STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 MARKET STREET; CN 087
TRENTON, NEW JERSEY 08625

BULLETIN 2437

December 27, 1984

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ITEM

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
RICHARD J. HUGHES JUSTICE COMPLEX
25 MARKET STREET; CN 087
TRENTON, NEW JERSEY 08625

BULLETIN 2437

December 27, 1984

1. COURT ACTION-DIRECTOR'S FINDINGS AND CONCLUSIONS IN THE MATTER OF TODD SEIFERT, ET AL.- CONFIRMATION OF VALIDITY OF DIVISION'S PRIMARY SOURCE WHOLESALER DESIGNATION REGULATIONS N.J.A.C. 13:2-25.2(a), N.J.A.C. 13:2-25.3(b) and N.J.A.C. 13:2-33.1, WAS AFFIRMED BY THE SUPERIOR COURT, APPELLATE DIVISION.

In Bulletin 2433, Item 3, December 14, 1983, the findings and conclusions of the Director In the Matter of Petitions of Todd Seifert, et al., Confirmation of Validity of Division's Primary Source and Wholesaler Designation Regulations, N.J.A.C. 13:2-25.2(a), N.J.A.C. 13:2-25.3(b) and N.J.A.C. 13:2-33.1, was published. In that opinion the Director affirmed the validity of the subject regulations.

The Findings and Conclusions were also published in the New Jersey Administrative Law Reports at 4 N.J.A.R. 294 (1984).

The Findings and Conclusions of the Director have recently been affirmed by the Superior Court of New Jersey, Appellate Division, in an unpublished decision decided on October 11, 1984, under Docket Number A-345-82T3, and entitled Todd Seifert, t/a Seifert Distributing Company, and Anthony Esposito t/a Longwood Distributors, Appellants, vs. John F. Vassallo, Jr., Director of the Division of Alcoholic Beverage Control of the State of New Jersey, et als (sic), Respondents. Appellate Division Judges Greenberg, O'Brien and Gaynor said, in a "per curiam" opinion, "The Findings and Conclusions of December 5, 1983 of the Director of the Division of Alcoholic Beverage Control confirming the validity of the regulations challenged are affirmed substantially for the reasons set forth in the Findings and Conclusions. The stays of enforcement of the regulations heretofore entered are vacated."

2. READOPTION OF DIVISION REGULATIONS: SUBCHAPTERS 5, 7, 8, 18, 25, 26, 27, 29, 33, 36, 37 and 39 READOPTED WITHOUT ANY SUBSTANTIVE CHANGE ON APRIL 26, 1984.

The following Division Regulations were readopted without any substantive changes on April 26, 1984:

Subchapter 5 (Special Permits issued by the Director);
Subchapter 7 (Transfers of State and Municipal licenses);
Subchapter 8 (Club licenses);
Subchapter 18 (Wholesale Discrimination proceedings);
Subchapter 25 (Diversion, Transshipment and Registered Distribution);
Subchapter 26 (Retail Cooperative Purchases);
Subchapter 27 (Labeling and Deposit Marked Containers);

Subchapter 29 (Records);
Subchapter 33 (Product Information Filing and Brand Registration);
Subchapter 36 (Advisory Opinion requests);
Subchapter 37 (Solicitor's Contracts and Conduct); and
Subchapter 39 (Delivery Documents and Credit terms).

These Regulations would have expired on May 1, 1984 pursuant to Executive Order No. 66. Notice of Proposed Readoption without change was published in the New Jersey Register on March 19, 1984 as PRN 1984-130 at 16 N.J.R. 492 through 502. Director John F. Vassallo, Jr. readopted same without change on April 26, 1984. No comments were received concerning any of the Regulations proposed for readoption and publication of the readoption notice occurred on May 21, 1984 in the New Jersey Register at 16 N.J.R. 1277 through 1280.

3. NOTICE REGARDING REQUIREMENT FOR SOLICITOR'S PERMIT AND USE OF DISPLAY COMPANY PERSONNEL FOR PROMOTIONAL PURPOSES.

It has come to the attention of the Director that certain wholesalers may be utilizing employees of display companies to engage in promotional work on a retail premises directly related to the retail selling of alcoholic beverages. For example, one wholesaler utilized an employee of an affiliated display company to approach customers at the retail establishment to encourage them to consider the purchase of a particular brand of spirits. He would then assist the customer in filing for the rebate offer on that product by filling out the rebate form, removing a portion of the label as the proof of purchase and advising them that he would save them the cost and effort of mailing in the rebate. The person did not have a solicitor's permit nor would he be eligible for a solicitor's permit due to the provisions of N.J.A.C. 13:2-16.4 which provides that a solicitor's permit may be issued only to bona fide employees of duly licensed manufacturers or wholesalers.

It is the position of the Director that the activity as noted in the example, where the promotion is dealing with the solicitation of an order, is the type of activity that requires a solicitor's permit under N.J.S.A. 33:1-67 and N.J.A.C. 13:2-16.1. Therefore, such activity may only be carried on by a bona fide employee of a duly licensed New Jersey manufacturer or wholesaler, which employee holds the proper solicitor's permit. It is not permissible for a person who does not hold a solicitor's permit, such as an employee of a display company, even though it might be affiliated in some fashion with the wholesaler, to engage in such direct promotional work on a retail licensed premises.

If such promotional activity is engaged in by the non-holder of a solicitor's permit, such person may be charged with a penal offense under N.J.S.A. 33:1-67, and the supplier or wholesaler on whose behalf the solicitation has been arranged and/or is being done may be disciplined under N.J.A.C. 13:2-16.6, which proscribes allowing, permitting or suffering any individual to offer for sale or solicit any order for the purchase or sale of any alcoholic beverage, unless such individual has a solicitor's permit.

If any supplier or wholesaler has any specific question about promotional activity and whether or not a solicitor's permit is required, prior to undertaking such activity, and prior to even publishing the activity in the Marketing Manual, such supplier or wholesaler would be well advised to make specific inquiry of the Division regarding the promotion.

4. VIDEO POKER AND OTHER SIMILAR TYPE MACHINES ON LIQUOR LICENSED PREMISES - RESTATEMENT OF BAN - ADDITIONAL EXCEPTIONS - WARNING TO LICENSEES.

In Bulletin 2430, Item 3, March 31, 1983, the Director had given notice that video machines which resemble games of card, dice, roulette, etc., are not permitted in liquor licensed premises in New Jersey as they are violative of N.J.A.C. 13:2-23.7(a)4. That ban, which was temporarily not enforced due to a stay ordered by the Appellate Division, has been in full force and effect since January 25, 1984 when the Appellate Division of the Superior Court of New Jersey affirmed the ban. Sidney Rosenkranz and Richard Fernandez vs. John F. Vassallo, Jr., Director of the State Division of Alcoholic Beverage Control, 193 N.J. Super. 319 (App. Div. 1984).

