance of any
5 order by any winery or its agent for any wine or beverages to a
6 wine wholesaler within this State;
7 f. The payment by a wine wholesaler and the acceptance of
8 payment by any winery or its agent for the shipment of any
9 order of wine or beverages intended for sale within this State.

10 (1A) 'Brand' means the name under which a wine is produced or imported
11 and shall include trade names or trademarks. A brand shall not be
12 construed to mean a class or type of wine, but all classes and types of
13 wines sold under the same brand label shall be considered a single
14 brand.

15 (2) 'Territory' or 'sales territory' means the area of primary sales
16 responsibility expressly or implicitly designated by any agreement
17 between any wine wholesaler and winery for a brand offered by any
18 winery. The term "area of primary sales responsibility" may not be
19 construed as restricting sales or sales efforts by any wine wholesaler
20 attempting to sell wines within any designated sales territory.

21 (3) 'Wine wholesaler' means any holder of a wine wholesaler permit, wine
22 importer permit, or bottler permit issued under the authority of this
23 Chapter.

24 (4) 'Winery' means any holder of an unfortified winery permit, fortified
25 winery permit, limited winery permit, or nonresident wine vendor
26 permit issued under the authority of this Chapter who sells at least
27 1,000 cases of wine in North Carolina per year."

28 Sec. 3. G.S. 18B-1204 reads as rewritten:

29 **"§ 18B-1204. Cancellation.**

30 Notwithstanding the terms, provisions, or conditions of any agreement, no winery
31 may amend, cancel, terminate, or refuse to continue to renew any agreement, or cause a
32 wholesaler to resign from an agreement, unless good cause exists for amendment,
33 termination, cancellation, nonrenewal, noncontinuation, or resignation. 'Good cause'
34 does not include a change in ownership of a ~~winery~~ winery, or the acquisition by
35 another person of the brand, trade name, or trademark, or the acquisition of the
36 marketing or distribution rights from the original winery. Nothing in this Article shall
37 create a cause of action against a winery whose rights to market or distribute a wine are
38 terminated involuntarily. 'Good cause' does include:

- 39 (1) Revocation of the wholesaler's permit or license to do business in this
40 State;
41 (2) Bankruptcy or receivership of the wholesaler;
42 (3) Assignment for the benefit of creditors or similar disposition of the
43 assets of the wholesaler; or

- 1 (4) Failure of the wholesaler to comply substantially, without reasonable
2 excuse or justification, with any reasonable and material requirement
3 imposed upon him by the winery, including a substantial failure by a
4 wine wholesaler to:
- 5 a. Maintain a sales volume of the brands offered by the winery, or
 - 6 b. Render services comparable in quality, quantity, or volume to
7 the sales volumes maintained and services rendered by other
8 wholesalers of the same brands within the ~~State-State~~; or
- 9 (5) Failure of the wholesaler to comply with the notice requirements of
10 this Article before the proposed sale, transfer, or assignment of any
11 business interest, brand, or territorial distribution rights to another
12 wholesaler.

13 In any determination as to whether a wholesaler has failed to comply substantially,
14 without reasonable excuse or justification, with any reasonable and material
15 requirement imposed upon him by the winery, consideration shall be given to the
16 relative size, population, geographical location, number of retail outlets, demand for the
17 products applicable to the territory of the wholesaler in question and to comparable
18 territories, and any reasonable sales quota set by the agreement. The burden of proving
19 good cause for amendment, termination, cancellation, nonrenewal, noncontinuation, or
20 resignation is on the winery.”

21 Sec. 4. G.S. 18B-1205(d) reads as rewritten:

22 "(d) ~~Upon receiving~~ No hearings pursuant to this section shall be conducted by the
23 Commission except upon the filing of a written request-petition from the winery or
24 wholesaler for requesting a hearing, the hearing. The Commission shall, after notice and
25 hearing, determine if the wholesaler has rectified the conditions or if good cause exists
26 for the amendment, termination, cancellation, or nonrenewal of the agreement, as
27 appropriate. In any case in which a petition is made to the Commission for such a
28 determination, the agreement in question shall continue in effect, pending the
29 Commission's decision and any judicial review thereof. The Commission shall adopt
30 rules setting forth the procedures to be followed in the initiation and course of hearings
31 under this Article. The Commission's decision shall be made within 180 days of the
32 filing of a petition unless the parties and the Commission stipulate to a longer time."

