TYRONE C. FAHNER
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

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FILE NO. 82-011

LIQUORS:
Eligibility of Corporate Retailers to Hold Licenses When an "Affiliated" Corporation Becomes a Manufacturer Under the Liquor Control Act

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Albert D. McCoy, Chairman
Illinois Liquor Control Commission
160 North LaSalle, Room 1422
Chicago, Illinois 60601

Dear Mr. McCoy:

I have your letter wherein you ask whether any violation of subsection 3(e) or section 5 of article VI of the Illinois Liquor Control Act (Ill. Rev. Stat. 1979, ch. 43, pars. 121(e), 123) would exist in the following factual situation. A multi-national European parent corporation is, among other things, engaged in the manufacturing and marketing of various beverages, food and consumer products. Two of its current major product areas are restaurants and hotels, liquid

drinks (including a European winery), culinary and other food products, with annual sales totaling $4.53 billion.

The parent company conducts all of its business through a network of subsidiaries and affiliated companies. In the United States its functions are carried out through nine subsidiaries. One of its subsidiaries is a Delaware Corporation (hereinafter called A Corporation). A Corporation wishes to acquire a winery in California whose alcoholic beverage products are currently being sold in Illinois. A Corporation does not currently engage in the manufacture, distribution or retail sale of alcoholic beverages in Illinois nor is it engaged in the restaurant business. A Corporation is a wholly-owned subsidiary of B Corporation, which is wholly owned by C Corporation, which is a United States corporation. C Corporation, in turn, is wholly-owned by D Corporation, a United States corporation. D Corporation is a wholly-owned subsidiary of the European parent company. Neither C Corporation nor D Corporation nor any of their subsidiaries manufactures, blends or distributes alcoholic beverages in the United States.

E Corporation is a wholly-owned subsidiary of D Corporation and operates a chain of restaurants in the United States, including at least 12 in the State of Illinois for which it holds retail liquor licenses as required by law. The board of directors of E Corporation and A Corporation are

entirely separate and independent and the companies have no common officers. None of the five above-mentioned corporations is involved directly or indirectly in the manufacture, importation or distribution of alcoholic beverages in the United States, other than the retail sales of alcoholic beverages by E Corporation in Illinois, nor is any one of the four unmentioned corportions so involved.

Based upon information which you have provided, it is clear that if A Corporation were to acquire the California winery, it would be considered a "manufacturer" under the Liquor Control Act. (See, Ill. Rev. Stat. 1979, ch. 43, par. 95.08.) It is also given that E Corporation is a retail licensee under the Act.

Your questions are as follows:

1) Would the proposed acquisition by A Corporation affect the eligibility of E Corporation to continue holding its Illinois retail liquor licenses? If so, in what manner.

2) Would E Corporation be able to continue to hold the retail licenses in question if the European parent corporation, A Corporation and E Corporation each agreed not to, directly or indirectly, or through affiliates or subsidiaries, manufacture, import, purchase, distribute, sell, or cause to be such, any alcoholic beverage products of the European and California wineries in the State of Illinois to

   (a) E Corporation retail licensees (and any future such licensees) only

   AND/OR

   (b) Any and all Illinois licensees of any class.

Because it is my opinion that E Corporation and A Corporation are "affiliates" for purposes of the Liquor Control Act, the answer to your first question is yes, and therefore the retailer's licenses of the E Corporation would be unlawful under section 3 of article VI of the Act if the proposed acquisition is accomplished. With respect to your second question, it is my opinion that neither of the proposed contractual arrangements would cure the illegality of the E Corporation retailer's licenses under section 3 of article VI of the Act.

Subsection 3(e) of article VI of the Liquor Control Act (Ill. Rev. Stat. 1979, ch. 43, par. 121(e)) provides in pertinent part that:

> " * * * [N]o manufacturer or distributor or importing distributor, * * * or any subsidiary or affiliate thereof, or any officer, associate, member, partner, representative, employee or agent, or shareholder shall be issued a retailer's license * * *."

Thus, the issue comes into full relief: Under the facts described above, is E Corporation an "affiliate" of A Corporation so as to bring it within the proscription of section 3(e), article VI of the Liquor Control Act? If so, upon the acquisition of the California winery by A Corporation, the retailer's licenses of E Corporation would perforce be unlawful.

