STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N.J. 07114

BULLETIN 2422

January 6, 1982

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1. RECENT COURT ACTION - NEW YORK STATE LIQUOR AUTHORITY v. DENNIS BELLANCA - TOPLESS DANCING.

In NYSLA v. Bellanca, ___, U.S., ___ (No. 80-813, June 22, 1981) the United States Supreme Court reversed a New York Appellate Court and affirmed the power of a State, pursuant to the Twenty-First Amendment, to prohibit topless dancing in an establishment licensed by the State to serve liquor.

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2. RECENT COURT ACTION - ROMANO'S NETCONG, INC. v. JOSEPH H. LERNER - TWO LICENSE LIMITATION LAW.

On October 20, 1981, the New Jersey Supreme Court (Doc. No. 18,744) entered an Order Dismissing an Appeal from the May 20, 1981 Superior Court, Appellate Division decision (Doc. No. A-4630-79) affirming the constitutionality of the "two license limitation law". N.J.S.A. 33:1-12.31 et seq. In rendering its decision, the Appellate Division relied upon the previous Supreme Court determination in Grand Union v. Sills, 43 N.J. 390 (1964).

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3. RECENT COURT ACTION - NEW JERSEY RETAIL LIQUOR STORES ASSOC. v. JOHN J. DEGNAN - JOINT ADVERTISING.

In N.J.L.S.A. v. Degnan, the Superior Court, Appellate Division (Doc. No. A-4245-79, June 4, 1981) affirmed the validity of Division Regulation N.J.A.C. 13:2-24.10(a)(7) which limits the manner by which non-identically owned retailers may engage in consumer advertising involving prices. No timely further appeal was filed.

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4. RECENT COURT ACTION - EDBURN CORP. v. JOSEPH H. LERNER - REGULATION OF CREDIT.

On October 8, 1981, in Edburn Corp. v. Lerner, the Superior Court, Appellate Division (Doc. No. A-2037-80T1) affirmed the power of the Division Director to adopt credit regulations. The regulation involved N.J.A.C. 13:2-39.3 was, independent of the litigation, repealed effective November 1, 1981. No timely further appeal was filed.

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5. RECENT COURT ACTION - RENAULT WINERY, INC. v. N.J. DIV. OF ALCOHOLIC BEV. CONTROL - FALSE AND MISLEADING ADVERTISING - BURDEN OF GOING FORWARD WITH PROOF.

In affirming a license suspension imposed by the Director for false and misleading advertising (now, N.J.A.C. 13:2-24.10(a)(1)), the

Appellate Division, in Renault Winery v. Division of ABC (Doc. No. A-3002-79, March 5, 1981), ruled that while the ultimate burden of proof is always upon the Divison in disciplinary matters, once the ABC has alleged that a licensee has made an advertising claim which it could not substantiate, the burden of going forward with proof to show that its claim was true could properly be shifted to the licensee. No timely further appeal was filed.

6. RECENT COURT ACTION - SHOWCASE LOUNGE, INC. v. DIV. OF ALCOHOLIC BEV. CONTROL - INTOXICATED PATRONS - PROOFS AND STANDARD REVIEW.

In affirming a license suspension imposed by the Director for serving alcoholic beverages to a person actually or apparently intoxicated (N.J.A.C. 13:2-23.1(b), the Superior Court, Appellate Division in Showcase Lounge, Inc. v. Division (Doc. No. A-4511-79, March 24, 1981), ruled that the standard of review is whether a person appears actually or apparently intoxicated to the reasonable person, rather than to the reasonable licensee or his representative. The Court restated that the average witness of ordinary intelligence, although lacking special skill, knowledge and experience, but who has had the opportunity of observation, may testify whether a person was sober or intoxicated. Finally, the court noted that the well recognized indicia of observable manifestations of intoxication include a description of a patrons person, speech, gait and deportment. Thus, where a licensee serves a patron who has dishevelled appearance, bloodshot eyes, incoherent speech, and unsteadiness, a finding of actual or apparent intoxication is supported. No timely further appeal was filed.

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7. PENDING COURT ACTION - N. J. WINE AND LIQUOR SALESMENS UNION v. JOSEPH H. LERNER - APPEAL FROM OPINION LETTER.

On June 25, 1981 the Director rendered an opinion letter to counsel to the N. J. Wine and Liquor Salesmens Union. On August 14, 1981 an appeal by the Union was filed with the Superior Court, Appellate Division (Doc. No. A-5403-80T1). The Notice of Appeal contained no request for a stay of the opinion, nor has this Division received from the Appellate Division an order staying the opinion. In light of the foregoing and the fact that the opinion letter has been circulated in only certain portions of the industry, and the Division's articulation with respect to "discrimination in sales to retailers" continues to be a matter of frequent inquiry, the full text of the opinion letter regarding N.J.A.C. 13:2-24.1 is hereinafter reprinted.

