Division of
ALCOHOLIC BEVERAGE CONTROL

Bulletin

140 E. Front Street, CN 087, Trenton, New Jersey 08625-0087

BULLETIN 2473 MAY 30, 1997

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Division of
ALCOHOLIC
BEVERAGE
CONTROL

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140 E. Front Street, CN 087, Trenton, New Jersey 08625-0087

BULLETIN 2473 MAY 30, 1997

1. NOTICE AND ORDER TO 1996-1997 SOLICITOR PERMITTEES.
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
CN-087 TRENTON NJ 08625

NOTICE AND ORDER TO 1996-1997 SOLICITOR PERMITTEES
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The following Notice and Order extending 1996-1997 Solicitor Permits was issued by Director John G. Holl on April 29, 1997. Based upon the authority granted by this Notice and Order, Solicitors may continue to solicit sales of alcoholic beverages on behalf of their Class A or B licensed employers, provided that they have in their possession a valid Solicitor Permit issued for the 1996-1997 term, until midnight August 31, 1997. This extension will permit renewal of Solicitor Permits to coincide with renewal of transit insignia for Solicitors.

BY THE DIRECTOR:

Pursuant to N.J.S.A. 33:1-67 and N.J.A.C. 13:2-16, no individual may offer for sale or solicit any order in the State on behalf of a Class A or B licensee, for the purchase or sale of any alcoholic beverages unless that individual has been issued a Solicitor Permit by the Division of Alcoholic Beverage Control. Solicitor Permits are issued for a one-year term which commences June 1 and expires the following May 31.

The Division has received industry requests to combine renewal of Solicitor Permits with issuance of transit insignia for Solicitors. Having considered the requests, and with the objective

of reducing paperwork burdens on the industry, I shall herein Order the 1996-1997 Solicitor Permit term extended.

Accordingly, on this 29th day of April, 1997, it is

ORDERED that the expiration date of Solicitor Permits issued for the 1996-1997 term is hereby amended and extended to August 31, 1997, and it is further

ORDERED that this Notice and Order shall serve as authorization for this extension. Any valid 1996-1997 Solicitor Permit containing an expiration date of May 31, 1997 shall continue in force and effect until August 31, 1997.

\S\ JOHN G. HOLL
JOHN G. HOLL
DIRECTOR

2. NOTICE OF CHECK CASHING BY LICENSEES.

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

The Division of Banking has brought to our attention that a number of liquor stores have been cashing checks without the necessary license required by the New Jersey Department of Banking and Insurance. Licensees may be confused by the paragraph in the Alcoholic Beverage Control Handbook for retail licensees entitled "Check Cashing."

New Jersey law requires that any person who cashes a check for a charge, fee or any other form of consideration first obtain a license from the Department of Banking and Insurance. The maximum penalty for each violation is $1,000.

A retail distribution licensee may provide check chasing services for a fee if properly licensed by the Division of Banking unless there is a municipal ordinance prohibiting such mercantile activity on the licensed premises. If anyone has any questions they should contact Leona B. Joyer, Chief of Investigations for the Enforcement Bureau of the Division of Banking.

3. NOTICE TO ALL MUNICIPALITIES - FORM OF RESOLUTION APPROVING TRANSFERS.

The Division has received inquiries from Municipal Attorneys requesting guidance on the proper form for municipal resolutions approving transfers which are conditional upon some future event. Examples of such conditions are:

1. A closing taking place in the future,
2. Receipt of investigative reports or fingerprint cards,
3. Receipt of a certificate of occupancy,
4. Receipt of zoning and/or planning board approval.

There are inherent difficulties in a resolution which approves a transfer but recites that the approval is conditioned upon or subject to a closing being held in the future. It is difficult for the Division of ABC and the issuing authority to be certain who is properly operating the license at any particular time in this situation. The issuing authority and the Division of ABC may not receive timely notice of when a closing is completed, and in rare situations, no closing may take place at all. On prior occasions the Division of ABC has advised municipal clerks that a transfer resolution is effective upon the date of its adoption unless another specific date is identified therein. If the condition is not fulfilled, the issuing authority has no remedy other than to charge the new licensee with a regulatory violation. The issuing authority may not revisit the resolution and change it absent special circumstances.

