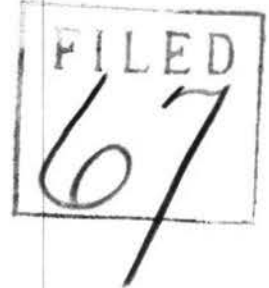


INTOXICATING LIQUOR: Brewers and wholesalers giving money and property to retail dealers for bottle tops redeemed violate Section 3 and Section 13139-z-14.

December 2, 1940

12-5

Honorable C. Roy Noel, Supervisor
Department of Liquor Control
Jefferson City, Missouri



Dear Sir:

This is in reply to your request for our opinion by your letter dated November 28, 1940, which is in the following terms:

"Certain brewers and wholesalers of intoxicating liquor and non-intoxicating beer are employing a practice in St. Louis which appears to be a violation of the Liquor Control Act of the State of Missouri.

Company A employs the following described practice: Persons in possession of bottle caps or tops removed from bottles of Company A's beer, which caps bear the name or trade-mark of Company A, take said tops to a department store, which acts as a cap redemption station, and there in return for each two bottle tops or caps redeemed, receive one trading stamp. The stamps are pasted in a booklet made and distributed for that purpose. When the booklet is filled with 1,000 such stamps, the stamps are exchanged for merchandise or cash. The minimum number of stamps redeemable is 1,000. That number of stamps represents a purchasing power of \$2.50, that is, at various mercantile establishments which cooperate in this program, 1,000 such stamps are exchanged for \$2.50 worth of merchandise,

or for \$2.00 in cash. Said Company A uses the advertising slogan, "Its the Tops".

Company B employs the following described practice: Persons in possession of bottle tops or caps removed from bottles of Company B's beer, which caps bear the name or trade-mark of Company B, take said caps to various mercantile establishments, which act as cap redemption stations and there in return for each 200 caps redeemed receive 25¢ in cash. The minimum number of caps redeemable is 200. Said Company B uses the advertising slogan, "Caps Off to Quality".

Each company advertises its practice, either by posters displayed in establishments licensed to sell by the drink intoxicating liquor or non-intoxicating beer, by small cards, by newspaper advertising, or by all of these methods. The two companies here considered act through the trading stamp company, advertising firms and various individual mercantile establishments.

Please give me your official opinion on the following question: Where wholesalers or brewers of intoxicating liquor or non-intoxicating beer, directly or indirectly through their agents, give money or merchandise to a retail dealer in the sale of intoxicating liquor or non-intoxicating beer, in return for bottle tops or caps redeemed in the manner above described directly or indirectly by said retail dealer --does that constitute a violation of the Liquor Control Act of the State of Missouri?"

"Intoxicating liquor" is defined in Section 17 of the

Liquor Control Act (Laws of Missouri Ex. Sess. 1933-34, page 83, Mo. St. Ann. page 4689, Section 4525g-19) as "alcohol for beverage purposes . . . fermented, malt, or other liquors . . . containing in excess of 3.2% of alcohol by weight."

"Non-intoxicating beer" is defined in Section 13139-z-2 of the said Act (Laws of Missouri 1933-R, page 265, Mo. St. Ann. page 4166, Section 13139-z-2) as "beer . . . having an alcoholic content of more than one-half of one per cent by volume and not exceeding 3.2% by weight."

The use of trading stamps in an ordinary mercantile business other than the liquor traffic is not prohibited by any Missouri statute and is not inherently illegal. In 24 American Jurisprudence, page 474, Section 101, it is said:

"While there is a diversity of opinion, the weight of authority supports the view that trading stamp schemes are not gift enterprises, within the purview of statutes or ordinances relating to such enterprises, inasmuch as the chance element does not enter into such schemes; and especially is this view strengthened where the term is used in connection with the word 'lottery' or 'lotteries,' both of which, as all the courts agree, are terms involving the element of chance or hazard." (See also annotations at 26 A.L.R. 724, 707; 39 A.L.R. 1036; 124 A.L.R. 345.)

