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April 16, 1985

The Honorable T. Moffatt Burriss
Member, House of Representatives
503-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Burriss:

You have asked our opinion as to the constitutionality of H.2490. Because your subcommittee is in need of an immediate response, our research as to your question has necessarily been somewhat limited. Therefore, based upon the case law we have found, we will comment upon potential constitutional problems which the bill would encounter if enacted.

H.2490 is what is commonly known as a designation statute. The bill provides that all manufacturers, etc. of alcoholic liquors who wish to ship their products into the State for sale must designate the one wholesaler to whom a particular brand will be shipped for exclusive sale in South Carolina. Designations of wholesalers and brands must be approved by and registered with the South Carolina Alcoholic Beverage Control Commission and once the single wholesaler for distribution of a particular brand has been designated and approved, he cannot be changed except for cause.

The bill also sets forth procedures for the registration and approval of additional brands or labels. The wholesaler initially approved possesses the right to object to approval of additional brands, and upon such objection a hearing is required to be held by the Commission. If the Commission determines that it is "unjust or inequitable (without cause being shown) to designate the brand or label to a wholesaler designated for the brand or label being so modified, substituted, upgraded, or extended, then the request must be denied... ."

REQUEST LETTER

The bill also sets forth the procedure for a manufacturer, etc. to change wholesalers once initial designation has occurred. Cause must be found by the Commission in order to alter existing wholesaler designations and the bill sets forth certain criteria which may be considered to constitute cause. Among these are bankruptcy of the wholesaler, repeated violations of law or the wholesaler's failure to maintain sales volume.

Section 11 of the bill mandates that "[t]hose wholesalers who, as of January 1, 1985, were the exclusive distributors for a manufacturer, importer. producer, shipper or broker, for a label or a particular brand must initially be designated as the licensed wholesaler of that brand pursuant to Section 2. Any change in this designation must thereafter be made in accordance with the terms, provisions, and conditions of this act."

We will first address Section 11 of the proposed bill. In our view, this section could raise a serious question of impairing existing contracts between manufacturers and wholesalers. Because the section makes the Act retroactive to January 1, 1985 and requires that the existing designations of wholesalers on that date must be continued until such time as altered pursuant to the statutory procedures, it is evident that this provision could materially alter existing contracts. It could, for example, extend such contracts made prior to January 1, 1985 in terms of duration and would obviously nullify any such contracts occurring between January 1, 1985 and the effective date of the Act.

Our Supreme Court recently addressed the question of impairment of contracts in G-H Ins. Agency v. Continental Ins. Co., S.C., 294 S.E.2d 336 (1982). There, an insurance agency entered a contract with an insurance company; under the terms of the contract, termination could be made by either party at any time. Subsequently, the General Assembly enacted a statute which required that no insurer could cancel its representation by an agent for certain reasons.

The Court held that the legislative enactment unconstitutionally impaired the existing contract. Relying primarily upon the Fourth Circuit Court of Appeals decision in Garris v. Hanover Ins. Agency, 630 F.2d 1001 (4th Cir. 1980) and the Supreme Court's decision in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), the Court in invalidating the statute stated:

> The impact of the provision was traumatic to some agents and insurance companies. There was no provision for gradual application for a grace period. No opportunity was given to renegotiate agency contracts. The impact of the proscription was immediate, irrevocable and without limit as to time.

294 S.E.2d at 340.

A virtually identical situation to here existed in McAleer Buick Pontiac Co. v. Ga. Motors Corporation, 95 Ill.App.3d 111, 419 N.E.2d 608 (1981). GMC had an agreement with a dealer which was subject to periodic renewal and which was provided by the parties to end on a certain date. The Illinois legislature subsequently enacted the Illinois Motor Vehicle Franchise Act which provided that dealerships could not be terminated except for good cause. The Court held that if the Act were retroactively applied, it would unconstitutionally impair existing contracts. Concluded the Court,

> The rule against giving a statute retroactive application is grounded at least in part upon the constitutional guarantee against the impairment of the obligation of contracts - a guarantee that could be violated if a law enacted subsequent to a party's acquiring constitutional rights were applied to that contract... .
>
> Although a few courts have rules otherwise, the great weight of authority is that retroactive application of franchise law ... would constitute an unconstitutional impairment of the obligation of contracts... . See, e.g. Ward v. Chevron U.S.A., Inc. (1979), 123 Ariz. 208, 598 P.2d 1027; Globe Liquor Co. v. Four Roses Distillers Co. (Del. 1971), 281 A.2d 19; United States Brewers' Assn., Inc. v. State of Nebraska (1974), 92 Neb. 328, 220 N.W.2d 544; Wipperwuth v. U-Haul Co. of Western Wisconsin, Inc. (1984), 98 Wisc.2d 516, 297 N.W.2d 65.