Resolutions which are not contingent upon a future event, but plainly recite that they are effective on a future date certain, are an acceptable alternative. For example, a resolution

contingent upon a closing taking place in the future would not be acceptable. On the other hand, a resolution approving a transfer of a license, effective on a specific future date would be acceptable. However, the transfer will automatically become effective on that date certain unless the issuing authority takes some affirmative action to rescind its resolution before then.

You should also be advised that no transfer of any license may take place before receipt of a Tax Clearance Certificate from the Division of Taxation. Resolutions which approve an issuance or transfer before receipt of the Certificate are null and void.

4. NOTICE OF SPECIAL PERMITS TO ALLOW CLASS A AND CLASS B LICENSEES TO ENGAGE IN LIMITED RETAILING ACTIVITY KNOWN AS "PARTY NIGHTS" PURSUANT TO N.J.S.A. 33:1-43(C)(1). *NOTE

"Supplier Party Nights" are promotional events that take place on the premises of a Retail Consumption License. A supplier (holder of a Class A or B License) of a particular brand arranges with the Retail Licensee to feature that brand on a specific date or dates. The supplier may work with the retailer to decorate the premises with point of sale materials before the event and may provide some form of entertainment during the event such as a Disc Jockey. Suppliers may use their own employees or independent contractors to conduct the event. Such persons usually attend the event and "talk up" the featured brand. Recently, the Division of A.B.C. advised some suppliers to cease and desist unless they received a Special Permit for this activity.

Generally, such activity is prohibited by the licensing statutes which define the privileges accorded to each license, as well as N.J.S.A. 33:1-43 which makes it unlawful for a supplier to engage in retail activity unless specifically permitted by the Director. In pertinent part, N.J.S.A. 33:1-43(c)(1) states "nothing . . . shall prohibit the exercise of limited retail privileges by Class A or Class B licensees conferred . . by Special Permit issued by the Director." Shiflin and Somerset Company, thorough its attorney, William MacKnight, Esq. has proposed that it be permitted to participate in a "Party Night" in a controlled manner.

The Division of A.B.C. has considered the history of these events, the marketing goals that suppliers hope to achieve and the policies underlying those statutes which restrict the contact that

*NOTE: This item does not pertain to suppliers' promotions at retail distribution licensed premises.

suppliers and their representatives may have with consumers. We have considered the Conditions under which such activity will not undermine the legislative policy of fostering moderation and responsibility in the use and consumption of alcoholic beverages (N.J.S.A. 33:1-3.1(2). We believe that some limited activity of the kind proposed should be permitted. Henceforth, the Division will issue a Special Permit pursuant to N.J.S.A. 33:1-43(C)(1) for this type of activity so long as the following guidelines are adhered to:

1. Each event must be held at the premises of a Plenary Retail Consumption Licensee.

2. Supplier/Representatives may greet consumers at the entrance and appropriately identify themselves at that time.

3. Supplier/Representatives may place signage and other point of sale material in and about the premises for the event.

4. Supplier/Representatives may wear apparel with logo identifying the supplier's products.

5. Supplier/Representatives may discuss with retailer's staff the features of supplier's products and how to use them.

6. Supplier/Representatives may not make drinks for consumers, take drink orders or serve drinks to a consumer on behalf of the retailer.

7. Supplier/Representatives may discuss with consumers the features of supplier's products and how they might be used. However, no supplier/representative may discuss specific retail prices for such products or the specific location where such products may be purchased.

8. Supplier/Representatives or employees of the participating retailer may give specialty items (such as tee shirts) with logos identifying the supplier's products to customers on a "no purchase necessary" basis.

9. Supplier/Representatives may not purchase complimentary drinks for customers.

10. No alcoholic beverages may be given by a supplier to the participating retailer or as a prize to any customer.

11. Suppliers shall include in their point of sale materials which are displayed at the participating retailers premises, an appropriate moderation message encouraging consumers to be responsible in their use and consumption of alcoholic beverages.

