

in CITY Beverage, the ILCC also recognized the unique and compelling facts of WEDCO's historical interest in CITY Beverage, and concluded that the application of the law need not require a divestiture of that historical interest.

Nothing has changed—either factually or legally—since March 10, 2010, with respect to WEDCO's interest in CITY Beverage. The Amended Citation is nothing more than a camouflaged motion to reconsider the ILCC's Declaratory Ruling.¹ For policy reasons that are obvious, the ILCC should reject this attempted “do over.”²

II. The Liquor Control Act, as amended by the Craft Brewer Act, does not prohibit WEDCO's 30% interest in CITY Beverage.

The Legal Division's response to the question of why this proceeding is taking place at all in light of the ILCC's 2010 Declaratory Ruling is the assertion that the Craft Brewer's Act (the “CBA”) changed the legal landscape in a way that now compels the ILCC affirmatively to nullify WEDCO's ownership interest and contract rights in CITY Beverage. This assertion, however, is simply a smoke screen.

The CBA amended the Illinois Liquor Control Act of 1934 (the “LCA”) in only two respects, neither of which affects the circumstances underpinning Declaration B. First, the CBA

¹ As explained below, the notion that the Craft Brewer's Act affected the law concerning WEDCO's ability to own its interest in CITY Beverage is wrong. While certain proponents of the Craft Brewer Act would have been happy for the General Assembly to enact a law prohibiting WEDCO's ownership interest in an Illinois distributor, the fact is, *it did not*. The ILCC should apply the *law*. 235 ILCS 5/6-4(a). *See also* ABDI's proposed amendment in 1999, S.B. 781, 91st Gen. Assemb., Reg. Sess. (Ill. 1999).

² At the pre-trial hearing in this matter, Chairman Schnorf asked WEDCO and the Legal Division, respectively, if they would like the ILCC to reconsider both parts of the Declaratory Ruling (including the part that each side viewed as favorable). WEDCO's position on that question is as follows: For purposes of the ILCC's current consideration of the Amended Citations, in this proceeding, WEDCO believes that the Declaratory Ruling should stand and the Citations should be dismissed. But, if the ILCC is going to reconsider any portion of the Declaratory Ruling, then the ILCC should assess, *de novo*, Declaration A and its ruling that the Liquor Control Act contains *any* sort of prohibition on WEDCO's ability to own an interest in a validly licensed Illinois distributor. As WEDCO explained in 2010, there is no such prohibition. And, just as WEDCO correctly implored the ILCC that its ruling in 2010 violated the Federal Constitution, WEDCO reserves its right to contend in any further proceeding that there is no prohibition on WEDCO's ownership of CITY Beverage, and that WEDCO should be allowed to increase its ownership stake to a full 100%. *See* 235 ILCS 5/6-4(a).

modified the terms of a Class 3 “brewer’s license” as set forth in Section 5-1(a) by deleting the language that permitted the holder of a Class 3 brewer’s license to make sales and deliveries of beer directly to retailers, *i.e.*, the CBA eliminated an in-state brewers’ right to *self-distribute* directly to retailers. Second, the CBA created a craft brewer *self-distribution* exemption, which allows qualifying brewers to self-distribute, *i.e.*, send their beer directly to retailers without complying with the regulations applicable to a distributor. Together, these modifications mean that in-state brewers may not *self-distribute* beer like a licensed craft brewer now may do.³

More important for these proceedings, however, is what the CBA did *not* do. The CBA created no prohibition against WEDCO maintaining an indirect, minority interest in a distributor. Indeed, if the General Assembly had intended to do so, it is clear how they would have amended the Liquor Control Act. In 1947 the General Assembly enacted the predecessor to Section 6-4(a) and introduced an explicit prohibition on certain manufacturers from owning a distributor, but not extending to brewers. Thus, for more than 60 years, the Liquor Control Act has contained a clear, unambiguous provision spelling out exactly which manufacturers may not own an interest in a distributor, and that is Section 6-4(a). These are the conclusive facts: Section 6-4(a) does not apply to brewers. It has never applied to brewers. Not before, or after, the enactment of the CBA. The existence of Section 6-4(a), and the fact that it does not apply to brewers renders *all* of

