

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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HOUSE DRH30224-MA-223 (03/17)

Short Title: Beer Franchise Law Clarifications.

(Public)

Sponsors: Representative Rhyne.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO PRESERVE THE THREE-TIER DISTRIBUTION SYSTEM FOR MALT BEVERAGES IN NORTH CAROLINA BY CLARIFYING PROVISIONS OF THE BEER FRANCHISE LAW TO PROVIDE: A FRANCHISE AGREEMENT APPLIES TO ALL SUPPLIER PRODUCTS UNDER THE SAME BRAND NAME; A WHOLESALER MUST SELL MALT BEVERAGES TO ALL RETAILERS IN ITS TERRITORY AT THE SAME PRICE AT THE TIME OF DELIVERY; PROHIBITED ACTS OF SUPPLIERS WITH RESPECT TO THEIR DEALINGS WITH WHOLESALERS; GOOD CAUSE FOR TERMINATION MAY NOT BE MODIFIED BY AN AGREEMENT THAT DEFINES GOOD CAUSE IN A MANNER DIFFERENT THAN PROVIDED BY STATE LAW; CERTAIN ACTS THAT DO NOT AMOUNT TO GOOD CAUSE FOR TERMINATION OF A FRANCHISE; REMEDIES FOR A SUPPLIER'S WRONGFUL TERMINATION OF A FRANCHISE; INCLUSION OF A WHOLESALER MERGER, THE FACTORS THAT MAY BE CONSIDERED BY THE SUPPLIER IN APPROVING A MERGER OR TRANSFER, AND REMEDIES FOR UNLAWFUL REFUSAL TO APPROVE A MERGER OR TRANSFER; THE BEER FRANCHISE LAW MAY NOT BE WAIVED BY AN AGREEMENT CONTRARY TO STATE LAW; AND MEDIATION OF DISPUTES ARISING UNDER THE BEER FRANCHISE LAW.

The General Assembly of North Carolina enacts:

SECTION 1. Article 13 of Chapter 18B of the General Statutes reads as rewritten:

"Article 13.

"Beer Franchise Law.

...

"§ 18B-1303. Filing of distribution agreement; no discrimination.

(a) Filing. – It is unlawful for a supplier to provide malt beverages to a wholesaler unless the Commission has received notification from the supplier designating the brands of the supplier which the wholesaler is authorized to sell and the territory in which such sales may take place. If the supplier sells several brands, the agreement need not apply to all brands. A franchise agreement applies to all supplier products under the same brand name and different categories of products manufactured under a common identifying trade name are considered to be the same brand. No supplier may provide by a distribution agreement for the distribution of a brand to more than one wholesaler for the same territory. A wholesaler shall not distribute any brand of malt beverage to a retailer whose premises are located outside the territory specified in the wholesaler's distribution agreement for that brand. A wholesaler may, however, with the approval of the Commission distribute malt beverages outside ~~his~~its designated



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1 territory during periods of temporary service interruption when requested to do so by the
2 supplier and the wholesaler whose service is interrupted.

3 (b) No Discrimination. – A wholesaler shall ~~servicesell~~ sell malt beverages to all retail
4 permit holders within hisits designated territory without discrimination with respect to the sale
5 price at the time of delivery and shall make a good faith effort to make available to each retail
6 permit holder in the territory each brand of malt beverage which the wholesaler has been
7 authorized to distribute in that area.

8 (c) No Price Maintenance. – A franchise agreement shall not, either expressly or by
9 implication or in its operation, establish or maintain the resale price of any brand of malt
10 beverages by a wholesaler.