12. All such events must be included in the supplier's marketing manual as described by N.J.A.C. 13:2-24.5.

13. All such events shall be offered by suppliers to retailers in such a manner as not to violate N.J.A.C. 13:2-24.2.

Applicants for this permit must be a Class A or B licensee and should submit their request to the Division of A.B.C. at least two weeks prior to the proposed event. The request should state the time and place of the event, the name of the product or products being featured and briefly describe the moderation message that will be part of the materials displayed. The fee for such permit shall be $25. Any permittee shall be responsible for the acts of their agents and that such agents are not otherwise disqualified under N.J.S.A. 33:1-26.

5. REQUEST TO RECEIVE DIVISION REVIEW OF THE PROPOSED GOURMET WINE AND GIFT SHOP FOR W.L. GOODFELLOWS, INC.

April 7, 1997

James Cicarelli
General Manager
W.L. Goodfellows and Company
310 E. White Horse Pike
Absecon, New Jersey 08201

RE: Request to Receive Division Review of the Proposed Gourmet Wine and Gift Shop for W.L. Goodfellows, Inc.

Dear Mr. Cicarelli:

Thank you for your letter of November 22, 1996, regarding your request to receive Division review of the proposed gourmet wine and gift shop for W.L. Goodfellows and Co. W.L. Goodfellows and Co.

operates as a restaurant and bar and holds a plenary retail consumption license.

You have advised that you wish to convert a porch adjacent to your main bar and dining area into a gourmet food shop. You have advised that you wish to "offer specialty cakes, sauces, nuts, candy and fancy snack food and . . . a selection of fine wines, liquors, spirits and microbrew beers." Also you state that you "will create custom gift baskets." In addition, you have advised that your consumers have repeatedly asked if your restaurant offers your own sauces and foods in retail packaging.

The Alcoholic Beverage Control Statute, N.J.S.A. 33:1-12 prohibits a Plenary Retail Consumption Licensee from having other "mercantile business" on their premises unless it is essentially an accommodation to patrons. This statute defines an accommodation to patrons as being "the sale of distillers', brewers and vintners, packaged merchandise prepackaged as a unit with other suitable objects as gift items to be sold only as a unit; the sale of novelty wearing apparel identified by the name of the establishment licensed under the provisions of the section; the sale of cigars, cigarettes, packaged crackers, chips, nuts and similar snacks and ice at retail." Specifically, the statute prohibits a consumption licensee from engaging in any business such as a grocery store, delicatessen or drugstore.

The sale of gourmet foods and gift baskets by a consumption licensee appears to elevate the licensee's activity to "other mercantile business" similar to a grocery store which is prohibited under the statute. The licensee would be engaging in an additional business other than the operation of a restaurant. The retail sale of gourmet foods and gift baskets would not be incidental sales or an accommodation to customers under the Division statute. In addition, unless the consumption licensee complies with Division regulation N.J.A.C. 13:2-35.1 through 6, the offering for sale of alcoholic beverages in closed containers would violate Division regulations.

The Alcoholic Beverage Control statute has been interpreted to allow consumption licensees to sell their own speciality sauces and foods in retail packaging as an accommodation to patrons. Therefore, as an accommodation to patrons you would be permitted to sell pre-made or frozen W.L. Goodfellows foods and sauces.

Although Division law and regulation prohibit you from operating a gourmet food shop on your licensed premises, you may operate such a shop in an unlicensed, separate area or room of your premises. You may not sell any alcohol on these premises. If you want to de-license a portion of your premises you must file a place-to-place transfer application with the local issuing authority to de-license a portion of your premises. Also, any cash registers use or sales of the gourmet products must take place on the unlicensed premises. Also, you would need the local issuing authority's permission to have a gourmet food shop adjacent to your licensed premises.

Thank you for contacting the Division. Please feel free to contact me should you have any questions.