33 Sec. 5. Chapter 18B of the General Statutes is amended by adding a new
34 section to read:

35 "**§ 18B-1205.1. Remedies for termination; compensation and damages.**

36 (a) Compensation for Inventory. – In addition to the procedural and judicial
37 remedies provided for by G.S. 18B-1205 and G.S. 18B-1207, any winery that amends,
38 cancels, terminates, or refuses to renew any wine agreement, or causes a wholesaler to
39 resign from an agreement shall compensate the wine wholesaler for the wine
40 wholesaler's wine inventory. The amount of compensation shall include the F.O.B.
41 costs of the wine inventory and any freight charges incurred by the wine wholesaler in
42 receiving them.

43 (b) Damages. – A winery that amends, cancels, terminates, or refuses to renew an
44 agreement with a wholesaler in violation of this Article shall be liable for damages to

1 the wholesaler for the value of the agreement and any goodwill, and any other
2 appropriate relief as provided in G.S. 18B-1207(a)."

3 Sec. 6. G.S. 18B-1206 reads as rewritten:

4 **"§ 18B-1206. Transfer of business.**

5 (a) ~~No winery may unreasonably withhold or delay consent to any transfer of the~~
6 ~~wholesaler's business or transfer of the stock or other interest in the wholesaleship~~
7 ~~whenever the wholesaler to be substituted meets the material and reasonable~~
8 ~~qualifications and standards required of the winery's wholesalers.~~

9 (b) ~~Notwithstanding subsection (a), no~~ (a) Transfer to Family Members. – No
10 winery may withhold consent to, or in any manner retain a right of prior approval of, the
11 transfer of the wholesaler's business to a member or members of the family of the
12 wholesaler. Subsequent to such a transfer, the rights and obligations of the
13 wholesaleship and its owners are in all respects governed by the provisions of this
14 Chapter. As used in this subsection, 'family' means the spouse, parents, siblings, and
15 lineal descendants, including those by adoption, of the wholesaler. With respect to an
16 incapacitated individual having an ownership interest in a wholesaler, the term 'family'
17 shall also include the person appointed by the court as the conservator of the
18 individual's property. The term shall also include the appointed and qualified personal
19 representative and the testamentary trustee of a deceased wholesaler. Nothing in this
20 subsection shall restrict the right of a winery to amend, cancel, terminate, or refuse to
21 continue to renew any agreement for good cause when the amendment, cancellation,
22 termination, or refusal to renew the agreement is done in compliance with the
23 requirements of this Article. In addition, any family member to whom a wholesaler's
24 business is transferred shall comply with the requirements of this Article upon the sale
25 or transfer of the business, upon the sale, assignment, or transfer of any brand, wine
26 product, or territory.

27 (b) Notice and Consent Required for Certain Transfers. – Upon notice to and
28 approval by the winery, an individual owning an interest in a wholesaler may sell,
29 assign, or transfer that interest, including the wholesaler's rights under its franchise
30 agreement with the winery to any qualified person. Within 20 days of receipt of notice
31 of the intended sale, assignment, or transfer, the winery shall request any additional
32 relevant, material information reasonably necessary for deciding whether to approve the
33 transaction. The winery shall have 45 days from receipt of that information to object to
34 the sale, assignment, or transfer. The winery shall notify the wholesaler in writing if it
35 objects to the proposed sale, assignment, or transfer, and shall state the specific reasons
36 why the proposed transferee fails to meet its qualifications and standards. The winery
37 may object if the proposed transferee fails to meet qualifications and standards that are
38 nondiscriminatory, material, reasonable, and consistently applied to North Carolina
39 wholesalers by the winery or for the reasons listed in G.S. 18B-1204(1), (2), or (3). The
40 burden shall be on the winery to prove that the proposed transferee is not qualified.