³ A licensed craft-brewer may now distribute its product directly from its brewery to retailers, without observing the myriad regulations applicable to a distributor. This allows a craft brewer, for example, to take its beer directly from its production facility and load it onto trucks bound for retailers without having to transport the beer to a distributor’s facility, off-load the beer at that facility, and then reload the beer for delivery to the retailer as is required when using a licensed distributor. Licensed craft brewers also do not have to comply with provisions of the statute prohibiting discrimination against retail licensees, and their record-keeping and administrative burdens are greatly simplified by the self-distribution arrangement. Licensed craft brewers also do not have to observe territorial restrictions applicable to distributors to the extent they choose not to use independent distributors. These are the same self-distribution privileges that used to be granted to all in-state brewers. Importantly, however, ownership (and certainly not partial ownership) of a valid Illinois distributor has nothing to do with self-distribution.

the Legal Division's theories on the alleged prohibitions in the Liquor Control Act, and the effect of the CBA, simple nullities. The CBA did not change WEDCO's rights.

Instead, the CBA was focused on self-distribution, and a craft brewer exemption allowing self-distribution. Self-distribution is not the same thing as owning an interest in a validly licensed Illinois distributor. Although the Legal Division now hopes to skirt this fact, its prior comments and admissions on this point are overwhelming. The ILCC and Legal Division previously interpreted Section 5-1(a) as limited to in-state brewer self-distribution. Indeed, the discrimination at issue in the federal court case was caused by the ILCC's interpretation of Section 5-1(a) to mean that a "brewer's license [was] an in-state license only." (Haymaker Memo to ILCC, dated March 1, 2010, at 1-2; Brief of Defendants-Appellees at 8-9, *Anheuser-Busch v. Schnorf*, Appeal Nos. 10-3298 and 10-3570, (7th Cir. May 25, 2011).) The ILCC further represented to the United States Court of Appeals for the Seventh Circuit that Section 5-1(a) provided a "limited allowance for a licensed 'brewer' to sell *directly* to retailers," which "is not the same activity of a 'distributor' who . . . engages in the '*resale or reselling* at wholesale' of alcoholic beverages." (Brief of Defendants-Appellees at 20-21, *Anheuser-Busch v. Schnorf*, Appeal Nos. 10-3298 and 10-3570, (7th Cir. May 25, 2011).) So, when the federal court nullified the in-state privileges, it made clear that it was "withdrawing the self-distribution privilege from in-state brewers" and eliminating their ability "to distribute their products directly to retailers." *Anheuser-Busch, Inc.*, 738 F. Supp. 2d at 817.

The CBA merely codified the elimination of the in-state self-distribution privilege, and then also created a craft brewer exemption. Even after the enactment of the CBA, the Legal Division re-emphasized the distinction between distribution and self-distribution, stating that distribution privileges "allow a brewer to sell their own beer directly to retailers. . . . Having

distribution privileges, however, is much different than holding a distributor license.” (Haymaker Memo, dated October 12, 2011, at 4.) Thus, it is abundantly clear—especially because of the Legal Division’s prior admissions—that the CBA did not affect WEDCO’s right to own an interest in a distributor, such as CITY Beverage.