Kronberg and Reiter, Esqs.
West Orange, N. J.

Re: N.J. Wine and Liquor Salesmens' Union - Complaint

In a letter dated December 2, 1980 on behalf of your client, Wine and Liquor Salesmen of the State of New Jersey, Local 19, a complaint was lodged with the Division alleging that all of the wholesalers with whom the Union has a contract are engaging in discriminatory sales of alcoholic beverages, in violation of N.J.A.C. 13:2-24.1. The legal theory supporting the complaint was set forth in a letter of November 14, 1980 which had been previously mailed to each of the employer-wholesalers.

On December 22, 1980, I met with the President of the Union, Louis Kronberg, and yourself to ascertain the exact nature of the allegations. At that time, I was advised that your client didn't "have detailed information" and it believed the violations to be "self-evident." The thrust of the Union's position is that every discount unilaterally offered by wholesalers to the retail trade must be the subject of actual cost justification, i.e., based upon an actual dollar saving by the wholesaler. Further, it was indicated that the complaint was initiated because retail licensees have been joining Cooperative Purchasing Groups (N.J.A.C. 13:2-26.1) and placing "quantity" orders through a smaller number of Union Salesmen, "thereby injuring the vast majority of salesmen who no longer receive commissions from individual retailer purchases."

On January 9, 1981, I wrote the wholesalers your client advised it had a contractual relationship with, soliciting their views with respect to the complaint and the interpretation of the regulations, as submitted in the November 14, 1980 letter. To date, I have received a single response, from Counsel to a trade association, indicating the advice which had been provided to its membership concerning the regulation (attached).

You are correct in your observation that N.J.A.C. 13:2-24.1 is broadly patterned after the federal "Robinson-Patman Act". However, principles and case law articulating the same do not apply in all instances. Some specific differences are:

1. The Robinson-Patman Act, Section 2(a) prohibits discrimination " . . . in price between different purchasers of commodities of like grade and quality . . . " N.J.S.A. 33:1-90, however, prohibits discrimination in discounts relating to " . . . like age, quality, and quantity." Therefore, our authorizing Statute is more akin to Section 2 of the original Clayton Act prior to its amendment by the Robinson-Patman Act. That Section of the Clayton Act had been construed to permit quantity discounts without regard to the sellers actual savings in cost. See, Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 92 L. ed. 1196, 1202-3 (1948).

2. The Robinson-Patman Act provides that a price differential may be justified by reason of a seller's diminished costs or by reason of the seller's good faith efforts to meet a competitor's equally low price. The "cost-justification" concept is at issue here and will be discussed below.

Price changes to meet a competitor's lower price are presently prohibited on less than a monthly price posting basis. See, N.J.A.C. 13:2-24.6.

3. Neither the Robinson-Patman Act nor N.J.S.A. 33:1-90 contemplated the subsequent enactment and impact of our "Two License Limitation Law," N.J.S.A. 33:1-12.31. As a result of that Law, then existing "chains" of liquor stores were "grandfathered" into continued permissive existence. Since 1962, new competitors can acquire, generally speaking, only two licenses. In an effort to balance possible inequities vis a vis quantity discount structures, the Division has affirmatively encouraged Cooperative Purchasing Groups with a membership limit equal to that of the largest "grandfathered" chain of licenses. See, N.J.A.C. 13:2-26.1.

Now, it is clear from a reading of your client's November 14, 1980 letter, that the Salesmens' Union interpretes N.J.A.C. 13:2-24.1 to mean something other than that which was intended. The regulation functions as follows:

A. N.J.S.A. 33:1-89 requires that individual wholesalers offer all retailers products of the same age, quality and brand at the same "base price."

B. N.J.S.A. 33:1-90 affirmatively permits a discount based on "quantity" without regard to actual cost savings, (as discussed above).

C. N.J.A.C. 13:2-24.1(a)(1)(i) embodies these two principles.

D. N.J.A.C. 13:2-24.1(b)(1). provides that the foregoing does not prevent:

> Differentials which make only due allowance for or actual differences in the cost of manufacture, sale or delivery resulting from different methods or quantities in which alcoholic beverage products are sold or delivered to, or paid by, purchasers including discounts for prompt payment.

