



STATE OF ARKANSAS
THE ATTORNEY GENERAL
DUSTIN MCDANIEL

Opinion No. 2014-128

December 8, 2014

Michael W. Langley, Director
Arkansas Alcoholic Beverage Control Division
1515 West 7th Street, Suite 503
Little Rock, Arkansas 72201

Dear Mr. Langley:

I am writing in response to your request for my opinion on a question I will paraphrase as follows:

Do A.C.A. §§ 3-5-1202(5) and -1203, which create an exception to the three-tier system of alcohol distribution and regulation, *see* A.C.A. § 3-3-212, permit existing manufacturers and retailers of alcoholic liquors to obtain an interest in a microbrewery-restaurant?

You report that your inquiry relates to the following circumstances:

The growing craft beer industry has prompted an increase in applications for native brewery and microbrewery-restaurant permits. Among those applicants and permit holders are individuals and corporations already in possession of retail or manufacturing outlets. Specifically, owners of a restaurant licensed with a restaurant-mixed drink permit and owners of a manufacturing brewery and distillery have obtained microbrewery restaurant permits under Ark. Code Ann. 3-5-1201 *et seq.*

RESPONSE

In my opinion, the answer to your question is “yes.”

DISCUSSION

Subsection 3-3-212 of the Arkansas Code contains the following proscription:

- (a) It shall be unlawful for a manufacturer^[1] to:
- (1) Be interested, directly or indirectly, in any premises where malt, vinous, or spirituous liquors are sold at retail or in any business devoted wholly or partially to the sale of such liquors at retail, by stock ownership, interlocking directors, mortgage or lien on any personal real property, or any other means[.]²

Subchapter 12 of title 3, chapter 5 of the Code,³ which sets forth the law governing the operation of microbrewery-restaurants, contains the following exception to this proscription:

Every provision of this subchapter shall be subject to all beer and malt beverage laws and regulations, except that conflicting beer and malt beverage laws and regulations shall be inapplicable to any provision of this subchapter to the extent that they conflict herewith.⁴

The phrase “conflicting beer and malt beverage laws and regulations” in this passage is defined as follows:

“Conflicting beer or malt beverage law or regulation” means any beer or malt beverage law or regulation which prohibits or conflicts with the otherwise legal licensing and operation of microbrewery-

¹ The term “manufacturer” as used in this statute means the following:

“Manufacturer means any person engaged in the business of distilling, brewing, making, blending rectifying, or producing for sale in wholesale quantities alcoholic liquors of any kind including whiskey, brandy, cordials, liquors, ales, beers, or other liquids containing alcohol, except wines[.]”

A.C.A. § 3-1-102(a)(4) (Repl. 2008).

² A.C.A. § 3-3-212(a)(1) (Repl. 2008).

³ A.C.A. §§ 3-5-1201 through -1208 (Repl. 2008 & Supp. 2013).

⁴ A.C.A. § 3-5-1203 (Repl. 2008).

restaurants, as authorized in this subchapter,^[5] by requiring any brewer to sell only to a licensed wholesaler, or requiring any licensed retailer to sell only beer or malt beverage purchased from a licensed wholesaler, or prohibiting any brewer or retailer from having any ownership or employment interest in the business of the other or the premises of the other, or requiring that the excise and enforcement tax on beer or malt beverage manufactured by a brewer be paid by a licensed wholesaler, or any beer or malt beverage law or regulation of similar direct or indirect effect[.]⁶

The prohibitions listed in this definition characterize what has been termed the “three-tier system” generally applicable to alcohol sales outside the microbrewery context – a system whose continuing applicability the legislature declared as follows in the microbrewery subchapter itself:

The General Assembly reaffirms the policy of this state of strict enforcement of laws and regulations applicable to the manufacture or sale of beer including, but not limited to, those establishing the three-tier distribution system with prohibitions against ownership

⁵ The activities a microbrewery-restaurant may conduct are detailed at A.C.A. § 3-5-1204 (Repl. 2008), which authorizes a licensee to do the following:

- (1) To operate a microbrewery which shall manufacture one (1) or more varieties of beer or malt beverage in an aggregate quantity not to exceed five thousand (5,000) barrels per year and to store any such beer or malt beverage and any other beer or malt beverage which the microbrewery-restaurant licensee may purchase from wholesalers licensed by this state on the microbrewery-restaurant licensed premises;
- (2) To operate a restaurant which shall be the sales outlet for beer or malt beverage manufactured by the microbrewery and which shall sell the beer or malt beverage and any other beer or malt beverage which the microbrewery-restaurant licensee may purchase from wholesalers licensed by this state for consumption on the licensed premises[.]

A.C.A. § 3-5-1204(a).

