

To: File

From: Mitch Rubin

RE: Return of Product or In-store Servicing of Beer

Date: October 29, 2010

This morning at 11:00 a.m., I attended a meeting of alcohol beverage representatives called by the DABT. The meeting was held in the DABT Conference Room. The purpose of the meeting was for the DABT to clarify the practice of swapping out close-code and out-of-code beer. The Retail Federation complained that some distributors were interpreting the new return rules as disallowing close-code and out-of-code beer.

The DBPR's Deputy General Counsel Mike Martinez ran the meeting and Patricia Nelson, DBPR Rules Attorney, and Debi Pender, Deputy Director, participated. The following industry representatives participated in person: Scott Ashley, Wine & Spirits Distributors of Florida, Brecht Heuchan, Southern Wine & Spirits, Eric Criss, Beer Industry of Florida, John Harris, Gray-Robinson, John Gilroy, J.J. Taylor, Scott Dick and Samantha Smith, Retail Beverage Council of the Florida Retail Federation, Gary Rutledge, MillerCoors. Participating by telephone were John Godar, Anheuser-Busch, Eric Levin and Ross Levin, Gold Coast Beverage.

The meeting began with introductions. Martinez stated that the DABT was aware of confusion in the market as to the return of close-coded and out-of-code beer. Martinez stated that as the beer freshness issue had arisen in recent years. John Godar clarified the Martinez's statement by pointing out that beer freshness goes back much further than the recent campaigns.

Gary Rutledge said that MillerCoors has code dates and that this practice had long been permitted.

I asked how it was that this issue had percolated to the top. Scott Dick volunteered that some of his members are being told by distributors that it was lawful and others were being told by other distributors that was not lawful. He explained that this issue was the most pressing because retailers did not wish to be selling out-of-code beer to consumers.

John Harris explained the history behind the swapping out of close-coded beer.

Martinez explained that the swapping of close-code and out-of-code beer was not an issue addressed in the return rules because the rotation of beer had always been exempt under the in-store servicing of beer statute.

I asked whether the issue was limited to beer or whether wine was implicated. Martinez stated and Dick agreed that the only issue on the table was beer. Martinez explained

that he believed that section 561.423 re in-store servicing of beer authorized the swapping of close-coded and out-of-code beer. At some point shortly thereafter, I read the relevant portion of the statute aloud placing the emphasis on the "in-store" conditions in the statutory language:

561.423 Beer and malt beverages; in-store servicing authorized.—Nothing in s. [561.42](#) or any other provision of the Beverage Law shall prohibit a distributor of beer or malt beverages from providing in-store servicing of beer or malt beverages. "In-store servicing" as used herein means quality control procedures which include, but are not limited to: rotation of malt beverages on the vendor's shelves, rotation and placing of malt beverages in vendor's coolers, proper stacking and maintenance of appearance and display of malt beverages on vendor's shelves, price-stamping of malt beverages in vendor's licensed premises, and moving or resetting any product or display in order to display a distributor's own product when authorized by the vendor.
History.—s. 1, ch. 75-143; s. 2, ch. 85-166.

I stated for the record that I disagreed with Martinez's reading of the statute. I also read the relevant portions of the in-store servicing of wine statute and stated that the two were not as dissimilar as Martinez was maintaining.

561.424 Vinous beverages; in-store servicing authorized.—

(1) It is the finding of the Legislature that the in-store servicing of wine by a distributor is a necessary part of a distributor's function and responsibility to a vendor. It is further the finding of the Legislature that the in-store servicing of wine by a distributor is not intended by the distributor to induce a vendor to purchase wine from the distributor nor does the distributor intend to provide any financial assistance to a vendor by providing such in-store servicing to the vendor. In addition, it is the finding of the Legislature that in-store servicing of wine by a distributor is a normal trade or business practice which has substantially contributed to the increase in sales of wine resulting in a substantial benefit to the state by increased tax revenues resulting from the increased sales, and therefore is not a rendering of financial assistance to a vendor or an inducement to purchase wine.

(2) Nothing in s. [561.42](#) or any other provision of the alcoholic beverage law shall prohibit a distributor of wine from providing in-store servicing of wine sold by such distributor to a vendor. "In-store servicing" as used herein means: placing the wine on the vendor's shelves and maintaining the appearance and display of said wine on the vendor's shelves in the vendor's licensed premises; placing the wine not so shelved or displayed in a storage area designated by the vendor, which is located in the vendor's licensed premises; rotation of vinous beverages; and price stamping of vinous beverages in vendor's licensed premises. This section shall not apply to distilled spirits.
History.

— s. 3, ch. 77-192.

I also asked whether there was any difference between close-code and out-of-code. Martinez did not believe there was any difference for purposes of quality control. Nelson asked if out-of-code for one year was included. Martinez explained that it was.

Brecht Heuchan asked if this was a precedent for wine. Martinez said the in-store servicing of wine statute was substantially different in that it did not contain two phrases: "quality control procedures" and "not limited to."

Eric Criss asked for the DABT to put out a notice on its letterhead stating that the new rules were in effect and directing licensees to the Website. Martinez, Nelson and Pender were all doubtful of the need or purpose. They raised issues regarding cost, logistics, and the duty of licensees to know the law. A discussion ensued where distributors asked for a notice on DABT letterhead that they could distribute. Martinez said that alerting licensees would only create more discontent amongst retailers. Distributors also requested training sessions for licensees. Martinez, Nelson and Pender frowned on that idea. Then distributors requested as an alternative, and Scott Dick spoke in favor of, tied house sessions for industry representatives. Neither Martinez nor Pender was fond of that idea.

Martinez stated that the statutes and rules are subjective--capable to many interpretations so that different agents, different distributors and different people could reach different conclusions about what they meant.

I asked Martinez how the DABT was going to inform licensees of this "non-rule" in-store servicing policy. He said that he was going to put it in writing for circulation to enforcement personnel. Martinez adamantly disagreed with my characterization of "non-rule policy" and called it "personnel training." By the end of the meeting Martinez was recanting the idea of putting the policy in writing. He suggested that the communication would best be by telephone.

Gilroy, Smith and Ashley did not say anything of substance during the meeting.

My purpose in taking a hard stand against the reading of the in-store servicing of beer statute as authorizing the beer swapping procedure under discussion was five-fold: 1. The FBWA should not be a party to back-room deal making on "non-rule policy" between the DABT and the regulated community, 2. The "in-store servicing of beer" statute cannot be fairly read to mean what Martinez says it means and to agree with the interpretation is to put the FBWA in the position of manipulating plain meaning when it suits its purpose, 3. If Martinez's interpretation is correct, then there may be a host of other "quality control procedures" that might be considered lawful that distributors do not agree with under tied house evil. 4. Anheuser-Busch's code date policy might change and having agreed to Martinez's interpretation would effectively bind distributors into the practice permanently, and 5. Martinez would cite the FBWA's agreement as preventing a later administrative challenge.

My assessment is that Martinez was a “fix it man” more than as a deputy general counsel on this issue. He was hoping to get agreement of all involved so that he could quietly inform DABT agents of the non-enforcement policy and this trade practice could go on without disruption.