This section is the "second prong" in competitive sales. It means that, separate from the issue of quantity discounts, a wholesaler may sell products at what amounts to a different price among retailers, if there is a cost justification as to that particular transaction. Thus, a wholesaler may also offer a discount to the "retail trade" under 24.1(b)(1) for differing methods of sale or delivery or payment. For example, if a wholesaler's quoted base or discount prices are inclusive of delivery, retailers purchasing F.O.B. warehouse might be eligible for additional discount; so too, if a sale contemplates 30 days credit and retailers pay C.O.D.

There are other factors with respect to N.J.A.C. 13:2-24.1(b)(1) that warrant comment. First, 24.1(b)(1) is not limited to discounts. The regulation speaks in terms of pricing "differentials." That term also includes pricing increases. When justified by due allowance to cost, it is possible that ultimate prices may be higher for such considerations as special or emergency delivery routing, split case sales or single bottle sales, etc. Second, the use of the term "different methods or quantities" in 24.1(b)(1) is not to be confused with quantity discounts in 24.1(a)(1)(i). In that regard, it is important to note that the 24.1(b)(1) was not drafted to address exclusively the sale by wholesalers to retailers of what are known as national or major "brands." A significant portion of this State's alcoholic beverage business involves the production and sale of proprietary and private label products. The latter activity may contemplate blending, rectifying, labeling, boxing and shipping, etc. as a manufacturing process. Under those circumstances, the timing and quantities of orders may bear a direct relationship on the methods of production, delivery and sale and, in turn, result in real cost differences. When those cost differences exist, they may justify a discount, distinct from the general provisions of N.J.A.C. 13:2-24.1(a)(1)(i).

Finally, I will amplify upon the language in the "Cooperative Purchases Regulation" which may have caused some confusion as a consequence of its inverse phrasing. N.J.A.C. 13:2-26.1(a)(11) provides:

> Nothing herein shall be deemed to require the servicing of any cooperative agreement with quantity or cash discounts if there exists no corresponding justification for the differential pursuant to N.J.A.C. 13:2-24.1(b)(1).

As I have previously indicated in Bulletin 2381, Item 9 (December, 1980), an entire "cooperative purchasing group" is to be treated as a single retailer for purposes of non-discriminatory wholesale sales. Thus, for example, if wholesale prices quoted to the retail trade are inclusive of

delivery, absent cost justification, a delivery to the location of more than one member of a cooperative of products purchased through a single cooperative order would constitute a discrimination in sales. N.J.A.C. 13:2-26.1(a) (11) was designed to make it clear that, although 26.1(a) (7) requires separate retailer invoicing and 26.1 (1) (6) requires some form of joint assurance of payment, there is no requirement to service cooperative group members with discounts if the sale is other than the functional equivalent, in cost terms, as that as if made to a single retailer. Indeed, to do otherwise would be a violation.

In short, a quantity discount needs no cost justification to be lawful under N.J.A.C. 13:2-24.1(a) (1) (i). Any other discount or differential made available to the trade must be supported by due allowance for actual cost savings. N.J.A.C. 13:2-24.1(b) (1). Of course, all discounts and other terms of sale must be established independently by wholesalers and filed in Current Price Lists. N.J.A.C. 13:2-24.6. In the event that any specific differential is challenged, the burden is upon the seller to establish the cost justification.

Having reviewed your complaint again, I am satisfied that further action is not warranted by this Division. Should your clients decide to provide specific factual information at some point in the future, I will reconsider the need for investigation into the sweeping allegations made if they relate to those types of discounts which require cost justification on the part of wholesalers.

Dated: June 25, 1981

JOSEPH H. LERNER
DIRECTOR

8. OPINION LETTER - ADVANCE DELIVERIES TO WHOLESALERS BY SUPPLIERS - CURRENT PRICE LISTS, TERMS OF SALE.

Wilentz, Goldman & Spitzer, Esqs.
Woodbridge, N.J.

Re: (a) Advance Deliveries to Wholesalers by Suppliers
(b) Current Price Lists - Terms of Sale -
N.J.A.C. 13:2-24.6

This communication will respond to your letters of July 11, 1980 and October 23, 1980 submitted on behalf of the New Jersey Wine & Spirit Wholesalers Association concerning the above.

With regard to the advance deliveries to wholesalers, some historical discussion is relevant. Effective July 3, 1980, the Division repealed N.J.A.C. 13:2-36.2 (formerly 13:2-36.9), which had permitted wholesalers to accept deliveries of products from suppliers seven days prior to a month for which supplier prices were to be reduced. The regulation was repealed as part of the "house-keeping" efforts necessitated by the recent "deregulation" amendments to Division regulations. Other portions of the regulation, standing by themselves, no longer made sense within the regulatory framework.