Now, in these proceedings, the Legal Division, as it must, attempts a complete “about face” on the meaning of Section 5-1(a). In its opposition to Respondents’ motion to dismiss, the Legal Division asserted that it and the ILCC did not mean to represent to the federal appeals court that Section 5-1(a) permitted only self-distribution. (Legal Division Response at 7 n.21.) The Legal Division instead now contends that under Section 5-1(a), “if these brewers had chosen to distribute another brewer’s products, they were legally authorized to do so by virtue of possessing a Distributors license and an Importing Distributors license.” (*Id.*). But, this new spin on Section 5-1(a) contradicts *yet another* representation that the ILCC made to the federal district court. In its opposition to plaintiffs’ motion for summary judgment in federal court, the ILCC expressly stated that “[t]he Commission interprets the Act to permit only in-state producers to distribute their *own product*.” (Defendants’ Response to Plaintiffs’ Motion for Summary Judgment on Their Commerce Clause Claim, Case No. 10-cv-1601 (Docket No. 65 at 1 (emphasis added).) The ILCC further argued that “[t]o the extent that Anheuser-Busch intends to distribute *other* producers’ beer, its proposed relief should be denied because the Commission permits in-state brewers to distribute only their own product.” (*Id.* at 30 n.13 (emphasis in original).) The Legal Division has understood all along that the in-state rights affected by the CBA are simply not the same thing as WEDCO’s ownership of an interest in a distributor. In light of all of their statements to the ILCC and to the federal courts, the Legal Division’s arguments to the contrary at this point have no credibility, and should be given no weight.

By the time the General Assembly passed the CBA on May 23, 2011, the issue of brewer ownership of a distributor had been publicly debated for over a year in various forums, including before the ILCC and as part of the federal litigation. As a consequence, the General Assembly had every opportunity to amend the LCA to categorically prohibit brewers from owning a distributor. However, it chose not to add brewers to the list of manufacturers in the “Prohibited Transactions and Interests” of Section 5/6-4(a) or prohibit brewers from owning a distributor in any other section of the LCA.⁴ The CBA did not change anything regarding WEDCO’s rights of ownership in CITY Beverage, and the ILCC’s prior Declaratory Ruling allowing WEDCO to maintain that 30% ownership interest should stand.

III. The LCA has never prohibited WEDCO’s 30% interest in CITY Beverage.

That brewers have never—before or after the CBA—been prohibited by Section 6-4(a) (or any other prohibition) from owning interests in distributors means that they are entitled to hold ownership interests in distributors as a matter of law.⁵ Respondents have repeatedly debunked the Legal Division’s arguments that the LCA prohibits brewers from holding an interest in distributors outside of Section 6-4(a). In short,

⁴ The Legal Division has argued that the scripted comments of one legislator, Rep. Frank Mautino, trumps the plain language of the CBA. This, however, is contrary to the cardinal rule of statutory construction, which requires this body to interpret the statute according to its plain language. *See Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 148, 151 (1997) (holding that the plain language rule “emphasizes the statutory language as written” and it is error to read into the law additional exceptions, limitations, or conditions); *Scattered Corp. v. Chicago Stock Exchange, Inc.*, 98 F.3d 1004, 1005 (7th Cir. 1996) (holding that “intent without a supporting text is not law”). And, it is well-established that the plain language of the statute controls over comments made during floor debates. *Bogseth v. Emanuel*, 166 Ill. 2d 507, 511-13 (1995) (rejecting reference to statements made during floor debates to determine legislative intent because the language of the statute is considered the primary source to determine its meaning).

⁵ Respondents believe that the Amended Citation should be dismissed based on Declaration B, but provide this background on the Liquor Control Act as context for the ILCC’s consideration. In addition, if the ILCC reconsiders Declaration B, then the ILCC should reconsider whether the LCA contains any prohibition whatsoever against WEDCO’s 30% interest in CITY Beverage.

- the definition of distributor contains no prohibition on brewers holding an interest in a distributor and the Legal Division’s argument is inconsistent with the Liquor Control Act; and
- the act of authorization principle has no application to determining whether persons are eligible for a particular license and is inconsistent with the numerous prohibitions in the statute.⁶

Because these points of law are so clear, the Legal Division has been compelled to shift its legal theories. Once Respondents demonstrated that the distributor definition and act of authorization arguments were materially flawed and conflicted irreconcilably with the LCA and one another, the Legal Division shifted to a new principal argument: that the CBA prohibits WEDCO’s ownership interest in CITY Beverage. However, now that Respondents have demonstrated that the plain language of the CBA does not prohibit WEDCO’s minority ownership interest in CITY Beverage, the Legal Division has pivoted again, asserting that the LCA is *ambiguous* on this question and the ILCC must look to comments from legislators and other “evidence” instead of the plain language of the statute. These flip-flops show that the Legal Division is leading the ILCC astray by assuming a prohibition and looking for ways to make the statute consistent with its prohibition, rather than simply construing the plain words of the legislature to determine whether the statute contains such a prohibition.

