

Minnesota Beer Wholesalers Association
2017 Regional Meetings
Agenda

1. Introduction (Brian Spehar)
2. Legislative Update
 - a. Summary of 2016-2017 Session (Cullen Sheehan)
 - b. Summer and Fall Legislative Advocacy (Mike Madigan & Cullen Sheehan)
 - i. Handwritten notes thanking supporters
 - ii. Letters to editor thanking supporters
 - iii. Warehouse visits
 - c. Likely issues in the next legislative session (Mike Madigan, Cullen Sheehan & Luke Dahlheimer)
 - i. Craft Brewer Initiatives
 - ii. Farm Winery Initiatives
 - iii. Craft Distiller Initiative
 - iv. Repeal of the One License per Municipality Limit
 - v. Repeal of the Retail to Retail Sales Ban
 - vi. Wine and Beer in Grocery and Convenience/3.2 Beer
3. Engagement in the 2018 Election (Mike Madigan & Cullen Sheehan)
 - a. House Leadership is very hostile to the interests of family-owned distributors and retailers and their employees.
4. President/Legal Report (Mike Madigan)
 - a. State of the Association
 - b. Upcoming Meetings (Amanda Aldrich)
 - c. Coalition Activities
 - d. Line Cleaning
 - e. Legal cases of note
5. NBWA Report (Luke Dahlheimer)
6. For the Good of the Order

Minnesota Beer Wholesalers Association

2017 End of Session Legislative Update

Session Overview

Minnesota's 2017 Legislative Session concluded early in the morning on Friday, May 26, with four extra days of special session immediately following the regular session. While this year's session went extra innings, legislators also claim many accomplishments, including passing comprehensive tax reform, transportation funding, and a large capital investment (bonding) bill. Governor Mark Dayton and the Republican House and Senate legislative majorities did all that they could to find compromise to avoid a prolonged special session and a government shutdown.

Although Governor Dayton signed all the budget bills that fund state government for the next two years (so there would not be a government shut-down), he was upset by a provision in the State Government Finance bill (that would have eliminated all funding of the Department of Revenue if the Governor did not sign the Tax bill into law). As a response to this maneuver and under pressure from left-leaning interest groups, the Governor used his authority to line-item veto all funding to the Minnesota House and Minnesota Senate and demanded the legislature re-negotiate the following in order to get their funding back:

- Repeal of the inflator on tobacco taxes & the premium cigar tax cut,
- Repeal of the inflator on the statewide business property tax,
- Partial conformity with the federal estate tax,
- Changes for teacher licensing,
- A requirement that an immigrant driving credential could only be created by legislation and not by rule making.

The Republican legislature declined to renegotiate these items previously passed by the legislature and signed into law by the Governor, saying the Governor had previously agreed to what was in the bills he signed. The legislature (joint House and Senate coordinating committee) hired a lawyer and filed a lawsuit in Ramsey County District Court in the hopes of having their funding restored. The case is pending, but will likely be expedited and a resolution should come before the 4th of July.

Sunday Sales

After 158 years the legislature approved Sunday liquor sales. The 2016 election results made this a very difficult bill to stop. Our coalition of retailers, distributors, and labor, worked with Senate leadership and House members to try and neutralize ongoing issues we expect to face now that this battle is over.

Other Liquor Issues

The alcohol industry and the three-tier system face unprecedented change and continued deregulation attempts at the State Capitol. During this past session we saw legislation introduced to:

- Increase the size of small brewers for the purposes of being able to sell growlers from 20,000 barrels to 250,000,
- Increase the amount of growlers a taproom and brewpub can sell from 500 barrels to 750 barrels (largely affecting one brewery: Dangerous Man),
- Allow an entity to have both a taproom and cocktail room license,
- Increase or change the size of containers that distillers and brewers could sell their product in – directly in off-sale to consumers at their tap /cocktail rooms
- Allow municipalities to grant multiple liquor licenses to a single owner

These were in addition to the general liquor bills we see on a yearly basis allowing municipalities to grant liquor licenses and allowing a 4 AM bar closing while the Super Bowl occurs.

Looking Ahead to 2018 and Beyond on Liquor Issues

While nearly all of these issues were defeated, it is a certainty that those that wish for exceptions and deregulation will be back next year and in the years to come. In addition to the items listed above, we have every expectation that the grocers and convenience stores will begin their push to allow the sale of full strength beer. The businesses are going to claim that they need to offset the negative impacts from Sunday sales on their bottom line, as well as the looming phase out of 3.2 beer around the country.

Our coalition – through our directly lobbying, communication, and grassroots advocacy efforts, has largely been successful in slowing down or stopping many negative changes to the industry from occurring. However, in order to maintain our current regulatory system we need to continue to educate and foster relationships with new legislators, while maintaining our strong ties to current legislators.

The next legislative session will convene on February 20th, 2018. The entire House of Representatives will be on the ballot in November, 2018, while the entire state Senate will not. Both the GOP and DFL already have many candidates seeking to be our state's next Governor, elected in November, 2018, as Governor Dayton has announced he will not seek re-election.

General Session Issues

Despite the theater around the legal battle to fund the legislature, the session ended nearly on time and with a complete two-year budget avoiding a government shutdown. Some of the additional higher profile issues that were also passed by the Republican-led legislature and Democratic governor included:

- Federal REAL ID compliance. Minnesota was the last state in the nation to comply
- A\$650 million tax cut
- Road and bridge funding without a gas tax increase
- Increase in education funding and \$50 million for Governor Dayton's priority of all day pre-Kindergarten.
- Health care compromises to provide relief for people who saw their health care premiums skyrocket last year, as well as a \$542 million reinsurance plan pushed by Republicans, which shields insurance companies by putting the state partially on the hook for more expensive claims.

The Republican legislature was not able to garner support from Governor Dayton for opportunity scholarships, a.k.a. "vouchers." They did not get the Governor to agree to or sign a preemption bill that would have stopped cities from passing their own workforce standards, such as a higher minimum wage or safe/sick leave. Republicans also did not fund their pay raises, or repeal MNsure.

Below is a brief overview of some of the items tackled this session;

Taxes

The Tax bill is comprised of \$650 million in tax relief – down from \$1.15 billion from the initial bill passed by the House and Senate earlier in the session that was vetoed by Governor Dayton. There is specific relief aimed toward those paying taxes on Social Security benefits.