Your letter of July 11, 1980 suggests that it would be desirable to retain the permissive practice in that it allowed wholesalers to have an inventory of lower priced goods on hand for resale. In theory, wholesalers would reduce prices to retailers if, in turn, they were assured that they could obtain, in advance, sufficient inventory to fill retailer purchase orders. In short, such pre-deliveries would facilitate the transfer of supplier price reductions through the distribution system.

Whether the theory was a practice, or will be in the future, remains an open question. However, I do not find the suggestion unreasonable. Therefore, it continues to be Division policy to permit wholesalers to purchase and suppliers to sell products offered at reduced prices seven (7) days in advance of the month for which reductions are offered. The permission is conditioned on the assumption that all wholesalers will be offered the same terms (N.J.A.C. 13:2-24.1) and that all invoicing and sales documents shall reflect that the sale is made in advance of the normal effective date of the quoted reduced prices.

The second matter submitted addresses a previous Division Opinion letter of April 10, 1980 concerning wholesalers' delivery terms. Briefly, the events precepitating the opinion include the following. On the first effective day of the new Division regulations ("deregulation"), I issued a Bulletin which included guidelines with respect to Current Price Lists (C.P.L.). In those guidelines, I observed "some questions trade sellers may wish to consider in independently developing C.P.L. follow:... At what point in time will orders cease to be taken under the terms of a given C.P.L.?" (Emphasis added). Division Bulletin 2342, Item 3 (D), at p. 34 (March 11, 1980). Shortly thereafter, I received a letter from a single wholesaler who advised that as

far as that company was concerned when preparing C.P.L. "We interpret this to mean that these prices will apply to all invoices whose billing date falls within the calendar month, even though delivery may be a few days later, in a subsequent month." (Letter, Jerome J. Blumberg, Chairman, The Jaydor Corporation, March 13, 1980).

After examining the first Current Price Lists filed with the Division (effective April 1, 1980), I responded to the inquiry on April 10, 1980, almost entirely as follows:

> ...While your interpretation is not per se offensive, it lacks a specificity required in order that the retail trade understand your company's offered terms of sale.
>
> Pursuant to N.J.A.C. 13:2-24.6, each wholesaler must independently file with the Division its sealed product prices and other terms of sale by the 15th day of the month prior to the monthly period for which they are to be effective via a Current Price List. On the 16th day of the month, or the next State business day, each Current Price List becomes a public record. Thus, all wholesale to retail prices are available to both the enterprising competitor sellers and retail buyers prior to their effective date of offer. Under such circumstances, it becomes increasingly important to establish, specifically, the point at which each independent wholesaler will cease to take orders under its old prices and terms and begin to accept orders under the new Current Price List.
>
> While it is obvious that a wholesaler may not invoice or deliver products under terms of sale that are not yet effective, I believe it is a fair observation to state that order and delivery transactions, end of the month or otherwise, are not completed with exactly the same speed by every wholesaler, due simply to logistical business differences. Therefore, each wholesaler must determine its own date for terminating the acceptance of orders under given price quotations and must affirmatively state that policy in its Current Price List and in communications to the retail trade with respect to product prices and other terms of sale.
>
> Having complied with the foregoing, any order actually invoiced within the calendar month of the terms and prices offered may permissively be delivered a few days later, even within the next, most recent, subsequent month. (Emphasis added).

Submitted with your letter of October 23, 1980 on behalf of a trade association are three identical supportive letters from wholesalers (Howard Jacobs, President, Reitman Industries, October 21, 1980; Eric Perlmutter, Vice-President, Joseph H. Reinfeld, October 21, 1980; and Myron Feldman, Vice-President, F & A Distributing, October 20, 1980), as follows:

> At the present time, a great percentage of our sales are made during the last few days of the month during which our current price list is in effect. We ordinarily experience a busy delivery schedule at the end of the month. In the event that deliveries are permitted to be made on a regular basis, during the first few days of the next subsequent month, it will merely result in a re-scheduling of the busy time to the first few days of the next month rather than the last few days of the current month. Thus, no relief from the busy delivery schedule should be anticipated because allowing delivery a few days into the next month will only serve to postpone sales which would ordinarily be made several days prior to the end of the month to the last day or days of the month, with requests for delivery in the next month.
>
> The retailer would also employ the extended delivery period to obtain a longer credit period. The state regulations provide that the usual and customary credit period is 30 days. By requesting that goods be delivered in the next month, although the sale is invoiced this month, at the price listed in this month's Current Price List, the retailer will attempt to extend the period within which he must pay for his goods to the first few days of the second month following the month during which the Current Price List was effective.