The term "affiliate thereof" is not defined in the Liquor Control Act. In the absence of a statutory definition

indicating a different legislative intent, words are to be given their common dictionary or commonly understood meaning. (Farrand Coal Co. v. Halpin (1957), 10 Ill. 2d 507; Fair Employment Practices Comm'n v. Rush-Presbyterian-St. Luke's Medical Center (1976), 41 Ill. App. 3d 712.) Webster's Third New International Dictionary defines the term as follows:

> " * * * a branch or unit of a larger organization * * * a company effectively controlled by another or associated with others under common ownership or control. * * *" (Webster's Third New International Dictionary 35 (1961 ed.)

Since the primary purpose of statutory construction is to ascertain the intent of the legislature, the definition of the term at issue must also be viewed in light of the purpose and public policy behind the statute. People v. Dednan (1933), 55 Ill. 2d 565.

The General Assembly has provided a rule of construction for the Liquor Control Act so as to make clear the purpose and public policy behind the statute:

> "This Act shall be liberally construed, to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors." (Emphasis added.) (Ill. Rev. Stat. 1979, ch. 43, par. 94.)

See, Kennessey Enterprises, Inc. v. Illinois Liquor Control Comm'n (1978), 63 Ill. App. 3d 975 (finding a legislative purpose of "close control" of alcoholic liquors mandated by

this section); Retail Liquor Dealers Protective Ass'n v. Fleck (1950), 341 Ill. App. 283 (finding "a system of strict regulation" under the Act).

With regard to the purpose behind the particular provisions of article VI of the Act at issue here, a recent opinion of the Massachusetts Supreme Court fully explained a similar statute from that State as follows:

" * * *

> * * * We observe that its dominant purpose is to eliminate vertical integration of the wholesale and retail levels of the liquor industry. The 'tied house' has been dealt with in the statutes of many States as an evil to be avoided. A Legislature might reasonably accept the contention that protection of smaller retailers, and ultimately the consuming public, calls for measures to prevent economic power at the wholesale level being transferred to the retail level; that protection of independent wholesalers, and thus the encouragement of the availability of a wide variety of products at the retail level, with ultimate benefits to the consumers, also calls for preventive measures; and that prohibiting the same person from holding both wholesale and retail licenses is an appropriate preventive device. * * * " (Opinion of the Justices to the House of Representatives (1972), 368 Mass. 857, 333 N.E.2d 414, 418.)

The Illinois courts have also given recognition to "the evils of the 'tied house'". (See Weisburg v. Taylor (1951), 409 Ill. 384, 388; Wine & Spirits Merchandisers, Inc. v. Illinois Liquor Control, (1982), 104 Ill. App. 3d 377.) In construing the predecessor to the current section 3 of article VI of the Act, Attorney General Otto Kerner noted that the legislative intent behind this section was to eliminate the tendency of alcohol

manufacturers, bottlers, and their agents to exercise control over local retail liquor businesses. 1933 Ill. Att'y Gen. Op. 509.

Because of the public policy behind the Liquor Control Act, Illinois courts have held that a strict or technical construction of the Act's provisions detrimental to the public interest should be avoided. Carrigan v. Illinois Liquor Control Comm'n (1960), 19 Ill. 2d 230; Wine & Spirits Merchandisers, Inc. v. Illinois Liquor Control, (1982), 104 Ill. App. 3d 377; Young v. Marcin (1978), 66 Ill. App. 3d 576; Hassiepen v. Marcin (1974), 24 Ill. App. 3d 97.

With these principles in mind, it is my opinion that under the facts as given, E Corporation falls within the term "any affiliate thereof" used in subsection 3(e) of article VI of the Act. Under the dictionary definition quoted above, both E Corporation and A Corporation are indisputably "branches or units" of the larger corporate structure present here. E Corporation is directly owned by D Corporation; A Corporation is indirectly owned by D Corporation by virtue of the 100% chain of ownership from A Corporation to B Corporation to C Corporation to D Corporation. Thus, E Corporation clearly is "associated with" A Corporation "under the common ownership" of D Corporation. Therefore, E Corporation is an "affiliate of" A Corporation under subsection 3(e) of article VI of the Liquor Control Act.

That a subsidiary of a subsidiary is subject to the Act's proscriptions against tied-house arrangements is made clear by the result in Wine & Spirits Merchandisers, Inc. v. Illinois Liquor Control Commission, (1982), 104 Ill. App. 3d 377. In that case, it was held that a subsidiary of a subsidiary of a distiller could not qualify under the "grandfather clause" of subsection 3(b) of article VI of the Act (Ill. Rev. Stat. 1979, ch. 43, par. 121(b)) even though the distiller's immediate subsidiary did so qualify. Thus, the holding recognized that a subsidiary of a subsidiary falls within the prohibitions of section 3 of article VI of the Act.

