



**Senate Fiscal Agency**  
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**BILL ANALYSIS**



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Senate Bill 1171 (as introduced 9-19-96)  
 Sponsor: Senator Bill Bullard, Jr.  
 Committee: Economic Development, International Trade and Regulatory Affairs

Date Completed: 9-24-96

**CONTENT**

**The bill would amend the Liquor Control Act to allow authorized distribution agents (ADAs) to distribute alcoholic liquor in the State, to allow wine makers and master distributors to grant exclusive sales territories to their wholesalers, and to establish a structure for the business relationships between an ADA and a supplier of spirits by requiring written agreements, prohibiting certain activities by suppliers and ADAs, and providing for grievance and arbitration procedures.**

“Authorized distribution agent” would mean a person approved by the Liquor Control Commission (LCC) to do one or more of the following:

- Store spirits owned by a supplier of spirits or the LCC.
- Deliver spirits sold by the LCC to retail licensees.
- Perform any function needed to store spirits owned by a supplier of spirits or by the LCC or to deliver spirits sold by the LCC to retail licensees.

“Supplier of spirits” would mean a vendor of spirits, a manufacturer of spirits, or a primary source of supply. “Primary source of supply” of domestic spirits would mean the distiller, producer, owner of the commodity at the time it became a marketable product, or bottler, or the exclusive agent of any such person. “Primary source of supply” of imported spirits would mean either the foreign distiller, producer, owner of the bottler, or the prime importer for, or the exclusive agent in the United States of, the foreign distiller, producer, owner, or the bottler.

Following is a more detailed description of the bill.

Distribution Rights

Currently, the Act prohibits the sale, delivery, or importation of alcoholic liquor, including alcoholic liquor for personal use, in this State unless the sale, delivery, or importation is made by the LCC or its authorized agent or distributor, a person licensed by the LCC, or by prior written order of the LCC. The bill also would make an exception to the prohibition for an authorized distribution agent approved by order of the LCC.

Exclusive Territory

Currently, the Act allows a manufacturer and outstate seller of wine to grant to each of its wholesalers a sales territory within which the wholesaler is a distributor of the specified brand or brands of the manufacturer or outstate seller of wine. Further, a manufacturer or outstate seller of wine may grant the right to sell a specified brand or brands in a sales territory to more than one wholesaler. The bill would delete the reference to “manufacturer” and specify, instead, that a wine maker, a small wine maker, and a master distributor, as well as an outstate seller of wine could grant an exclusive sales territory to its wholesalers. Moreover, the bill specifies that in spite of the previous provision, a wine maker, small wine maker, master distributor, or outstate seller of wine who, before the effective date of the bill and according to the agreement as required by the bill, assigned one or more wholesalers to a sales territory for a brand or brands of wine could not assign that brand or brands of wine to any additional wholesaler or wholesalers in any part of that sales territory.

The appointment, after September 24, 1996, by a wine maker, a small wine maker, a master distributor, or an outstate seller of wine of an

additional wholesaler or wholesalers to sell or distribute a brand or brands of wine in any part of a sales territory currently being serviced by a wholesaler for that brand or brands of wine would be null, void, and of no effect, upon the effective date of the bill.

#### ADA Eligibility and Appointment

The bill would allow the LCC to appoint by order authorized distribution agents to warehouse and deliver spirits in this State. An order appointing an ADA would be considered a license. An ADA would be subject to uniform requirements, including business operating procedures, which the LCC would have to prescribe by rule.

A person would be eligible for appointment as an ADA if the person satisfied the qualifications and requirements for licensure of a wholesale license and all applicable LCC rules prescribing qualification for licensure; entered into a written agreement or contract with a supplier of spirits for the purpose of warehousing and delivering a brand or brands of spirits of that supplier; and had an adequate warehousing facility located in this State for the storing of spirits from which all delivery of spirits to retail licensees would have to be made.

An ADA could not have a direct or indirect interest in a supplier of spirits or in a retailer, and a supplier of spirits or a retailer could not have a direct or indirect interest in an ADA.

#### Contracts and Agreements

An ADA or prospective ADA would have to maintain and make available to the LCC or its representative, upon notice, any contract or written agreement it had with a supplier of spirits or other ADA for the warehousing and delivery of spirits in this State.

All contracts or agreements between an ADA or prospective ADA and a supplier of spirits would have to be in writing, would have to comply with the bill's provisions regulating the business relationship between an ADA and a supplier of spirits, and would have to include such uniform terms as the LCC prescribed by rule, including, but not limited to, the following provisions:

- The duration and method for renewal of the contract or agreement.
- A listing of the brand or brands of spirits subject to the contract or agreement.