41 The notice required of the wholesaler under this subsection shall be in writing, and
42 shall conform to the terms of the distribution agreement if there is a contractual
43 provision specifying notice procedures. In the absence of a specific contractual
44 requirement to the contrary, written notice shall be transmitted by the wholesaler to the

1 winery at its principal office, addressed to the winery personnel responsible for handling
2 licensing procedures in this State.

3 (c) Determination of Good Cause. – When the proposed assignment or change of
4 ownership of a wholesaler's business has been disapproved or prevented by a winery,
5 the wholesaler seeking to assign or sell his interest may maintain a suit against the
6 winery. The court may determine if the winery had good cause to object to the
7 proposed transferee, applying the standards set forth in subsection (b) above. In lieu of
8 an action against the winery in court, the wholesaler may seek a determination by the
9 Commission as to whether the winery had good cause to object to or disapprove the
10 proposed transferee. No hearing shall be conducted by the Commission under this
11 section except upon the filing of a petition by the wholesaler, alleging that the proposed
12 change in ownership or assignment was objected to or prevented without good cause.
13 The Commission's decision shall be made within 180 days of the filing of a petition
14 unless the parties and the Commission stipulate to a longer time.

15 (d) Damages. – A winery who disapproves or prevents a proposed assignment or
16 change in ownership and is found in violation of this section by a court or the
17 Commission shall either accept the transferee wholesaler, or shall be liable to the
18 wholesaler who proposed to make the sale, transfer, or assignment for the difference
19 between the disapproved sale price of the interest proposed to be transferred and a
20 subsequent actual sale price of a sale of the same assets completed within a reasonable
21 period, or the sale price of the assets or interest transferred without the winery's brands,
22 plus any incidental damages including, but not limited to, actual damages caused by any
23 delay in the sale, transfer, or assignment, and other costs, including attorneys' fees."

24 Sec. 7. Chapter 18B of the General Statutes is amended by adding a new
25 section to read:

26 **"§ 18B-1206.1. Transfer of brands or territories by wholesaler.**

27 (a) Notice by Wholesaler Required. – Before a wholesaler sells, assigns, or
28 transfers any brand or wine product to another wholesaler, or enters into any agreement
29 with another wholesaler to assign or transfer territorial distribution rights for any brand
30 or wine product under an existing agreement, it shall first notify each winery who has
31 assigned such brand or product, or designated such territory pursuant to the agreement
32 with the wholesaler.

33 (b) Winery's Right to Object for Good Cause. – Notice shall be in writing to each
34 affected winery, and shall state the brands or products proposed to be transferred, and
35 the territory affected by the proposed transfer. The winery shall have 20 days from
36 receipt of the notice of the intended transfer to request any additional relevant
37 information reasonably necessary for deciding whether to approve the transfer. The
38 winery shall have 45 days from receipt of that information to object to the sale,
39 assignment, or transfer of the brand, product, or territory. The winery shall notify the
40 wholesaler in writing if it objects to the proposed transfer of the brand, product, or
41 territory, and shall state the specific reasons why it objects. 'Good cause' to object to
42 the transfer of a brand or territory shall include, but shall not be limited to, the
43 following:

- 1 (1) When the brand, product, or territory proposed to be transferred
2 constitutes a substantial portion of the transferor wholesaler's business;
3 (2) When the brand, product, or territory proposed to be transferred
4 constitutes a substantial portion of the winery's total sales in this State;
5 (3) When the wholesaler to whom the brand or product is proposed to be
6 sold, assigned, or transferred will be substantially associated with the
7 brand or product, and that transferee wholesaler will constitute a
8 substantial component of the winery's distribution system;
9 (4) When the wholesaler to whom the brand, product, or territory is
10 proposed to be sold or assigned does not meet the material and
11 reasonable qualifications and standards required of the winery's
12 wholesalers in similar market environments.

