

# Department of Alcoholic Beverage Control

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The Department of Alcoholic Beverage Control (ABC) is a constitutionally-authorized agency established in 1955 (section 22 of Article XX, California Constitution). A division of the Business, Transportation and Housing Agency, ABC is responsible for the enforcement of the Alcoholic Beverage Control Act (ABC Act), Business and Professions Code section 23000 *et seq.*, and its regulations, which are codified in Divisions 1 and 1.1, Title 4 of the California Code of Regulations (CCR). The Act delegates to ABC the exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages in California. In addition, the ABC Act vests the Department with authority, subject to certain federal laws, to regulate the importation and exportation of alcoholic beverages across state lines.

ABC is authorized to investigate violations of the Business and Professions Code and other statutes which occur on premises where alcohol is sold, and may deny, suspend, or revoke alcoholic beverage licenses. Approximately 71,200 retail licenses operate under this authority. ABC's disciplinary decisions are appealable to the Alcoholic Beverage Control Appeals Board. Many disciplinary actions taken by ABC, as well as other information concerning the Department, are printed in liquor industry trade publications such as *California Beverage News* and *Beverage Industry News*.

The Director of ABC is appointed by, and serves at the pleasure of, the Governor. ABC divides the state into two divisions (northern and southern), with assistant directors in charge of each division. The Department is further divided into 24 field offices, which are headed by district administrators or supervisors and staffed by investigators, licensing representatives, and support personnel. ABC's investigators, who have full peace officer powers to enforce the ABC Act, the California Penal Code, and the Department's regulations, are responsible for investigating applicants for licenses and complaints filed against licensees and, when necessary, making arrests for statutory violations. In addition to the district offices' investigations, the Department operates a Special Operations Unit consisting of 22 special investigators who primarily assist district offices and other law enforcement agencies in undercover operations involving vice and criminal activities, as well as high-profile operations at large events.

ABC dispenses various types of licenses to qualified persons and legitimate businesses to sell, manufacture, or other-

wise deal in alcoholic beverages. "On-sale" refers to a license to sell alcoholic beverages which will be bought and consumed on the same premises. "Off-sale" refers to a license to sell alcoholic beverages which will not be consumed on the premises. Population based quotas determine the number of general liquor licenses issued each year per county; in 1997, the legislature applied similar quotas to beer and wine licenses.

## MAJOR PROJECTS

### **ABC Proposes Changes to Minor Decoy Regulations**

On September 24, ABC published notice of its intent to amend section 141, Title 4 of the CCR, which sets forth minimum requirements for minor decoy programs which may be

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In *Proviso Corporation v. Alcoholic Beverage Control Appeals Board*, 7 Cal. 4th 561 (1994), the California Supreme Court upheld the constitutionality of local law enforcement's use of

minors as decoys in undercover sting operations, despite the fact that a minor is committing a crime when attempting to purchase alcoholic beverages. The court held that the use of minors as decoys is not entrapment and does not violate due process requirements. [14:2&3 CRLR 118] Immediately following the *Proviso* case, the liquor industry sponsored AB 3805 (Richter) (Chapter 1205, Statutes of 1994), which required ABC to adopt guidelines to which local law enforcement agencies must adhere when using minors as decoys in sting operations. [14:4 CRLR 109] ABC complied with the law in 1995 by adopting section 141, Title 4 of the CCR. [15:4 CRLR 137] The regulation currently requires the decoy to be less than 20 years of age and to display an appearance which could generally be expected of a person under 21 years of age. The decoy must either carry his/her own identification showing his/her correct date of birth, or carry no identification. A decoy who carries identification must present it upon request to any seller of alcoholic beverages, and must answer truthfully any questions about his/her age. Further, following any completed sale, the law enforcement officer directing the decoy must, not later than the time a citation (if any) is issued, make a reasonable attempt to enter the licensed

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premises and have the minor decoy who purchased alcoholic beverages make a face-to-face identification of the alleged seller of the alcoholic beverage. Recent court decisions, including *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board*, 67 Cal. App. 4th 575 (1998), require "strict adherence" to the rules adopted by ABC; local law enforcement's failure to fully comply with the rules is a defense to any disciplinary action brought by ABC under Business and Professions Code section 25658. [16:1 CRLR 126-27]

