

## New York's New Rules Regarding Small Brewer Termination Of Distributors

On January 1, 2013, changes to New York's Alcoholic Beverage Control Law ("ABCL") took effect, enabling small brewers to terminate underperforming wholesalers. The ABCL generally restricts termination of a distribution agreement except for in cases of "good cause." However, new changes pursuant to New York's Small Brewers Bill, enacted August 1, 2012, took effect this year. The Small Brewers Bill amended the ABCL to allow small brewers whose annual volume is less than 300,000 barrels of beer and whose sales to a wholesaler are 3% or less of a beer wholesaler's annual business, the right to terminate distribution rights without good cause provided that the brewer pays the wholesaler fair compensation.

**Meeting the Production Volume & Sales Requirements.** Any brewer with an annual volume of less than 300,000 barrels of beer and whose sales to an affected beer wholesaler are three percent or less of the beer wholesaler's total annual brand sales, measured in case-equivalent sales of twenty-four 12ounce units, may terminate an agreement with any beer wholesaler without having good cause for such termination.

**Determining Your Annual Volume.** The term "annual volume" means (1) the aggregate number of barrels of beer under trademarks owned by your brewery and brewed, directly or indirectly, by or on behalf of your brewery during the measuring period, on a worldwide basis; plus (2) the aggregate number of barrels of beer brewed during the measuring period, directly or indirectly, by or on behalf of any person or entity which, at any time during the measuring period, controlled, was controlled by, or was under common control with the brewer, on a worldwide basis. Annual volume does not include beer brewed under contract for any other brewer. The term "measuring period" means the twelve month calendar period immediately preceding the date notice of termination is given by a brewer to the beer wholesaler.

**Notice of Termination.** No brewer may amend or materially modify or otherwise terminate any essential and material term or requirement of an agreement unless the brewer has furnished the affected party with at least fifteen days prior notification.

**Notice Contents.** The notification must be in writing and sent to the affected party by certified mail. Such notification shall contain (i) a statement of intent to cancel, not renew, otherwise terminate, materially amend or modify an agreement; (ii) a statement of all reasons therefor, stated with particularity; and (iii) the date on which such action shall take effect. The notice should also include the fair market value the brewery proposes to pay the wholesaler for terminating the distribution rights.

**Fair Market Value.** Prior to the effective date of the termination, a brewer must pay the beer wholesaler the fair market value of the distribution rights which will be lost or diminished by reason of the termination. The ABCL does not provide guidance on determining fair market value except that it must be a good faith estimate. The ABCL does provide a dispute resolution procedure regarding fair market value but the dispute resolution takes place after termination.

**Dispute of Fair Market Value.** If a brewer and a beer wholesaler cannot mutually agree to the fair market value of the applicable distribution rights lost or diminished by reason of the termination, then the brewer shall pay the beer wholesaler a good faith estimate of the fair market value of the applicable distribution rights. If the beer wholesaler being terminated disputes that the payment made by the brewer was less than the fair market value of the distribution rights, then the beer wholesaler may, within 45 days of termination, submit the question of fair market value to binding arbitration before a panel of three neutral arbitrators appointed in accordance with the commercial arbitration rules of the American Arbitration Association. The panel shall determine by majority decision whether the brewer's payment

was the fair market value. If the arbitration panel rules that the payment made by the brewer to the beer wholesaler was less than the fair market value, then the brewer must pay the beer wholesaler the difference between the payment made to the beer wholesaler and the determined fair market value plus interest. If the arbitration panel rules that the payment made by the brewer to the beer wholesaler was more than the fair market value of distribution rights, then the beer wholesaler must pay the brewer the difference between the payment made to the beer wholesaler and the determined fair market value plus interest. All arbitration fees and expenses shall be equally divided among the parties to the arbitration except if the arbitration panel determines that the brewer's payment upon termination was not a good faith estimate of the fair market value, in which case the panel may award up to one hundred percent of the arbitration costs to the wholesaler.

**Take Action Now.** The changes to the ABCL enacted by the Small Brewers Bill took effect on January 1, 2013 and many small brewers are already terminating underperforming wholesalers. Small brewers with underperforming wholesalers should not delay in terminating wholesalers pursuant to the changes. Sending a termination notice as soon as possible will help protect a brewer against failure to meet the volume requirements of the ABCL, which provide that in order for a brewer to terminate the agreement, the brewer's products must make up three percent or less of the wholesaler's total annual brand sales. If a wholesaler is a problematic distributor for you, then the wholesaler may be problematic for other brewers. If multiple brewers all seek to terminate their agreements with a problematic wholesaler, and your brewery is last to provide notice to terminate, then your products could possibly make up three percent or more of the wholesaler's total annual brand sales, and termination under the new provisions would be precluded.

For assistance with properly terminating a wholesaler or other alcohol-related matters, please contact Brian P. Slough at [bslough@nmmlaw.com](mailto:bslough@nmmlaw.com).