Indeed, in March 2010, the Legal Division convinced the ILCC to block WEDCO’s attempt to purchase the 70% interest in CITY Beverage by representing to the ILCC that the LCA was *clear and unambiguous* in its prohibition of WEDCO’s ownership of an interest in a distributor. For example, the Legal Division advised the ILCC that a “plain reading of the Illinois

⁶ See, e.g., AB Inc., WEDCO, & CITY Beverage, Memorandum of Fact and Law 14-16,19-21 (Mar. 2, 2010); A-B, LLC, WEDCO, & CITY Beverage, Submission Relating the ILCC Open Meeting 16-17 (Nov. 7, 2011); A-B, LLC, WEDCO, & CITY Beverage, Rebuttal Submission Relating to the ILCC Open Meeting 13-18 (Jan. 5, 2012); WEDCO’s Memorandum of Law in Support of its Motion to Dismiss All Claims Against Respondents, In the Matter of CITY Beverage - Markham, LLC, *et al.*, 12 CCH 01, at 14-19 (Jul. 18, 2012).

Liquor Control Act specifically states that a distributor cannot also be a non-resident dealer,” and, referring to the definition of distributor, “[t]hese definitions unambiguously establish the rule that no person holding an Illinois distributors license can also be a non-resident dealer.” (Haymaker Memo, dated March 1, 2010, at 2 (emphasis added).) Based on that advice, the ILCC issued Declaration A of the Declaratory Ruling dated March 10, 2010.⁷

But now, the Legal Division contends that the LCA (after amendment by the CBA) no longer clearly and unambiguously prohibits WEDCO’s ownership interest in a distributor. Instead, the Legal Division now asserts that the LCA is “ambiguous” and that the ILCC “plays a critical role in interpreting some of the Act’s ambiguities.” (Legal Division Response to Motion to Dismiss at 3-4; Legal Division Discovery Response at 5.) Where originally there was clarity when advocating to block the WEDCO deal in 2010, the Legal Division now “*recognizes the legitimacy of the ambiguity* of the Act and the Commission must answer the question of whether or not an NRD/brewer can be Distributor.” (Response to Motion to Dismiss at 4-5 (emphasis added).) The Legal Division’s new position concedes that the LCA—before and after amendment by the CBA—does not, by its express language, prohibit WEDCO’s ownership interest in CITY Beverage.

In addition, in 2010, the Legal Division relied heavily on the 2001 letter that then chief legal counsel John Stanton sent to Miller Brewing Company (no such letter was sent to an A-B entity) as the foundation for what it now refers to as the “Stanton doctrine.” According to the Legal Division, this letter represented an effort of the ILCC in 2001 to reinterpret the LCA to

⁷ And in the 2 ½ years since that Declaratory Ruling was issued, the Legal Division has repeated the mantra that the LCA *clearly* and *unambiguously* precludes WEDCO from owning an interest in a distributor in filings with the ILCC, pleadings and briefs in federal court proceedings, and in public meetings held by the ILCC. (See, e.g., Haymaker Memo, dated October 12, 2011, at 3 (“It is the opinion of the ILCC legal staff that the Liquor Control Act and the recent statutory amendments to the Act make it clear that a brewer cannot hold an interest in a distributor.”).)

prohibit brewers from holding distributor's licenses. The Legal Division and others even suggested that Miller relinquished its distributor's licenses after receiving the 2001 letter.