Very truly yours,

/s/ Analisa Sama Holmes
Analisa Sama Holmes
Deputy Attorney General

6. REQUEST TO RECEIVE DIVISION AUTHORIZATION FOR THE RETURN OF ALCOHOLIC BEVERAGES.

May 1, 1997

Andrea Lehner
The Wine Group
17000 E. Hwy 120
P.O. Box 897
Ripon, CA 95366-0897

Re: Request to Receive Division Authorization for the Return of Alcoholic Beverages

Dear Ms. Lehner:

Thank you for your letter of March 17, 1997 in which you ask for Division authorization to refund $44.52 to a retailer for cost incurred by a retailer caused by a manufacturing labeling error.

Specifically, you advised that the Wine Group inadvertently mislabeled some of your G & D Marsala, 1.5 Liter bottles with a 750ml UPC code. As a result, the retailer sold 12 1.5 liter bottles at the 750ml cost before discovering this discrepancy.

Division regulations permit a winery or wholesaler to accept a return of alcoholic beverages from a retailer for cash, credit or exchange for bona fide errors in products delivered, change in product or labeling of products and for such other good causes as may be approved of by the Director. N.J.A.C. 13:2-39.1(a).

Provided the winery has a return policy printed in its marketing manual, that is "non-discriminatorily applied to all similar situated retail licensees," the above-referenced matter appears to fall within an authorized return. N.J.A.C. 13-39.1.

The return should be accompanied by a return document dated and signed by a duly authorized representative of both the wholesaler and retail licensee. The return document should contain a detailed description of the product which contained the labeling error, the original date of delivery, an invoice number of original purchase, the date of return, the name of the person requesting the return and the terms of return, whether it be cash, credit or exchange. A copy of that document should be left with the retail licensee.

Thank you for contacting the Division.

Very truly yours,

/S/ Analisa Sama Holmes
Analisa Sama Holmes
Deputy Attorney General
Regulatory Bureau

7. R & R MARKETING, L.L.C.; ROYAL DISTRIBUTORS AND IMPORTERS, LTD., INC., AND REITMAN INDUSTRIES, INC. V. BROWN-FORMAN CORPORATION - FINAL CONCLUSION AND ORDER GRANTING MOTION FOR SUMMARY JUDGEMENT BY RESPONDENT.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

R & R MARKETING, L.L.C.; ROYAL DISTRIBUTORS AND IMPORTERS, LTD., INC., AND REITMAN INDUSTRIES, INC., Petitioners, v. BROWN-FORMAN CORPORATION, Respondent.	AGENCY DKT. NO. 07-94-239 FINAL CONCLUSION AND ORDER Decided: May 9, 1997

This is a proceeding brought by holders of New Jersey plenary wholesale licenses against a national supplier of distilled spirits. The wholesalers have petitioned the Division of Alcoholic Beverage Control for an order compelling the supplier to continue doing business with them.

Respondent Brown-Forman Corporation ("Brown-Forman") has moved for summary judgment, dismissing Petitioners' claims brought pursuant to N.J.S.A. 33:1-93.6 et seq. The Petitioners, R & R Marketing, L.L.C. ("R & R"), Royal Distributors and Importers, Ltd. ("Royal") and Reitman Industries, Inc. ("Reitman") have opposed the motion and have sought a full plenary hearing.

N.J.S.A. 33:1-93.6 prohibits

". . . discrimination in the sale of any nationally advertised brand of alcoholic beverage . . . by importers, blenders, distillers, rectifiers . . . to duly licensed wholesalers of alcoholic beverages who are authorized by such importers, blenders,

distillers, rectifiers . . . to sell such nationally advertised brand in New Jersey."

For purposes of this motion, Brown-Forman does not dispute that its brands at issue herein are nationally advertised. Nor do they dispute that, prior to the creation of R & R, both Reitman and Royal were protected by the statute.

Instead, Brown-Forman contends that since it never authorized R & R to sell its brands, then R & R cannot enjoy the protection of the anti-discrimination statute. Brown-Forman further contends that Reitman and Royal have essentially forfeited their statutory rights by denuding themselves of their ability to act as independent wholesalers.