First, I find the "credit" argument to be without merit. N.J.A.C. 13:2-24.1(b)(2) states that the credit term commences thirty days "from the date of delivery"; not the date a salesman secured an order, the date a computer invoice was printed or the date a truck was loaded.

Second, I think it is a fair assumption to state that wholesalers are busy towards the end of the month because many retailers are able to ascertain after the 15th of each month which product prices are going to increase at wholesale on the first of the next month. I view the argument submitted against the previous opinion from two perspectives; both contrary to competition.

If the Division affirmatively states that no wholesaler may deliver goods at a quoted price beyond a certain date, wholesalers will most probably use the Division as a "shield" against the end of the month orders by agressive retailers (e.g. sorry your order cannot be honored beauase the ABC won't let us deliver it when we can). I'm not suggesting that a wholesaler may not have legitimate business justifications for declining to fill an order. I am saying that the excuse or reason should be that of the individual wholesaler involved. This dovetails into my other concern, i.e., can this request for more uniform terms of sale by a trade association result in a more competitive market, if granted. I conclude that it will not.

As I have stated, each wholesaler must independently determine its prices and other "terms of sale". One of those terms of sale is the point at which orders will cease to be accepted at prices quoted for a given month. This should be a competitive determination based on individual judgement and market forces. If a wholesaler determines that it will accept and honor orders for products through the last effective date of a Current Price List, those are part of its terms of sale and should be contained in its C.P.L. If an order is accepted and actually invoiced under those terms, but cannot be physically delivered until the first day of the next month due to delivery logistics or cannot be delivered until a few days into the next month, due to a strike or holiday or weekend, the transaction will not be viewed as a violation of N.J.A.C. 13:2-24.6. Retailers should not be made to suffer because wholesalers are reluctant to compete.

Further, your letter suggests that this Division's position is contrary to rulings of the Federal Bureau of Alcohol, Tobacco and Firearms.

> "This policy also appears to raise problems under the BATF regulations. The BATF prohibits the furnishing of free warehousing. BATF. Reg. 6.44 (to be effective November 24, 1980; codifies BATF Revenue Ruling 74-12). This regulation prohibits the wholesaler from delaying delivery of merchandise as an accommodation to retailers."

For some time now, at least since the beginnings of this State's effort to "deregulate", industry members have urged that the Division adopt or not adopt a position due to alleged conflict with the Federal Alcohol Administration Act, 27 USCA 205, or rulings of the Bureau of Alcohol, Tobacco and Firearms. For future reference, these arguments will be regarded as having little weight when balanced against this State's interests and policy pursuant to the Twenty-First Amendment. The BATF's authority to intervene in State prompted competitive pricing and terms of sale is limited. See, Nat'l Distributing Co., Inc. v. U.S. Treasury Dept., ATF Bureau, 626 F2d 997 (C.A.D.C. April 22, 1980). In the instant matter, I disagree with the analysis. Both 27 C.F.R.§ 8.22 and N.J.A.C. 13:2-24.6 utilize the "date of delivery" as the point at which credit begins. 27 C.F.R.§ 6.44 (Effective November 24, 1980) prohibits the warehousing of products for which payment has been received or, in credit sales, "delaying final delivery of products beyond the close of the period of time for which credit is lawfully extended."

Finally, the position affirmed in this letter does not sanction discriminatory or exclusionary treatment of retailers. The policy continues that all terms of sale offered by a wholesaler must be equally available to all retail trade buyers. N.J.A.C. 13:2-24.1

Dated:
November 3, 1980

JOSEPH H. LERNER
DIRECTOR

9. OPINION LETTER - SUPPLIER, WHOLESALER AND RETAILER PARTICIPATION IN CHARITABLE FUND-RAISING INVOLVING PRODUCT OR BUSINESS IDENTIFICATION.

National Multiple Sclerosis Society
Teaneck, N. J.

Re: Supplier, Wholesaler and Retailer Participation in Charitable Fund-raising Involving Product or Business Identification

Your communications with this Division concerning the proposed fundraiser for the National Multiple Sclerosis Society have presented questions of general applicability to the entire industry; N.J.S.A. 33:1-36.1. Because the fundraiser involves product or business identification and all three levels of the industry, I shall discuss the issues at some length in responding.

First, any licensee or employee of the alcoholic beverage industry in this State may donate funds, services or assets to charitable or other community causes without Division approval so long as neither the donation is alcoholic beverages nor a product or licensed business is being promoted in connection with the initiative. Review is required in the latter instances to insure compliance with long standing Division policies. Thus, for example, a retail licensee may support or sponsor a "little league" sports program, but may not have the name of its business advertised on the team shirts to be worn by minors.