Education

Some of the key provisions in the bill include a 2% increase in the per-pupil formula for school districts for the next two fiscal years and \$50 million for a pre-Kindergarten program called "School Readiness Plus" – a top priority for the governor.

Transportation

The Transportation funding bill brings new dollars into transportation funding through the repurposing of \$300 million from the general fund from automobile-related sales tax revenue and authorizing \$940 million in borrowing over four years. The bill does not raise new revenue from constitutionally-dedicated sources to fund roads and bridges, like a gas tax or vehicle registration fees. It also prohibits state dollars from going toward the operating costs for future light rail lines.

Preemption

The House and Senate passed legislation that would prohibit local units of government from setting their own labor and wage policies (known as preemption). In an attempt to get Governor Dayton to sign the bill, Republicans also included pension reform, wage theft protections, and paid family leave for state workers. Governor Dayton vetoed this bill.



SUPPORTING MINNESOTA'S ALCOHOL
REGULATIONS AND TRADITIONS

SMART™

The SMART Campaign, led by Leslie Rosedahl and Peter Glessing of Lockridge Grindal Nauen, is a public education and advocacy effort in support of Minnesota's current alcohol laws and three tier system. SMART stands for Supporting Minnesota's Alcohol Regulations and Traditions and is made up of individuals, concerned citizens, and hundreds of small business owners and employees around the state. The SMART campaign is supported by the Minnesota Licensed Beverage Association, the Minnesota Beer Wholesalers Association, Minnesota Wine and Spirits Wholesale Association, the Minnesota Municipal Beverage Association, and the Teamsters Joint Council 32. More information is available at www.mnSMART.org.

2017 LEGISLATIVE SESSION RECAP OF THE SMART CAMPAIGN

Communications efforts:

- **REFINED MESSAGING AND TALKING POINTS:**
 - Minnesota's current alcohol regulations are smart and work well.
 - Minnesota's current alcohol regulations are balanced and create a level playing field for local main street retailers.
 - Changes in our proven system could have serious repercussions for businesses, communities, and consumers.
- **MONITORED MEDIA COVERAGE** and provided regular updates to the coalition;
- **MANAGED ALL MEDIA INQUIRIES & REQUESTS** on behalf of coalition members with liquor beat reporters, Capitol press corps, and statewide and regional media (Associated Press, Star Tribune, Pioneer Press, MinnPost, Forum newspapers, the Growler Magazine); worked with trained spokespersons; issued several media statements and spoke on background with reporters
- **ENGAGED VIA SOCIAL MEDIA** with our Twitter handle, @MnSMARTcampaign

Grassroots advocacy efforts:

- **REFRESHED AND RESTRUCTURED THE WWW.MnSMART.ORG WEBSITE** for advocates with a new look and better functioning site to easily send emails to legislators; 807 emails sent in 2017.
- **DRAFTED AND SENT TEN (10) CAMPAIGN EMAILS** to coalition members to engage supporters through the MnSMART website; sent language directly to MBWA members to send direct emails to legislators.
 - Sunday sales rushed through House Committee! We need your help today!
 - Urgent! Contact Your State Representative to Vote No on Sunday sales!
 - Urgent! Your Help Needed with Liquor Issues at the Capitol!
 - MN Senate to Vote on Sunday Sales Very Soon
 - Urgent! Contact your State Representative to Vote No on House File 68!
 - State Legislative Update on Liquor Issues
 - Oppose the House Liquor Bill before May 8!
 - Email your State Representative to Oppose the House Liquor Bill!
 - House Liquor Bill Legislative Update – Good and Bad News
 - Recap of the 2017 Legislative Session – and what's in store for next year
- **LEGISLATIVE TARGET ENGAGEMENT:** Personally engaged additional grassroots activists in targeted districts.
- **LEGISLATIVE DAY AT THE CAPITOL** with 88 MLBA and MMBA members personally meeting with their legislators made a difference in supporting current smart and balanced alcohol regulations. The SMART Campaign team organized all aspects – from registration, scheduling meetings, creating materials, on-site management, and a reception afterwards with attendees and legislators.

Ways to support smart and balanced alcohol regulations and engage with the SMART Campaign:

- Invite your local legislators and candidates to tour your business, meet with employees, etc.
- Write a letter to the editor thanking legislators for supporting smart and balanced alcohol regulations and local small businesses,
- Write a personal note to legislators thanking them for support.

PRESIDENT'S REPORT
TO THE
MINNESOTA BEER WHOLESALERS ASSOCIATION

JUNE 2017
REGIONAL MEETINGS

BY: MICHAEL D. MADIGAN
President and Legal Counsel

TABLE OF CONTENTS

INTRODUCTION.....	1
I. DEREGULATION: AN ENDURING STRUGGLE.....	1
II. INDUSTRY MERGER AND CONSOLIDATION.....	1
III. DEREGULATION BY SMALL BREWERS.....	2
IV. DEREGULATION BY MEGA-RETAILERS	3
V. FINANCIAL CONDITION OF THE ASSOCIATION	3
VI. LEGISLATIVE OVERVIEW	3
VII. PAC CONTRIBUTIONS AND DONATIONS	4
VIII. COALITION BUILDING	4
IX. PUBLIC RELATIONS CAMPAIGN	4
X. UPCOMING MBWA MEMBER MEETINGS	5
XI. UPCOMING NBWA MEMBER MEETINGS	5
CONCLUSION	6

INTRODUCTION

I. DEREGULATION: AN ENDURING STRUGGLE

In the past four years, DISCUS, Total Wine, small brewers, small wineries, and small distillers have stepped up their attempts to deregulate the alcohol industry through legislative, judicial, and grass roots action. This year, DISCUS and Total Wine invested a great deal of money and made a concerted effort to repeal the Sunday Sales ban. Unfortunately, they were successful. This will likely embolden grocers, convenience stores and mega retailers to pursue wine and beer in grocery and convenience stores. In addition, small suppliers also introduced bills this session to provide themselves with further exemptions to three-tier and tied-house laws which precipitated a pitched battle in the House of Representatives. That effort was largely unsuccessful.