FACTUAL BACKGROUND

In the summer of 1993, Reitman and Royal began discussions to somehow combine their respective businesses. Neil Wassner, a financial consultant to Reitman, noted that preservation of the franchises was a legal and tax issue to be explored. Wassner spoke with Charles Sapienza, then Executive Director of the New Jersey Wine and Spirits Wholesalers Association.[1] Wassner's notes reflect Sapienza's views of the statute.

The record demonstrates that the principals of Reitman and Royal were aware of the potential to lose their franchises with various suppliers. Wassner noted that the "proper structure for the combined company . . . involve(d) interplay of tax, licensing, franchise and operating issues."

It is also clear that Reitman's attorneys, Ken Slutsky and John Mac Kay, Royal's financial consultant, Francis Warburton, Wassner, Sapienza and others gave serious analysis to the franchise issue. The options explored included stock contributions, merger, transfer of operating assets, partnership, contractual arrangements and the formation of a new company.

In November of 1993, Mr. Mac Kay wrote to the Director of the Division of ABC seeking an advisory opinion as to whether the creation of an "operating partnership" would deprive the wholesalers of the protection of the anti-discrimination law.

Subsequent correspondence from Mr. Mac Kay to the Division raised the possibility that the wholesalers would form a limited liability company. Although I did not respond in writing at that time, I advised Mr. Mac Kay I believed it inappropriate for the Division to issue an advisory opinion since the matter could well end up as a contested case before the Division. Subsequently, on October 11, 1994, after the filing of the within petition, I wrote to the parties summarizing my contacts with Mr. Mac Kay.[2]

Despite their inability to obtain this measure of regulatory reassurance, Royal and Reitman forged ahead.

In July of 1994, Royal and Reitman entered into an agreement which created R & R as a limited liability company (L.L.C.) pursuant to P.L. 1993, c. 210 (N.J.S.A. 42:2B-1 et seq.) To this end, they executed an Operating Agreement, which, among other things, purported to prohibit Royal and Reitman from engaging in the wholesale distribution of alcoholic beverages The agreement went on to provide, however, that in the event the distribution and warehouse contracts of Royal, Reitman and R & R could not be "transferred and assigned" to R & R, then those contracts would remain in their respective names. In this event, Royal, Reitman and R & R agreed to perform their contracts on behalf of R & R at such terms to ensure that R & R "would be in the same economic position with respect to such contract as it would have been in" had the contracts been transferred to R & R.

Shortly after the creation of R & R, Petitioners attempted to purchase alcoholic beverages from Brown-Forman in the name of R & R. These orders were refused.

In opposing the motion, Petitioners contend that the various agreements creating R & R ensured that R & R would retain the rights and privileges of its members. They assert that N.J.S.A. 33:1-93.6 should be "liberally construed" to achieve the stated ends of the law, i.e. to achieve the independence of wholesalers from distillers, citing Canada Dry Ginger Ale, Inc. v. F. & A. Distributing Co., 28 N.J. 444, 455 (1958) and Joseph H. Reinfeld, Inc. v. Schiefflin & Co., 94 N.J. 400, 404 (1983).

Petitioners maintain that their decision to create a new L.L.C., R & R, is no different from a corporate merger, which, they assert, would have entitled them to continuing protection under N.J.S.A. 33:1-93.6.

In January of 1995, I issued an order denying Brown-Forman's motion to dismiss the petition. In that order, I noted the potential existence of a number of factual issues -- including the nature of a limited liability company and the assignability of any contracts -- and denied the motion since a full record had not been developed.

Since that time, the parties have engaged in extensive discovery relating to these and other issues (including Petitioners' assertion of estoppel). Upon review of written and oral argument as well as discovery material, I am satisfied that no purpose would be served by a plenary hearing. The parties have developed a full record; their points of contention are issues of law, not questions of fact. This case is ripe for summary disposition.

