

5614

2009-2010 Regular Sessions

I N S E N A T E

May 21, 2009

Introduced by Sen. VALESKY -- read twice and ordered printed, and when printed to be committed to the Committee on Commerce, Economic Development and Small Business

AN ACT to amend the alcoholic beverage control law, in relation to agreements between small brewers and beer wholesalers

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. Subdivision 4 of section 55-c of the alcoholic beverage
2 control law is amended by adding a new paragraph (c) to read as follows:
3 (C) NOTWITHSTANDING ANY PROVISION OF THIS SUBDIVISION TO THE CONTRARY:
4 (I) ANY BREWER WITH AN ANNUAL VOLUME AS DEFINED IN THIS PARAGRAPH OF
5 LESS THAN THREE HUNDRED THOUSAND BARRELS OF BEER AND WHOSE SALES TO AN
6 AFFECTED BEER WHOLESALER ARE THREE PERCENT OR LESS OF THE BEER WHOLE-
7 SALER'S TOTAL ANNUAL BRAND SALES MEASURED IN CASE EQUIVALENT SALES OF
8 TWENTY-FOUR--TWELVE OUNCE UNITS, HEREINAFTER REFERRED TO AS "COVERED
9 BREWERS," MAY TERMINATE AN AGREEMENT WITH ANY BEER WHOLESALER WITHOUT
10 HAVING GOOD CAUSE FOR SUCH TERMINATION, AS DEFINED IN PARAGRAPH (E) OF
11 SUBDIVISION TWO OF THIS SECTION, AND SHALL NOT BE SUBJECT TO LIABILITY
12 TO THE BEER WHOLESALER UNDER PARAGRAPH (B) OF SUBDIVISION SEVEN OF THIS
13 SECTION PROVIDED THAT, PRIOR TO THE EFFECTIVE DATE OF THE TERMINATION,
14 SUCH COVERED BREWER PAYS THE BEER WHOLESALER THE FAIR MARKET VALUE OF
15 THE DISTRIBUTION RIGHTS WHICH WILL BE LOST OR DIMINISHED BY REASON OF
16 THE TERMINATION. IF SUCH BREWER AND BEER WHOLESALER CANNOT MUTUALLY
17 AGREE TO THE FAIR MARKET VALUE OF THE APPLICABLE DISTRIBUTION RIGHTS
18 LOST OR DIMINISHED BY REASON OF THE TERMINATION, THEN THE COVERED BREWER
19 SHALL PAY THE BEER WHOLESALER A GOOD FAITH ESTIMATE OF THE FAIR MARKET
20 VALUE OF THE APPLICABLE DISTRIBUTION RIGHTS.
21 (II) IF THE BEER WHOLESALER BEING TERMINATED UNDER SUBPARAGRAPH (I) OF
22 THIS PARAGRAPH DISPUTES THAT THE PAYMENT MADE BY THE COVERED BREWER WAS
23 LESS THAN THE FAIR MARKET VALUE OF THE DISTRIBUTION RIGHTS, THEN THE
24 BEER WHOLESALER MAY WITHIN FORTY-FIVE DAYS OF TERMINATION SUBMIT THE

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets
[] is old law to be omitted.