But Section 3 of the Liquor Control Act (Laws of Missouri 1939, page 820, Mo. St. Ann. page 4689, Section 4525g-3) dealing with intoxicating liquor, provides:

"Distillers, wholesalers, wine makers, brewers or their employees, officers or agents, shall not, under any circumstances, directly or indirectly, have any finan-

cial interest in the retail business for sale of intoxicating liquors, and shall not, directly or indirectly loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for liquors sold to such retail dealers. Any distiller, wholesaler, wine maker or brewer who shall violate the above provisions of this section, or permit his employees, officers or agents to do so, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished as follows: For the first offense, by a fine of One Thousand Dollars (\$1000.00); for a second offense, by a fine of Five Thousand Dollars (\$5000.00); and for a third offense, the license of said person shall be revoked. All contracts entered into between distillers, brewers and wine makers, or their officers or directors, in any way concerning any of their products, obligating such retail dealers to buy or sell only the products of any such distillers, brewers or wine makers or obligating such retail dealers to buy or sell the major part of such products required by such retail vendors from any such distiller, brewer or wine maker, shall be void and unenforceable in any court in this state." (Italics ours)

And, Section 13139z-14 of the said Act (Laws of Missouri 1935, page 399, Mo. St. Ann. page 4166, Section 13139z-14), applicable to non-intoxicating beer, provides:

"Neither brewers nor manufacturers of non-intoxicating beer, or their employees, officers, agents, subsidiaries or affiliates shall, under any circumstances, directly or indirectly, have any financial interest in the retail business for the sale of such

non-intoxicating beer, nor shall they, directly or indirectly, loan, give away or furnish equipment, money, credit or property of any kind, except ordinary commercial credit for such beer sold to such retail dealers. All contracts entered into between such brewers or manufacturers, or their officers, employees, directors, or agents, in any way concerning any of their products, obligating such retail dealers to buy or sell only the products of any such brewer or manufacturer or obligating such retail dealers to buy or sell the major part of such products, required by such retail vendors from any such brewer or manufacturer, shall be void and unenforceable in any court in this state, and proof of the execution of such contract shall forfeit the license of both the vendor and the vendee." (Italics ours)

The question is not whether the use of trading stamps is illegal, but it is whether the act accomplished with or without their use is a violation of the above quoted statutes. From the facts stated in your said letter, it is clear that the trading stamp company, the various mercantile establishments, and the advertising firms are merely the instrumentalities of the brewers or wholesalers. The benefits accruing from redemption of bottle tops or caps are ultimately paid and provided chiefly, if not entirely, by the brewers and wholesalers.

The law does not prohibit the payment and furnishing of such benefits to the general public, as contradistinguished from retail dealers. However, in one plan the minimum number of stamps redeemable is 1,000; in the other plan the minimum number of caps redeemable is 200. In order to obtain 1,000 stamps, the individual citizen must buy and save stamps from 2,000 bottles of beer. In order to obtain 200 caps, one must buy and save caps from 200 bottles of beer. The

average citizen has no occasion to deal with such quantities of beer. The plans do not readily lend themselves to use by the general public. Only retail (by the drink) dealers or their agents or families, daily selling many bottles of beer and saving caps therefrom, have ready access to a sufficient number of bottle tops or caps to enable them to use the plans described in your letter. The redemption of bottle tops or caps is merely a method by which money or property is placed in the hands of retail dealers in order to encourage them to buy and sell the products of certain brewers and wholesalers.