ESTOPPEL

Petitioners maintain that Brown-Forman is estopped from refusing to sell its products to R & R. In order to sustain the estoppel argument, Petitioners must show that they relied on the actions of Brown-Forman as part of their corporate restructuring and that by relying on the actions of Brown-Forman, they changed their position to their detriment. "An estoppel arises when one party is led to change his or her position in reliance on a course of conduct followed by another. In such a case, the doctrine of estoppel will be applied to bar the second party from altering that conduct, if, to do so, would prejudice the first party." Connell v. American Funding Ltd., 231 N.J. Super. 406, 416 (Chan. Div. 1987); aff'd 231 N.J. Super. 202 (App. Div. 1989).

In advancing their estoppel claim, Petitioners rely heavily upon an affidavit of Howard Jacobs, President of Reitman. In his affidavit, as well as in his later deposition, Mr. Jacobs describes a telephone conversation he had with William Street, Brown-Forman's President and CEO. The conversation occurred sometime on or after May 16, 1994. During this telephone call, Mr. Jacobs described the corporate restructuring, and the benefits expected to flow from the joint venture. According to Mr. Jacobs, Mr. Street's reaction was positive. Jacobs also had similar conversation with Mark Brown, a Senior Vice President of Respondent, and with Ira Polvill, National Sales Manager of Brown-Forman Select Brands.

Petitioners also maintain that certain telephone conversations between Dennis Resnick, Vice President of Sales and Marketing for R & R and two New Jersey Brown-Forman representatives support the estoppel claim. Resnick spoke with Phil Magnotti and Paul Galante of Brown-Forman immediately after issuance of a press release annoucing the restructuring. In his affidavit and later deposition, Resnick asserts that Magnotti and Galante reacted positively to news of the joint venture, although he admits that he did not describe the new arrangement in any detail.

In response, Brown-Forman asserts that Petitioners are unable to demonstrate a good faith, reasonable and detrimental reliance upon the perceived initial positive reactions of Brown-Forman's representatives.

Petitioners have not demonstrated that they relied upon Brown-Forman's conduct to their detriment. As noted above, Petitioners and their accountants and lawyers devoted a great deal of energy exploring the pros and cons of various restructuring arrangements. A corporate merger, which arguably would have preserved their rights under N.J.S.A. 33:1-93.6 et seq., was rejected because of "prohibitive' tax consequences. Likewise, Petitioner rejected a partnership restructuring because of advice that it would probably cause them to lose the statute's protections.

It is important to note that Petitioners issued their press release announcing the L.L.C. before anyone spoke to Brown-Forman's representatives. Although the documents creating R & R were not executed until later, it is clear that the decision to proceed as an L.L.C. had been made prior to the telephone contacts with Brown-Forman. Further, petitioners only vaguely described their new "venture" to Brown-Forman and did not set forth any of the details as to how the business would operate. Moreover, Petitioners admit that they had specifically approached Hiram Walker, a major supplier of alcoholic beverages to Royal, and had obtained Hiram Walker's specific consent before going forward with the venture. It is undisputed that they did not similarly deal with Brown-Forman.

While much is made of the percentage of R & R's business supplied by Brown-Forman -- Petitioners claim in excess of eight percent for Reitman while Respondent claims it to be one percent of

the combined enterprise -- it is clear that Petitioners did not deem it of sufficient volume to handle Brown-Forman as they handled Hiram Walker.

Despite all of their claims, Petitioners cannot establish what they would have done differently had not Brown-Forman "lulled them into a false sense of security." In essence, Petitioners assert that had Brown-Forman voiced its objections at an earlier stage, they would have "explored" other means to secure Brown-Forman's acceptance of their restructuring.

Giving Petitioners the best possible construction of this claim, they have failed to provide anything more than mere speculation. Petitioners have the burden to establish the elements of estoppel. In this case, they are unable to show how they would have gone about overcoming Brown-Forman's recalcitrance.

Indeed, their answers to interrogatories, which state Petitioners would have "explored" other arrangements "i.e. partnership, corporate merger and joint venture," border on the disingenuous given the extensive exploration those options had already been given prior to Brown-Forman's refusal to sell to R & R.