11 **"§ 18B-1304. Prohibitions.**

12 It is unlawful for a supplier, or an officer, agent or representative of a supplier, to:

- 13 (1) Coerce or attempt to coerce or persuade a wholesaler to violate any
14 provision of the ABC laws or rules of the Department of ~~Revenue;~~
15 ~~or~~ Revenue.
- 16 (2) Alter in a material way, terminate, fail to renew, or cause a wholesaler to
17 resign from, a franchise agreement with a wholesaler except for good cause
18 and with the notice required by G.S. 18B-1305.
- 19 (3) Require a wholesaler without the wholesaler's consent to participate in an
20 arrangement for the payment or crediting by an electronic fund transfer
21 transaction for any item or commodity or to access a wholesaler's account
22 for any item or commodity.
- 23 (4) Present a franchise agreement, amendment, or renewal to a wholesaler that
24 attempts to waive compliance with any provision of this Article or that
25 requires a wholesaler to waive compliance with any provision of this Article.
26 A wholesaler entering into a franchise agreement containing provisions in
27 conflict with this Article shall not be deemed to waive rights protected by, or
28 in compliance with, any provision of this Article.
- 29 (5) Induce or coerce, or attempt to induce or coerce, any wholesaler to assent to
30 any franchise agreement, amendment, or renewal that does not comply with
31 this Article and the laws of this State.
- 32 (6) Coerce or attempt to coerce a wholesaler, or its designated or anticipated
33 successor, to sign a franchise agreement, amendment, or renewal to a
34 franchise agreement by threatening to refuse to approve or delay issuing an
35 approval for the sale, transfer, or merger of a wholesaler's business.
- 36 (7) Terminate, cancel, or nonrenew or attempt to terminate, cancel, or nonrenew
37 a franchise agreement on the basis that the wholesaler fails to agree or
38 consent to an amendment at the time such amendment is presented to the
39 wholesaler.
- 40 (8) Prohibit a wholesaler from distributing the product of any other supplier.
- 41 (9) Refuse to approve or require a wholesaler to terminate a brand manager or
42 successor manager without good cause. A supplier has good cause only if
43 the person designated for approval by the wholesaler fails to meet reasonable
44 standards and qualifications.
- 45 (10) Discriminate in price, allowance, rebate, refund, commission, discount, or
46 service between wholesalers licensed in North Carolina. As used in this
47 subsection, "discriminate" means the granting of a more favorable price,
48 allowance, rebate, refund, commission, discount, or service to one North
49 Carolina wholesaler than to another North Carolina wholesaler.

50 **"§ 18B-1305. Cause for termination of franchise agreement.**

1 (a) Meaning of Good Cause. – Good cause for altering or terminating a franchise
2 agreement, or failing to renew or causing a wholesaler to resign from such an agreement, exists
3 when the wholesaler fails to comply with provisions of the agreement which are reasonable,
4 material, not unconscionable, and which are not discriminatory when compared with the
5 provisions imposed, by their terms or in the manner of enforcement, on other similarly situated
6 wholesaler by the supplier. The meaning of good cause set out in this section may not be
7 modified or superseded by provisions in a written franchise agreement prepared by a supplier if
8 those provisions purport to define good cause in a manner different than specified in this
9 subsection. In any dispute over alteration, termination, failure to renew or causing a wholesaler
10 to resign from a franchise agreement, the burden is on the supplier to establish that good cause
11 exists for the action.

12 (b) Notice of Cause. – At least 90 days before altering, terminating or failing to renew a
13 franchise agreement for good cause, the supplier must give the wholesaler written notice of the
14 intended action and the specific reasons for it. If the cause for the alteration, termination or
15 failure to renew is subject to correction by the wholesaler, and the wholesaler makes such
16 correction within 45 days of receipt of the notice, the notice shall be void.

17 (c) Termination for Cause without Advance Notice. – A supplier may terminate or fail
18 to renew a franchise agreement for any of the following reasons, and the termination shall be
19 complete upon receipt by the wholesaler of a written notice of the termination and the reason:

- 20 (1) Insolvency of the wholesaler, the dissolution or liquidation of the
21 wholesaler, or the filing of any petition by or against the wholesaler under
22 any bankruptcy or receivership law which materially affects the wholesaler's
23 ability to remain in business.
- 24 (2) Revocation of the wholesaler's State or federal permit or license for more
25 than 30 days.
- 26 (3) Conviction of the wholesaler, or of a partner or individual who owns ten
27 percent (10%) or more of the partnership or stock of the wholesaler, of a
28 felony which might reasonably be expected to adversely affect the goodwill
29 or interest of the wholesaler or supplier. The provisions of this subdivision
30 shall not apply, however, if the wholesaler or its existing partners or
31 stockholders shall have the right to purchase the interest of the offending
32 partner or stockholder, and such purchase is completed within ~~45~~30 days of
33 the conviction.
- 34 (4) Fraudulent conduct by the wholesaler in its dealings with the supplier or its
35 products.
- 36 (5) Failure of the wholesaler to pay for the supplier's products according to the
37 established terms of the supplier.
- 38 (6) Assignment, sale or transfer of the wholesaler's business or control of the
39 wholesaler without the written consent of the supplier, except as provided in
40 G.S. 18B-1307.

41 (d) Absence of Good Cause. – Good cause for alteration, termination or failure to renew
42 a franchise agreement does not include:

- 43 (1) The failure or refusal of the wholesaler to engage in any trade practice,
44 conduct or activity which would violate federal or State law.
- 45 (2) The failure or refusal of the wholesaler to take any action which would be
46 contrary to the provisions of this Article.
- 47 (3) A change in the ownership of the supplier or the acquisition by another
48 supplier of the brewery, brand or trade name or trademark, or acquisition of
49 the right to distribute a product, from the original supplier.
- 50 (4) Sale or transfer of the rights to manufacture, distribute, or use the trade name
51 of the brand to a successor supplier, whether the sale or transfer is made

1 directly from the original supplier to the successor or goes through a third
2 party.