Although it has been the focus of annual legislative initiatives, the regulatory structure remains largely intact. Small brewers will continue to advocate for further three-tier and tied-house exceptions, however. Also, Discus and Total Wine have fully engaged and are likely to mount future legislative campaigns and have become quite engaged in the election process. We must be prepared to aggressively fight against the battle to deregulate the industry in upcoming years. In the foreseeable future, this struggle will be the primary focus of the National Beer Wholesalers Association (“NBWA”), Minnesota Beer Wholesalers Association (“MBWA”), and our political allies, the retailers and the Teamsters.

II. INDUSTRY MERGER AND CONSOLIDATION

Every tier of the industry has experienced significant consolidation. At the supplier tier, Anheuser-Bush InBev (“ABI”) has acquired SAB Miller and now controls about 30% of the world’s beer sales. Although new craft suppliers are entering the business every year, many

speculate that the craft segment is reaching a saturation point. Furthermore, ABI, MillerCoors, and some large craft suppliers have embarked on an aggressive program to acquire smaller craft brewers. It is rumored that ABI and MillerCoors will likely acquire soda companies in the near future to expand their portfolios. Consolidation at the distribution tier has also been occurring at a steady pace. Finally, mega-retailers are significantly expanding their market share. With the repeal of the Sunday Sales ban, we expect that consolidation at the retail tier will likely accelerate.

Another significant industry development has been the response of big brewers to the craft beer movement. Specifically, large brewers are aggressively acquiring smaller craft brewers. For instance, ABI has purchased 10 Barrel and Constellation has purchased Ballast Point. In several instances, these large brewers have attempted to bootstrap themselves into small brewer exemptions such as taproom and brewpub exemptions.

III. DEREGULATION BY SMALL BREWERS

The Brewers Association (“BA”), representing small brewers, has become much more organized and legislatively active. They are openly pursuing a deregulatory agenda. At the moment, they are one of the greatest threat to state based alcohol regulation. Across the country, BA and local brewers/guilds have pursued legislative amendments to create exceptions to the three-tier system. In pertinent part, these amendments include: (a) the ability of small brewers to sell directly to the public on-sale and off-sale; (b) the ability of small brewers to own retail establishments (and sell any alcohol); notably, New York and North Carolina have passed a small brewer exception for franchise laws; Massachusetts, Pennsylvania, and Indiana are considering such legislation; (c) the ability of small brewers to self-distribute or own a distributorship; and (d) an exemption for small brewers from franchise laws. Some of these

legislative amendments directly implicate the interests of beer distributors and some do not. Each such legislative amendment must be carefully assessed and analyzed.

IV. DEREGULATION BY MEGA-RETAILERS

Across the country, mega-retailers are aggressively pursuing a deregulation agenda. In control states (like Washington and Pennsylvania), mega-retailers are pursuing privatization. Total Wine is pursuing this agenda both in state legislatures and the courts. In Minnesota, I expect that mega-retailers will seek to repeal the one license per municipality limit, the central warehouse ban, the retail to retail ban, and the municipal liquor store law.

V. FINANCIAL CONDITION OF THE ASSOCIATION

The Association is in sound financial condition. Our income in 2016 was \$545,788.62 and our expenses were \$511,399.86. As you can see, our income exceeded our expenses by \$34,388.76.

VI. LEGISLATIVE OVERVIEW

Last year, we had another tough legislative session. Our opponents were successful in passing Sunday Sales. The law goes into effect July 1. Under current law, no retailer may sell strong beer, wine, or spirits on Sunday. Grocers, convenience stores, and other 3.2 beer retailers can currently sell 3.2 beer on Sundays, however. Next session, it is likely that a Bill will be introduced to allow grocers, convenience stores, and 3.2 retailers to sell strong beer based on the argument that a Sunday Sales Bill would alter the competitive environment by providing thousands of retailers the right to sell on Sunday which was previously the exclusive province of 3.2 licensees. If successful, this would open up the Minnesota market to mega-retailers. I am confident that we could defeat this bill next year but we do need to develop a strategy to do so.

VII. PAC CONTRIBUTIONS AND DONATIONS

In 2017, the MBWA PAC carried over a balance of \$17,797.61 from 2016. In addition, to date members have contributed an additional \$24,744.71 to the PAC this year. Accordingly, MBWA PAC currently has an account balance of \$38,042.32.

The 2017 contributions made to date are as follows:

2017 MBWA BEER PAC CONTRIBUTIONS

Date	Payee	Amount
1/2/2017	Mark Dayton for a Better MN	\$2,500.00
5/30/2017	Pat Harris for Mayor	\$1,000.00
6/27/2017	Debra Hilstrom Volunteer Committee	\$1,000.00
Total PAC Contributions through 6/27/2017		\$4,500.00
Account Balance as of 6/27/2017		\$38,042.32

VIII. COALITION BUILDING

We have been engaged in extensive coalition building over the last year and will continue these activities. Specifically, we have regularly met with Tony Chesak (Minnesota Licensed Beverage Associations), Paul Kaspszak (Minnesota Municipal Beverage Association), Dan McElroy (Hospitality Minnesota), Sam Kaplan (Minnesota Wine and Spirits Wholesaler Association), and Ed Reynoso (Teamsters). Luke Dahlheimer and I also met with representatives from Minnesota's breweries. Finally, I have also met on several occasions with representatives of the Alcohol and Gambling Enforcement Division. We will continue to deepen these relationships and to reach out to other parties with interests aligned with MBWA.

IX. PUBLIC RELATIONS CAMPAIGN

Last year, MBWA funded a coalition for the purpose of a Public Relations Campaign which would seek to educate the public, policymakers, opinion makers and legislators generally

about the benefits of our current regulatory system and specifically about the inadvisability of small brewer, farm winery and craft distillery exceptions and Sunday Sales. The campaign was very successful. The PR Campaign fund was \$65,000.00 funded as follows: MBWA - \$17,105.40; MLBA - \$17,105.40; MMBA - \$10,262.85; MSWWA - \$10,262.85; and Teamsters - \$10,262.85.