It is clear to me, despite their concerns about jeopardizing their franchises, and the protection afforded by the statute, that both Reitman and Royal eschewed a merger and chose the L.L.C. structure for the tax benefits it offered.

Petitioners argued on the return date of the motion that throughout their formation process, a primary focus was preservation of their franchise rights. They argue that the intent behind their various agreements was to preserve an "escape clause" that would enable them to refashion their venture until it met the protections of the law. While this may well have been their subjective goal, Petitioners are unable to point to specific language which accomplished this (if indeed this were even possible). Instead, they realized they had to make a business decision and made it, fully cognizant of the significant tax and operational benefits and of the potential loss of franchise rights.

FORMATION OF THE L.L.C.

Petitioners also contend that by forming an L.L.C., they have maintained the protections of the anti-discrimination statute. The purpose of the law is to "ensure an equitable basis for competition between supplier franchised wholesalers of alcoholic beverages in New Jersey." Joseph H. Reinfeld, Inc. v. Schiefflin & Co., 94 N.J. 400, 408 (1983).

The statute affords no protection to a New Jersey wholesaler until after a manufacturer has designated it as an authorized distributor. The statute does not require that a distiller designate any particular wholesaler to distribute its products. Indeed, under the Alcoholic Beverage Law, a distiller obtaining the requisite licenses would be free to wholesale its own products not covered by the anti-discrimination law.

In the instant case, Reitman and Royal urge a construction of the statute that would require distillers to distribute their products through a wholesaler who was never authorized. If their interpretation were correct, it would lead to a situation where any authorized wholesaler could enter into similar agreements and distribute a distiller's products through any number of unauthorized wholesalers. While the anti-discrimination law is meant to be liberally construed to achieve its objectives, Reinfeld, supra at 409, the objectives of the law do not include forcing a distiller to distribute its products to unauthorized wholesalers.

Petitioners also argue both Reitman and Royal, having enjoyed the status of protected wholesalers under the statute, retain those benefits despite the creation of R & R. They contend that Brown-Forman opposes State franchise laws (such as N.J.S.A. 33:1-93.6 et seq.) as a matter of corporate policy and as such, should somehow be penalized for their corporate views. They further contend that since the policy behind our statute is to protect wholesalers, Brown-Forman's motion must fail.

In the first instance, I find it of no moment that Brown-Forman has a corporate policy disapproving of State franchise laws. Brown-Forman is free to adopt any views on the subject it wishes, and those views are irrelevant to the determination of the legal issues presented herein. Brown-Forman's decision to

terminate Royal and Reitman cannot fairly be characterized as an attempt "to frustrate New Jersey franchise laws" as Petitioners would have it, but rather is a reflection of Brown-Forman's view that the creation of R & R offered it the chance, within the law, to restructure its New Jersey distribution arrangements.

Reitman and Royal, by creating R & R and executing the Operating Agreement, have lost the protections of the statute. Section 4.6 of the Operating Agreement provides:

Distribution and Warehouse Contracts. All Distribution and Warehouse Contracts between Royal, Reitman or R & R and manufacturers or distributors of alcoholic or non-alcoholic beverages shall, to the extent possible, be transferred and assigned to the Company as the contracting party in the place of Royal, Reitman or R & R. To the extend any such Distribution or Warehouse Contract cannot be transferred or the other party thereto refuses to consent to such transfer, if such consent is necessary, such contract shall remain in the name of Royal, Reitman or R & R. In such event, Royal, Reitman or R & R shall purchase beverages from or perform warehousing services for the other party to such contract and sell the same directly to and perform such warehousing services on behalf of the Company at cost so that the Company would be in the same economic position with respect to such contract as it would have been in had such contract been transferred pursuant to this Section 4.6. Each Member shall take such action as is necessary or reasonable in order to effect the intent of this Section 4.6.

The other agreements executed by the parties also mirror this arrangement. The "Transfer, Assignment and Assumption Agreements" executed by the parties require Reitman and Royal to give R & R the "economic benefit of such assets and agreements, as if such assets had been transferred to R & R."