3 (5) Failure of the wholesaler to meet standards of operation or performance
4 which have been imposed or revised unilaterally by the supplier without a
5 fair opportunity for the wholesaler to bargain as to the terms.

6 (6) The establishment of a franchise agreement between a wholesaler and
7 another supplier, or similar acquisition by a wholesaler of the right to
8 distribute a brand of another supplier.

9 (7) The desire of a supplier to consolidate its franchises.

10 **"§ 18B-1306. Remedies for wrongful termination.**

11 (a) Injunctive Relief. – A wholesaler whose franchise agreement is altered, terminated
12 or not renewed in violation of this Article may bring an action to enjoin such unlawful
13 alteration, termination or failure to renew. The action may be brought in the county in which
14 the wholesaler has its principal place of business or in any county in which the wholesaler
15 receives or distributes the products in issue. Any injunction issued pursuant to this subsection
16 shall require the wholesaler to supply the customers in its territory with their reasonable retail
17 requirements and to otherwise serve the territory.

18 (b) Monetary Damages. – ~~In lieu of addition to~~ injunctive relief, a wholesaler whose
19 franchise agreement is altered, terminated or not renewed in violation of this Article shall be
20 entitled to recover monetary damages from the supplier. ~~The amount to which the wholesaler is~~
21 ~~entitled shall be the value of the wholesaler's business distributing the supplier's products,~~
22 ~~including:~~ If the wholesaler retains its franchise rights through injunctive relief, the monetary
23 damages to which the wholesaler is entitled shall include the losses suffered by the wholesaler
24 from disruption of its business and harm to its reputation, plus the costs of litigation, including
25 attorneys' fees. If the wholesaler elects to receive or is otherwise found to be entitled to
26 monetary damages only, and not injunctive relief, the damages shall be the value of the
27 wholesaler's business distributing the supplier's brands, including:

28 (1) The laid-in costs to the wholesaler of the inventory of the supplier's
29 products, including any State and local taxes paid on the inventory by the
30 wholesaler, plus a reasonable charge for handling of the products upon
31 surrender of the inventory to the supplier.

32 (2) The fair market value of all assets, including ancillary businesses of the
33 wholesaler used in distributing the supplier's products. The total
34 compensation to be paid to the wholesaler shall be reduced, however, by any
35 amount received by the wholesaler from sale of assets of the business used
36 in distributing the supplier's products as well as by the value such assets
37 have to the wholesaler unrelated to the supplier's products. "Fair market
38 value" means the highest dollar amount at which a seller would be willing to
39 sell and a buyer willing to buy at a time prior to the alteration, termination or
40 failure to renew, when each possesses all information relevant to the
41 transaction.

42 **"§ 18B-1307. Transfer or merger of wholesaler's business.**

43 (a) Right of Transfer to Designated Family Member upon Death. – Upon the death of a
44 wholesaler, that individual's interest in the wholesaler business, including the rights under the
45 franchise agreement with the supplier, may be transferred or assigned to a designated family
46 member. The transfer or assignment shall not be effective until written notice is given to the
47 supplier, but the supplier's consent is not required for the transfer or assignment. "Designated
48 family member" means the deceased wholesaler's spouse, child, grandchild, parent, brother or
49 sister, who is entitled to inherit the deceased wholesaler's ownership interest under the terms of
50 the deceased wholesaler's will or other testamentary device or under the laws of intestate
51 succession. With respect to an incapacitated individual having an ownership interest in a

1 wholesaler, the term "designated family member" also means the person appointed by the court
2 as the conservator of such individual's property. The term also includes the appointed and
3 qualified personal representative and the testamentary trustee of a deceased wholesaler.

4 (b) Approval of Certain Transfers and Mergers. – Upon notice to and approval by the
5 supplier, an individual owning an interest in a wholesaler may sell, assign or transfer that
6 interest, including the wholesaler's rights under its franchise agreement with the supplier, to any
7 qualified person. Likewise, a wholesaler may merge with another wholesaler in the State,
8 transferring to the new wholesaler entity the merging wholesaler's existing franchise rights.
9 Within 30 days of receipt of notice of the intended sale, ~~assignment or transfer,~~ assignment,
10 transfer, or merger, the supplier shall request any additional relevant, material information
11 reasonably necessary for deciding whether to approve the transaction. The supplier shall have
12 30 days from receipt of that information to object to the sale, ~~assignment or transfer.~~
13 assignment, transfer, or merger. The supplier may object only if the proposed ~~transferee~~
14 transferee, or the wholesalership resulting from the merger, fails to meet qualifications and
15 standards that are nondiscriminatory, material, reasonable and consistently applied to North
16 Carolina wholesalers by the supplier. The burden shall be upon the supplier to prove that the
17 proposed transferee or merged wholesaler is not qualified.