The ban as discussed in the previous paragraph remains in effect, although, as set forth in Bulletin 2434, Item 9, March 13, 1984, certain exceptions to the ban were granted by the Director because of the state of the art in video games having developed to the point that such video games designed around a card or similar type format could constitute entertainment devices in the true sense of the word as opposed to gambling devices which were covered by the ban. In accordance with the policy set forth in Bulletin 2434, Item 9, the Division reviewed certain games on an individual basis to determine if they would be considered exceptions to the ban, and to date nine exceptions have been issued. Four of the exceptions were set forth in Bulletin 2434, Item 9, and an additional three were added in Bulletin 2435, Item 4, April 19, 1984.

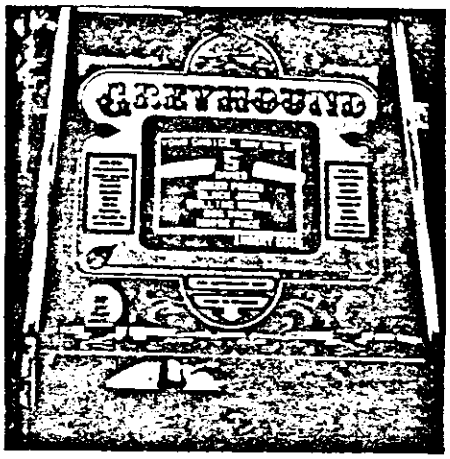
The other two exceptions that have been issued since the publication of Bulletin 2435, Item 4, are:

Video card game exception #008 (June 19, 1984):

Re: Winner's Shuffle
Copyright 1984
by SMS Manufacturing Corp.
1 Arnold Avenue
Pt. Pleasant Beach, NJ 08742

Two versions:
Conversion Kit
Upright Cabinet

Video card game exception #009 (November 30, 1984):



Re: "Casino Games" Model 105AM
Copyright 1984
by:
Greyhound Electronics, Inc.
Route 37 & Germania Station Rd.
Toms River, New Jersey 08753

Games included:
- Joker Poker
- Black Jack
- Casino Slots
- Beat the Spread
- Rolling Bones
- Greyhound Race
- Horse Race

Buttons:
- Cancel
- Stand
- Deal
- Play Chips

It should be noted that in the exceptions to the ban certain requirements are placed upon licensees having the excepted machines on their licensed premises, and such requirements include a provision whereby the Division must be notified of the identity of the machine and its serial number, together with the information as to the name and address of the licensed premises on which the machine is placed, within 48 hours of the placement. Upon receipt of the notification of placement, the Director will furnish the retail licensee an acknowledgement, which original signed document must be prominently displayed on or near the machine.

WARNING TO LICENSEES

Within the past month, it has come to the personal attention of the Director that several licensees have permitted placement on their licensed premises of video card game format machines which appear to be those presented to the Director for review and for which exceptions have been granted, but which in reality are modified versions containing not only the approved amusement versions, but also prohibited gambling versions with build-up of credits and mechanisms for erasure of those credits. The Director has personally reviewed a "Grand Prix" machine manufactured by SMS Manufacturing Corporation which was represented to have fallen under video card game exception #001, but which in reality was version 031384 and would have normally been covered under video card game exception #007. That machine, however, was maintained with the power on and, when a quarter was placed into it, it registered credits rather than the 10,000 points required for the amusement game version of the "Grand Prix" machine. Subsequently, when the electrical power to the machine was cut off and then restored, the machine came back on in the amusement version and thereafter required a special code to be entered through the buttons in order to be restored to the gambling mode. The credits built up in the gambling mode could also be erased by a code through the operating buttons.

The Director has also personally viewed two "Just-For-Fun, Four-in-One" games manufactured by M. Kramer Manufacturing Company and has found them to have both the gambling mode and the amusement mode. Those machines were viewed by the Director in a club licensed premises which even had an electrical power switch underneath the bar so that the power could be turned off and on, thereby changing the machine from the gambling format to the amusement format for which the exception to the ban had been issued under video card game exception #006.

In addition to the SMS Manufacturing Corp. and the M. Kramer Manufacturing Company game machines discussed above, it has also come to the attention of the Director that "Casino Games" model 104AM, which was covered by video card game exception #003, and "Casino Games" model 105AM, which is covered by video card game exception #009, are being modified to also have the dual program with the capability of changing from the gambling program mode to the approved amusement mode by the cessation of electrical power to the machine for a brief period of time, and then the ability to reprogram the machine to the gambling mode through a special code to be entered through the operating buttons of the machine.

As a result of these observations, licensees are hereby warned that possession of any machines with the gambling format will be considered to be a violation of N.J.A.C. 13:2-23.7(a)4, and will be dealt with very harshly. It is incumbent upon a licensee to be sure that any video card game machine contains only the approved amusement version and is properly registered with the Division. If a machine is registered with the Division and represented as being approved, and is thereafter found to have an altered program so as to include a gambling or credit-build-up format, the machine will be confiscated as contraband and the license will be severely disciplined. Of course, if gambling is also found to be taking place upon the licensed premises, this will be dealt with even more severely, since gambling is absolutely forbidden on any licensed premises [N.J.A.C. 13:2-23.7(a)3)].

5. NOTICE REGARDING LIQUORED CANDY - STATEMENT OR SIGN IDENTIFYING PROHIBITION OF SALE TO PERSONS UNDER THE LEGAL AGE FOR PURCHASING ALCOHOLIC BEVERAGES - NOTICE OF REQUIREMENT OF PERMIT BY MANUFACTURER OF CANDY.

On August 28, 1984, N.J.S.A. 24:5-9 was amended to allow the intrastate manufacturing and sale of confectionery containing less than 5% by volume of alcohol. The Amendment, however, added a new section which makes the sale of any confectionery containing more than ½ of 1% alcohol, rendered unfit for beverage purposes, to persons who are under the legal age for purchasing alcoholc beverages a disorderly persons offense.

In addition, the New Jersey manufacturer of the product must place a printed label on the package stating "Sale of this product to a person under the legal age for purchasing alcoholic beverages is unlawful." A person who violates this particular provision commits a disorderly persons offense. In the event a package fails to contain such a label, the person selling the same, including alcoholic beverages, licensees of this State, must post a sign containing the same warning as set out above. A person who fails to do so also commits a disorderly persons offense.

Notice is hereby given that a manufacturer, in order to purchase alcoholic beverages at wholesale and to store such beverages for use in the manufacture of the confectionery, must apply to the Division for a permit to purchase and store said alcohol. It is permissible, however, for a manufacturer to purchase alcoholic beverages for use in the manufacture of candy from a retail licensee without a permit being required.