Second, when a program connected in any way with the marketing or sale of alcoholic beverages involves two or more levels of the industry, the antidiscrimination provisions of Division Regulations become applicable. See, N.J.A.C. 13:2-24.1 et seq. In essence, each supplier must offer each of its wholesalers the same terms of participation and likewise for the wholesale to retail relationship.

Finally, any contest or promotion involving prizes and consumers, which as a condition of participation or entry requires the purchase or tasting of an alcoholic beverage is prohibited; N.J.A.C. 13:2-23.16.

The fundraiser you envision is known as the "Ugly Bartender Contest", whereby the bartenders who raise the most donations to "MS" will be awarded prizes, which are other than alcoholic beverages. The prizes will be donated by non-industry groups and include a round-trip to Finland offered by Finn Air. The Buckingham Corporation, the exclusive United States importer of Finlandia Vodka and Fedway Associates, the exclusive New Jersey wholesaler of the product, will contribute financial support and employee time to underwrite the operating costs of the program. Some of the fundraiser promotional material will make reference to Finlandia Vodka. Obviously, the major parties to the program; Finn Air, Finlandia, Buckingham, Fedway, the participating retailers and their bartenders and MS, expect to realize benefits from the effort. The structure of the program is not, in and of itself, unique, except that it involves the alcoholic beverage industry. There are, however, several areas which deserve specific comment.

As noted, when a supplier engages in a promotion, it must offer the program to all of its wholesalers in this State. Here, although Buckingham has other New Jersey distributors, only one wholesaler, Fedway, is authorized to distribute Finlandia. While I would not encourage promotions designed to exclude some of a supplier's wholesalers, in this instance, because of the nexus between Finn Air, Finlandia and Fedway, I do not find the program offensive.

The same issue arises with respect to retail participation. The program is being offered only to retailers in Bergen and Passaic Counties. Normally, I would find such geographical restriction in a wholesaler's promotion suspect. Here, because the program is limited, not by the wholesaler, but by the sponsoring organization, i.e., the Bergen-Passaic Chapter of "MS", I do not find it offensive. Further, I am not disturbed by the possibility that a "winning" bartender may, in fact, turn out to be a retail licensee. The prizes will be awarded by "MS", not the supplier or wholesaler.

Finally, although the purchase or sale of alcoholic beverages is not a determining factor in the "Ugly Bartender Contest", the Division does have an interest in insuring that the public can ascertain what the program is and where their contributions are going. Therefore, the program may proceed, subject to the condition that each licensee have available for consumer review, a written statement from "MS" indicating that it is the sponsoring organization and beneficiary of the funds to be collected.

JOSEPH H. LERNER
DIRECTOR

Dated: April 6, 1981

10. OPINION LETTER - "TIED HOUSE" - AQUISITION OF HOWARD JOHNSON CO. BY IMPERIAL GROUP, LTD.

Shanley & Fisher, Esqs.
Newark, N. J.

Re: Acquisition of Howard Johnson Company by Imperial Group Ltd.

You have solicited an Advisory Opinion with respect to the acquisition of Howard Johnson Company (hereinafter "Howard Johnson") by Imperial Group Ltd. or its subsidiaries (hereinafter "Imperial") vis-a-vis the proscription contained in New Jersey's "tied-house" statute, N.J.S.A. 33:1-43.

"Howard Johnson" is a publicly traded Maryland Corporation owning twenty (20) retail licenses in this State which do business as Howard Johnson and Ground Round Restaurants. In addition "Howard Johnson" has entered into restaurant franchise agreements with eleven independently owned licensees. For purposes of this Opinion, it is assumed that all of the twenty (20) "Howard Johnson" owned licenses are functioning as bona-fide restaurants. See, N.J.S.A. 33:1-12.31, 12.32

"Imperial" is incorporated in the United Kingdom and publicly traded on the London and American Stock Exchanges. In addition to alcoholic beverages, "Imperial's" diversified business includes tobacco, poultry breeding, seafood and other food products. While the parent company, Imperial Group Ltd., does not itself manufacture alcoholic beverages, subsidiary companies are engaged in brewing, distilling, wholesaling, exporting, importing and retailing various alcoholic beverage products overseas, but primarily within the United Kingdom. A wholly owned subsidiary, Saccone & Speed (U.S.A.), Inc., a New York Corporation, imports alcoholic beverages into the United States. In 1978 total United States sales were approximately $1,000,000. In 1979 total New Jersey sales to wholesalers were approximately $82,700, primarily in Hankey Barrister Scotch and John Courage Beer.