X. UPCOMING MBWA MEMBER MEETINGS

MBWA Fall Conference
September 15-17, 2017
The Best Western Plus and New Ulm Conference Center
New Ulm, Minnesota

MBWA Annual Conference
January 25 & 26, 2018
The Saint Paul Hotel
St. Paul, Minnesota

MBWA Fall Conference
September 14-16, 2018
Madden's on Gull Lake
Brainerd, Minnesota

XI. UPCOMING NBWA MEMBER MEETINGS

NBWA Next Generation Conference
August 6-8, 2017
Boston, Massachusetts

NBWA 80th Annual Convention & Trade Show
October 8-11, 2017
Las Vegas, Nevada

NBWA Legislative Conference
April 22 – 25, 2018
Washington, DC

NBWA 81st Annual Convention & Trade Show
September 23-26, 2018
San Diego, California

NBWA Legislative Conference
April 7 – 10, 2019
Washington, DC

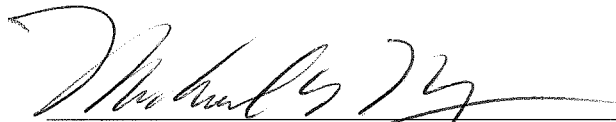
NBWA 82nd Annual Convention & Trade Show
September 22-25, 2019
Las Vegas, Nevada

Please reserve these dates on your calendar and attend these important and fun events.

CONCLUSION

I thank you for the opportunity to serve as your President and legal counsel and look forward to meeting the upcoming challenges with you.

MINNESOTA BEER WHOLESALERS ASSOCIATION



Michael D. Madigan
President and Legal Counsel

LEGAL REPORT
TO THE
MINNESOTA BEER WHOLESALERS ASSOCIATION
(PRIVILEGED AND CONFIDENTIAL)

JUNE 2017
REGIONAL MEETINGS

BY: MADIGAN, DAHL & HARLAN, P.A.

MICHAEL D. MADIGAN, ESQ.

TABLE OF CONTENTS

INTRODUCTION.....	1
I. ABI/DOJ UNITED STATE DISTRICT COURT ACTION	1
II. RETAIL DIGITAL NETWORK V. APPELSMITH.....	4
III. MITCHELL HAMLINE LAW REVIEW ARTICLE	6
IV. SUMMARY OF PENDING CASES OF INTEREST TO BEER DISTRIBUTORS	8
CONCLUSION	18

INTRODUCTION

Suppliers, mega-retailers and others have continued their effort to deregulate the alcohol industry through the courts. In the last ten years, there have been as many legal challenges to state liquor laws as there have been in the preceding 80 years. In order to meet this threat, NBWA has engaged in both the courts and Congress. Fortunately, we are winning most of the legal battles.

I. ABI/DOJ UNITED STATE DISTRICT COURT ACTION

As you know, ABI has acquired SAB Miller. That proposed sale triggered the scrutiny of the Department of Justice (DOJ) under the Scott Hart Rodino Act. On July 20, 2016, the DOJ filed in the US District Court for the District of Columbia a complaint alleging the merger violates Section 7 of the Clayton Act. The DOJ also filed a proposed final judgment to settle the matter and a competitive impact statement explaining the provisions and the intent of the proposed final judgment.

The case is United States v. Anheuser-Busch Inbev and SABMiller, Case No. 16-CV-01483 (D.D.C. 2016). The case has been assigned to Judge Emmet Sullivan.^a The proposed final judgment (“PFJ”) has not yet been approved. We expect that it will be approved soon, however. The PFJ requires the following. A copy of the PFJ is attached.

- **Divestiture.** PFJ requires a divestiture of all SABMiller assets sold in the United States to Molson Coors. This includes the requirement for the parties within 10 days to create transition and supply agreements that will allow for Molson Coors to import SABMiller brands of beer to the United States and operate the Miller International Business. Despite the divestitures of the SABMiller business in other countries, the proposed Final Judgment requires that ABI divest the US rights to imported brands, including Peroni, Grolsch and Pilsner Urquell, to

^a Emmet Sullivan was the judge on the recent FTC v. Staples matter, and has presided over approximately 21 antitrust cases in the past decade.

Molson Coors, notwithstanding the divestiture of the ex-US rights to those brands to other buyers.

- **Numerous provisions concerning United States distribution.** ABI is prevented from:
 - Acquiring a distributor if the acquisition would cause more than 10% of ABI's beer in the United States to be sold through ABI-owned distributors.
 - Prohibiting or impeding a distributor that sells ABI's beer from using its best efforts to sell, market, advertise, promote, or secure retail placement for rivals' beers, including the beers of high-end brewers.
 - Providing incentives or rewards to a distributor who sells ABI's beer based on the percentage of ABI beer the distributor sells as compared to the distributor's sales of the beers of ABI's rivals.
 - Conditioning any agreement or program with a distributor that sells ABI's beer on the fact that it sells ABI's rivals' beer outside of the geographic area in which it sells ABI's beer.
 - Exercising its rights over distributor management and ownership based on a distributor's sales of ABI's rivals' beers.
 - Requiring a distributor to report financial information associated with the sale of ABI's rivals' beers.
 - Requiring that a distributor who sells ABI's beer offer its sales force the same incentives for selling ABI's beer when the distributor promotes the beers of ABI's rivals with sales incentives.

- Consummating non-reportable acquisitions of beer brewers-including craft brewers -without providing the United States with advance notice and an opportunity to assess the transaction's likely competitive effects.
- **Notification of non-reportable acquisitions.** PFJ requires ABI to notify the United States in advance of any purchase of distribution or brewer assets, which would otherwise not be HSR reportable, if assets generate at least \$7.5 million in annual gross revenue from beer sold in the US, if distribution licenses generate at least \$3 million in annual gross revenue in the US, and if beer distribution generates at least \$3 million in annual gross revenue in the US. In addition to advanced notice to the DOJ, PFJ provides DOJ with the opportunity to evaluate such acquisitions including the ability to seek additional information during which time ABI cannot consummate the transaction.
- **No termination.** PFJ requires ABI and SABMiller to agree-and for ABI to further require Molson Coors to agree-not to cite the transaction or the required divestiture as a basis for modifying, renegotiating, or terminating any contract with any Distributor.
- **No retaliation.** ABI may not discriminate against, penalize, or retaliate against a Distributor that brings to the attention of the Monitoring Trustee or the United States a potential violation by ABI of Section V of the Final Judgment.
- **Confidential information.** PFJ requires Defendants to implement and maintain procedures to prevent the disclosure of the confidential commercial information of MillerCoors and Molson Coors by Defendants to any of Defendants' affiliates who are involved in the marketing, distribution, or sale of beer in the United States.
- **Monitoring Trustee.** The proposed Final Judgment imposes a Monitoring Trustee, the responsibilities of which go beyond the Monitoring Trustee created for the ABI-Modelo deal.