- The ADA's service area, and delivery, warehousing, and other responsibilities with respect to the brands of spirits subject to the contract or agreement.
- The ADA's compensation under the contract or agreement.
- The supplier's obligation to provide safe, saleable products to the ADA on a regular and timely basis.
- Requirements for, or limitations upon, subcontracting of the ADA's duties under the contract or agreement.
- A procedure by which the ADA would be notified of and afforded a reasonable opportunity to correct any deficiencies for its performance under the agreement.
- The obligation of good faith that would be imposed upon the parties to the contract or agreement.
- The grounds for termination of the contract or agreement, which would have to include a requirement of good cause.

An ADA's appointment would have to remain in effect as long as it had one or more agreements with a supplier of spirits for the warehousing and delivering of spirits in this State, unless the agreement were revoked, suspended, or forfeited.

If an ADA violated the Act, rules promulgated under the Act, or the terms of an order appointing an ADA, the ADA would be subject to the suspension, revocation, forfeiture, and penalty provisions of the bill. An ADA aggrieved by a penalty imposed by the LCC could invoke the hearing and appeal procedures of the bill, and LCC rules promulgated under it.

For the purposes of the rules promulgated by the LCC, a supplier of spirits and an ADA would have to be considered and treated as a vendor of spirits and a wholesaler respectively, except that they would be subject to rules applicable to spirits for purposes of manufacturing and labeling.

#### Business Structure

The bill states, "The purpose of this section is to provide a structure for the business relations between an authorized distribution agent and a supplier of spirits. Regulation in this area is considered necessary for the following reasons:

- (A) To promote and maintain a sound, stable, and viable 3-tier distribution system of spirits to the public.

- (B) To recognize the marketing distinctions between beer, wine, and spirits.
- (C) To promote the public health, safety, and welfare.”

Prohibited Acts - Suppliers

The bill would prohibit a supplier from doing any of the following:

- Coercing, or attempting to coerce, an ADA to accept delivery of any spirits or other commodity that it had not ordered. A supplier, however, could impose reasonable inventory requirements upon an ADA if they were made in good faith and were generally applied to other ADAs having an agreement with the supplier. “Agreement” would mean any agreement between an ADA and a supplier, whether oral or written, in which an ADA was granted the right to warehouse and deliver a brand or brands of spirits sold by a supplier.
- Coercing, or attempting to coerce, any ADA to accept delivery of any spirits or other commodity ordered by an ADA if the order were properly canceled by the ADA in accordance with the procedures agreed upon by the supplier and ADA.
- Coercing, or attempting to coerce, any ADA to do any illegal act by threatening to amend, cancel, terminate, or refuse to renew any agreement existing between the supplier and the ADA.
- Requiring an ADA to assent to any condition, stipulation, or provision limiting the ADA's right to warehouse and deliver the brand or brands of spirits of any other supplier anywhere in this State unless the acquisition of the brand or brands of another supplier would materially impair the quality of service of the brand or brands of the supplier presently being warehoused and delivered by the ADA.
- Requiring an ADA to warehouse and deliver one or more brands of spirits in order for the ADA to warehouse and deliver another brand or brands of spirits for any reason.
- Requiring an ADA to submit profit and loss statements, balance sheets, or financial records as a requirement for renewing or retaining an agreement.
- Withholding delivery of spirits ordered by an ADA, or changing an ADA's quota of a brand or brands if the withholding or change were not made in good faith. "Good faith" would mean honesty in fact and the

observance of reasonable commercial standards of fair dealing in the trade, as defined and interpreted under provisions of the Uniform Commercial Code. "Master authorized distribution agent" would mean an ADA who acted in the same or similar capacity as a supplier for a brand or brands of spirits to other ADAs on a regular basis in the normal course of business.

- Requiring an ADA by any means to participate in, or contribute to, any local or national advertising fund controlled directly or indirectly by a supplier.
- Failing to provide each ADA of the supplier's brand or brands with a written agreement that contained in total the supplier's agreement with each ADA, and designated a specific distribution territory. "Distribution territory" would mean an area of exclusive delivery responsibility for the brand or brands of spirits of a supplier as designated by an agreement.
- Taking any retaliatory action against an ADA who filed a complaint regarding an alleged violation by the supplier of State or Federal law or an administrative rule. "Retaliatory action" would mean action that included, but was not limited to, the refusal to continue an agreement, or a material reduction in the quality of service or quantity of products available to an ADA under an agreement, which refusal or reduction was not made in good faith.
- Requiring by a provision of any agreement or other instrument in connection with the agreement that any dispute arising out of, or in connection with, that agreement be determined through the application of any other state's laws. Any supplier or ADA aggrieved by any dispute arising out of, or in connection with, an agreement governed by the Act would have the right to file an appropriate action consistent with the Act in any court in this State having venue.