13 (c) Determination of Good Cause. – If a winery objects to the proposed transfer
14 of a brand, product, or territory by one wholesaler to another, the wholesaler proposing
15 to make the transfer may seek a determination by the Commission as to whether the
16 winery had good cause to object to the transfer. No determination shall be made except
17 upon the filing of a petition by the wholesaler with the Commission, which shall, upon
18 receipt of such petition, enter an order barring any transfer of brand, product, or territory
19 pending a hearing and findings by the Commission on the issue of good cause. The
20 Commission's decision shall be made within 180 days of the filing of the petition unless
21 the parties and the Commission stipulate to a longer time.

22 If the Commission determines the winery does not have good cause to object to the
23 transfer, the wholesaler proposing to make the transfer may complete the transaction. It
24 shall be unlawful for the winery to take any subsequent action without good cause to
25 terminate any agreement with the wholesalers who are parties to the sale, transfer, or
26 assignment of the brand, product, or territory.

27 If the Commission determines that the winery has good cause to object to the
28 proposed transfer, the wholesaler seeking to sell, transfer, or assign a brand, product, or
29 territorial distribution rights shall not enter into any agreement with any other
30 wholesaler to transfer such brand, product, or territory without the prior consent of the
31 winery.

32 No proposed sale, transfer, or assignment of any brand, product, or territory shall
33 become effective until such time as either the winery consents to the transfer or the
34 Commission approves the transfer after a determination that the winery has no good
35 cause to object.

36 (d) Remedies. – In lieu of a determination by the Commission on whether a
37 winery has good cause to object to a transfer under this section, the wholesaler
38 proposing to make a transfer and the affected winery may enter into an agreement
39 whereby the winery may pay to the transferor wholesaler the value of the brand or
40 territorial distribution rights proposed to be transferred. The amount of payment shall
41 be determined by the actual fair market value of the brand, product, or distribution
42 rights."

43 Sec. 8. G.S. 18B-1207 reads as rewritten:

44 "**§ 18B-1207. Judicial remedies.**

1 (a) If a winery violates any provision of this Article, a wholesaler may maintain a
2 suit against the winery. The court may grant injunctive and other appropriate relief,
3 including damages to compensate the wholesaler for the value of the agreement and any
4 good will, to remedy violations of this Article.

5 ~~(b) Any winery that amends, cancels, terminates, or refuses to renew any wine~~
6 ~~agreement, or causes a wholesaler to resign from an agreement shall compensate the~~
7 ~~wine wholesaler for the wine wholesaler's wine inventory. The amount of~~
8 ~~compensation shall include the F.O.B. costs of the wine inventory and any freight~~
9 ~~charges incurred by the wine wholesaler in receiving them.~~

10 (c) For any violation of the provisions of this Article, the Commission may
11 take any of the following actions against the winery:

- 12 (1) Suspend the winery's permit for a specific period of time no longer
13 than three years;
- 14 (2) Revoke the winery's permit;
- 15 (3) Issue an order suspending the shipment of the winery's products to one
16 or more designated sales territories previously served by the
17 wholesaler who has been terminated or who is the successor in interest
18 to a wholesaler who sold the winery's products in the designated
19 territory.
- 20 (4) Impose a monetary penalty up to fifteen thousand dollars (\$15,000) for
21 a first offense and up to thirty-five thousand (\$35,000) for the second
22 offense. All monetary penalties imposed by this subsection shall be
23 remitted by the Commission to the State Treasurer for the General
24 Fund.

25 In any case in which the Commission is entitled to suspend or revoke a permit, the
26 Commission may accept from the winery an offer in compromise to pay a monetary
27 penalty. The Commission may either accept a compromise or revoke a permit, but not
28 both. The Commission may accept a compromise and suspend the permit in the same
29 case.

30 (d) Notwithstanding the choice of forum agreed to by the parties, venue for all
31 actions under this Article shall be determined by the trial judge based upon the
32 convenience of witnesses and the promotion of the ends of justice."

33 Sec. 9. This act is effective upon ratification.