It cannot rightly be said that used bottle tops or caps have any value. The only value which could possibly be attributed to them is the artificial one so attributed by the brewers and wholesalers in their plan to give money and property to retail dealers. Therefore, the benefits accruing from their redemption are for present purposes without consideration--they are given away. It is elementary that a gift is the transfer of property from one to another without consideration or compensation therefor (Ballentine's Law Dictionary, page 551). Certainly, such money or property is "furnished". The act of the brewers and wholesalers in furnishing and giving away cash directly or indirectly through their agents, to retail dealers in return for bottle tops or for stamps previously exchanged for bottle tops is a clear violation of the prohibition contained in both said Section 3 and said Section 13139-z-14 that they shall not "give away or furnish . . . money . . . to such retail dealers".

The giving away and furnishing to retail dealers by the brewers and wholesalers directly, and indirectly through their instrumentalities, of merchandise in exchange for stamps previously exchanged for bottle tops is a clear violation of the prohibition contained in both Section 3 and Section 13139-z-14, supra, that they shall not "give away or furnish equipment . . . or property of any kind . . . to such retail dealers."

The use of trading stamps and of other stores is at most a mere indirection. It is significant that both

Section 3 and Section 13139-z-14 provide that the things thereby prohibited shall not be done either "directly or indirectly".

The foregoing propositions are so plain that no further citation of authority is needed. However, an analogy is found in a case arising under the Federal Alcohol Administration Act, Amer. Distilling Co. vs. Wisconsin Liquor Co. (1939) 104 Fed 2nd 582, 123 A.L.R. 739. There, the plaintiff, a distiller, sold liquor to defendant, a wholesaler, and the action was for goods sold and delivered. On the defense that the transaction was illegal because plaintiff violated the law, the Seventh Circuit Court of Appeals ruled that even if the plaintiff had violated the law as to competition, the sale was legal. Apposite to this case, the court said at l.c. 742, 743 of 123 A.L.R.:

"A salesman for plaintiff gave one salesman of defendant a traveling bag, and to another salesman of defendant a shirt, a \$5 bill, and, on another occasion, a \$5 or \$10 bill. The reason for such gifts was to induce defendant's salesmen to make a strong effort to sell goods which plaintiff had delivered to defendant under the contract of sale. * * * * Section 205(c), 27 U.S.C.A. makes it unlawful for any person engaged in business as a distiller, brewer, etc., * * * * * by offering or giving a bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer, (a) to induce the trade buyer to purchase from the seller to the exclusion in whole or in part of the products of another seller in commerce; * * * * * The offering or giving of a bonus, premium or compensation is broader than

commercial bribery and need not be for the purpose of directly influencing a buyer to purchase from the seller. It would include a case in which a seller influences an officer or employee of a buyer to push sales of the seller's goods to the exclusion of goods of competitors and thereby indirectly induces the buyer to buy from the seller. It is significant that the section makes it unlawful for a seller 'directly or indirectly' by commercial bribery or by offering or giving of any bonus, premium or compensation to induce any buyer to buy to the exclusion of the goods of competitors, etc."

Similarly, the case of *Re Pennsylvania Whiskey Distributing Corporation* (1939) 256 App. Div. 781, 11 N.Y.S. 2nd, 718, l.c. 721, was decided under Section 101, subdivision 1(c) of the alcoholic beverage control law, which made it "unlawful for a manufacturer or wholesaler . . . to . . . make any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed . . . which may tend to influence such licensee to purchase the product of such manufacturer or wholesaler". Regarding that statute, the Appeals Division of the Supreme Court of N. Y. said, at l.c. 721, of 11 N.Y.S. 2nd:

"The practice at which the statute appears to have been directed was the furnishing of free liquor, in large or small quantities, in order to influence the patronage of retailers."