6. OPINION LETTER - WHOLESALERS AND SALESMEN SERVICING RETAIL ACCOUNTS - MODIFICATION OF OPINION LETTERS NOTED IN BULLETIN 2421, ITEMS 7 & 8

An inquiry of November 27, 1984 raised various questions regarding the opinion letters articulated in October 1980 and June 1981 and contained in Bulletin 2421, Items 7 and 8 concerning permissible activities of New Jersey licensed wholesalers and salesmen involving retail licensee accounts.

The major area of the inquiry is the questioning of the purpose and efficacy of the opinions expressed in 1980 and 1981 which totally preclude a wholesaler or salesman from engaging in any type of service or activity that concerns retail pricing. Specifically prohibited in Bulletin 2421, Item 7 was the price marking by salesmen of retail prices for alcoholic beverages even under the affirmative direction of the retailer. Bulletin 2421, Item 8 went on to advise that salesmen could not discuss or involve themselves in retailer-to-consumer pricing, as well as to reiterate that a salesman could not physically shelf price or label products with prices even if those prices are established by the retailer.

The retail price prohibitions were identified as a matter of policy by the then Director of the Division of Alcoholic Beverage Control. It would appear that such policy decision was a response to the fear or concern that wholesalers and/or suppliers would, through this mode, establish retail sales prices or impede retail competitive pricing. Since the State was entering a totally new area of competitive pricing called "deregulation" with the elimination of Minimum Consumer Resale Price posting (suppliers and/or wholesalers established the minimum resale price to consumers), these concerns or fears were alleviated by an absolute ban on retail price activities by wholesalers and salesmen.

Over three and one half years have passed since the policy pronouncements articulated in Bulletin 2421. Experience has shown that competitive pricing has become a significant element in the sale and distribution of alcoholic beverages in New Jersey. Wholesale to retail prices for thousands of different products change each month. Retail to consumer prices change weekly in many instances. It would appear that some wholesaler or salesmen services relating to retailer pricing should be permitted in the present competitive price climate of the industry. The basic principle which must be preserved and fostered is the ultimate, absolute right of the retail licensees to establish on their own the retail to consumer price. Yet wholesaler or salesmen services in furtherance of a retailer's independent price determination is appropriate marketing assistance. Accordingly, as noted in the following, I shall modify some of the policy statements articulated in Bulletin 2421, Items 7 and 8.

(1) Affixing of retail prices on shelves, product displays and alcoholic beverage products by salesmen will be permitted at retail licensed premises subject to the following:

(a) the retail price must be established by the retail licensee and there must be an affirmative request and direction by the retail licensee to perform this service; and

(b) any mechanical price labelling device used to affix prices must be supplied to the salesman by the retailer.

However, the offering to or providing of preprinted signs, display cards, banners or the like to retailers which identify the retail price of a product is prohibited. Such practice creates too strong an impression that the wholesaler or product supplier has actually established the retail price, even if the retailer can refuse the preprinted price sign.

(2) Discussing with a retailer the retail prices of a competitor-retailer will be permitted. This activity, however, must only involve specific prices offered by other retailers in the sales market of the retailer or identification of what could be the lowest legal consumer price for a product based upon the lowest wholesale to retail price filing on the Current Price List for the month in question. The retailer must first request this service or aid and in no event can the permitted price discussions be disseminated in any written or preprinted price listing. The only printed price material a salesman can offer or provide to a retailer is the wholesale to retail price data contained in the wholesale Current Price List of that salesperson's employer.

(3) Customizing a percentage mark up service by a wholesale licensee for retail licensees on the sales invoice for the products contained thereon will be permitted subject to the following:

(a) The retailer must specifically request such service in writing. The written request must afford the retailer the opportunity to identify any percentage it desires to be computed and added to the bottle cost of the product.

(b) The invoice cannot identify the result of the mark up formula as "retail sales price", "suggested retail sales price" or the like. The proper invoice designation must be "____% markup", "____% over cost" or the like. In sum, the percentage applied must be identified on the invoice and no reference to retail price can be utilized.

(c) The customized mark up service on invoices must permit a retailer to select different percentages for different categories of alcoholic beverage products (e.g. liquor, wine, cordials, beer). The retailer must be allowed to change specified percentages as often as the retailer desires.

(d) No mark up information can be included on an invoice if a retailer chooses not to utilize the service.

In considering these modifications, which expand the ability of wholesalers to engage in services in furtherance of retailers' marketing decisions, the Division intends to monitor the activities of wholesalers and retailers in this regard. Should further experience indicate that the new permitted activities are not furthering proper purposes, but rather are resulting in actual or implied price maintenance or encouraging retail price parallelism, the previous ban on wholesaler or salesmen price activities may be reimposed.

The balance of discussions contained in Bulletin 2421, Items 7 & 8, which dealt with an identification and comment on various statutory and regulatory provisions applicable to servicing retail accounts, an enumeration of examples of permitted activity by salesmen at retail accounts, and the admonition of a practice of "salesmen's pick-up" where they involve deliveries to individual retail licensees participating in a cooperative purchase, are affirmed as continuing Division interpretation and policy with one amplification.

It has been previously indicated that a salesman may assist a retailer by dusting and cleaning shelves, rotating brands or shelf stocking with either newly delivered products or products from the retailer's storeroom. This was not and is not intended to justify the practice which has been observed of "resetting stores" by wholesalers, salesmen or display companies. The permitted activity may encompass only the products of the wholesaler or salesmen. Competitor's products cannot be relocated or moved. The indication in Bulletin 2421, Item 7 that "[there] is no prohibition against touching a competitor's product during permitted activities..." is only intended to allow a temporary removal or displacement of competitor's products while dusting, cleaning or stocking shelves. After the permitted services are rendered, the competitor's products must be returned to the same location. If a retailer wants to realign product

displays in his store or provide expanded shelf area for a product, only the retailer or his employees can undertake such modifications at the licensed premises.

7. NOTICE TO LICENSEES CONCERNING LEGAL AGE (21) TO PURCHASE AND CONSUME ALCOHOLIC BEVERAGES - RECOGNIZED DEFENSES TO A SALE TO A PERSON UNDER THE LEGAL AGE.

Effective January 1, 1983, the legal age to purchase and consume alcoholic beverages in New Jersey was raised from 19 years of age to 21 years of age (N.J.S.A. 9:17B-1). That amendment permitted those individuals who had attained the previous legal age of 19 years by December 31, 1982 to retain the privilege of purchasing and consuming alcoholic beverages in this State. Thus, for the past two years, retail licensees have had to review documents offered to establish age to ascertain whether the individual was 21 or whether the person less than 21 years of age was "grandfathered" and capable of lawfully purchasing and consuming alcoholic beverages.