The Monitoring Trustee, among other things, will have the authority to investigate complaints that ABI has violated the restrictions related to its distribution practices.

II. RETAIL DIGITAL NETWORK V. APPELSMITH

A decision of a Panel of the 9th Circuit Court of Appeals in California had disturbing implications for the industry. In *Retail Digital Network v. Appelsmith*, the Panel decision called into serious question the constitutionality of California trade practice laws which prohibited suppliers and distributors from buying advertising for retailers or otherwise advertising in a manner that provides specific value to the retailer. Fortunately, as discussed below, the Panel decision was just reversed by the 9th Circuit En Banc. A copy of the En Banc decision is attached.

The Panel decision held that the trade practice law in question may violate the First Amendment as a burden on commercial speech and remanded the case to the District Court (which had upheld the law) to determine whether the law survived a heightened level of scrutiny under the First Amendment.

In pertinent part, the Panel held as follows:

California Business and Professions Code Section 25503(f)—(h) forbids manufacturers and wholesalers of alcoholic beverages from giving anything of value to retailers for advertising their alcoholic products. Thus, for example, a liquor store owner in California can hang a Captain Morgan Rum sign in his store's window, but the Captain cannot pay him, directly or through an agent, for doing so. Twenty-nine years ago, in *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986), we found this law to be consistent with the First Amendment. Today we consider whether *Actmedia* remains binding in light of intervening Supreme Court decisions, which Plaintiff-Appellant Retail Digital Network, LLC (RDN) contends have strengthened the protection we must give commercial speech under the First Amendment.

We conclude that *Actmedia* is clearly irreconcilable with *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). *Sorrell* requires heightened judicial scrutiny of content-based restrictions on non-misleading commercial speech regarding lawful products, rather than the intermediate scrutiny applied to section 25503 in *Actmedia*. We therefore reverse the district court's summary judgment in favor of Defendant-Appellee Jacob Appelsmith, Director of the California Department of

Alcoholic Beverage Control (the State), and remand on an open record for the district court to apply heightened judicial scrutiny in the first instance.

The *Actmedia* case rejected a 1986 First Amendment challenge and upheld Section 25503 on the basis of the Supreme Court case of *Central Hudson Gas & Electric Corp. vs. Public Service Commission*, 447 U.S. 557 (1980). The *Central Hudson* case had set forth a four part test for laws that burden commercial speech. Under that test, courts examine four questions: (1) whether the speech concerns lawful activity and is not misleading; (2) whether the asserted governmental interest justifying the regulation is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than is necessary to serve that interest. *Id.* at 566. In *Actmedia*, the 9th Circuit found that all four tests were satisfied, largely on the basis that the state was properly exercising its powers under the Twenty-first Amendment and regulating the structure and market of the alcohol industry.

In 2011, however, the Supreme Court decided the *Sorrell* case. The Court appeared to change the standards governing commercial speech. The *Retail Digital* case summarized the *Sorrell* holding as follows:

In *Sorrell*, however, the Supreme Court held that content- or speaker-based restrictions on non-misleading commercial speech regarding lawful goods or services must survive "heightened judicial scrutiny." 131 S. Ct. at 2664. The Court invalidated a Vermont law that restricted the sale, disclosure, and use of pharmacy records for marketing purposes. *Id.* at 2659. On its face, the law was content-and speaker-based. In fact, it had been enacted with the avowed purpose of "diminish[ing] the effectiveness of marketing by manufacturers of brand-name drugs." *Id.* at 2663. While the Court found that heightened judicial scrutiny of the law was required, the Court did not actually apply heightened scrutiny, as it found that the law could not withstand intermediate scrutiny under *Central Hudson*. *Id.* at 2667-68.

Consistent with *Sorrell*'s plain language, we rule that *Sorrell* modified the *Central Hudson* test for laws burdening commercial speech. Under *Sorrell*, courts must first determine whether a challenged law burdening non-misleading commercial speech about legal goods or services is content-or speaker-based. If so, heightened judicial scrutiny is required. *See Sorrell*, 131 S. Ct. at 2664.

The State of California petitioned the 9th Circuit for a Rehearing En Banc. Various organizations, including the National Beer Wholesalers Association submitted Amicus Briefs in support of the State's Petition. A copy of the NBWA Amicus Brief is attached. Although such Petitions are rarely granted, the 9th Circuit did take the extraordinary step of granting the Petition.

The En Banc decision reversed the Panel and upheld the trade practice law. The 9th Circuit opinion contained very favorable language regarding the three-tier system. In pertinent part, the Court held as follows:

To the extent that *Actmedia* upheld Section 25503(h) on the basis that it directly and materially advances the States’s interest in maintaining a triple-tiered distribution scheme, we agree with the court’s sound analysis. Furthermore, we concur that Section 25503(h) is sufficiently tailored to advance that interest. Section 25503(h) serves the important and narrowly tailored function of preventing manufacturers and wholesalers from exerting undue and undetectable influence over retailers. Without such a provision, retailers and wholesalers could side-step the triple-tiered distribution scheme by concealing illicit payments under the guise of “advertising payments”.

If the trade practice law in question had been struck down under the First Amendment, it would have created a huge loophole in trade practice laws. Retailers, in particular mega-retailers, would begin to insist that suppliers and distributors purchase advertisements which specifically benefit their venues. Such payments would thereafter be characterized as advertising or commercial speech. This would have substantially undermined tied-house “for value” laws. Fortunately, the 9th Circuit Court of Appeals understood and appreciated the benefit of the three-tier system and tied-house laws and upheld the trade regulation in question on that basis.

III. MITCHELL HAMLINE LAW REVIEW ARTICLE

This spring, I submitted a proposed article for publication in the Mitchell Hamline Law Review. The Review accepted the article for publication this fall. An outline of the article is set forth below.