It is sufficient to observe that should "Imperial's" business continue to be conducted in this fashion, even though domestically di minimus in nature, the proposed acquisition would impact contrary to N.J.S.A. 33:1-43. Cognizant of this sensitive concern, Counsel has represented that several significant changes will be made, to wit:

1. Prior to acquisition, all alcoholic beverage activities of "Imperial" subsidiaries in the United States, its territories or possessions, Canada and Mexico, will be discontinued.

2. Neither "Imperial" nor any of its subsidiaries will have any facilities, assets, sales offices or personnel in the United States dealing with the manufacture, importation or wholesaling of alcoholic beverages. Therefore, the business of Saccone & Speed (U.S.A.), Inc. will terminate.

3. Neither "Imperial" nor any of its subsidiaries will own any stock in, or have common directors, officers or employees with any corporation or business which engages in manufacturing, importing or wholesaling alcoholic beverages in the United States.

4. No alcoholic beverage product "handled" (I construe this to mean manufactured, distributed, exported or imported) by any subsidiary of "Imperial" will be bought or sold by "Howard Johnson" licensee.

N.J.S.A. 33:1-43 provides in part:

"It shall be unlawful for any owner, part owner, stockholder or officer or director of any corporation, or any other person whatsoever interested in any way whatsoever in any brewery, winery, distillery or rectifying and blending plant, or any wholesaler of alcoholic beverages, to conduct, own either in whole or in part, or be directly or indirectly interested in the retailing of any alcoholic beverages except as provided in this chapter, and such interest shall include any payments or delivery of money or property by way of loan or otherwise accompanied by an agreement to sell the product of said brewery, winery, distillery, rectifying

and blending plant or wholesaler..." (Emphasis added)

N.J.S.A. 33:1-39 authorizes the Director to make "special rulings and findings as may be necessary for the proper regulation and control" of alcoholic beverages with respect to specific areas and other matters "as are or may become necessary in the fair, impartial, stringent and comprehensive administration" of the Alcoholic Beverage Law.

The statutory provisions against the tied-house system were designed to prevent brewers, distillers and wholesalers from owning or controlling retailers. Grand Union v. Sills, 43 NJ 390, 407 (1964); Affiliated Distillers Brands Corp. v. Sills, 56 NJ 251, 258-59 (1970) rev. in part 60 NJ 342 (1972). The legislative concerns were both economic and social. The latter being dominant. Grand Union v. Sills, Id. On the record before me there is no indication that the Acquisition would result in per-se anti-competitive vertical restraints. See, Continental T.V., Inc. v. GTE Sylvania, Inc. 43 US 36, 97 S. Ct. 2549 (1977). The essential question is then; whether under the terms submitted to the Division, the Acquisition could result in predatory "sales stimulation" of products manufactured or distributed by "Imperial" through "Howard Johnson" retail licensees. Based on the four representations discussed above, I conclude that the Acquisition could not result in such anti-social conduct.

Obviously, the Legislature could not contemplate every possible factual situation that could arise when it adopted our Alcoholic Beverage Laws. It has recognized that the Director of the Division of Alcoholic Beverage Control should possess sufficient latitude to confront such circumstances, consistent with the underlying policy determinations. See, N.J.S.A. 33:1-74, 33:1-39

Accordingly, it is the opinion of the Director that subject to the four conditions represented by Counsel, that the Acquisition of "Howard Johnson" by "Imperial" would not contravene the policy enunciated by the Legislature in adopting N.J.S.A. 33:1-43.

JOSEPH H. LERNER
DIRECTOR

Dated: February 21, 1980

11. OPINION LETTER - "TIED HOUSE" - TRADE ADVERTISING IN PUBLICATION PARTIALLY OWNED BY RETAILER STOCKHOLDERS.

The Deal Sheet, Inc.
Livingston, N. J.

In your letter of October 15, 1980 you have inquired as to the propriety of The Deal Sheet, Inc. accepting advertising. The "Deal Sheet" is a monthly publication which compares competitor wholesale prices of approximately four thousand alcoholic beverage items. It is available to the industry on a subscription basis. In theory, the information provided is intended to assist retailers seeking to purchase products at the best quoted price.

While you have not described the types of advertising contemplated, I note that The Deal Sheet, Inc. is neither a licensee nor registrant of this Division. At this time, I see no reason to consider an opinion other than the decision is up to the company.

Inasmuch as Kenneth Friedman and Joel Kastin each hold a twenty-five percent interest in The Deal Sheet, Inc. and both gentlemen also hold interests in retail licensees, I caution that business must be maintained separately, particularly with respect to revenues generated through supplier or wholesaler accounts. See, N.J.S.A. 33:1-43, N.J.A.C. 13:2-24.2. Finally, while licensees and registrants of this Division will always be responsible for advertising done on their behalf, I suggest you seek independent advice as to any questions of failure in compliance on their parts. See, N.J.S.A. 33:1-52.