As of January 1, 1985, the legal age to purchase and consume alcoholic beverages will uniformly be 21 years of age. On that date and thereafter, no one will be grandfathered, and therefore the rule of thumb will be only that the person was born at least 21 years before the date of sale without reference to any particular date of birth such as December 31, 1963.

It is also appropriate with this notice to reiterate what legal defenses presently exist for a retail licensee when a sale to a person under the age of 21 does occur.

Bulletin 2435, Item 1 identified and set forth the full text of a legislative amendment on January 17, 1984 to N.J.S.A. 33:1-77 that modified the defenses available to a retail licensee. The law now provides a defense to prosecution if the retail licensee can establish:

(1) that the purchaser falsely represented his or her age by producing

(a) a photo driver's license of any State; or

(b) a County photo identification card issued by the County Clerk pursuant to N.J.S.A. 33:1-81.2, et seq.; or

(c) an alcoholic beverage photo identification card similar to the County identification card in New Jersey issued pursuant to the laws of another State or the Federal government; and

(2) that the appearance of the purchaser was such that an ordinary prudent person would believe the purchaser was 21 years of age or older; and

(3) that the licensee made the sale in good faith relying upon the production of the permissible photographic identification and the reasonable belief from the purchaser's appearance that the individual was 21 years of age or older.

The retail licensee has the burden of establishing all three elements to perfect the defense. Attention must be directed to the photographic identification produced to identify any apparent alteration, changes or inconsistencies in the document itself or with the individual offering the identification. Review of documentary proof alone is not sufficient. The individual must appear to be 21 years of age or older. While no set rules can identify the factors which will apply to test whether an ordinary prudent person would say someone is 21 years of age or older, retail licensees must remember that they are required to judge the appearance of the purchaser, which judgment will be reviewed in any prosecution or administrative charge filed for a sale to a person under the legal age.

Finally, it should be noted that the purchaser's signing of an age representation card or form certifying that the purchaser is of legal age under penalty of law is no longer considered valid to establish a defense under N.J.S.A. 33:1-77. That written representation was eliminated in the January 1984 amendment to the statute.

8. NOTICE TO RETAIL LICENSEES REGARDING COLLECTION OF SALES TAX ON NON-ALCOHOLIC PACKAGE GOODS

In Bulletin 2434, Item 5, it was noted that retail consumption licensees must collect the New Jersey Sales and Use Tax of 6 per cent in any sale of non-alcoholic beverages. Of specific concern at that time was the identification of the practice of some retail consumption licensees to maintain a beverage bill - "bar tab" - separate from a restaurant or food bill. The restaurant bill was properly taxed, but the bar bill was not. To the extent that such bar bill included non-alcoholic beverages, this practice conflicted with the State law to collect tax on the sale of the non-alcoholic beverage.

Besides reiterating this requirement, it is now noted to all retail licensees, including retail distribution licensees, that the 6% New Jersey Sales and Use Tax must also be collected upon the sale of the new non-alcoholic malt and grape beverage products which are being offered to consumers as an alternate to alcoholic beverages. Those beverages, since the alcoholic beverage (excise) tax and wholesale tax do not apply to them, must be treated just as soda is treated, with the 6% sales tax added at the time of the retail sale.

Licensees should additionally note that liquored candy (see Item 5, above) is also subject to the 6% retail sales tax, to be added at the time of sale to the consumer.

9. NOTICE TO THE INDUSTRY - PREPROPOSAL HEARINGS ON POSSIBLE MODIFICATION AND AMENDMENTS TO N.J.A.C. 13:2-23.16; N.J.A.C. 13:2-24.1 TO 24.12; AND N.J.A.C. 13:2-35.1 TO 35.6

On November 26, 1984 Director John F. Vassallo, Jr. announced that the Division would hold preproposal hearings at the Richard J. Hughes Justice Complex, 4th Floor Conference Hearing Room A-1, 25 Market Street, Trenton, New Jersey, commencing 9:30 a.m. on January 3, 4, 7, 10, 11, 1985, at which time the Division would accept testimony and presentations regarding possible amendments and modifications to the existing Division's regulations governing trade practices, discrimination, marketing and advertising. Notice of these hearings were forwarded to the industry trade associations, trade periodicals and articles were published in several newspapers throughout the State. The notice was also published in the December 3, 1984 New Jersey Register at 16 N.J.R. 3292 substantially as follows:

> Various regulatory changes that became effective in March 1980 significantly altered the manner in which the alcoholic beverage industry in New Jersey sold, marketed and advertised its products. These changes, commonly referred to as "deregulation", have introduced concepts and policies which necessitate evaluation and assessment to insure that the basic purposes of the Alcoholic Beverage Law, that is, the promotion of temperance and industry stability, are maintained. Heir v. Degnan, 82 N.J. 109, 127-28(1980).
>
> The public hearings are being held as a forum for eliciting comments on existing trade practice, marketing and advertising regulations contained in N.J.A.C. 13:2-24, and in N.J.A.C. 13:2-35. Also, the hearings will serve to review promotional practices of the industry (N.J.A.C. 13:2-23.16). The Division invites all industry members, other governmental agencies or law enforcement departments, the news and advertising media and the general public to discuss their experiences and to make suggestions concerning the regulations and possible amendments or modifications.
>
> The general topics to be addressed are the existing trade practice, marketing and advertising regulations of the Division, specifically as referenced above. Though not necessarily all-inclusive, specific areas or topics of discussion are the following:
>
> 1. Are quantity discounts discriminatory? Should quantity discounts be limited? Must quantity discounts be cost justified? (N.J.A.C. 13:2-24.1)
> 2. Should wholesale licensees continue to file monthly price listings with the Division? Should wholesale prices remain unchangeable for an entire month period? Is a system for communication of prices to retailers necessary? (N.J.A.C. 13:2-24.6 and 7)
> 3. Are changes necessary to the Division's credit regulations? (N.J.A.C. 13:2-24.4)

4. Does the existing Division definition of "cost" adequately achieve the purposes of the Alcoholic Beverage Control Law? Are changes necessary in the definition? (N.J.A.C. 13:2-24.8)
5. Should wholesalers be permitted to combine different types of the same brand of alcoholic beverages in sales to retailers? (N.J.A.C. 13:2-24.9)
6. Is there a need for stricter regulation of cooperative price advertising by nonidentically owned retailers? (N.J.A.C. 13:2-24.10)
7. Should promotional practices be specifically addressed in regulation? (N.J.A.C. 13:2-23.16)
8. Should the Division's regulation identifying the permissible areas where retail consumption licensees, without the "Broad Package Privilege", can display and sell packaged goods be modified? (N.J.A.C. 13:2-35)
9. Should wholesalers and suppliers be able to provide equipment to retail licensees? (N.J.A.C. 13:2-24.2)
10. Should the manufacturer's rebate regulation be expanded to permit the manufacturer to give or sell at discount to the consumer logo identified or other merchandise with the proof of purchase of an alcoholic beverage product? (N.J.A.C. 13:2-24.11)