- I. Introduction.
- II. The Public Policy Underlying Alcohol Regulations.
- III. The Eighteenth Amendment.
- IV. The Twenty-first Amendment.
- V. Evolution of Twenty-First Amendment Jurisprudence.

- A. Shortly after enactment in 1933.
- B. The 21st Amendment does not shield state liquor laws from all constitutional challenges.
- C. The interplay between the Commerce Clause and the 21st Amendment: Dormant Commerce Clause.
 - 1. Dormant Commerce Clause Challenges to facially discriminatory state liquor laws regulating producers or products.
 - 2. Dormant Commerce Clause challenges to state liquor law regulating retailers.
 - 3. Dormant Commerce Clause challenges to state liquor laws regulating distributors.
 - 4. Dormant Commerce Clause challenges to state liquor laws regulating producers and products based upon production levels.
 - 5. Remedies to rectify unconstitutional discrimination: extension vs. nullification.
- D. The interplay between the Commerce Clause and the 21st Amendment: The Positive Commerce Clause.
 - 1. The Capitol Cities Balancing Test.
 - 2. Seminal Preemption cases preceding and succeeding Capitol Cities same stature as the goals of the Sherman Act.
- VI. A suggested framework for analysis.
- VII. Conclusion.

III. SUMMARY OF PENDING CASES OF INTEREST TO BEER DISTRIBUTORS

Equal Protection:

- ***Indiana Petroleum Marketers and Convenience Store Association v. IN Alcohol and Tobacco commission (cold beer case)***

- E.P challenge to Indiana's laws and regulations that keep grocery stores and gas stations from selling cold beer. A complaint was filed in May 2013 by the Indiana Petroleum Marketers and Convenience Store Association, along with other convenience stores and one consumer, arguing that the regulation that prevent them from selling refrigerated beer violates their U.S. and Indiana constitutional rights.

- The Southern District of Indiana granted summary judgment dismissing Indiana Petroleum Marketers and Convenience Store Association's claim that the state law banning convenience, grocery and pharmacy stores from selling cold beer violates the U.S. Constitution's equal protection clause as well as on other state claims. Judge Richard Young stated that "Indiana's legislative classifications, which serve to limit the outlets for immediately consumable cold beer, is rationally related to the legitimate goals of Indiana's alcoholic beverage laws..." Young continued stating "the state has a legitimate interest in limiting the sale of alcohol and, more to the point, a legitimate interest in curbing the sale of immediately consumable beer to minors."

- The Indiana Petroleum Marketers and Convenience Store Association appealed seeking 7th Circuit review.

- The 7th Circuit ruled for the state in December 2015.

- ***Wal Mart v. Texas ABC***

- Wal-Mart brought suit against the Texas Alcoholic Beverage Commission in the Western District of Texas challenging the Texas laws restricting public ownership of liquor stores in Texas.
- This lawsuit alleges that the Texas liquor store system violates the Equal Protection, Commerce Clause, and Privileges and Immunity clauses of the U.S. Constitution.
- In July, the district court dismissed the Privileges and Immunity claim by Wal-Mart, but did not grant Texas' motion to dismiss on the Equal Protection and Commerce clause claims as the judge believed Wal-Mart had provided enough information to seek additional discovery.
- The court has issued a scheduling order: ADR Report Deadline due by 9/25/2015, Amended Pleadings due by 10/1/2015, Discovery due by 3/25/2016, Joinder of Parties due by 10/1/2015, Dispositive Motions due by 4/22/2016. Bench Trial set for 9/26/2016 09:00 AM before Judge Robert Pitman.

- ***Monarch Beverage v. Huskey***

- Indiana is facing a new lawsuit filed by Monarch Beverage filed suit against Indiana ABV challenging the laws that restrict beer distributors from securing liquor distribution licenses while wine distributors may obtain a permits to wholesale liquor or beer.
- This lawsuit was filed under the Equal Protection Clause.
- The Court denied Indiana Beverage Alliance's request to appear as Amicus Curiae in support of the state and granted the Wine & Spirits Distributors of Indiana's motion to file an amicus brief in support of the state.

- Both parties moved for summary judgment, and Monarch Beverage requested that the Court hear oral arguments on the motions.
- On September 30, 2015, the court granted the state's motion for summary judgement and dismissed this matter.
- The state court ruled for Indiana in December 2015.
- ***Retail Services & Systems, Inc., dba Total Wine & More v. South Carolina***
 - A trial-level court in South Carolina recently issued an opinion upholding the constitutionality of the state's statutory limitation on the number of retail dealer licenses granted to an individual or corporation. The plaintiff, Total Wines & More, argued that the state's limitations on the number of retail dealer licenses it could obtain violated the due process and equal protection clauses of the federal and state constitutions, and exceeded the state's police powers. The court's decision highlights the unlikelihood of success in challenging such alcohol licensing laws on equal protection and due process grounds due to the application of rational basis scrutiny.
 - In considering the plaintiff's claims, the court set forth the due process and equal protection tests, which, in the absence of a fundamental right or suspect classification, both require only a reasonable relationship between the challenged law and a legitimate legislative purpose. In finding the requisite reasonable relationship, the court noted possible purposes of such licensing limitations, including preventing concentration of power within the liquor industry, preventing monopolies, avoiding indiscriminate price cutting and excessive advertising, and protecting small, independent liquor dealers. The court also held that the licensing laws did not exceed the state's police powers, as such

licensing is a typical exercise of the police power designed to protect the “morals and welfare of the public.”

- Total Wine has appealed to the South Carolina Court of Appeals asked the Court to examine whether the General Assembly acted within the scope of its police powers when it enacted S.C. Code Ann. Sections 61-6-140 and -150; whether those codes violate the Equal Protection Clause and South Carolina’s Due Process Clause.
- An appeals hearing was held in November. A decision will be any day.
- ***E.F. Transit v. Indiana Alcohol & Tobacco Commission***
 - E.F. Transit, an entity under common ownership and control with Monarch, is challenging the applicability to it of the prohibition against using depots or “relay yards” under the preemption provision of the Motor Carrier Act.
 - The Wine and Spirits Distributors of Indiana (WSDI) filed an Amicus and attached the complaint to include Equal Protection claims because WSDI can have multiple warehouses.
 - The State agreed not to cite Monarch until the conclusion of the trial and appeal.
 - Monarch is conducting discovery with the deadline of February 9, 2016.
 - Dispositive motions scheduled for March 3, 2016.