419 N.E.2d at 610. Thus, based upon the G.H. Ins. Agency case, supra and the other cases mentioned, we would have serious

doubts about the constitutional validity of Section 11 of the proposed bill.

Section 4 of the proposed bill also possesses potential constitutional problems. The section provides that if an objection is filed by a wholesaler to the registration of additional brands, the commission must hold a hearing on the matter. Thereupon,

> [i]f it is determined from the evidence adduced at this hearing that the brand or label involved is the same as, or similar to, or is a modification of, substitution of, upgrade of, or extension of a brand or label which has already been registered by the manufacturer ... [etc.] so as to render it unjust or inequitable (without cause being shown) to designate the brand or label to a wholesaler different from the wholesaler designated for the brand or label being so modified, substituted, upgraded, or extended, then the request must be desired. (emphasis added).

We note that in other cases, courts have declared unconstitutional similar provisions as those emphasized above because they provide insufficient and imprecise standards of conduct and are thus void for vagueness. In Vintage Imp., Ltd. v. Joseph E. Seagram, 409 F.Supp. 497 (E.D.Va. 1976), the District Court concluded that the average person could not determine what words such as "unfairly" or "without due regard to the equities of such wholesaler" meant and their use without proper definition and standards was unconstitutional. Likewise, in United States Brewers' Assn. v. State of Nebraska, supra, similar language was declared invalid. Thus, based upon the foregoing cases, Section 4 as drafted would probably be constitutionally doubtful. 1/

1/ By contrast, see Allstate Beer Inc. v. Julius Wile Sons & Co., 479 F.Supp. 605 (N.D.Ga. 1979) and §§ 3 and 5 which clearly define cause with regard to a change in wholesalers.

Finally, we note that several cases have upheld statutes similar to H.2490 in effect and purpose against a variety of constitutional objections. See, Allstate Beer, Inc. v. Julius Wile Sons & Co., 479 F.Supp. 605 (D.Ga. 1979); Jefferson Co. v. Braswell, (Ala.), 407 So.2d 115 (1981); see also, Rice v. Norman Williams, Co., 458 U.S. 654 (1982); Lanierland Distributors, Inc. v. Strickland, 544 F.Supp. 747 (N.D.Ga. 1982).

However, we call to your attention the case decided by the Nebraska Supreme Court, United Brewers' Assn. v. State of Nebraska, supra. That case invalidated a similar statute to H.2490 on a number of constitutional grounds. One such ground was substantive due process. The Court emphasized that the "freedom to contract and to acquire and sell property in a lawful manner are valuable constitutional rights."

> Measures adopted by the Legislature to protect the public health and secure the public safety and welfare must have some reasonable relation to those proposed ends. A citizen has a constitutional right to own, acquire, and sell property; and if it is apparent that a statute ... does not tend to preserve the public health, safety, or welfare ... it is unconstitutional as an invasion of the property rights of the individual.

The Court found the Nebraska statute to be arbitrary because it

> locks in the present distributors and places a severe burden upon a manufacturer who wants to make any change in the distribution of his product. The act even provides for "the succession" of distributorships.

Thus, at least one court has declared a similar act invalid in its entirety.

CONCLUSION

1. We would advise that, based upon South Carolina case law and the majority of decisions in other jurisdictions, Section 11 of H.2490 is most probably unconstitutional. A court would likely rule that the bill, if enacted, cannot be made retroactive to January 1, 1985.

2. Section 4 of H.2490 is also probably constitutionally objectionable because it sets forth no standards or criteria for determination by the ABC Commission.

3. As to the bill generally, courts in other jurisdictions have upheld such legislation as a valid exercise of the State's enhanced police power in the area of regulation of alcoholic beverages; thus, except for Sections 11 and 4 of the bill, a court would probably conclude that the bill is constitutional. We must caution, however, that at least one court has declared unconstitutional legislation similar to H.2490 because it constitutes an unreasonable invasion of the personal property rights of the manufacturers.

If we can be of further assistance, please let us know.

Sincerely,

Robert D. Cook
Executive Assistant for Opinions

RDC:djg