Interested persons who wish to provide comment should arrange to be scheduled by contacting:

J. Wesley Geiselman, Executive Assistant, Division of Alcoholic Beverage Control, at (609) 984-2626.

Written comments, suggestions or ideas may be sent by the final day of hearing to:

John F. Vassallo, Jr., Director
Division of Alcoholic Beverage Control
Richard J. Hughes Justice Complex
CN 087
Trenton, New Jersey 08625

10. NOTICE - SUBSCRIPTIONS FOR 1985 ALCOHOLIC BEVERAGE CONTROL BULLETINS

ABC Bulletins are published on an irregular basis throughout the calendar year. Subscriptions are $25.00 per year and subscribers receive all copies of the bulletin published for that calendar year. To renew or begin a subscription, purchasers should send their check or money order for $25.00 along with their "name" and full mailing address to: State of New Jersey, Department of Law and Public Safety, Division of Alcoholic Beverage Control, Richard J. Hughes Justice Complex, CN-087, Trenton, NJ 08625, Attention: George Lund, Deputy Director, Administration.

If you are a government official and are ordering in your official capacity, please include your title and jurisdiction.

11. DISCRIMINATION PETITION PROCEEDINGS - - ROYAL LIQUOR DISTRIBUTORS AND IMPORTERS ET AL. V. BROWN FORMAN DISTILLERS CORP., ET AL. - DIRECTOR ORDERED RESPONDENTS TO CONTINUE SALES PURSUANT TO N.J.S.A. 33:1-93.6 ET SEQ. - ORDER AFFIRMED BY THE SUPERIOR COURT, APPELLATE DIVISION.

In a discrimination petition proceeding initiated pursuant to N.J.S.A. 33:1-93.6, bearing the caption as shown below, the Director, by Order dated May 10, 1982, required the respondents to sell to petitioners certain nationally advertised distilled spirits products. Because the issues in this matter as well as the entire area of discrimination petition proceedings have been subject to recent adjudications and are subject to several pending proceedings, the entire decision is now being published herein. The Division case follows:

ROYAL LIQUOR DISTRIBUTORS AND IMPORTERS AND DEALERS' LIQUOR CO.; JOSEPH G. SMITH & SONS, INC. Petitioners	:	CONCLUSIONS AND ORDER
vs.	:	OAL DKT. NOS. ABC 2865/2866-79
BROWN-FORMAN DISTILLERS CORP., SOUTHERN COMFORT CORP., AND B.F. SPIRITS, LTD., Respondents.	:	AGENCY DKT. NOS. 4343 & 4344

D'Alessandro, Sussman, Jacovino & Dowd, Esqs. by Edward G.D'Alessando, Esq. Attn'ys. for the Petitioners, Royal Liquor & Importers & Dealers' Liquor Co.
Joseph M. Jacobs, Esq., Attorney for Petitioner Joseph G. Smith.
Riker, Danzig, Scherer and Hyland, Esqs., by Alvin Weiss, Esq., Attorneys for the Respondents.

INITIAL DECISION BELOW - HON. STEVEN L. LEFELT, ADMINISTRATIVE LAW JUDGE

DATED: MARCH 26, 1982 RECEIVED: MARCH 29, 1982

BY THE DIRECTOR:

No written Exceptions were filed by the parties in this discrimination proceeding brought by petitioners under N.J.S.A. 33:1-93.6 et seq.

Having considered the entire record in this matter, I concur with the basic findings and conclusions of law set forth by Judge Lefelt in the Initial Decision and I adopt same as my conclusions herein.

Accordingly, it is, on this 10th day of May, 1982,

ORDERED that the respondents, Brown-Forman Distillers Corp., Southern Comfort Corp. and B.F. Spirits, Ltd. sell and continue to sell to petitioners, Royal Liquor Distributors & Importers, Dealers' Liquor Co. and Joseph G. Smith & Sons, Inc. all of its Southern Comfort alcoholic beverage products distributed in New Jersey, on terms and conditions usually and normally required by respondents.

/s/ JOHN F. VASSALLO, JR., Director

APPENDIX: INITIAL DECISION BELOW

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. ABC 2865/2866-79

AGENCY DKT. NOS. 4343 and 4344

ROYAL LIQUOR DISTRIBUTORS AND
IMPORTERS AND DEALERS' LIQUOR CO.;
JOSEPH G. SMITH & SONS, INC.,

Petitioners

v.

BROWN-FORMAN DISTILLERS CORP.,
SOUTHERN COMFORT CORP.,
AND B.F. SPIRITS, LTD.

Respondents

APPEARANCES:

Edward G. D'Alessandro, Esq., for petitioners Royal Liquor and Importers and Dealers' Liquor Co. (D'Alessandro, Sussman, Jacovino & Dowd)

Joseph M. Jacobs, Esq., for petitioner Joseph G. Smith

Alvin Weiss, Esq., for respondents (Riker, Danzig, Scherer and Hyland)

Record Closed February 15, 1982 Decided March 26, 1982

BEFORE STEVEN L. LEFELT, ALJ:

Nature of Case

Petitioners, licensed New Jersey wholesalers, claim that respondents' refusal to continue to permit their distribution of Southern Comfort liquor in New Jersey is discriminatory and therefore illegal under N.J.S.A. 33:1-93.6 et seq. Respondents contend

that as the new owners of Southern Comfort by virtue of a stock acquisition, they have the right to establish their own group of "authorized" wholesale distributors in New Jersey and were not required to continue the wholesalers who were previously authorized to distribute Southern Comfort in New Jersey. Respondents thus argue that since petitioners were never authorized by respondents, the new owners of Southern Comfort, N.J.S.A. 33:1-93.6 et seq. does not apply. Respondents further contend that if the statute is construed to require them to continue to supply the Southern Comfort brand liquor then the statute is unconstitutional.

The Facts

The facts in this case have been stipulated. Accordingly, based on counsel's stipulations, the following facts are found:

Petitioners for many years were duly licensed alcoholic beverage wholesalers who were authorized by the licensed importer, Southern Comfort Corporation of Missouri, to distribute Southern Comfort liquor, a nationally advertised brand, in New Jersey.

On July 20, 1978, respondent Brown-Forman, a Delaware Corporate importer, licensed to distribute liquor in New Jersey, obtained an option to purchase the stock of Southern Comfort and on February 12, 1979, respondent exercised this option.

