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SENATE BILL 745\*  
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Short Title: Beer Franchise Law Clarifications.

(Public)

Sponsors:

Referred to:

April 20, 2011

A BILL TO BE ENTITLED

AN ACT TO PRESERVE THE THREE-TIER DISTRIBUTION SYSTEM FOR MALT BEVERAGES IN NORTH CAROLINA BY CLARIFYING PROVISIONS OF THE BEER FRANCHISE LAW TO PROVIDE: A FRANCHISE AGREEMENT APPLIES TO ALL SUPPLIER PRODUCTS UNDER THE SAME BRAND NAME; A WHOLESALER MUST SELL MALT BEVERAGES TO ALL RETAILERS IN ITS TERRITORY AT THE SAME PRICE AT THE TIME OF DELIVERY; PROHIBITED ACTS OF SUPPLIERS WITH RESPECT TO THEIR DEALINGS WITH WHOLESALERS; GOOD CAUSE FOR TERMINATION MAY NOT BE MODIFIED BY AN AGREEMENT THAT DEFINES GOOD CAUSE IN A MANNER DIFFERENT THAN PROVIDED BY STATE LAW; REVERSION OF SMALL BREWERIES' SELF-DISTRIBUTION RIGHTS UNDER CERTAIN CIRCUMSTANCES; CERTAIN ACTS THAT DO NOT AMOUNT TO GOOD CAUSE FOR TERMINATION OF A FRANCHISE; REMEDIES FOR A SUPPLIER'S WRONGFUL TERMINATION OF A FRANCHISE; INCLUSION OF A WHOLESALER MERGER, THE FACTORS THAT MAY BE CONSIDERED BY THE SUPPLIER IN APPROVING A MERGER OR TRANSFER, AND REMEDIES FOR UNLAWFUL REFUSAL TO APPROVE A MERGER OR TRANSFER; THE BEER FRANCHISE LAW MAY NOT BE WAIVED BY AN AGREEMENT CONTRARY TO STATE LAW; AND MEDIATION OF DISPUTES ARISING UNDER THE BEER FRANCHISE LAW.

The General Assembly of North Carolina enacts:

**SECTION 1.** Article 13 of Chapter 18B of the General Statutes reads as rewritten:

"Article 13.

"Beer Franchise Law.

...

**"§ 18B-1303. Filing of distribution agreement; no discrimination.**

(a) Filing. – It is unlawful for a supplier to provide malt beverages to a wholesaler unless the Commission has received notification from the supplier designating the brands of the supplier which the wholesaler is authorized to sell and the territory in which such sales may take place. If the supplier sells several brands, the agreement need not apply to all brands. A franchise agreement applies to all supplier products under the same brand name, and different categories of products manufactured under a common identifying trade name are considered to be the same brand. No supplier may provide by a distribution agreement for the distribution of a brand to more than one wholesaler for the same territory. A wholesaler shall not distribute any brand of malt beverage to a retailer whose premises are located outside the territory



1 specified in the wholesaler's distribution agreement for that brand. A wholesaler may, however,  
2 with the approval of the Commission distribute malt beverages outside ~~his~~its designated  
3 territory during periods of temporary service interruption when requested to do so by the  
4 supplier and the wholesaler whose service is interrupted.

5 (b) No Discrimination. – A wholesaler shall ~~service~~sell malt beverages to all retail  
6 permit holders within ~~his~~its designated territory without discrimination with respect to the sale  
7 price at the time of delivery and shall make a good faith effort to make available to each retail  
8 permit holder in the territory each brand of malt beverage which the wholesaler has been  
9 authorized to distribute in that area.

10 (c) No Price Maintenance. – A franchise agreement shall not, either expressly or by  
11 implication or in its operation, establish or maintain the resale price of any brand of malt  
12 beverages by a wholesaler.