Dated: October 29, 1980

JOSEPH H. LERNER
DIRECTOR

12. NOTICE TO WHOLESALERS AND DISTRIBUTORS - MULTIPLE DELIVERIES TO MEMBERS OF COOPERATIVE PURCHASING GROUPS.

The Holiday sales period is an appropriate time to remind wholesalers of the careful attention that must be given to contemplated sales to Cooperative Purchasing Groups authorized pursuant to N.J.A.C. 13:2-26.1 et seq. It is particularily important to recognize the anti-discrimination provisions of N.J.A.C. 13:2-24.1 as they relate to co-op sales and multiple deliveries to members of such groups.

It has been, and continues to be, the position of the Division that absent affirmative cost justification on the part of a wholesaler, a sale at a discount to a cooperative group involving more than one delivery violates N.J.A.C. 13:2-24.1. If the cost to a wholesaler of a sale to a cooperative (with more than one delivery stop) is greater than or equal to the cost of a sale of the same amount of the product(s) delivered to a single retailer, it is likely that a violation has occurred. This does not mean that multiple deliveries constitute a per se violation, but that they continue to be suspect. If challenged by the Division, the burden of going forward with proofs to establish that there are cost savings in spite of multiple deliveries rests upon the wholesaler.

Since an indiscretion on the part of a wholesaler in sales made to cooperatives can result in dire business consequences with respect to the retailers involved, (See, N.J.A.C. 13:2-26.1(a)(10) ), in addition to disciplinary action against an offending wholesaler, I know that the wholesale level of the industry will accept this reminder in a continuing spirit of compliance.

JOSEPH H. LERNER
DIRECTOR

Dated: December 8, 1981

13. CREDIT REGULATION - DELINQUENCY VACATED BY BANKRUPTCY COURT PROCEEDINGS.

New Jersey Association of
Credit & Financial Executives
Kenilworth, N. J.

Re: Summit Squire Restaurant, Inc.
#2018-33-017-003

Elben, Inc.
#0703-44-006-002

The Division is in receipt of letters from Counsel representing the above licensees together with Bills of Sale issued by the Interim Trustee/Trustees pursuant to 11 USCA 363 and U. S. Bankruptcy Court (D.N.J.) authority. Docket Nos. B-80-03312 and B-81-00033. It is the position of the Division that licensee debts to wholesalers are liquidated by operation of law via final determinations pursuant to Bankruptcy Court jurisdiction. See, N.J.S.A. 33:1-26. A discharge in bankruptcy precludes a wholesaler - creditor from any further action in equity or law to enforce the prior debts. Division Regulations cannot recognize these obligations which have been discharged by law. Therefore, a debt arising prior to the effective date of a Bankruptcy Court supervised Bill of Sale transferring a license may not be considered a delinquency for purposes of N.J.A.C. 13:2-24.4.

In the instant matters Elben, Inc. received title on September 26, 1980 and Summit Squire Restaurant, Inc. on March 10, 1981. Prompt action to correct these situations is anticipated.

To make it clear for future purposes, it is the obligation of your licensee clients, who would have notice of Bankruptcy Court proceedings involving similarly situated retailers, to inform you that by operation of law certain debts have been liquidated. Their failure to do so places them at their own peril.

JOSEPH H. LERNER
DIRECTOR

Dated: December 31, 1981

14. STATE LICENSES - NEW APPLICATIONS FILED.

Direct Import Wine Associates
of New Jersey, Inc.
235 Paul Court
Hillsdale, New Jersey
Application filed November 23, 1981
for transfer of wine wholesale license
to include a warehouse at 695 Broadway,
Westwood, New Jersey.

Anthony M. Grieco
t/a Grieco's Soda Depot
628 Higgins Avenue
Brielle, New Jersey
Application filed December 7, 1981
for person-to-person transfer of a
state beverage distributor's license
from Joseph P. Kelly, t/a Kelly Beverages.

Parliament Import Company
3303 Atlantic Avenue
Atlantic City, New Jersey
Application filed December 7, 1981
for place-to-place transfer of a
limited wholesale license to include
additional space.

Dominick Fattaruso & Stephen Whitman
t/a Brick Beverage
2016 Rt. 88 East
Bricktown, New Jersey
Application filed December 10, 1981
for state beverage distributor's
license.

Kramer Beverage Co. Inc.
Fire Road at Delilah Road
Pleasantville, New Jersey
Application filed December 22, 1981
for limited wholesale license.

Joseph H. Lerner
Director