Pursuant to the option, on March 2, 1979 the Missouri Corporation's stock was transferred to a Brown-Forman Delaware subsidiary, International Spirits Corporation, and on March 13, 1979, International Spirits changed its Delaware corporate name to Southern Comfort Corporation. On or before March 15, 1979, International Spirits received from the Missouri Corporation assignments of trademarks, labels and all of the remaining assets.

On April 30, 1979, petitioners who had never disparaged the Southern Comfort brand were notified by respondent B-F Spirits, Ltd. that their distributorship was terminated, effective May 1, 1979, even though respondent intended to continue other

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New Jersey wholesalers as distributors. Petitioner Dealers had ordered Southern Comfort liquor from the Southern Comfort Corporation located in Missouri on March 5, 1979 and the deliveries were made on March 22, 1979. Petitioner Royal ordered Southern Comfort liquor from the Southern Comfort Corporation located in Missouri on March 5, April 23, 24 and 26, 1979 and received the liquor thereafter. On March 26, 1979 the Missouri Corporation changed its name and on July 12, 1979, Articles of Liquidation were executed and filed with the Missouri Secretary of State.

Procedural History

After being notified that their distributorship would terminate in May, petitioners filed two separate discrimination petitions under N.J.S.A. 33:1-93.6 et seq. The Director of the Division of Alcoholic Beverage Control ordered respondents to show cause on June 20, 1979 why distributions should not continue pending this litigation. Pursuant to a consent order, respondents agreed to supply petitioners with Southern Comfort liquor pending the final determination of this action. Subsequently, on June 26, 1979, respondents answered both petitions and on August 9, 1979, the Division of Alcoholic Beverage Control transmitted these cases to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq. These matters were thereafter consolidated.

After completing a lengthy discovery and motion period, petitioners, Royal and Dealers, on October 5, 1981 moved for summary decision which was denied by substantive order on October 22, 1981 because I concluded that there were at least nine material facts that were either contested or undeveloped at the time of the motion. On October 28, 1981 the Director of the Division of Alcoholic Beverage Control elected to review this order pursuant to N.J.A.C. 1:1-9.7(c) and on December 1, 1981 the Director issued a Special Ruling modifying the substantive order and substantially circumscribing the proof in this matter. The Director ruled that because of the construction he placed on the statute (see Special Ruling below) the only material fact was whether the petitioners have the ability to pay. See N.J.A.C. 13:2-18.1(b). However, respondents do not contend

that petitioners are unable to pay; petitioners, Royal and Dealers, proferred their ability to pay; and petitioner Joseph Smith has at all times paid the Southern Comfort Corporation invoices. In short, none of the justifications for "discrimination" listed in N.J.A.C. 13:2-18.1(b) 1-10 are urged by any party to this proceeding.

The Special Ruling

The Director's Special Ruling stated that: "It would frustrate the legislative intent to conclude that an authorization to distribute a product could be rendered a nullity as a consequence of the sale, transfer, merger or acquisition of business assets relating to brand or product distribution. If permitted, such initiatives could be used as a vehicle to terminate distributors in a scheme which would be in direct and intentional contravention of the statute. Even if the decision to terminate 'was the result of a business judgement' in good faith, the Court has previously affirmed the Director's interpretation that discrimination has occurred. See American B.D. Co. v. House of Seagrams, Inc., 107 N.J. Super. 264 at pp. 266-67.

I conclude that a successor-in-interest to the rights or privileges of a brand, product or label, is, as far as continued distribution to wholesalers in this State, bound as a supplier to the 'authorizations' made by its predecessor. Thus, I find the 'new' Southern Comfort Corporation, for purposes of N.J.S.A. 33:1-93.6 et seq. stands in the shoes of the 'old' Southern Comfort Corporation, with respect to wholesalers in this State authorized to distribute products subsequent to June 2, 1966."

The Issue

Therefore, because of the Director's Special Ruling, and respondents' assertion that inability to pay is not an issue in this case, the only remaining question is whether the statute as construed by the Special Ruling is unconstitutional as applied. There is no need to inquire whether the preexisting corporation sold or transferred its stock or assets or merged or consolidated with respondents. The method of acquisition has been rendered

irrelevant. Similarly, there is no need to ask whether the acquisition of the Southern Comfort brand by respondents was designed to adversely affect the rights of New Jersey wholesalers. Indeed, there is no need to inquire at all into the business judgment or motivation of either the preexisting corporation or respondent distiller. As long as the distiller succeeds to the rights or privileges of the brand, that corporation is bound to all New Jersey wholesalers who had previously dealt with the preexisting corporation. Thus, in this matter unless N.J.S.A. 33:1-93.6 et seq. is unconstitutional, petitioners have been unlawfully discriminated against by respondents who have succeeded to the rights or privileges of the Southern Comfort brand and who provide no reason for their actions except an alleged right as the new owners of Southern Comfort. The constitutional question thus raised is whether the statute, as construed, which prevents respondents from eliminating any previously authorized New Jersey wholesalers violates the contract clause, the due process clause, or the commerce clause.

Jurisdiction Over The Constitutional Question

Since my statutory obligation under N.J.S.A. 52:14B-10 was to develop a complete and clear factual record on the constitutional question, Brunetti v. Borough of New Milford, 68 N.J. 576, 590-591 (1975) and Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 141-142 (1962), I directed the parties to present at trial or by stipulation any evidence relevant to the constitutional questions raised by respondents. On December 8, 1981, the parties were given an opportunity to develop such proof. However, counsel elected neither to submit proof nor to present any stipulations.

Preliminarily, I must ask whether my function ceases after having provided the parties with an opportunity to develop any record it wishes on this matter. In other words, a preliminary question is whether an administrative law judge initially or an agency head finally may decide the constitutional questions raised in this case.

It has often been repeated that constitutional issues are "unsuited to resolution in administrative hearing procedures." E.g., Califano v. Sanders, 430 U.S. 99, 201 (1977).

However, this broad assertion is no longer an accurate statement of the law. In New Jersey, administrative agencies may decide constitutional questions within their special areas of competence. For example, agency action under attack in a particular case may be challenged on constitutional grounds. E.g., Winston v. Board of Education of South Plainfield, 64 N.J. 582 (1974); Portia Williams v. The Red Bank Board of Education, 662 F.2d 1008 (3rd Cir. 1981) and Hunterdon Central High School v. Hunterdon Central High, 174 N.J. Super. 468 (1980).

The Division of Alcoholic Beverage Control has traditionally taken the position that issues involving the constitutionality of legislation require direct action in a court of plenary jurisdiction. Seip v. Mayor, etc., of Frenchtown, 79 N.J. Super. 521 (App. Div.1963) (judicial constitutional attack preceded administrative appeal) and Blanck v. Mayor and Borough Council of Magnolia, 73 N.J. Super. 306 (App. Div. 1962), rev'd and remanded 38 N.J. 484 (1962), rehearing 85 N.J. Super. 297 (App. Div. 1964).