13 **"§ 18B-1304. Prohibitions.**

14 It is unlawful for a supplier, or an officer, agent or representative of a supplier, to:

- 15 (1) Coerce or attempt to coerce or persuade a wholesaler to violate any  
16 provision of the ABC laws or rules of the Department of ~~Revenue;~~  
17 ~~or~~Revenue.
- 18 (2) ~~Alter~~Except as authorized by G.S. 18B-1305(a1), alter in a material way,  
19 terminate, fail to renew, or cause a wholesaler to resign from, a franchise  
20 agreement with a wholesaler except for good cause and with the notice  
21 required by G.S. 18B-1305.
- 22 (3) Withdraw money from or otherwise access a wholesaler's bank accounts  
23 without the wholesaler's consent.
- 24 (4) Present a franchise agreement, amendment, or renewal to a wholesaler that  
25 attempts to waive compliance with any provision of this Article or that  
26 requires a wholesaler to waive compliance with any provision of this Article.  
27 A wholesaler entering into a franchise agreement containing provisions in  
28 conflict with this Article shall not be deemed to waive rights protected by, or  
29 in compliance with, any provision of this Article.
- 30 (5) Induce or coerce, or attempt to induce or coerce, any wholesaler to assent to  
31 any franchise agreement, amendment, or renewal that does not comply with  
32 this Article and the laws of this State.
- 33 (6) Coerce or attempt to coerce a wholesaler, or its designated or anticipated  
34 successor, to sign a franchise agreement, amendment, or renewal to a  
35 franchise agreement by threatening to refuse to approve or delay issuing an  
36 approval for the sale, transfer, or merger of a wholesaler's business.
- 37 (7) Terminate, cancel, or nonrenew or attempt to terminate, cancel, or nonrenew  
38 a franchise agreement on the basis that the wholesaler fails to agree or  
39 consent to an amendment to the franchise agreement.
- 40 (8) Prohibit a wholesaler from distributing the product of any other supplier,  
41 except that a supplier may prohibit a wholesaler from distributing the  
42 product of another supplier if reasonable grounds exist for prohibiting the  
43 wholesaler's acquisition of the product and the acquisition would result in  
44 the wholesaler acquiring eighty percent (80%) or more by volume of all malt  
45 beverage products sold in the territory being acquired at the time of the  
46 acquisition.
- 47 (9) Refuse to approve or require a wholesaler to terminate a brand manager or  
48 successor manager without good cause. A supplier has good cause only if  
49 the person designated for approval by the wholesaler fails to meet reasonable  
50 standards and qualifications.

1           (10) Discriminate in price, allowance, rebate, refund, payment term, commission,  
2 discount, or service between wholesalers licensed in North Carolina. As used  
3 in this subsection, "discriminate" means the granting of a more favorable  
4 price, allowance, rebate, refund, payment term, commission, discount, or  
5 service to one North Carolina wholesaler than to another North Carolina  
6 wholesaler based on the quantity of malt beverages purchased or for any  
7 other reason, but shall exclude freight and transportation costs, price  
8 promotions on malt beverage products in a particular market not to exceed  
9 14 consecutive days, point-of-sale advertising materials, sponsorships,  
10 consumer specialty items, consumer sweepstakes, and novelties. A supplier  
11 may, however, offer a lower price or discount in order to match that of a  
12 competing supplier on a similar category of malt beverage products in the  
13 entire State or in a particular market.

14 **"§ 18B-1305. Cause for termination of franchise agreement.**

15       (a) Meaning of Good Cause. – Good cause for altering or terminating a franchise  
16 agreement, or failing to renew or causing a wholesaler to resign from such an agreement, exists  
17 when the wholesaler fails to comply with provisions of the agreement which are reasonable,  
18 material, not unconscionable, and which are not discriminatory when compared with the  
19 provisions imposed, by their terms or in the manner of enforcement, on other similarly situated  
20 wholesaler by the supplier. The meaning of good cause set out in this section may not be  
21 modified or superseded by provisions in a written franchise agreement prepared by a supplier if  
22 those provisions purport to define good cause in a manner different than specified in this  
23 section. In any dispute over alteration, termination, failure to renew or causing a wholesaler to  
24 resign from a franchise agreement, the burden is on the supplier to establish that good cause  
25 exists for the action.