This result is in accordance with the policy behind the statute as explained above. In the circumstances in question, both the Illinois retailers and the proposed manufacturing corporation are wholly owned, either directly or indirectly, by the same parent corporation. In these circumstances the potential for, if not the probability of, effective control by the parent over both wholly-owned affiliates is clearly present. It is this type of arrangement between a manufacturer and a retailer and the consequent temptation for "special arrangements" between the two companies which the statute seeks to prohibit. That the manufacturing corporation is not presently licensed under the Act is of no consequence under the applicable provision of section 3 of article VI of the Act. Where the Act proscribes activities and arrangements by or on behalf of licensed entities, it plainly so states. In

this case, no such limitation is present. (Compare Ill. Rev. Stat. 1979, ch. 43, pars. 121(a), 121(d) with Ill. Rev. Stat. 1979, ch. 43, par. 123.) For these reasons, and based on the plain language of the statute, it is my opinion that E Corporation and A Corporation must be considered "affiliates" for the purposes of the Liquor Control Act. Therefore, if A Corporation were to acquire the California winery, the retail licenses of E Corporation would be unlawful under subsection 3(e) of article VI of the Act.

Next, you inquire whether section 5 of article VI of the Act (Ill. Rev. Stat. 1979, ch. 43, par. 123) would be violated if A Corporation were to acquire the California winery. Given my finding that the retail licenses of E Corporation would be unlawful under subsection 3(e) of article VI of the Act if the proposed acquisition is accomplished, it becomes unnecessary to determine whether section 5 of article VI would also be violated. For the purposes of your inquiry, there is no difference in result between a violation of section 3 and section 5 of article VI of the Act. Even if section 5 were found not to be violated by the proposed acquisition, E Corporation's retail licenses would still be unlawful under subsection 3(e) of article VI of the Act.

Finally, you inquire whether certain contractual arrangements among the parties might eliminate the legal detriment to the licenses of the Illinois retailers owing to

the proposed acquisition. In effect, you inquire whether a private contract, by which the parties presumably seek to act in furtherance of the policy behind a statute, can overcome the express prohibitions of the statute itself.

In holding invalid an agreement between a municipality and certain property owners who desired to use certain premises for the sale and consumption of alcoholic beverages, the appellate court of Illinois reiterated the basic principles involved in these cases:

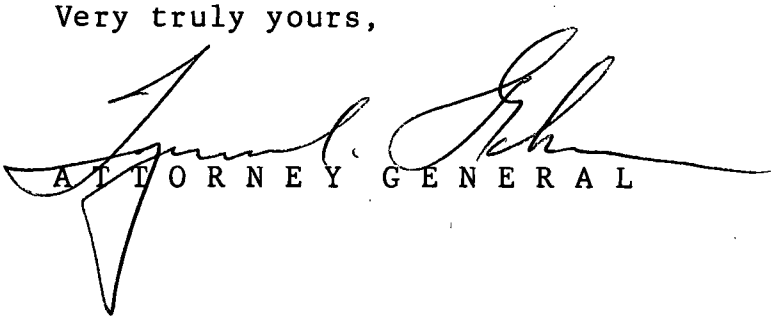
" * * *

> The right to deal in intoxicating liquors is not an inherent or alienable right; a right of citizenship, or one of its privileges and immunities; nor is it a property right. A license to sell liquor is not a contract and it creates no vested right. Such license constitutes a personal privilege to pursue a business peculiarly subject to police regulation and control. Great A. & P. Tea Co. v. Mayor & Com'rs of City of Danville, 367 Ill. 310, 317, 11 N.E.2d 388, 113 A.L.R. 1386 (1937); Boerner v. Thompson, 278 Ill. 153, 158, 115 N.E. 866 (1917); 25 I.L.P., Liquor, § 62. The right given by license and the controls and regulations imposed relative thereto are determined by the requirements of 'the public good and convenience.' Great A. & P. Tea Co. v. Mayor & Com'rs of City of Danville, supra, 367 Ill. 314, 315, 11 N.E.2d 388. These determinations * * * are not to be curtailed by private contracts or interests. * * *" (Maywood Proviso State Bank v. City of Oakbrook Terrace (1966), 67 Ill. App. 2d 280, 290.)

It is my opinion that the proposed contracts between the parties would not remove the legal impediment to the retailer's licenses occasioned by the proposed acquisition of the California winery by A Corporation and the operation of subsection

3(e) of article VI of the Act. A private contract cannot make lawful that which is expressly deemed unlawful by the legislature.

Very truly yours,



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