There is no doubt that cases generally preclude facial constitutional attacks upon statutes in administrative hearings. But see Alcala v. Wyoming St. Bd. of Barber Examiners, 365 F. Supp. 560 (D. Wy. 1973). An administrative agency may not deal with purely legal issues. E.g. Schwartz v. Essex County Board of Taxation, 129 N.J.L. 129, 132 (Sup. Ct. 1942). However, the hearing accorded litigants by the Office of Administrative Law is not so "informal and of such a limited scope that it 'clearly bars the interposition of the constitutional claims.' " William v. Red Bank Bd. of Education, 662 F.2d 1008, 1021 (3rd Cir. 1981) (quoting Moore v. Sims, 442 U.S. 415, 426 (1979)).

A body of law has developed which requires exhaustion of administrative remedies when statutes are claimed unconstitutional as applied. Exhaustion of remedies "is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary interference from the courts." Brunetti v. Borough of New Milford, 68 N.J. 576, 588 (1975) (citing Ward v. Keenan, 3 N.J. 298, 302 (1949)). There is a strong presumption in favor of this rule. Id. Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 139 (1962); East Brunswick Tp. Bd. of Education v. East Brunswick Tp. Coun., 48 N.J. 94, 102 (1966); Pleasantville Taxpayers Association v. City

of Pleasantville, 111 N.J. Super. 377 (Law Div. 1970), aff'd 115 N.J. Super. 85 (App. Div. 1971) and Patrolman's Benevolent Association v. Montclair, 128 N.J. Super. 59, 64 (Ch. Div. 1974), aff'd 131 N.J. Super. 505 (App. Div. 1974). Therefore, when a claim is made that a statute is unconstitutional as applied, the exhaustion principle requires that factual and legal determinations rest in the first instance with the administrative official designated by the legislature for that purpose. Roadway Express, Inc. v. Kingsley, 37 N.J. 136 (1962). Depkin and Son, Inc. v. the Director, N.J. Div. of Taxation, 114 N.J. Super. 279 (App. Div. 1971).

The exhaustion doctrine has three purposes: (1) to insure that the dispute will be heard first in a forum with the necessary expertise; (2) to create a factual record for possible appellate review; and (3) to produce an administrative decision that may satisfy the parties without the necessity of court adjudication. City of Atlantic City v. Laezza, 80 N.J. 255 (1979).

Because of the exhaustion doctrine's purposes, I believe that it would be counterproductive merely to note for court decision the constitutional questions in this case. After a lengthy and hard fought administrative proceeding, a factual record and a construction of the statute have clarified the remaining issues. A mere notation of the constitutional questions would provide neither the parties nor any reviewing court with the specialized and experienced perspectives of the Division of Alcoholic Beverage Control and would force this case into the Appellate Division, thereby increasing the cost and delay of an already lengthy proceeding, which consequences are contrary to the policy behind the exhaustion requirement. Paterson Redevelopment Agency v. Schulman, 78 N.J. 378 (1979). In addition, an administrative adjudication of all the issues might satisfy the parties thereby precluding any further expense and delay.

Therefore, I proceed to the constitutional issues, hopefully to promote due process and expedite the just conclusion of a contested case. See, Statement of Senate, State Government, Federal and Interstate Relations and Veteran's Affairs Committee to Senate #766-L. 1978 c. 67 (The Office of Administrative Law's Enabling Statute).

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The Constitutional Questions

(a) Due Process

The due process clause of the fourteenth amendment protects an individual or corporation's rights and freedoms from arbitrary governmental action. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856); Twining v. New Jersey, 211 U.S. 78, 106 (1908).

In general, when employing a due process analysis to a statute, the central question is whether the statute is unreasonable or arbitrary. Wisconsin v. Constantineau, 400 U.S. 433 (1971). One must ask whether the statute bears a reasonable relationship to the object of the legislation and to a legitimate state purpose. Hudson Circle Servicecenter, Inc. v. Town of Kearny, 70 N.J. 289 (1976). If the statute does have a reasonable nexus to the promotion of the public health, safety or welfare, then it will not violate the due process clause. Affiliated Distillers Brands Corp. v. Sills, 56 N.J. 251, 260 (1970), mod. 60 N.J. 342 (1972); Grand Union v. Sills, 43 N.J. 390, 403 (1964).

In the case of N.J.S.A. 33:1-93.6, the asserted state interests are temperance, which is the state interest behind the liquor regulatory scheme in general, Canada Dry Ginger Ale, Inc. v. F & A Distrib. Co., 28 N.J. 444, 455 (1958) and the prevention of monopolistic domination of the alcoholic beverage market. Id. at 460. In an introductory comment to N.J.S.A. 33:1-93.6, a legislator stated: "The purpose of this bill is to insure an equitable basis for competition between franchise wholesalers of alcoholic beverages in New Jersey." L. 1966, c. 59 (N.J.S.A. 33:1-93.6); Letter Brief of Petitioner, Feb. 1, 1982 at p. 4. Similarly, in an introduction to predecessor legislation, it was stated that the goal was to "prevent any monopolistic freezing out of one wholesaler by another by preventing the sale of certain products to him." L. 1942, c. 264, Letter Brief of Petitioner, Feb. 1, 1982 at p. 4.

> A wholesaler dependent upon a distiller for a supply of sought-after merchandise might be tempted to comply with the non-legitimate desires of the distiller if the latter were free to discontinue the

> supply at will. For the purpose of strengthening the wholesaler's resistance if confronted with a distiller's wish to over-stimulate sales and thus negate the public policy in favor of temperance or a desire to engage in other prohibited acts, e.g., tie-in sales, the statute seeks to prevent the distiller from arbitrarily closing the source of supply to a wholesaler. Canada Dry Ginger Ale, Inc. v. F & A Distrib. Co., 28 N.J. 444, 455 (1958).

N.J.S.A. 33:1-93.6 as construed relates reasonably to these interests. Under the construction, no corporate manipulations could subvert equitable competition between wholesalers. Any wholesaler authorized after June 2, 1966 would remain authorized and protected by N.J.S.A. 33:1-93.6, unless the wholesaler loses the ability to pay, disparages the brand, materially breaches any sale conditions or makes an unfair preferment in sales effort. N.J.A.C. 13:2-18.1. Thus, all wholesalers will continue to be supplied by distillers no matter what corporation controls the distiller that had previously supplied New Jersey wholesalers. I therefore CONCLUDE that the due process clause has not been violated.