A supplier also would be prohibited from requiring or prohibiting any change in the manager or successor manager of any ADA who held that position prior to the effective date of the bill. After the bill's effective date, if a supplier required that a manager or successor manager be appointed, or if an ADA changed an approved manager or successor manager, a supplier could not interfere with or prohibit the appointment unless the person failed to meet the reasonable written standards for Michigan for an ADA of the supplier, which were provided to the ADA. "Reasonable qualifications"

would mean the average standard of the criteria used by the respective supplier for ADAs that entered into or renewed an agreement with the supplier during a period of 24 months period to the proposed transfer of the authorized distribution agent's business. "Supplier" would mean a supplier of spirits or a master distributor. "Successor" would mean a supplier who obtained, in any manner from any person, including a person who was not a supplier, the distribution rights of one or more brands of spirits that an ADA had distributed in this State pursuant to an agreement with another supplier, who previously had the distribution rights for the brand or brands.

#### Temporary Service

An ADA could not deliver spirits to a retail licensee located outside the exclusive distribution territory designated by the supplier of a particular brand or brands of spirits. During periods of temporary service interruptions affecting a particular distribution territory, however, the ADA who normally serviced the affected distribution territory would have to file with the LCC a written notice designating the specific ADA or an ADA who would service the distribution territory during the interruption, and the approximate length of time of the interruption. When the temporary service interruption was over, the ADA who normally serviced the distribution territory would have to notify in writing the LCC and the ADA, or ADAs, who were servicing the distribution territory on a temporary basis that the interruption was over, and any ADA servicing the distribution territory on a temporary basis would have to stop servicing the territory upon receipt of the notice. An ADA who was designated to service the affected distribution territory during the period of temporary service would not be in violation of these provisions and would not have any of the rights concerning amendment of an agreement, protection from forced resignation from an agreement, criteria for good cause and good faith, and written notification specified by the bill.

The bill would prohibit a supplier or ADA from restricting or inhibiting, directly or indirectly, the right of free association among suppliers or authorized distribution agents for any lawful purpose.

#### Criteria for Changes/Termination of Agreements

The bill provides that notwithstanding the terms, provisions, or conditions of any agreement, a supplier could not amend any agreement unless

the supplier had good cause and was acting in good faith in making the amendment. Further, notwithstanding any agreement and except as otherwise provided for in these provisions, a supplier could not cause an authorized distribution agent to resign from an agreement or cancel, terminate, fail to renew, or refuse to continue under an agreement, unless the supplier had satisfied the applicable written notice requirements specified by the bill, had acted in good faith, and had good cause for the cancellation, termination, nonrenewal, discontinuance, or forced resignation.

Notwithstanding any agreement, good cause would exist for the purposes of a termination, cancellation, nonrenewal, or discontinuance if all of the following occurred:

- The ADA failed to comply with a provision of the agreement that was both reasonable and of material significance to the business relationship between the ADA and the supplier.
- The supplier first acquired knowledge of the failure not more than two years before the date notification was given.
- The ADA was given written notice by the supplier of failure to comply with the agreement.
- The ADA was afforded a reasonable opportunity to assert good faith efforts to comply with the agreement within the time limits.
- The ADA had been afforded 25 days in which to submit a plan of corrective action to comply with the agreement and an additional 75 days to cure the noncompliance in accordance with the plan.

A supplier or ADA who terminated, canceled, discontinued, or did not renew an agreement would have the burden of showing that it had acted in good faith and complied with the applicable notice requirements, and that there was good cause for the termination, cancellation, nonrenewal, or discontinuance.

#### Written Notice

Notwithstanding any agreement and except as otherwise provided in these provisions, a supplier would have to furnish written notice of a termination, cancellation, nonrenewal, or discontinuance of an agreement to an ADA at least 15 days before the effective date of the termination, cancellation, nonrenewal, or discontinuance. The notice would have to be by

certified mail and would have to contain a statement of intent to terminate, cancel, not renew, or discontinue the agreement; a statement of the reason for the termination, cancellation, nonrenewal, or discontinuance; and the date on which the termination, cancellation, nonrenewal, or discontinuance would take effect.