The statutes of the United States, New York and Missouri are alike in their purpose of prohibiting gifts by brewers or wholesalers to retail dealers, designed to influence patronage. The Missouri statute goes further by

prohibiting the making of these gifts for any purpose. Violation of Section 3 or of Section 13139-z-14, supra, constitutes a legal ground for revocation of the licenses of brewers and wholesalers by the Supervisor of Liquor Control. Section 26 of said Act (Laws of Missouri 1937, page 531, Section 26, Mo. St. Ann. page 4689, Section 4525g-30) which applies to brewers and wholesalers of intoxicating liquor, provides:

"Whenever it shall be shown, or whenever the Supervisor of Liquor Control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the provisions of this act, said Supervisor of Liquor Control shall suspend or revoke the license of said dealer, but the dealer must have ten (10) days' notice of the application to suspend or revoke his license prior to the order of revocation or suspension issuing, with full right to have counsel, to produce witnesses in his behalf in such hearing and to be advised in writing the grounds upon which his license is sought to be revoked or suspended."

Section 13139-z-24 of said Act (Laws of Missouri 1935, page 402, Mo. St. Ann. page 4166, Section 13139-z-24) which applies to brewers and wholesalers of non-intoxicating beer, provides

"Whenever it shall be shown, or whenever the Supervisor of Liquor Control has knowledge that a dealer licensed hereunder, has not at all times kept an orderly place or house, or has violated any of the provisions of this act, said Supervisor of Liquor Control shall revoke the license of said dealer, but the dealer must have ten (10) days' notice of the application to revoke his

license prior to the order of revocation issuing, with full right to have counsel, to produce witnesses in his behalf in such hearing and to be advised in writing of the grounds upon which his license is sought to be revoked."

With reference to a criminal prosecution, Section 26, supra, makes a violation thereof a misdemeanor. Section 13139-z-14 does not itself provide that a violation of its terms is a misdemeanor, but another section of the non-intoxicating beer law, Section 13139-y (Laws of Missouri 1939, page 827, Section 13139-y, Mo. St. Ann. page 4166, Section 13139-y) in part provides:

"Any violation of any of the provisions of this article not otherwise defined, shall be a misdemeanor, and any person guilty of violating any of said provisions, and for which violation no other penalty is by this article imposed, shall, upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than Fifty (\$50.00) Dollars, nor more than One Thousand (\$1,000.00) Dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence. If the person so convicted shall be the holder of any permit or license issued pursuant to the provisions of this article, such conviction by any court of competent jurisdiction shall, without further proceeding, action or order by any court or by the Supervisor of Liquor Control, operate to revoke and forfeit as of the date of such conviction such

permit and all rights and privileges granted thereby, and the holder of such permit and all rights shall not thereafter, for a period of one year after the date of such conviction, be entitled to any permit for any person authorized in this act."

The term "person" includes a corporation (Section 43-a, Laws of Missouri, Ex. Ses. 1933-34, page 91, Mo. St. Ann. page 4689, Section 4525g-49; Section 13139-z-11, Laws of Missouri 1939, page 835, Mo. St. Ann. page 4166, Section 13139-z-11).

Regarding officers of corporations, Section 13139-x of said Act (Laws of Missouri 1935, page 398, Mo. St. Ann. page 4166, Section 13139-x) applicable to brewers and wholesalers of non-intoxicating beer provides:

"It shall be unlawful for any officer, agent, or employèe of any incorporated company, or association, acting for such corporation or association, to authorize or permit such corporation to violate any of the provisions of this article, and any such officer, agent or employèe so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment in the county jail for a term of not more than one year or by a fine of not less than Fifty Dollars (\$50.00) nor more than One Thousand Dollars (\$1000.00) or by both such fine and jail sentence."

It is further noted that Section 3, supra, provides for fines graduated up to \$5,000.00 for violations.

CONCLUSION

Where wholesalers or brewers of intoxicating liquor or non-intoxicating beer give money or merchandise directly, or indirectly through their agents, to a retail dealer in the sale of intoxicating liquor or non-intoxicating beer, in return for bottle tops or caps redeemed in the manner above described directly or indirectly by said retail dealer, the brewers and wholesalers are guilty of a violation of Section 3 and Section 13139-z-14 of the Liquor Control Act of the State of Missouri.

Respectfully submitted,

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APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

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