The ILCC's document production, however, reveals that these contentions are baseless. ILCC correspondence demonstrates that the 2001 letters and TPP-39 were intended as a means to simplify revenue collection for dual-licensees other than brewers. Indeed, citing the 1979 Illinois Attorney General opinion that explained that brewers could hold distributor's licenses under the LCA because Section 5/6-4(a) does not include brewers, John Stanton *expressly recognized a "brewer 'exemption'"* to the policy provided in the 2001 letters. Consistent with that fact, ILCC records show that Miller Brewing Company continued to hold its distributor's license from 2001 through 2008 and did not relinquish that license in 2001, as previously suggested to the ILCC. Thus, the 2001 policy change was never intended to—and did not—apply to brewers.

It should now be clear why the ILCC's blocking of the CITY Beverage transaction in 2010 came as such a surprise to WEDCO. Contrary to the incorrect assertions of the Legal Division to the ILCC, it was the very first time the ILCC had asserted that the LCA prohibited brewers from owning an interest in distributors. Based on the advice of the Legal Division, the ILCC's decision in 2010 contradicted the long-standing interpretation of the unambiguous terms of the LCA. Rather than compound this error, the ILCC should rely on the plain language in the LCA, reaffirm Declaration B, holding that it is in full force and effect, and dismiss the Amended Citation. If the ILCC voids Declaration B, however, the ILCC should also void Declaration A and rule that WEDCO may retain its 30% interest because the LCA does not prohibit brewers from owning an interest in distributors.

IV. Equity warrants dismissal of the Amended Citation.

Respondents are entitled to equitable estoppel against the Amended Citation because (1) the ILCC has affirmatively acted to license WEDCO and its affiliates as distributors, approved the 2005 formation of CITY Beverage with WEDCO holding a 30% interest, and again approved that ownership interest in Declaration B on March 10, 2010; (2) Respondents justifiably relied on these actions; and (3) WEDCO substantially changed its position in reliance on the ILCC's affirmative actions and would be significantly harmed by an order requiring it to divest its interest in CITY Beverage. *Cty. of DuPage v. K-Five Construction Corp.*, 267 Ill. App. 3d 266, 273 (2d Dist. 1994).

The ILCC's long-standing practice has been to permit brewers, including AB Inc. and Miller Brewing Company, to participate at the distributor tier. For example, since at least 1980, without interruption, A-B LLC has held a distributor's license in its own name or been affiliated with a distributor. The ILCC annually issued distributor's licenses to A-B LLC and its affiliates, and/or CITY Beverage during this period. ILCC records also indicate that Miller Brewing Company held a distributor's license from at least 1997 through 2008.⁸ In 2001, John Stanton, then chief legal counsel of the ILCC expressly noted that there is a "brewer 'exemption'" under the LCA to the prohibition against wine and spirits manufacturers owning distributors.

Moreover, in 2005, the ILCC expressly gave its approval to A-B LLC and the entities that owned CITY Beverage L.L.C., CITY Beverage - Markham, L.L.C., and CITY Beverage Chicago, to combine their licensed distributor businesses to form CITY Beverage, with WEDCO maintaining a 30 percent stake. Before consummating this transaction, in-house counsel for A-B LLC, Jay Golder requested that then ILCC chief legal counsel, William O'Donaghue, approve

⁸ The Legal Division did not access records before 1997.

this transaction. In connection with Mr. Golder's request, the parties to the transaction sent the ILCC information regarding the transaction, including a contribution agreement summary and organizational chart. These documents provided significant detail regarding the transaction and specifically described the involvement of the various parties to the transaction. After discussing the details with Mr. Golder, Mr. O'Donaghue considered the legality of WEDCO's potential 30 percent interest. He also conducted legal research and conferred with the ILCC executive director, the prior chief legal counsel John Stanton, and representatives of ABDI and WSDI, none of whom objected to the transaction. Mr. O'Donaghue then concluded that the LCA permitted WEDCO to hold a 30 percent interest in CITY Beverage and conveyed his approval to Mr. Golder, informing him that the contemplated transaction was permissible and that the transaction could proceed. The ILCC then issued distributor's licenses to the CITY Beverage entities, which it has renewed to this day.