Notwithstanding the notice requirements, a supplier immediately could terminate, cancel, fail to renew, or discontinue an agreement upon written notice given in the manner and containing the required information if any of the following occurred:

- Insolvency of the ADA, the filing of any petition by or against the ADA under any bankruptcy or receivership law, or the dissolution or liquidation of the ADA that materially affected the ADA's ability to remain in business.
- Revocation of the ADA's certification by the LCC so that the ADA could not service its distribution territory for more than 60 days.
- Conviction of the ADA, or an individual who owned more than 10% of the stock of a corporate ADA, of a felony. "Felony" would mean a felony under the United States Code or the Michigan Compiled Laws. An existing approved stockholder or stockholders, however, would have the right to purchase the stock of the offending stockholder prior to the conviction of the offending stockholder, and if the sale were completed prior to conviction, this provision would not apply.

Notwithstanding the notice, good faith, and good cause requirements, upon at least 15 days' prior written notice given in the manner and containing the information required by the bill, a supplier could terminate, cancel, fail to renew, or discontinue an agreement if there were fraudulent conduct on the part of the ADA in dealing with the supplier, or the ADA failed to confine its distribution of a brand or brands to the assigned distribution territory. This provision would not apply if there were a dispute between two or more ADAs as to the boundaries of the assigned territory, and the boundaries could not be determined by a reading of the description contained in the agreements between the supplier and the ADAs.

Further, notwithstanding the notice, good faith, good cause, and fraudulent acts provisions, a supplier could terminate, cancel, not renew, or

discontinue an agreement upon at least 30 days' prior written notice if the supplier discontinued production or discontinued distribution in this State of all the brands assigned by the supplier to the ADA. These provisions would not prohibit a supplier, upon at least 30 days' notice, completely to discontinue in this State the distribution of any particular brand or package of spirits. A supplier who discontinued the distribution of all or any particular brand or package of spirits and then reintroduced that brand package or brand within 365 days of the discontinuance would have to assign that brand package or brand to the ADA who had been assigned the brand package or brand prior to the discontinuance. This provision would not prohibit a supplier from conducting test marketing of a new brand of spirits that was not already being sold in this State if the supplier had notified the LCC in writing of its plans to test market. The notice would have to describe the market area in which the test would be conducted; the name or names of the ADA or ADAs who would be distributing the spirits; the name or names of the brand of spirits being tested; and the period of time during which the testing would take place. A market testing period could not exceed six months.

An ADA would have to devote reasonable efforts and resources to the distribution of all the supplier's products that it had been granted the right to distribute.

#### Transfer of Business

A supplier could not withhold consent to any transfer of an ADA's business if the proposed transferee met the reasonable qualifications required by the supplier. "Transfer of an authorized distribution agent's business" would mean the voluntary sale, assignment, or other transfer of the business or control of the business of the ADA including the sale or other transfer of stock or assets by merger, consolidation, or dissolution. An ADA would have to give the supplier written notice of intent to transfer his or her business. A supplier could not unreasonably delay a response to a request for a proposed transfer. A transfer that was not approved by the supplier, however, would be null and void. A supplier could not interfere with, or prevent, the transfer of the ADA's business if the proposed transferee were a designated member. "Designated member" would mean the spouse, child, grandchild, parent, brother, or sister of a deceased individual who 1) owned an interest in an ADA, 2) was entitled to inherit the deceased

individual's ownership interest in the ADA under the terms of the deceased individual's will, 3) had otherwise been designated in writing by the deceased individual to succeed the deceased individual in the ADA's business, or 4) was entitled to inherit such ownership interest under the laws of intestate succession of this State. With respect to an incapacitated individual owning an ownership interest in an ADA, the term would mean the person appointed by a court as the conservator of such an individual's property. The term also would include the appointed and qualified personal representative and the testamentary trustee of a deceased individual owning an ownership interest in an ADA.

#### Successor Manager

As part of the required written agreement and subject to the bills provisions concerning disputes over agreements, a supplier could require an ADA to designate a successor manager who would be subject to prior approval by the supplier. If the designated successor manager failed to assume the role of approved manager, or for any reason did not continue to manage the ADA's business after assuming that responsibility, any successor would be subject to the prior approval of the supplier, subject to the bill's dispute provisions, notwithstanding the transferee's interest as a designated member.