(b) Commerce Clause

California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980) held that a state wine pricing scheme was illegal as a restraint on trade in violation of the Sherman Act. Id. at 113-14; 15 U.S.C.A. Sec. 1 et seq. In that case, the state's regulatory power and the federal commerce power were in contradition, and "the congressional policy - adopted under the commerce power - in favor of competition" was determined to be more important. Id. at 106. In the present case, the State interest behind N.J.S.A. 33:1-93.6 which discourages monopolistic domination of the alcoholic beverage market and the federal interest in competition complement each other. See Canada Dry Ginger Ale, Inc. v. F & A Distrib. Co. 28 N.J. 444, 455 (1958).

In Epstein v. Lordi, 261 F. Supp. 921 (1966) the court noted that state regulation of liquor under its police power is invalid, as in any commerce clause case, if:

> (a) the subject demands national uniformity so that State action is precluded even absent Federal action; (b)

> Congress has occupied the field to the exclusion of State regulation; or (c) a particular State statute conflicts directly with an express regulation by Congress. Cooley v. Board of Wardens, 12 How. 299, 13 L. Ed. 996 (1851); Kelly v. State of Washington, 302 U.S. 1, 58 S. Ct. 87, 82 L. Ed. 3 (1937). [at 931]

None of these three conditions appear to operate in this case. The statute as construed requires liquor previously distributed into New Jersey to continue to be distributed. The impact upon commerce appears negligible while the interests of New Jersey in continuing supplies to wholesalers are great. I, therefore, CONCLUDE that there is no commerce clause violation.

(c) Contract Clause

The contract clause precludes the impairment of contractual obligations, but is not absolute. In this century, the strength of the clause has waned in the face of economic necessity and public policy. Often, legislation altered contractual obligations because of important economic or public policy goals and was upheld against contract clause attack. E.g., Home Building and Loan Assoc. v. Blaisdell, 290 U.S. 398 (1933); El Paso v. Simmons, 379 U.S. 497 (1965).

In Globe Liquor Co. v. Four Roses Distillers Co., 281 A.2d 19, 21 (Del. Supr. 1971), cert. den. 404 U.S. 873 (1971), the Delaware Franchise Security Law changed a one-year contract term into one which would continue indefinitely. Consequently, the court struck down the law under the contract clause, inter alia, because that law changed the existing franchise contracts between franchisors and wholesalers. Id. at 20.

In this case, by virtue of the Special Ruling, Brown-Forman has been placed into the shoes of the preexisting Missouri Corporation and whatever contract they had with each other may have been affected. However, the contract respondents had with the Missouri corporation specifically noted and recognized all New Jersey wholesalers (see P-1 Ev. Option Agreement and P-12 Ev. Bill of Sale) and contrary to respondents' argument that they merely "purchased a brand," if I were to characterize the transaction I

would declare it a de facto merger, cf. Applestein v. United Board and Carton Corp., 60 N.J. Super. 333 (Ch. Div. 1960), making the Delaware Corporation responsible for the Missouri Corporation's debts and liabilities. McKee v. Harris-Seybold Co., 109 N.J. Super. 555 (Law Div. 1970), aff'd per curiam, 118 N.J. Super. 480 (App. Div. 1972). In addition, respondents claim that their right to make new contracts with wholesalers is being impaired. By this argument, however, no present contract would be impaired by N.J.S.A. 33:1-93.6. In addition, the contract Brown-Forman is being held to is identical to the preexisting contract that the Missouri Corporation had with petitioners; both are terminable only under N.J.A.C. 13:2-18.1. Therefore, Globe Liquor Co., supra, is distinguishable and whatever right Brown-Forman may have to make new contracts is outweighed by the legislative purpose of N.J.S.A. 33:1-93.6 which fosters the public policy of fair wholesaler competition in New Jersey. Consequently, I CONCLUDE that there is also no contract clause violation.

(d) The Twenty-First Amendment and the Presumption of Constitutionality

The twenty-first amendment greatly affects the constitutional analysis in cases concerning liquor importation and transportation, particularly in commerce clause cases. The twenty-first amendment, which repealed the eighteenth amendment, gives the states expansive power to regulate alcohol. As the Supreme Court stated, "The Twenty-first Amendment has placed liquor in a category different from that of other articles of commerce ... local, not national, regulation of the liquor traffic is the general Constitutional policy." Carter v. Virginia, 321 U.S. 131, 138 (1944) (Black, J. concurring). Obviously, therefore, the twenty-first amendment further supports my conclusion that N.J.S.A. 33:1-93.6 is constitutional.

In addition, statutes are presumed constitutional. E.g., Independent Electricians, etc. Assoc. v. N.J. Board of Electrical Contractors, 48 N.J. 413 (1967). I note respondents' argument that this statute was designed to benefit wholesalers who seek to perpetuate a monopoly, Affiliated Distillers Brands Corp. v. Sills, 106 N.J. Super. 458 (Ch. Div. 1969). However, on this record, I cannot conclude that the dominant purpose of this legislation was to advance such private interests. Independent Electricians, etc., Assoc. v. N.J. Board of Electrical Contractors, 48 N.J. at 420-421.

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Determination

I, therefore, CONCLUDE that N.J.S.A. 33:1-93.6 as construed by the Special Ruling is constitutional and that respondents have discriminated against petitioners contrary to N.J.S.A. 33:1-93.6 et seq. and N.J.A.C. 13:2-18. Consequently on this 26th day of March 1982, I ORDER that respondents continue to sell Southern Comfort liquor to petitioners on the same terms as heretofore existed.

This recommended decision may be affirmed, modified or rejected by the ACTING DIRECTOR OF THE DIVISION OF ALCOHOLIC BEVERAGE CONTROL, DENNIS P. O'KEEFE, who by law is empowered to make a final decision in this matter. However, if Dennis P. O'Keefe does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby FILE my Initial Decision with DENNIS P. O'KEEFE for consideration.

3/26/82
DATE

STEVEN L. LEFELT, ALJ

Receipt Acknowledged:

3/29/82
DATE

DIVISION OF ALCOHOLIC BEVERAGE CONTROL

Mailed To Parties: 4-7-82

DATE

OFFICE OF ADMINISTRATIVE LAW

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APPELLATE DIVISION REVIEW

On appeal of the Director's Order of May 10, 1982, the New Jersey Superior Court, Appellate Division, on February 28, 1984, in a per curiam opinion, affirmed the Director's decision. The Appellate Division case, which is unreported, was captioned Royal Liquor Distributors and Importers and Dealers' Liquor Co.; Joseph G. Smith & Sons, Inc., v. Brown-Forman Distillers Corp., Southern Comfort Corp.and B.F. Spirits, Ltd., and Division of Alcoholic Beverage Control, and bore Appellate Division Docket No. A-4599-81T2.

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PUBLICATION OF BULLETIN 2437 IS HEREBY DIRECTED THIS

27th DAY OF DECEMBER, 1984.

John F. Vassallo Jr.

JOHN F. VASSALLO, JR.
DIRECTOR