The system set up by Royal and Reitman requires them in the first instance to transfer their distribution contracts to R & R. If they are unable to do so, they must purchase product themselves and sell it directly to R & R "at cost" so that R & R achieves the same economic position if would have been in had the contract been transferred. In short, they have agreed to front for R & R.

Brown-Forman correctly characterizes this as a "sham arrangement." Once Reitman and Royal executed agreements obligating them to front for R & R, they forfeited their protection under the statute.

The statute is designed to balance interests. If the interpretation urged by Petitioners is correct, then authorized wholesalers would be able to auction off their "authorized status" to the highest bidders among non-authorized wholesalers.

This interpretation of the statute would lead to chaos, effectively destroying a manufacturer's ability to create a stable distribution network. One of the purposes of the Alcoholic Beverage Law is to promote stability in the marketing of alcoholic beverages, which in turn fosters moderation and responsibility in the use of alcoholic beverages.

In Canada Dry Ginger Ale, Inc. v. F. & A. Distributing Co., 28 N.J. 444 (1958), the New Jersey Supreme Court examined the predecessor statute and noted that "promotion of temperance" (now often referred to as moderation) was a key element of the public policy behind the law. Id at 455.

The instability that would likely result were Petitioners' arguments accepted would in turn create a real danger of "price wars" and other destabilizing practices. Accordingly, I must conclude that an authorized wholesaler which bargains away its authorized status to a non-authorized wholesaler loses the protection of the statute.

Petitioners' argument that the nature of an L.L.C. requires a plenary hearing is likewise without merit. They have pointed to nothing in the "New Jersey Limited Liability Company Act," N.J.S.A. 42:2B-1 et seq., to support the bald assertion that the new entity has retained the franchises of its members.

New Jersey's Corporations Law, in contrast, spells out the consequences of a corporate merger in N.J.S.A. 14A:10-6(c):

"Such surviving or new corporation, shall, to the extent consistent with its certificate of incorporation as amended or established by the merger . . . possess all the rights, privileges, powers and immunities, purposes and franchises, both public and private, of each of the merging . . . corporations." (Emphasis added)

The same statute also provides that "the separate existence of all parties to the . . . merger . . . except the surviving or new corporations, shall cease" when the merger becomes effective. N.J.S.A. 14A:10-6(b). The merger law also provides that all real and personal property, tangible and intangible becomes vested in the new corporation; that claims of or against the merging corporations are unaffected by the merger. N.J.S.A. 14A:10-6(d) and (e).

While N.J.S.A. 42:2B-20 governs the merger of an existing L.L.C. into another entity, the rest of the New Jersey Limited Liability Company Act envisions no similar intent that in forming an L.L.C. the constituent companies cease to exist. Instead, the terms of the L.L.C. are left largely to the Operating Agreement.

The consequences of merger -- cessation of existence -- are greatly different from the consequences of forming an L.L.C.

There is no basis in law or policy to conclude that the formation of an L.L.C. preserves in its founding members the franchise rights protected by N.J.S.A. 33:1-93.6.

Accordingly, it is, on this 9th day of May 1997

ORDERED that the Motion for Summary Judgment by Respondent Brown-Forman be and the same hereby is granted; and it is further

ORDERED, that the Verified Petition filed herein be and the same hereby is, dismissed.

\S\ JOHN G. HOLL
John G. Holl
Director

1. It should be noted that in January 1997, Mr. Sapienza was appointed Deputy Attorney General-in-Charge of the Division of Alcoholic Beverage Control's ("ABC") Regulatory Bureau. At no time has he had any involvement whatsoever in my resolution of this case

2. The circumstances of Mr. Mac Kay's request to me were brought to the parties' attention early on in these proceedings. the parties concurred that, in view of my refusal to issue an advisory opinion, there was no reason to seek my disqualification from hearing this matter.

Publication of Bulletin 2473 is hereby directed this
30th Day of May, 1997

JOHN G. HOLL, DIRECTOR
DIVISION OF ALCOHOLIC BEVERAGE CONTROL