#### Compensation/Arbitration

A supplier who had amended, canceled, terminated, or refused to renew any agreement; caused an ADA to resign from an agreement; or withheld consent to any assignment or transfer of an ADA's business, except as provided for in the bill, would have to pay the ADA reasonable compensation for the diminished value of the ADA's business, or of any ancillary business that was negatively affected by the act of the supplier, or both. The value of the ADA's business or ancillary business would include, not would not be limited to, its goodwill. "Ancillary business" would mean a business owned by an ADA, a stockholder of an ADA, or a partner of an ADA, whose the primary purpose was directly related to the transporting, storing, or delivery of the brand or brands of spirits of a supplier with whom the ADA had an agreement; or a business owned by an ADA, a stockholder of an ADA, or a partner of an ADA that recycled empty returnable beverage containers.

Either party, at any time, could determine that mutual agreement on the amount of reasonable compensation could not be reached. If such a determination were made, the supplier or the ADA would have to send written notice to the other party declaring its intention to proceed with arbitration. Arbitration could proceed only by mutual agreement of both parties.

The matter of determining the amount of compensation under arbitration, by agreement of the parties, could be submitted to a five-member arbitration panel consisting of two representatives selected by the supplier but unassociated with the affected supplier, two ADA representatives selected by but unassociated with the ADA, and an impartial arbitrator.

Within 30 days after the list of arbitrators was received, the ADA and the supplier would have to exchange in writing the names of their respective arbitration panel representatives. Within 30 days after the final selection of the arbitration panel was made, the arbitration panel would have to convene to decide the dispute. The panel would have to render a decision by majority vote of the participants within 20 days from the conclusion of the arbitration. If either party failed to abide by the time limitations, failed or refused to select any arbitrators, or failed to participate in the arbitration hearings, the other party would have to select its arbitrators and proceed to arbitration. The party who failed or refused to comply would be considered to be in default. Any party considered to be in default would have to waive any and all rights it would have had in the arbitration and would be considered to have consented to the determination of the arbitration panel.

The cost of the impartial arbitrator, the stenographer, and the meeting site would have to be divided equally between the ADA and the supplier. All other costs would have to be paid by the party incurring them. The award of the arbitration panel would be final and binding on the parties.

#### Civil Action/Violations

If a supplier engaged in conduct prohibited by the bill, an ADA with which the supplier had an agreement could maintain a civil action against the supplier to recover actual damages reasonably incurred as the result of the prohibited conduct. Conversely, a supplier could maintain a civil action against an ADA who violated the bill.

A supplier who violated any of the bill's provisions concerning the business relationship between ADAs and suppliers would be liable for all actual damages and all court costs and reasonable attorney fees incurred by an ADA as a result of that violation. An ADA that violated any provision would be liable for all actual damages and all court costs and reasonable attorney fees incurred by the supplier as a result of that violation.

A supplier or ADA could bring an action for declaratory judgment for determination of any controversy arising pursuant to the bill.

Except as otherwise provided in the bill, if a court found that a supplier had not acted in good faith in effecting the amendment, termination, cancellation, or nonrenewal of any agreement; or had unreasonably withheld its consent to any assignment, transfer, or sale of an ADA's business, it could award exemplary damages, as well as actual damages, court costs, and reasonable attorney fees to the ADA who had been damaged by the action of the supplier.

Upon proper application to the court, a supplier or ADA could obtain injunctive relief against any violation of the bill. If the court granted injunctive relief or issued a temporary restraining order, bond would not have to be posted.

The procedure for resolving any violation of the bill's provisions concerning coercion and certain other prohibited activities by suppliers and distribution of spirits outside of designated exclusive territories would be the procedure prescribed by the Act and the Administrative Procedures Act. Any other violation of, or dispute regarding the bill, unless the dispute were resolved under the bill's arbitration provisions, could be resolved only by a civil action in court and not by the LCC.

The bill's provisions concerning the business relationship between ADAs and suppliers would apply to agreements in existence on the effective date of the bill, as well as agreements entered into or renewed after that date.

MCL 436.3 et al.

Legislative Analyst: L. Burghardt

### **FISCAL IMPACT**

This bill would codify the existing rules for authorized agents who will become the distributors

of spirits throughout the State. The bill also would require the Commission to promulgate rules for its operating procedures concerning authorized agents.

Currently, operating procedures are determined by the Commission, which is given the authority to change those procedures on a need-be basis. By mandating that these procedures be promulgated as rules, this bill would delay the implementation and increase the administrative cost for the Department of Consumer and Industry Services, as staff would be required to draft and submit the changes. It is difficult to determine the actual amount of these costs as they vary depending on complexity of the rules.

Fiscal Analyst: M. Tyszkiewicz

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.