Moreover, the Legal Division cannot show any negative effects on the health, safety, and welfare of the People of Illinois from A-B LLC maintaining an indirect interest in CITY Beverage or operating a distributor for decades. Despite arguing to the federal court in 2010 that the three-tier system would collapse if brewers could participate at the distributor tier, the ILCC was unable to produce any evidence that A-B LLC's ownership of a validly licensed Illinois distributor over the past three decades has "undermine[d] the State's interest in temperance, regulatory control, and tax collection."⁹

A-B LLC and WEDCO have structured their business and made key business decisions in substantial reliance on the ILCC's actions in this regard, such as determining to contribute its

⁹ Defendants' Response to Plaintiffs' Motion for Summary Judgment at 20, *Anheuser-Busch, Inc. v. Schnorf*, No 10-cv-1601 (N.D. Ill. 2010). *See also Anheuser-Busch, Inc. v. Schnorf*, 738 F. Supp. 2d at 810 (noting that the ILCC defendants "fail[ed] to cite record evidence" to support their contention that "tax collection problems would be compounded by the fact that AB Inc. is an out-of-state producer").

licensed distributor business to the CITY Beverage company, to continue to hold that ownership interest, and not to sell at opportune times. If forced to divest, WEDCO would suffer significant harm from this reliance because it would not be able to realize the full value of its investment, especially given that the market would take advantage of a forced sale. In addition, WEDCO only maintains a minority interest and the ILCC blocked its attempt to acquire the majority interest, which makes WEDCO's interest even less appealing to potential buyers. For those reasons, WEDCO would be subjected to significant financial harm if required to divest its interest. For these reasons, the ILCC should be equitably estopped from reversing its position as to WEDCO's 30% interest in CITY Beverage.

These are the types of facts and circumstances that the ILCC apparently took into account when issuing Declaration B of its Declaratory Ruling of March 10, 2010, another ILCC action upon which WEDCO has substantially relied. Nothing has changed—either factually or legally—since March 10, 2010, with respect to WEDCO's interest in CITY Beverage and thus the ILCC should stand behind that section of its Declaratory Ruling.

Importantly, it is well established that third-parties to this proceeding (including CITY Beverage's competitors that lobbied for this proceeding) are not considered "parties in interest" and thus do not have standing to challenge the ILCC's decision with respect to the CITY Beverage license, either through the appeal process set forth in the LCA and Administrative Review Law, or any other review process. *See American Surety Co. v. Jones*, 384 Ill. 222, 230 (1943) (holding that a competitive interest in an agency's decision is insufficient to confer standing to seek judicial review; "[T]he only possible interest [plaintiffs] could have had . . . would be to be free from the competition of a company that had not complied with the provisions of the code."); *Winston Plaza Currency Exchange v. Dep't of Fin. Inst.*, 211 Ill. App. 3d 1062

(1st Dist. 1991) (holding that the plaintiff lacked standing to challenge its competitor's licensing); *Kemp-Golden v. Dep't of Children & Family Servs.*, 281 Ill. App. 3d 869, 873-76 (4th Dist. 1996) (holding that one who has an interest in the outcome and participates in an administrative hearing by examining witnesses does not have standing to appeal a decision under the Administrative Review Law unless they were a “party of record” to the hearing whose rights, privileges, or duties were adversely affected by the decision).

Therefore, an ILCC determination, consistent with the Declaratory Ruling, that CITY Beverage’s licenses may be renewed despite WEDCO’s 30% stake, will put this issue to rest and will not be subject to judicial review in any proceeding filed by a party to this action or third-parties.

WHEREFORE, Respondents respectfully request that the ILCC continue to allow WEDCO to maintain its 30% ownership interest in CITY Beverage.

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Proof of Service

Now comes the undersigned, an attorney, and does hereby state that the brief in support thereof was served on September 7, 2012, and was served via e-mail and hand delivery on Stephen B. Schnorf, Michael V. Casey, and Richard Haymaker, Illinois Liquor Control Commission, at 100 W. Randolph St., Room 7-801, Chicago, IL 60601.

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