26       (a1) Termination by a Small Brewery. – A brewery's authorization to distribute its own  
27 malt beverage products pursuant to G.S. 18B-1104(7) shall revert back to the brewery, in the  
28 absence of good cause, if the brewery pays the wholesaler fair market value for the distribution  
29 rights for each affected brand. For purposes of this subsection, "fair market value" means the  
30 highest dollar amount at which a seller would be willing to sell and a buyer willing to buy at  
31 the time the self-distribution rights revert back to the brewery, after each party has been  
32 provided all information relevant to the transaction. No brewery's authorization to  
33 self-distribute shall revert back to the brewery until the brewery and the wholesaler have agreed  
34 in writing on the fair market value for the distribution rights for each affected brand and the  
35 wholesaler has received compensation from the brewery for the value of the distribution rights.

36       (b) Notice of Cause. – At least 90 days before altering, terminating or failing to renew a  
37 franchise agreement for good cause, the supplier must give the wholesaler written notice of the  
38 intended action and the specific reasons for it. If the cause for the alteration, termination or  
39 failure to renew is subject to correction by the wholesaler, and the wholesaler makes such  
40 correction within 45 days of receipt of the notice, the notice shall be void.

41       (c) Termination for Cause without Advance Notice. – A supplier may terminate or fail  
42 to renew a franchise agreement for any of the following reasons, and the termination shall be  
43 complete upon receipt by the wholesaler of a written notice of the termination and the reason:

- 44           (1) Insolvency of the wholesaler, the dissolution or liquidation of the  
45 wholesaler, or the filing of any petition by or against the wholesaler under  
46 any bankruptcy or receivership law which materially affects the wholesaler's  
47 ability to remain in business.
- 48           (2) Revocation of the wholesaler's State or federal permit or license for more  
49 than 30 days.
- 50           (3) Conviction of the wholesaler, or of a partner or individual who owns ten  
51 percent (10%) or more of the partnership or stock of the wholesaler, of a

1 felony which might reasonably be expected to adversely affect the goodwill  
2 or interest of the wholesaler or supplier. The provisions of this subdivision  
3 shall not apply, however, if the wholesaler or its existing partners or  
4 stockholders shall have the right to purchase the interest of the offending  
5 partner or stockholder, and such purchase is completed within ~~45~~30 days of  
6 the conviction.

7 (4) Fraudulent conduct by the wholesaler in its dealings with the supplier or its  
8 products.

9 (5) Failure of the wholesaler to pay for the supplier's products according to the  
10 established terms of the supplier.

11 (6) Assignment, sale or transfer of the wholesaler's business or control of the  
12 wholesaler without the written consent of the supplier, except as provided in  
13 G.S. 18B-1307.

14 (d) Absence of Good Cause. – Good cause for alteration, termination or failure to renew  
15 a franchise agreement does not include:

16 (1) The failure or refusal of the wholesaler to engage in any trade practice,  
17 conduct or activity which would violate federal or State law.

18 (2) The failure or refusal of the wholesaler to take any action which would be  
19 contrary to the provisions of this Article.

20 (3) A change in the ownership of the supplier or the acquisition by another  
21 supplier of the brewery, brand or trade name or trademark, or acquisition of  
22 the right to distribute a product, from the original supplier.

23 (4) Sale or transfer of the rights to manufacture, distribute, or use the trade name  
24 of the brand to a successor supplier.

25 (5) Failure of the wholesaler to meet standards of operation or performance  
26 which have been imposed or revised unilaterally by the supplier without a  
27 fair opportunity for the individual wholesaler to bargain as to the terms,  
28 unless the supplier has implemented the standards on a national basis and  
29 those standards are consistently applied to all similarly situated North  
30 Carolina wholesalers in a nondiscriminatory manner.

31 (6) The establishment of a franchise agreement between a wholesaler and  
32 another supplier, or similar acquisition by a wholesaler of the right to  
33 distribute a brand of another supplier.

34 (7) The desire of a supplier to consolidate its franchises.

35 **"§ 18B-1306. Remedies for wrongful termination.**

36 (a) Injunctive Relief. – A wholesaler whose franchise agreement is altered, terminated  
37 or not renewed in violation of this Article may bring an action to enjoin such unlawful  
38 alteration, termination or failure to renew. The action may be brought in the county in which  
39 the wholesaler has its principal place of business or in any county in which the wholesaler  
40 receives or distributes the products in issue. Any injunction issued pursuant to this subsection  
41 shall require the wholesaler to supply the customers in its territory with their reasonable retail  
42 requirements and to otherwise serve the territory.