18 (c) Factors That May Be Considered. – In determining whether the proposed transferee
19 or merged wholesaler is a qualified person, the supplier may consider:

- 20 (1) Whether the proposed transferee has the financial capacity to purchase the
21 wholesaler or the specified interest upon terms that will not jeopardize the
22 future operation of the business, or whether the new entity resulting from a
23 merger will have such financial capacity to operate successfully, and
24 whether under such ownership the wholesaler will be able to provide
25 financial support necessary to the successful operation of the business,
26 including market spending, capital expenditures, and any equity
27 capitalization or refinancing requirements.
- 28 (2) Whether the proposed transferee, or the new entity resulting from a merger,
29 has the proven business experience to hire and maintain a management team
30 to successfully operate the business.
- 31 (3) If the proposed transferee does not have experience in the beer business,
32 whether the transferee has other experience to enable it to operate a
33 distributorship successfully and whether the transferee is willing to
34 participate in training provided by the supplier.
- 35 (4) Whether the proposed transferee, or a party to the merger, already is a
36 wholesaler for the supplier in a different territory and, if so, whether
37 sufficient time and attention can be devoted to an additional market area.

38 (d) Business Considered on Own Merits. – In determining whether a proposed
39 transferee, or the entity resulting from a merger, is a qualified person, a supplier must consider
40 the business on its own merits and may not designate a specifically identified person as the only
41 purchaser who will be approved.

42 (e)(e) Damages.—ARemedies. – A wholesaler may seek injunctive relief to enforce the
43 provisions of this section. In addition to any such injunctive relief, a supplier who disapproves
44 or prevents a proposed assignment or change of ownership or merger in violation of this section
45 shall be liable to the wholesaler who proposed to make the sale, ~~assignment or~~
46 transferassignment, transfer, or merger for the difference between the disapproved sale price
47 and a subsequent actual price of a sale of the same assets completed within a reasonable period.
48 If, however, the proposed transfer or sale was to a business associate at a bargain price, the
49 amount of compensation shall be at least the fair market value of the interest proposed to be
50 sold or transferred, minus the proceeds of an actual sale of the interest completed within a
51 reasonable time. The supplier also shall be liable for any damages suffered by the wholesaler in

1 its business if, because of the supplier's unlawful refusal to approve a sale, transfer, or merger,
2 the wholesaler is unable to complete a sale, transfer, or merger and remains in business.

3 **"§ 18B-1308. Article part of all franchise agreements.**

4 The provisions of this Article shall be part of all franchise agreements as defined in
5 G.S. 18B-1302 and may not be altered by the parties. A wholesaler's rights under this Article
6 may not be waived or superseded by the provisions of a written franchise agreement prepared
7 by a supplier that are in any way inconsistent with or contrary to any part of this Article. The
8 rights of a wholesaler under this Article shall remain in effect regardless of a provision in a
9 written franchise agreement prepared by a supplier that purports to require arbitration of a
10 franchise dispute or that purports to require legal remedies to be sought in a different
11 jurisdiction.

12 **"§ 18B-1309. Mediation at direction of Alcoholic Beverage Control Commission.**

13 If a dispute arises between a wholesaler and supplier under this Article, and such dispute
14 appears likely to lead to litigation, the Commission, upon request of any party or on its own
15 initiative, may require the parties to participate in mediation in an effort to resolve the dispute.
16 This authority shall be in addition to the Commission's authority to issue declaratory rulings
17 pursuant to G.S. 150B-4. The Commission may designate the mediator, in which case the
18 Commission shall pay the mediator's fee, or the Commission may direct the parties to agree
19 upon and share the costs of a mediator. If the parties then cannot agree upon a mediator, the
20 Commission shall designate the mediator and the fees shall be divided evenly by the parties.
21 The Commission shall direct that the mediation be completed within a specified period of time.
22 Except for injunctive relief, a lawsuit or other legal action concerning the dispute may be filed
23 until the mediation is completed and is unsuccessful, unless necessary to avoid expiration of a
24 statute of limitation."

25 **SECTION 2.** The provisions of this act are severable and, if any phrase, clause,
26 sentence, or provision is declared to be unconstitutional, is preempted by federal law or
27 regulation, or is otherwise invalid, the validity of the remainder of this act shall not be affected
28 thereby.

29 **SECTION 3.** This act is effective when it becomes law, and its provisions shall
30 apply to all existing franchise agreements. A supplier's shipment of malt beverages to a
31 wholesaler in North Carolina following the effective date of the act shall constitute acceptance
32 by the supplier of the terms of this act, which shall be considered incorporated into the
33 agreement between the supplier and wholesaler.