Although the statute further authorizes retail sales “directly to the consumer for off-premise consumption,” *id.* at subsection (a)(3), to various nonprofit entities, *id.* at subsections (4) and (5), and to wholesalers, *id.* at subsection (b), production in all instances cannot exceed 5,000 barrels per year.

⁶ A.C.A. § 3-5-1202(5) (Repl. 2008).

and employment interests between the three (3) tiers, or the “three-tier system.”⁷

This “three-tier system,” as you point out in your correspondence, is defined by regulation as follows:

The three-tier system of alcohol distribution consists of the three broad categories of the marketing chain. Alcoholic beverage manufacturers, including distilleries, breweries, importers or rectifiers, whether or not they hold a permit issued by the Arkansas Alcoholic Beverage Control Division, are considered the first tier of the distribution system. Alcoholic beverage wholesalers, licensed by the State of Arkansas, are considered the second tier of distribution. Alcoholic beverage retailers, licensed by the State of Arkansas, are considered the third tier of distribution.⁸

You summarize as follows the microbrewery exemption to the proscription against vertical integration across these three tiers:

The crux of the three tier system is that ownership and employment interests are prohibited between the three tiers. ABC Rules and Regulations prohibit any shared interests among the tiers, and Ark. Code Ann § 3-3-212 prohibits interests between the first and third tiers. A micro-brewery restaurant, by its nature, is a co-mingling of the first and third tiers. The intent of the exemption is clear as it pertains to the existence of micro-brewery restaurants, and the ability to operate a manufacturing and retail facility on the same premises and under the same ownership.

Essentially, you have asked whether licensed manufacturers, on the one hand, and restaurateurs holding permits to serve mixed drinks, on the other, are precluded from establishing microbrewery-restaurants under the microbrewery subchapter of the Code. In my opinion, they are not.

⁷ A.C.A. § 3-5-1201(a) (Repl. 2008).

⁸ Arkansas Alcoholic Beverage Control Rules and Regulations, Section 2.13.1(2).

I base this opinion on the fact that the subchapter of the Code devoted to microbrewery-restaurants – which, pursuant to A.C.A. § 3-5-1203, expressly trumps any contrary law set forth elsewhere in the Code – imposes no conditions upon entry into the market. Rather, it is concerned exclusively with operations within that limited market itself, at no point imposing barriers to entry based upon an applicant’s unrelated commercial activities. Specifically, A.C.A. § 3-5-1204 (Repl. 2008) authorizes *any* entity operating in a “wet” area of the state to produce up to 5,000 barrels per year for sale either on site or to wholesalers, subject to certain specified conditions on sales.

Your factual recitation suggests that the Alcoholic Beverage Control Board (the “Board”) concurs in this opinion. You report, for instance, that the class of “permit holders” in the “growing craft beer industry” includes “individuals and corporations already in possession of retail or manufacturing outlets” – a condition consistent with your suggestion that the statutes setting forth the microbrewery-restaurant exemption “have been interpreted,” presumably by the Board, “to extend beyond the conflict that is inherent to the micro-brewery restaurant, so that they serve as an exemption to the three-tier separations, in general, and specifically to Ark. Code Ann. § 3-3-212.”

Despite our concurrence on the issue of who may participate in the microbrewery-restaurant industry, however, I question that allowing parties “already in possession of retail or manufacturing outlets” to hold interests in microbrewery-restaurants would create a general “exemption to the three-tier separations.” These separations continue to apply *outside* the microbrewery-restaurant context despite an existing manufacturer or retailer’s having become a “permit holder” in the “craft beer industry.” A manufacturer would still be precluded, for instance, from operating a retail liquor store. What you term the “conflict that is inherent to the micro-brewery restaurant” – namely, being able both to produce and to engage in retail sales of beer and malt beverages – would thus remain restricted to the narrow market of microbrewery-restaurants.

I believe my opinion on this score is compelled by the statutes set forth at the beginning of my discussion. Section 3-5-1203 provides that “conflicting beer and malt beverage laws and regulations” will not apply to otherwise authorized microbrewery-restaurants. Section 3-5-1205 defines a “conflicting beer and malt beverage law and regulation” as one that “prohibits or conflicts with the otherwise legal licensing and operation of microbrewery-restaurants.” Obviously, to apply A.C.A. § 3-3-212 as a basis to deny an existing manufacturer or alcohol-licensed

restaurant any interest in a microbrewery-restaurant would be to give effect to a “conflicting beer and malt beverage law” in derogation of the statutes just quoted. Simply put, then, I believe it would violate A.C.A. § 3-5-1203 to invoke A.C.A. § 3-3-212 as a basis to prohibit an existing manufacturer or alcohol-permitted restaurant from holding an interest in a microbrewery-restaurant.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

A handwritten signature in black ink, appearing to read "Dustin McDaniel", is written over a horizontal line.

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh