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May 16, 1979

Honorable Daniel B. Hickey
House of Representatives
State House
Augusta, Maine 04333

Re: L.D. 776 AN ACT to Establish the Beer and Wine Franchising Act

Dear Representative Hickey:

The following responds to your request for an opinion on the antitrust implications and the constitutionality of L.D. 776, AN ACT to Establish the Beer and Wine Franchising Act.

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Four principal statutes, two federal and two state, prohibit anticompetitive activity. The Sherman Act, 15 U.S.C. § 1, and "the State Sherman Act", 10 M.R.S.A. § 1101 prohibit contracts, combinations and conspiracies in restraint of trade. The Federal Trade Commission Act, 15 U.S.C. § 45, et seq., and "the mini-FTC Act", 5 M.R.S.A. § 206, et seq., prohibit unfair methods of competition. Antitrust actions may be maintained under these statutes by the federal government (the Justice Department and the Federal Trade Commission), the State of Maine and private persons (under § 4 of the Clayton Act, 15 U.S.C. § 12, et seq.; 5 M.R.S.A. § 213; and 10 M.R.S.A. § 1104).

Art. I, § 10, cl. 1 of the United States Constitution and Art. I, § 11 of the Maine Constitution prohibit states from enacting laws which impair the obligation of contracts.

QUESTION I:

Section 667 of L.D. 776 prohibits an approval holder who designates a sales area for which a particular wholesaler shall be primarily responsible from selling to another wholesaler who serves that sames sales territory. Is an approval holder who establishes exclusive territories pursuant to § 667 in violation of state or federal antitrust laws?

ANSWER I:

The antitrust liability of an approval holder who establishes exclusive sales territories will depend upon whether the grant of exclusive territories unreasonably restrains trade, and not upon the provisions of § 667.

REASONING I:

The term "sales territory" is defined in § 665-6 to "mean the area of primary sales responsibility expressly or impliedly designated by any agreement...." between a wholesaler and an approval holder. Sec. 667 prohibits an approval holder who designates a sales territory for which a particular wholesaler is primarily responsible from agreeing to sell to another wholesaler serving that same territory. The effect of § 667, thus, is to modify the definition of sales territory contained in § 665-6 so that the grant of a primary sales area in fact constitutes the grant of an exclusive sales area.

In determining whether approval holders are liable under antitrust laws for designating exclusive territories pursuant to § 667, two separate issues must be addressed: (1) whether approval holders would be exempt from antitrust liability by virtue of L.D. 776, and (2) if approval holders are not exempt, whether the grant of exclusive territories violates state or federal antitrust laws.

1. Exemption from Antitrust Laws

In our opinion L.D. 776 does not confer an antitrust exemption upon approval holders who designate exclusive territories. The United States Supreme Court in a line of cases beginning with Parker v Brown, 317 U.S. 341 (1943), has developed an exemption from the

Sherman Act, commonly known as the state action exemption, for conduct directed or compelled by the State. Although the parameters of the state action exemption are currently in a state of flux, the Supreme Court appears to have established a two part test for applying the exemption. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) and Cantor v. Detroit Edison Co., 428 U.S. 579 (1976). First, a private person can successfully claim exemption under the Sherman Act only if the anticompetitive activity is required or compelled by the State. Second, even if required by the State, the private person will not be exempt unless the anticompetitive activity is a necessary part of the State's regulatory effort.

An approval holder who designates exclusive territories does not qualify for an exemption under either part of this test. First, approval holders are not required by § 667 to designate exclusive territories. Rather, § 667 merely provides that when an approval holder designates primary sales areas those areas must be exclusive. The approval holder always has the option of refusing to designate exclusive sales areas. Second, the purpose of LD 776 is not furthered by the sanctioning of anticompetitive distribution plans. The Statement of Fact accompanying LD 776 explains that the purpose of the Act is to "set forth the law regulating agreements between" wholesalers and approval holders in order to protect wholesalers from the superior bargaining power of approval holders. Sec. 667 clarifies the law concerning the designation of sales territories (if an approval holder designates a sales territory, that territory is an exclusive territory) and, thus, furthers the purpose of the bill. The stated purpose of the bill, however, is in no way served by exempting antitrust violators from liability.

It can be argued that § 667 constitutes legislative approval of all grants of exclusive distributorships regardless of whether those grants unreasonably restrain commerce. We reject this interpretation of § 667 for one important reason: since antitrust laws express an important public policy, exemptions to those laws are strictly construed so as to avoid undercutting that policy. Moreover, our reading of the developing case law concerning the state action exemption leads us to conclude that mere state approval of anticompetitive activity under these facts does not confer exemption under the Sherman Act.

The Supreme Court's decisions concerning the state action exemption have addressed liability only under the Sherman Act. The few lower courts which have considered the question have applied the state action exemption to the FTC Act as well. The Maine Supreme Judicial Court has not decided whether the reasoning of the United States Supreme Court's decisions are applicable to the state Sherman Act. 10 M.R.S.A. § 1101, et seq.[1] However, we need not reach the question of whether the state action exemption applies to state antitrust laws because such an exemption is not available under the Sherman Act. L.D. 776 does not exempt approval holders from antitrust liability under federal antitrust laws. Thus, even if an exemption exists under state law, approval holders will have to face the issue of whether their conduct violates the Sherman Act.

2. Liability of Approval Holders

The legality under the antitrust laws of a grant of an exclusive territory by an approval holder is not affected by § 667 of L.D. 776 but, rather, will depend upon a case by case analysis of the impact of that grant upon free and open competition. In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the United States Supreme Court concluded that exclusive territorial divisions will be judged to violate antitrust laws only if those divisions unreasonably restrain competition. This approach, commonly referred to as the "rule of reason," requires courts to evaluate the competitive impact of any distribution plan which involves the grant of exclusive territories.

An approval holder who grants exclusive sales areas pursuant to § 667 will violate antitrust laws only if the distribution plan unreasonably restrains commerce. The liability of an approval holder, therefore, will be judged on the facts of each particular case.[2]

1/ The Unfair Trade Practices Act contains a provision exempting from the statute transactions which are permitted by State law. 5 M.R.S.A. § 208-1. Sec. 208-1 arguably exempts approval holders from liability under the Unfair Trade Practices Act.

2/ If an approval holder determines, after enactment of L.D. 776, that its existing agreement with a wholesaler concerning sales territories unreasonably restrains commerce, it can amend or cancel the agreement. Sec. 668 provides that an approval holder can cancel or amend its agreement with a wholesaler only for "good cause." That an agreement violates antitrust laws constitutes good cause for cancellation or amendment.

QUESTION II:

Does § 678, by providing that the bill applies to already existing contracts, violate the impairment of contracts clauses of the Maine and United States Constitutions?

ANSWER II:

Sec. 678 does not violate the impairment of contract clauses of the Maine and United States Constitutions.

REASONING II:

Article I, § 10, cl. 1 of the United States Constitution and Art. 2, § 11 of the Maine Constitution prohibit the State from enacting any law impairing the obligation of contracts. Although the language of these constitutional provisions is far reaching, both the United States Supreme Court and the Maine Supreme Judicial Court have significantly limited the otherwise broad scope of this language. Legislation which is enacted as a valid exercise of the State's police power does not violate the impairment of contracts clause. National Hearing Aid Centers, Inc. v. Smith, 376 A 2d 456, 461 (Me. 1977); Baxter v. Waterville Sewerage District, 146 Me. 211, 218 (1951); In re Guilford Water Co. 118 Me. 367, 372 (1919). The Law Court in In re Guilford Water Co., citing a number of decisions of the United States Supreme Court, explained this rule as follows:

> [E]very contract touching matters within the police power, must be held to have been entered into with the distinct understanding that the continuing supremacy of the State, if exerted for the common good and welfare, can modify the contract when and as the benefit of that interest properly may require.
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> 118 Me. 367, at 372[3/]

3/ The one area in which the impairment of contracts clause is still vigorously applied involves laws affecting the remedial rights of creditors. For example, in Portland Savings Bank v. Landry, 372 A 2d 573 (Me. 1977), the Law Court held that a statute reducing the period of redemption of a mortgage from one year to 90 days could not be applied to mortgages entered into prior to the effective date of the legislation. Decisions such as this, however, are an exception to the general rule stated in In re Guilford Water. See Constitution of the United States of America, Library of Congress, p. 413 (1973).

According to its Statement of Fact, L.D. 776 is "necessary because of the unequal bargaining power" between approval holders and wholesalers. L.D. 776, on its face, appears to constitute an exercise of the Legislature's power to enact "reasonable laws... for the defense and benefit of the people of this State...." Art. IV, Pt. 3, § 1, Maine Constitution. As the Law Court concluded in National Hearing Aid Centers, Inc. v. Smith, supra, the reasonableness of a Legislative enactment in exercise of its police power is presumed. 376 A 2d 456, at 460. We have not been presented with any facts which indicate either that the Legislature lacked a factual basis for its enactment or that the legislation did not "bear a rational basis to the evil sought to be corrected." 376 A 2d 456, at 460. We presume, therefore, that L.D. 776 constitutes a valid exercise of the State's police power.

L.D. 776 arguably alters the existing contractual obligations between wholesalers and approval holders. However, because L.D. 776 constitutes a valid exercise of the Legislature's police power, the bill does not violate the constitutional prohibition upon the impairment of contracts.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC/SLW/reb
cc: Governor's Office