BEER AND LAW (/)

Craft Beer Distribution Contracts: Myths & Mistakes (//www.beerandlaw.com/blog/craft-beer-distribution-contracts-myths-mistakes)

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(Editor's Note: It has been a while since I've been able to blog, I recently spoke at the NABCA Legal Symposium and the Craft Brewers Conference, and I am moderating a panel this week on Financing Your Craft Beverage Company at the Craft Beverage Expo tomorrow. But I will try to update this blog more regularly.)

A couple years ago, some of my clients were experiencing issues with their distribution partners and others were entering into new distribution contracts, so I put together a presentation on beer distribution contract law that I gave at Brewbound Session (San Diego), and have summarized some of the points in the article below, Also known as "beer franchise laws," the laws on beer distribution contracts are particular to the beer industry. This is not regular franchise law (such as a McDonald's or Subway's franchises).

In order for a craft production brewery to reach more consumers, it will inevitably consider entering into a distribution agreement with a beer distributor. There are many myths and mistakes relating to beer distribution contracts. Many of these myths and mistakes arise out of the fact that certain practices in the industry have been around for a long time, and small craft breweries often feel they have to blindly accept whatever terms are offered to them.

Yuengling technically does not self distribute anymore, see this article (http://indyitguy.com/an-interview-with-yuenglings-coo/).

That is not true. Before entering into a distribution contract, a craft brewery should carefully review the distribution contract terms and negotiate those terms where appropriate.

While distribution contracts are commonplace in most industries, the laws and

practices governing beer distribution contracts are usually specific to the beer industry. There is a whole body of beer distribution law, called "beer franchise laws," that govern the distribution relationship between breweries and wholesalers. Under some states' beer franchise laws, merely sending beer to a distributor for sale without a written contract, locks that brewery into the distributor without an ability to terminate the "contract." And in many states, once a brewery enters into a contract with a distributor, it is locked into that distributor and cannot terminate the agreement at all or at least not without "good cause." Good cause generally means a material or bona fide reason to terminate, such as a breach of a material term of the contract or the distributor has filed bankruptcy or committed fraud.

In California, which is considered a "half" or "partial" beer franchise law state, there is no law that requires a brewery to terminate only for "good cause." The law also does not require that breweries are locked into a distributor indefinitely. While many distributors will give breweries a contract that limits termination only for "good cause," savvy breweries can negotiate what constitutes "good cause" in the contract or at least negotiate to have a non-exhaustive list of "good cause" triggers. For example, a brewery might try to negotiate for the ability to terminate for "good cause" if certain sales goals are not met (California law does require, however, that any sales goals must be commercially reasonable). Alternatively, a brewery might try to negotiate the right to terminate the agreement if the distributor's sales are a small percentage of the distributor's overall sales in a given year.

Many distribution contracts and states' beer franchise laws also require a brewery to pay "fair market value" to the distributor if the brewery terminates the agreement without good cause. Again, California law does not require such a payment (except in certain situations such as where a brewery is acquired by another brewery and the acquiring brewery seeks to switch distributors). If a distributor's contract requires payment of fair market value upon termination, a brewery may want to negotiate for the right to terminate without cause, and without paying fair market value, during the first year or several months of the agreement at least to give the brewery some time to determine if the relationship is working out.

Alternatively, a brewery may also want to specify how "fair market value" is calculated. Some breweries that have been self-distributing and have already built up a market for their beers will ask a distributor to pay the brewery up front for the right to distribute their beers in that market. This helps to offset the sting of paying fair market value later to the distributor in order to terminate the contract. If a distributor declines to do this, then a brewery could negotiate a provision that any "fair market value" payment must be offset by the value of the brands prior to the agreement. (*Note: In practice, if there is a succeeding distributor, the new distributor often pays the prior distributor for the "brand," but in cases where a brewery is going to self-distribute again, paying fair market value can be unfair and onerous if the brand has not grown while being distributed).*

Other terms can also be negotiated including the geographic scope of the territory, the specific brands that a distributor has the right to distribute, the payment terms, and the type and frequency of sales data that a distributor must provide to the brewery. A craft brewery often has its greatest leverage *before* signing an agreement. After the agreement is signed, many smaller craft breweries have found that they do not get the attention they

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had expected from a distributor. Before signing a distribution contract, craft breweries should carefully consider and negotiate the terms, and if possible consult with a craft beer attorney for advice.

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Here is a link to Steve Hindy's op-ed in The New York Times (http://www.nytimes.com/2014/03/30/opinion/sunday/free-craft-beer.html?_r=0) about beer franchise law reform, and BA"s position statement (https://www.brewersassociation.org/government-affairs/ba-position-statements/) on beer franchise laws (scroll down and expand). And for the distributor's viewpoint, here is NBWA's position (https://www.nbwa.org/government/benefits-of-beer-franchise-laws)on beer franchise laws.

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New Law Designed To Deter Unauthorized Re-Sale of Craft Beers (AB 776) (//www.beerandlaw.com/blog/new-law-designed-to-deter-unauthorized-re-sale-of-craft-beers-ab-776)

11/25/2015

(By Eugene Pak)

During Prohibition the term "scofflaw" was coined to refer to someone who disregarded or flouted the law. Today, although the sale and distribution of alcoholic beverages is no longer prohibited, it is still heavily regulated. Some retailers have scoffed, intentionally or unintentionally, at these regulations by buying hard-to-find premium craft beers such as **Pliny the Elder** (Russian River Brewing) directly from brewery tap rooms and brewpubs and then re-selling them at inflated prices. This practice was described in a recent article by Kate Bernot in DRAFT magazine, "**In Search of Craft Beer's Most Wanted**." (http://draftmag.com/most-wanted-bottles/)

Read More (//www.beerandlaw.com/blog/new-law-designed-to-deter-unauthorized-re-sale-of-craft-beers-ab-776)

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