December 18, 2012
To: Bob Johnston
From: Mitch Rubin
Re: Discontinuance of Distribution in State
Issue: Whether a manufacturer of malt beverages may withdraw a brand from distribution for a period of time and reassign the brand to a different distributor upon reentry into the state?
Brief Answer: Yes, but the conditions of such discontinuance are difficult to satisfy. A manufacturer must act in good faith, provide proper notice, and withdraw all of its brands from the state for a significant period.
Analysis: Section 563.022 (11), Florida Statutes, governs. It provides:
DISCONTINUANCE OF PRODUCTION OR DISTRIBUTION.—Notwithstanding subsections (6), (9), and (10), a manufacturer may terminate, cancel, not renew, or discontinue an agreement upon not less than 30 days' prior written notice if the supplier discontinues production or discontinues distribution throughout this state of all the brands sold by the manufacturer to the distributor. Nothing in this section shall prohibit a manufacturer, upon not less than 30 days' notice, to completely discontinue the distribution throughout this state of any particular brand or package of beer. This subsection does not prohibit a manufacturer from conducting test marketing of a new brand of beer or from conducting the test marketing of a brand of beer which is not currently being sold in this state, provided that the manufacturer has notified the division in writing of its plans to test market. The notice shall describe the market area in which the test shall be conducted, the name or names of the distributor or distributors who will be selling the beer, the name or names of the brand of beer being tested, and the period of time during which the testing will take place. A market testing period shall not exceed 18 months.
The underscored provision above of section 563.022 (11), Florida Statutes, provides a manufacturer with the right to discontinue a distribution agreement by providing 30 days notice and discontinuing distribution throughout the entire state.
The real issue involves the time period that the discontinuance must be maintained in order to renter and reassign. Two other provisions assist with interpretation. Section 563.022 (2)(g), Florida Statutes, requires the manufacturer to act in "good faith," which means honesty in fact. In addition, section 563.022 (8), Florida Statutes, places the "burden of proof" on the manufacturer to show that it acted in good faith in discontinuing distribution.
The requirement to discontinue in good faith suggests that the facts surrounding discontinuance are important. A manufacturer that discontinues distribution for the purpose of reentry and reassignment may have difficulty prevailing in litigation. A court will examine the manufacturer's communications that show signs of not acting in good faith. A court will also examine the period of discontinuance. The longer the period of

discontinuance (for example, perhaps in excess of 1 year to 18 months--compared to a period of 90 days) the more likely it is that a court would find that a manufacturer acted in good faith. A court will also examine the number of brands discontinued and the level of disruption to the manufacturer's business within the state from discontinuance. The more brands discontinued and the more disruption caused to the manufacturer, the more likely it is that a court would find that a manufacturer acted in good faith.

Conclusion: Acting in good faith, a manufacturer must provide the incumbent distributor with 30 days notice and discontinue distribution of all brands throughout the entire state. Again, acting in good faith, a manufacturer may reenter and reassign distribution rights. The more brands discontinued, the more disruption to the manufacturer's business and the longer the period, the more likely that the manufacturer would prevail in showing good faith upon reentry and reassignment in the event of litigation.