43 (b) Monetary Damages. – ~~In lieu of addition to injunctive relief, a wholesaler whose~~  
44 ~~franchise agreement is altered, terminated or not renewed in violation of this Article shall be~~  
45 ~~entitled to recover monetary damages from the supplier. The amount to which the wholesaler is~~  
46 ~~entitled shall be the value of the wholesaler's business distributing the supplier's products,~~  
47 including: If the wholesaler retains its franchise rights through injunctive relief, the monetary  
48 damages to which the wholesaler is entitled shall include the losses suffered by the wholesaler  
49 from disruption of its business and harm to its reputation, plus the costs of litigation, including  
50 attorneys' fees. If the wholesaler elects to receive or is otherwise found to be entitled to

1 monetary damages only, and not injunctive relief, the damages shall be the value of the  
2 wholesaler's business distributing the supplier's brands, including:

3 (1) The laid-in costs to the wholesaler of the inventory of the supplier's  
4 products, including any State and local taxes paid on the inventory by the  
5 wholesaler, plus a reasonable charge for handling of the products upon  
6 surrender of the inventory to the supplier.

7 (2) The fair market value of all assets, including ancillary businesses of the  
8 wholesaler used in distributing the supplier's products. The total  
9 compensation to be paid to the wholesaler shall be reduced, however, by any  
10 amount received by the wholesaler from sale of assets of the business used  
11 in distributing the supplier's products as well as by the value such assets  
12 have to the wholesaler unrelated to the supplier's products. "Fair market  
13 value" means the highest dollar amount at which a seller would be willing to  
14 sell and a buyer willing to buy at a time prior to the alteration, termination or  
15 failure to renew, when each possesses all information relevant to the  
16 transaction.

17 **"§ 18B-1307. Transfer or merger of wholesaler's business.**

18 (a) Right of Transfer to Designated Family Member upon Death. – Upon the death of a  
19 wholesaler, that individual's interest in the wholesaler business, including the rights under the  
20 franchise agreement with the supplier, may be transferred or assigned to a designated family  
21 member. The transfer or assignment shall not be effective until written notice is given to the  
22 supplier, but the supplier's consent is not required for the transfer or assignment. "Designated  
23 family member" means the deceased wholesaler's spouse, child, grandchild, parent, brother or  
24 sister, who is entitled to inherit the deceased wholesaler's ownership interest under the terms of  
25 the deceased wholesaler's will or other testamentary device or under the laws of intestate  
26 succession. With respect to an incapacitated individual having an ownership interest in a  
27 wholesaler, the term "designated family member" also means the person appointed by the court  
28 as the conservator of such individual's property. The term also includes the appointed and  
29 qualified personal representative and the testamentary trustee of a deceased wholesaler.

30 (b) Approval of Certain ~~Transfers~~. Transfers and Mergers. – Upon notice to and  
31 approval by the supplier, an individual owning an interest in a wholesaler may sell, assign or  
32 transfer that interest, including the wholesaler's rights under its franchise agreement with the  
33 supplier, to any qualified person. Likewise, a wholesaler may merge with another wholesaler in  
34 the State, transferring to the new wholesaler entity the merging wholesaler's existing franchise  
35 rights. Within 30 days of receipt of notice of the intended sale, ~~assignment or transfer,~~  
36 assignment, transfer, or merger, the supplier shall request any additional relevant, material  
37 information reasonably necessary for deciding whether to approve the transaction. The supplier  
38 shall have 30 days from receipt of that information to object to the sale, ~~assignment or transfer,~~  
39 assignment, transfer, or merger. The supplier may object only if the proposed ~~transferee~~  
40 transferee, or the wholesalership resulting from the merger, fails to meet qualifications and  
41 standards that are nondiscriminatory, material, reasonable and consistently applied to North  
42 Carolina wholesalers by the supplier. The burden shall be upon the supplier to prove that the  
43 proposed transferee or merged wholesaler is not qualified.