Regulatory:

- ***Texas ABC v. Cadena DBA Oxxo:*** (Travis County, Texas)
 - Lawsuit related to denial of license by Cadena to have retail license.
 - Cadena OXXO parent company is 30% owner of Heineken/FEMSA. OXXO is largest retailer in Mexico.
 - This violates Texas prohibited interests section.

- Court agreed and ruled for Texas.
- ***Live Oak Brewing v. Texas:*** (Travis County, Texas)
 - 3 Texas brewers are challenging in state court the 2013 Texas legislation that bans payment for distributor rights.
 - They allege taking of property and violation of due process.
 - The lawsuit has been filed in state court.
 - The breweries are represented by the Institute for Justice. The same group that brought the original *Granholm* lawsuits.
 - The Texas Supreme Court has created new precedent creating a strong economic liberty right that may prove problematic in state court review of alcohol regulation.
- ***Mark Anthony Brands v. Texas ABC:*** (Travis County, Texas)
 - Mark Anthony was denied the ability to register TGIF brands and filed lawsuit in state court.
 - TGIF is the name of a prominent alcohol retailer.
 - Texas law prohibits private label alcohol. TGIF filed lawsuit to be allowed to sell the TGIF brands in Texas.
 - Private labels increasingly concern in alcohol space.
 - Court ruled for Mark Anthony Brands and the Texas ABC must engage in corrective rulemaking.
- ***Deep Ellum Brewing v. Texas ABC:***
 - Lawsuit filed in federal court against law in Texas that allows wineries, distilleries, and brewpubs to sell their products directly to the end consumer for off-premise consumption.

- Lawsuit filed in September with a Go Fund Me public appeal to raise \$100,000. They have raised \$25,000 so far.
- All dispositive motions are to be filled by August 8, 2016.
- Trials are scheduled to begin on November 7, 2016.

Idaho:

In the wake of Anheuser-Busch InBev's (ABI) purchase of Bend, Oregon's 10 Barrel Brewing Co. which operates a brewpub in the state of Idaho, the Idaho Beer & Wine Distributors Association has petitioned the state for a declaratory ruling seeking confirmation of Idaho law that prohibits a brewer producing more than 30,000 barrels from holding a retail, brew pub or wholesale license. Both ABI and 10 Barrel Brewing Co. have an annual production in excess of that limit. The fact that the state of Idaho is the landlord for the brewery is a complicating matter. A lawsuit is expected over the issuance of a license to ABI-10 Barrel in this matter.

Shelton Brothers Litigation:

These importer/distributors are very litigious and have created dangerous precedent to date on franchise laws in states such as Missouri. Here is a quick rundown of Shelton Brothers' other litigation from across the country in which they claim franchise laws are unconstitutional:

- ***Shelton Brothers v. Arbor Beverage Company***, Case No. 3:2015cv30143 (Massachusetts District Court).
 - Action by SB to terminate its Michigan wholesaler.
 - Contains similar constitutional claim that MI's statute is unconstitutional, claiming unconstitutionality because the MI Liquor Code cannot be applied to the parties' commercial relationship consistent with the Commerce Clause.
 - This case was just filed in September.

- **Shelton Brothers v. Three Pirates, LLC**, Case No. 3:2015cv30140 (Massachusetts District Court).
 - Action by SB to terminate its Oregon wholesaler.
 - Contains similar constitutional claim that Oregon’s statute is unconstitutional, claiming unconstitutionality because SB is not prohibited from ceasing or terminating at will its commercial relationship with Point Blank because the statute cannot apply to the parties’ commercial relationship in this case consistent with the commerce clause.
 - This case was also just filed last month.
- **Artesian Enterprises v. Shelton Brothers**, Case No. 14 CVS 9833 (North Carolina state court).
 - Artesian claims unlawful termination of beer franchise, unlawful dual distribution, unlawful discrimination among retailers, unlawful price maintenance.
 - Action by SB’s North Carolina wholesaler to enjoin new distributor from distributing SB’s products.
 - Also includes unlawful termination claim against SB (attorney fees).
 - Retailer discrimination; SB attempted to set wholesaler’s resale prices.
 - Breach of contract.
 - Remanded to North Carolina state court (Guilford County) on November 24, 2014.
- **Missouri Beverage Company v. Shelton Brothers**, Case No. 11-2456 (8th Cir. 2012).
 - Notably, Shelton Brothers achieved a significant victory in the Eight Circuit. The 8th Circuit upheld the lower court’s holding that Missouri’s “franchise law” did not apply to Shelton Brothers’ relationship with a Missouri distributor.

- **Shelton Brothers v. Aleph Wines Corp.**, Civil Action No. 3:13-CV-30180-MAP (U.S. District Court of Massachusetts, 2014).

- Action by SB regarding termination of South Carolina beer wholesaler.
- Shelton Brothers filed suit in Mass. and Aleph wanted the case to be heard in South Carolina. Main arguments dealt with jurisdiction, venue, forum nonconveniens, and transfer of venue.
- Important language from the case, which does not discuss the commerce clause, but could still be helpful:
 - "... the defendants in-state contacts must show that the defendant purposefully availed itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable."
 - "Parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other State for the consequences of their activities." (Burger King v. Rudzewicz)

Pabst Litigation:

- Pabst has terminated wholesalers in OH, CA and MD generally alleging that Pabst is a successor supplier due to the purchase by Eugen Kalsper.
- Litigation is underway in all three states.
- There are various state laws implicated and concerns of a nationwide strategy of terminations by brewers with no injunction ability.

First Amendment

- **Missouri Broadcasters Association et al. v. Lacy et al.**

- The case was initiated in February 2013. Plaintiffs challenged Missouri regulations regarding discount advertising prohibitions and below cost advertising prohibitions and the statute regarding the single retailer advertising prohibition. The complaint alleges that the laws prohibit commercial speech protected under the First Amendment and that they have a chilling effect on speech and advertising sales. The complaint also alleges inconsistent enforcement, and seeks a declaration by the court that the laws are unconstitutional.