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1 QUESTION OF FAIR MARKET VALUE OF THE APPLICABLE DISTRIBUTION RIGHTS LOST
2 OR DIMINISHED BY REASON OF THE TERMINATION TO BINDING ARBITRATION BEFORE
3 A PANEL OF THREE NEUTRAL ARBITRATORS APPOINTED IN ACCORDANCE WITH THE
4 COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION,
5 WHICH PANEL SHALL DETERMINE BY MAJORITY DECISION WHETHER THE COVERED
6 BREWER'S PAYMENT MEETS THE REQUIREMENTS OF SUBPARAGRAPH (I) OF THIS
7 PARAGRAPH. IF THE ARBITRATION PANEL RULES THAT THE PAYMENT MADE BY SUCH
8 BREWER TO THE BEER WHOLESALER UPON TERMINATION WAS LESS THAN THE FAIR
9 MARKET VALUE OF DISTRIBUTION RIGHTS LOST OR DIMINISHED BY REASON OF THE
10 TERMINATION, THEN THE COVERED BREWER SHALL PAY THE BEER WHOLESALER THE
11 DIFFERENCE BETWEEN THE PAYMENT MADE TO THE BEER WHOLESALER AND THE
12 DETERMINED FAIR MARKET VALUE PLUS INTEREST. IF THE ARBITRATION PANEL
13 RULES THAT THE PAYMENT MADE BY SUCH BREWER TO THE BEER WHOLESALER UPON
14 TERMINATION WAS MORE THAN THE FAIR MARKET VALUE OF DISTRIBUTION RIGHTS
15 LOST OR DIMINISHED BY REASON OF THE TERMINATION, THEN THE BEER WHOLE-
16 SALER SHALL PAY THE COVERED BREWER THE DIFFERENCE BETWEEN THE PAYMENT
17 MADE TO THE BEER WHOLESALER AND THE DETERMINED FAIR MARKET VALUE PLUS
18 INTEREST. ALL ARBITRATION FEES AND EXPENSES SHALL BE EQUALLY DIVIDED
19 AMONG THE PARTIES TO THE ARBITRATION EXCEPT IF THE ARBITRATION PANEL
20 DETERMINES THAT THE BREWER'S PAYMENT UPON TERMINATION WAS NOT A GOOD
21 FAITH ESTIMATE OF THE FAIR MARKET VALUE, THEN THE PANEL MAY AWARD UP TO
22 ONE HUNDRED PERCENT OF THE ARBITRATION COSTS TO THE COVERED BREWER.

23 (III) NOTWITHSTANDING ANY PROVISION OF THIS SECTION TO THE CONTRARY,
24 FOR PURPOSES OF THIS PARAGRAPH, THE TERM "BREWER" SHALL MEAN ANY PERSON
25 OR ENTITY ENGAGED PRIMARILY IN BUSINESS AS A BREWER OR MANUFACTURER OF
26 BEER.

27 (IV) FOR THE PURPOSES OF THIS PARAGRAPH, THE TERM "BEER WHOLESALER"
28 SHALL MEAN ANY WHOLESALER FOR WHOM LESS THAN FIFTY PERCENT OF ITS TOTAL
29 ANNUAL BRAND SALES MEASURED IN CASE EQUIVALENT SALES OF
30 TWENTY-FOUR--TWELVE OUNCE UNITS ARE DERIVED FROM SALES BY SUCH COVERED
31 BREWERS OR ANY OTHER COMPANY CONTROLLED BY SUCH WHOLESALER OR WHICH
32 CONTROLS SUCH WHOLESALER IN HIS OR HER EXCLUSIVE TERRITORY.

33 (V) FOR THE PURPOSE OF THIS PARAGRAPH, THE TERM "ANNUAL VOLUME" SHALL
34 MEAN: (1) THE AGGREGATE NUMBER OF BARRELS OF BEER, UNDER TRADEMARKS
35 OWNED BY THE COVERED BREWER AND BREWED, DIRECTLY OR INDIRECTLY, BY OR ON
36 BEHALF OF THE SUCH BREWER DURING THE MEASURING PERIOD, ON A WORLDWIDE
37 BASIS, PLUS (2) THE AGGREGATE NUMBER OF BARRELS OF BEER BREWED, DURING
38 THE MEASURING PERIOD, DIRECTLY OR INDIRECTLY, BY OR ON BEHALF OF ANY
39 PERSON OR ENTITY WHICH, AT ANY TIME DURING THE MEASURING PERIOD,
40 CONTROLLED, WAS CONTROLLED BY OR WAS UNDER COMMON CONTROL WITH SUCH
41 BREWER, ON A WORLDWIDE BASIS. ANNUAL VOLUME SHALL NOT INCLUDE BEER
42 BREWED UNDER CONTRACT FOR ANY OTHER BREWER. THERE SHALL BE NO DOUBLE
43 COUNTING OF THE SAME BARRELS OF BEER UNDER CLAUSES ONE AND TWO OF THIS
44 SUBPARAGRAPH.

45 (VI) FOR THE PURPOSES OF THIS PARAGRAPH, THE TERM "MEASURING PERIOD"
46 SHALL MEAN THE TWELVE MONTH CALENDAR PERIOD IMMEDIATELY PRECEDING THE
47 DATE NOTICE OF TERMINATION, AS REQUIRED UNDER SUBPARAGRAPH (I) OF THIS
48 PARAGRAPH, WAS GIVEN BY A BREWER TO THE BEER WHOLESALER.

49 S 2. This act shall take effect immediately.