ABC is proposing changes to section 141 in response to the *Acapulco* decision and to problems that have come up both in the field and before the Alcoholic Beverage Control Appeals Board. ABC's proposed changes would clarify that section 141 contains the only standards applicable to minor decoy programs; amend section 141(a) to clarify that the purpose of minor decoy programs is to reduce sales of alcoholic beverages "to minors" (and not to reduce alcoholic beverage sales overall); amend section 141(b)(2) to require the decoy to display the "physical" appearance which could generally be expected of a person under 21 years of age; and clarify section 141(b)(4), which requires a decoy to answer truthfully any questions about his/her age, by stating that the decoy may comply with this requirement by presenting identification showing his/her own correct date of birth.

In direct response to the *Acapulco* decision, ABC also proposes to amend section 141(b)(5) to state as follows: "Following any completed sale, but not later than the time a citation, if any, is issued, a peace officer shall make a reasonable attempt to have the minor decoy who purchased alcoholic beverages identify or confirm the identity of the alleged seller of the alcoholic beverages to a peace officer and to give the alleged seller a reasonable opportunity to see and recognize the minor decoy." This amendment removes existing requirements that the peace officer directing the decoy "enter the licensed premises" and have the minor decoy make "a face-to-face identification" of the alleged seller. In *Acapulco*, the court ordered the withdrawal of an accusation because the undercover peace officer who witnessed the illegal transaction failed to have the decoy make the required "face-to-face" identification; the proposed rule change would permit more flexibility in the decoy's identification of the alleged seller. Finally, ABC proposes to amend section 141(c), to clarify that failure to comply with the section is a defense to any action brought "by the Department" pursuant to section 25658; this amendment implements *People v. Figueroa*, 68 Cal. App. 4th 1409 (1999), which held that noncompliance with section 141 is a defense only to an ABC disciplinary action, not to a misdemeanor charge of selling alcohol to a minor. [16:2 CRLR 108-09]

At this writing, ABC is scheduled to hold a public hearing on its proposed amendments to section 141 on November 8 in Sacramento.

## LEGISLATION

**AB 749 (Wesson)**, as amended August 26, makes a number of changes to the ABC Act, including the following:

- Previously, a first violation of the provision prohibiting attempted purchase of alcohol by a minor was punishable by a fine of not more than \$100; for subsequent violations, the penalty was a fine of \$250 or community service. This bill increases the penalty for a first violation by requiring, as an alternative to or in combination with the fine, 24-32 hours of community service, as determined by the court; such community service shall be performed at an alcohol or drug treatment program or facility, if available in the area where the violation occurred or where the person resides.

- AB 749 establishes a penalty for a second or subsequent offense of a minor purchasing alcohol or consuming alcohol in an on-sale premises: a fine of not more than \$500 or community service as determined by the court. Again, the bill expresses the legislature's intent that the community service be performed at an alcohol or drug treatment program or facility or at a county coroner's office, if available in the area where the violation occurred or where the person resides.

- AB 749 provides that a second or subsequent violation of the provision prohibiting the presentation of fraudulent information for the purpose of obtaining alcohol is punishable by a fine of not more than \$500 and/or community service as the court deems just; again, the community service shall be performed at an alcohol or drug treatment program or facility, if available in the area where the violation occurred or where the person resides.

- The ABC Act makes it a misdemeanor for a person under the age of 21 years to have in his/her possession any alcoholic beverage on any street or highway or in any public place or place open to the public. AB 749 makes a first violation of that provision punishable by a fine of at least \$250 or 24-32 hours of community service; a second or subsequent violation is a misdemeanor punishable by a fine of not more than \$500 and 36-48 hours of community service. Any grant of probation shall include the fine and not less than 50 hours of community service.

- Existing law authorizes the state Department of Justice to obtain a court order for the destruction of drug paraphernalia and controlled substances. This bill allows ABC to directly request and receive a court order to seize and destroy drug paraphernalia and controlled substances found at businesses licensed by ABC.