44 (b1) Factors That May Be Considered. – In determining whether the proposed transferee  
45 or merged wholesaler is a qualified person, the supplier shall consider, but is not limited, to the  
46 following factors:

47 (1) Whether the proposed transferee has the financial capacity to purchase the  
48 wholesaler or the specified interest upon terms that will not jeopardize the  
49 future operation of the business, or whether the new entity resulting from a  
50 merger will have such financial capacity to operate successfully, and  
51 whether under such ownership the wholesaler will be able to provide

1 financial support necessary to the successful operation of the business,  
2 including market spending, capital expenditures, and any equity  
3 capitalization or refinancing requirements.

4 (2) Whether the proposed transferee, or the new entity resulting from a merger,  
5 has the proven business experience to hire and maintain a management team  
6 to successfully operate the business.

7 (3) If the proposed transferee does not have experience in the beer business,  
8 whether the transferee has other experience to enable it to operate a  
9 distributorship successfully and whether the transferee is willing to  
10 participate in training provided by the supplier.

11 (4) Whether the proposed transferee, or a party to the merger, already is a  
12 wholesaler for the supplier in a different territory and, if so, whether  
13 sufficient time and attention can be devoted to an additional market area.

14 (b2) Business Considered on Own Merits. – In determining whether a proposed  
15 transferee, or the entity resulting from a merger, is a qualified person, a supplier must consider  
16 the business on its own merits and may not designate a specifically identified person as the only  
17 purchaser who will be approved.

18 (c) Damages.—ARemedies. – A wholesaler may seek injunctive relief to enforce the  
19 provisions of this section. In addition to any such injunctive relief, a supplier who disapproves  
20 or prevents a proposed assignment or change of ownership or merger in violation of this section  
21 shall be liable to the wholesaler who proposed to make the sale, assignment or  
22 transferassignment, transfer, or merger for the difference between the disapproved sale price  
23 and a subsequent actual price of a sale of the same assets completed within a reasonable period.  
24 If, however, the proposed transfer or sale was to a business associate at a bargain price, the  
25 amount of compensation shall be at least the fair market value of the interest proposed to be  
26 sold or transferred, minus the proceeds of an actual sale of the interest completed within a  
27 reasonable time. The supplier also shall be liable for any damages suffered by the wholesaler in  
28 its business if, because of the supplier's unlawful refusal to approve a sale, transfer, or merger,  
29 the wholesaler is unable to complete a sale, transfer, or merger and remains in business.

30 **"§ 18B-1308. Article part of all franchise agreements.**

31 The provisions of this Article shall be part of all franchise agreements as defined in  
32 G.S. 18B-1302 and may not be altered by the parties. A wholesaler's rights under this Article  
33 may not be waived or superseded by the provisions of a written franchise agreement prepared  
34 by a supplier that are in any way inconsistent with or contrary to any part of this Article. The  
35 rights of a wholesaler under this Article shall remain in effect regardless of a provision in a  
36 written franchise agreement prepared by a supplier that purports to require arbitration of a  
37 franchise dispute or that purports to require legal remedies to be sought in a different  
38 jurisdiction.

39 **"§ 18B-1309. Mediation at direction of Alcoholic Beverage Control Commission.**

40 If a dispute arises between a wholesaler and supplier under this Article, and such dispute  
41 appears likely to lead to litigation, the Commission, upon request of any party or on its own  
42 initiative, may require the parties to participate in mediation in an effort to resolve the dispute.  
43 This authority shall be in addition to the Commission's authority to issue declaratory rulings  
44 pursuant to G.S. 150B-4. The Commission may designate the mediator, in which case the  
45 Commission shall pay the mediator's fee, or the Commission may direct the parties to agree  
46 upon and share the costs of a mediator. If the parties then cannot agree upon a mediator, the  
47 Commission shall designate the mediator, and the fees shall be divided evenly by the parties.  
48 The Commission shall direct that the mediation be completed within a specified period of time.  
49 Except for injunctive relief, no lawsuit or other legal action concerning the dispute may be filed  
50 until the mediation is completed and is unsuccessful, unless necessary to avoid expiration of a  
51 statute of limitation."

1           **SECTION 2.** The provisions of this act are severable and, if any phrase, clause,  
2 sentence, or provision is declared to be unconstitutional, is preempted by federal law or  
3 regulation, or is otherwise invalid, the validity of the remainder of this act shall not be affected  
4 thereby.

5           **SECTION 3.** This act is effective when it becomes law, and applies to all  
6 transactions on or after that date.