- On March 31, 2015, the Western District of Missouri issued its Order on Plaintiffs' Motion for Summary Judgment.

- The Court determined that the proposed commercial speech would be constitutionally protected, and that the government's interest in regulating the speech (responsible consumption, combat underage drinking, and maintaining an orderly marketplace) is legitimate. In analyzing whether the regulations directly advance the government's claimed interest, the Court noted that Plaintiffs would not have challenged the regulations and statute unless they believed that sales would increase if the regulations were lifted. Restrictions on discount alcohol advertising will alleviate the harms raised by the government.

- However, the Court acknowledged that it was not clear from the record if there is a reason why manufacturers of intoxicating liquor other than beer and wine are treated differently in 11 CSR 70-2.240(5)(G), and it instructed the parties to further brief the issue (consumer cash rebate coupons). In all other respects, though, the Court found that the Defendants established that the regulations directly advance the government's interests.

- The Court also found that the regulations have a reasonable fit to the harms they seek to alleviate. And, therefore, the Court denied Plaintiff's motion for summary judgment as to the two regulations, and granted Defendants' motion to dismiss as to all claims related to the two regulations, with the exception of the issue related to 11 CSR 70-2.240(5)(G)'s treatment of manufacturers of intoxicating liquor other than beer or wine.
- With regard to § 311.070.4(10), RSMo, Plaintiffs argued that it directs the content of advertising. The Court determined otherwise, and stated that the statute is not compelled advertising but should be considered a limited allowance for some advertising paid for by producers or wholesalers that mentions the names of retailers. As such, the Court denied Plaintiffs' motion for summary judgment as to the statute, and granted Defendants' motion to dismiss, as well.
- In summary, Plaintiffs' motion for summary judgment was denied, and all claims were dismissed with the exception of the sub-issue of 11 CSR 70-2.240(5)(G)'s disparate treatment of manufacturers of intoxicating liquor other than beer or wine, which shall be addressed by the parties in briefs filed by April 17, 2015 with responses due May1. The Court directed the parties to address the following questions in their briefs:
 - Is there a reason that manufacturers of intoxicating liquor are treated differently under 11 CSR 70-2.240(5)(G)?
 - Does that difference make Missouri's regulatory scheme irrational such that the Court should find the regulation unconstitutional?
 - If the Court found the regulation unconstitutional as written, how should the Court remedy the issue?

Supreme Court for Next Term:

- ***Nebraska v. Parker:***

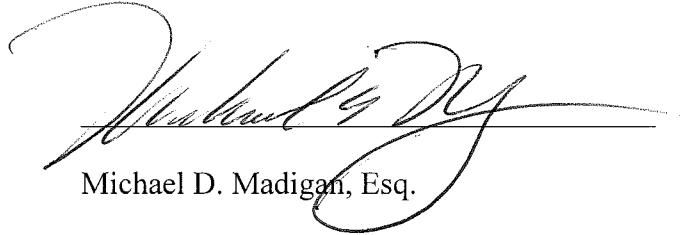
- The U.S. Supreme Court decided a case involving the imposition of a ten-percent alcohol tax on alcohol purchases within the Omaha tribe's Indian reservation.
- The Supreme Court will review the boundary of the reservation, not directly review the challenged alcohol law.
- The case, on appeal from the U.S. Court of Appeals for the Eighth Circuit, was a result of individual petitioners whose request to remit the ten-percent tax was denied by the Omaha tribe (Tribe), who informed the petitioners they were subject to the Omaha Tribal Code, as well as fines up to \$10,000 per violation.
- The Secretary of the Interior approved amendments to Title 8 of the Omaha Tribal Code on Feb. 28, 2006, which promoted a Beverage Control Ordinance (Ordinance). The Ordinance governs the sale, possession and distribution of alcohol within the Omaha Tribe's Indian Reservation by imposing a licensing scheme and the ten-percent sales tax on the purchase of alcoholic beverages from any licensee.
- The Supreme Court ruled for the Tribe and against Nebraska. The boundaries of the reservation have not been changed by congress therefore those alcohol businesses and retailers are subject to the Tribe's alcohol ordinances. 18 USC 1161.

CONCLUSION

Challenges to state liquor laws continue at a steady pace. While it is certainly unsettling to have so many battles looming on the horizon, it is comforting that we have achieved resounding victories in the vast majority of the cases. I am confident that the industry will weather this storm and that the three-tier system will survive.

I would like to thank all of you for the opportunity and privilege to serve as your legal counsel for the last thirty-three (33) years and for the opportunity to serve as MBWA President for the last thirteen (16) years. I look forward to working with you for many years to come in service of the Association.

MADIGAN, DAHL & HARLAN, P.A.

A handwritten signature in black ink, appearing to read "Michael D. Madigan", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael D. Madigan, Esq.



Issues of Interest

- Distributor Independence
- Tax Reform
- TTB Funding
- Trade Practice Enforcement


 A graphic showing a smartphone screen displaying the text "NBWA ADVOCACY" and a bottle of beer.

Building Relationships





 A collage of three black and white photographs. The top left shows a group of people standing in front of the US Capitol building. The top right shows three men standing in front of a sign that reads "GRETZ BEER COMPANY WELCOMES US CONGRESSMAN BRIAN FITZPATRICK". The bottom left shows another group of people in front of the US Capitol.

Beer Serves America



- Nearly 135,000 distribution jobs
- Up 24% over past decade
- \$350 billion in economic output
- 1.9% of U.S. GDP

Study: U.S. Beer Industry Creates More Than 2 Million Jobs

Beer Industry Brews 2.2M Jobs, \$350B For U.S. Economy



Spreading the Message

- Highlighting Jobs & Consumer Choice





 A collage featuring a woman holding a beer with the text "ASK A BEER EXPERT", an "EMPLOYEE SPOTLIGHT" graphic for Heidi Knudsen, and social media icons for Facebook, Twitter, and Instagram.



August 6 – 8, 2017
Boston, MA


 A collage of black and white photographs from an event. It includes a ship, a "Next Generation" graphic, a date and location announcement, and several photos of people at the event, including a man in a suit and a group of people.