- Finally, this bill requires a retailer licensed by ABC who sells or rents video recordings with box covers depict-

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ing "harmful matter," as defined in Penal Code section 313, to create within his/her business establishment an area labeled "adults only" for the placement of those video recordings and any materials that advertise those video recordings. The licensed retailer must make a reasonable effort to arrange the video recordings in this area in such a way that minors may not readily access the video recordings or view the video box covers. Failure to comply with this provision is an infraction.

The Governor signed AB 749 on October 7 (Chapter 787, Statutes of 1999).

**AB 216 (Wesson)**, as amended August 16, would have established a permanent funding mechanism for ABC's GALE and LEAD Programs by redirecting to the ABC Fund the penalty revenues obtained from licensees that now are deposited in the general fund. ABC's Grant Assistance to Local Law Enforcement (GALE) program distributes grants, awarded on a competitive basis and generally in an amount of less than \$100,000, to local governments to assist their law enforcement agencies in training personnel to police and eliminate crime and nuisance problems associated with problematic licensed establishments. The Licensee Education on Alcohol and Drugs (LEAD) program provides training programs for ABC licensees and their employees on how to identify minors, the use and types of false identification, and existing criminal and administrative penalties for licensees and their employees who are cited for the sale of alcohol to minors.

AB 216 would have redirected revenues derived from the fines imposed upon licensees who violate the provisions of the ABC Act from the general fund to a new "Alcoholic Beverage Control Special Enforcement and Training Fund" created by the bill, and would have required all funds deposited into the Enforcement and Training Fund to be allocated, upon appropriation by the legislature, as follows: (1) not less than 75% to local law enforcement agencies pursuant to competitive grants approved by ABC; and (2) the balance to ABC for remedial licensee training and costs incurred in administering the local law enforcement grants. On September 27, Governor Davis vetoed AB 216, noting that the bill "would result in a loss of \$2.7 million available to the general fund, which was not reflected in the 1999 Budget Act."

**SB 340 (Baca)**, as amended August 16, amends the ABC Act in three ways. First, it amends Business and Professions Code section 25658, regarding minor decoy programs, to require any local law enforcement agency using a minor decoy to notify licensees of the results of the program within 72 hours. Second, it amends section 25658.1, which authorizes ABC to revoke a license for a third violation of section 25658 (which prohibits the sale of alcoholic beverages to minors) within any 36-month period, to clarify that no violation of

this provision may be considered for this purpose unless it has become final.

The ABC Act prohibits a clerk from selling alcoholic beverages unless the clerk executes, under penalty of perjury, on the first day he/she makes a sale, an application and acknowledgment on a form prepared by ABC that includes a summary of the requirements and prohibitions in the ABC Act. This bill allows nonprofit organizations or licensees to obtain videotapes and other training materials from ABC on its LEAD program and provide these materials to licensees regarding the sale of alcoholic beverages. The videotapes and training materials may be updated periodically and may be provided in English and other languages; when made available by the Department, they shall be provided at cost. SB 340 was signed by the Governor on October 7 (Chapter 787, Statutes of 1999).

**SB 810 (Costa)**. The "tied-house laws" separate the alcoholic beverage industry into three component parts: manufacturer, wholesaler, and retailer. Generally, other than through exemptions granted by the legislature, the holder of one type of license is not permitted to do business as another type of

licensee within the three-tiered system. One exception to the "tied-house laws" permits an alcoholic beverage manufacturer to purchase beer and wine advertising space from on sale retail licensees that own certain arenas in Orange and Sacramento counties. As amended September 3, SB 810 would expand this tied-house exception to include the on-sale licensee that owns the Centennial Garden Arena in Bakersfield, a

fully enclosed arena with a fixed seating capacity in excess of 8,500; the Walt Disney Company, which is building its new "California Adventure" theme park just south of Disneyland's main entrance in Anaheim; and the proprietor of the National Orange Show, a public benefit nonprofit organization which conducts the annual Citrus Fruit Fair and other events through the course of the year. The Governor signed SB 810 on October 10 (Chapter 937, Statutes of 1999).

**SB 587 (Burton)**, as amended April 5, provides that any provision in an agreement between a beer manufacturer and a beer wholesaler for the sale and distribution of beer in California, which restricts venue to a forum outside this state and in the state of incorporation of the beer manufacturer, is void with respect to any claim arising under or relating to the agreement involving a beer wholesaler operating within California. SB 587 was signed by Governor Davis on October 8 (Chapter 860, Statutes of 1999).

**AB 1407 (Wesson)**, as amended September 3, allows a retail off-sale licensee with annual United States auction sales revenues of at least \$5 million to sell wine at an auction and deliver that wine to any purchaser at the auction from the

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vendor's licensed premises or any other storage facility under specified conditions.

Business and Professions Code section 25503.2 allows any winegrower, wine blender, beer manufacturer, brandy manufacturer, distilled spirits manufacturer, distilled spirits manufacturer's agent, rectifier, distilled spirits wholesaler, and beer and wine wholesaler, or their authorized agents, to perform certain services for off-sale retail licensees at or on the premises of the off-sale retail licensee with the licensee's permission relating to stacking, rotating, servicing, and taking inventory of stock. This bill expands the permitted services to include rotating or rearranging the brand(s) of wine or distilled spirits owned or sold by the licensee on, in, or among permanent shelves, permanent fixtures, refrigerated boxes, or floor or other displays or display pieces; stocking the brand(s) onto or into floor or other displays or display pieces; and stocking the brand(s) onto or into permanent shelves, permanent fixtures, or refrigerated boxes "for the sole purpose of the introduction of new products, the resetting or rearrangement of existing products, or the setting or arranging of new stores" (see LITIGATION). This bill was signed by the Governor on October 6 (Chapter 699, Statutes of 1999).

**SB 607 (Chesbro)**, as amended August 25, would create a new "winegrower-cafe license"—a retail, on-sale beer and wine license operated as a cafe and owned, in whole or in part, directly or indirectly, by any winegrower, any shareholder, equity owner, officer, director, or agent of the winegrower, any person holding any interest in those persons or the business operated by those persons, or any relative of the first or second degree of any of those persons, where the winegrower is licensed pursuant to Business and Professions Code section 23356. A winegrower-cafe may sell all beer and wine to consumers for consumption on the premises at a bona fide eating place, as defined in section 23038, operated by or for the licensee located on or off the winegrower's premises.

Under the bill, a winegrower-cafe must purchase from licensed wholesalers all beer and wine brands sold to consumers for consumption on the premises at a bona fide public eating place. No more than 15% of those wine brands may be produced or bottled by, produced for, or produced and packaged for the winegrower. A winegrower who owns any interest in a winegrower-cafe license and also owns an interest in an on-sale license other than a winegrower-cafe license shall purchase all beer and wine at the other retail premise from a licensed wholesaler. Finally, no winegrower, either alone or in combination with any of the persons specified in this section, may, in the aggregate, hold any of the interests specified herein in more than six winegrower-cafe licenses. [A. GO]

**AB 1525 (Lempert)**, as amended in May 1999, would create another new ABC license—the "licensed brewer-restaurant," defined as a beer manufacturer authorized to manufacture beer and to sell beer, wine, and distilled spirits to consumers at a restaurant on the premises that is operated by and for the licensee. AB 1525 would (1) impose minimum brewing restrictions on each facility; (2) authorize the brewer-res-

taurant licensee to sell beer manufactured by or produced for the licensee to both the public, for off-sale consumption, and to licensed wholesalers (all other alcoholic beverages purchased by a brewer-restaurant licensee must be purchased from a licensed wholesaler); (3) prohibit a brewer-restaurant licensee, or any officer, director, agent, or other person holding not more than 20% interest in the licensed business, from holding any interest in any other type of alcoholic beverage license in this state; (4) require the brewer-restaurant licensee to sell an equal number of canned, bottled, or draft beer products that are commercially available from licensed wholesalers to the number of beer products offered for sale by the manufacturer at the restaurant; and (5) prescribe that the original and annual fees for a brewer-restaurant license are the same as the fees for on-sale general licenses, and that the concentration limitations imposed upon on-sale general licenses do not apply. [A. GO]

**AB 377 (Wesson)**. Business and Professions Code section 25600(a), one of the state's "tied-house laws," prohibits ABC licensees from "directly or indirectly" giving any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage, except as provided in regulations adopted by ABC. Section 25600(b) states that "no rule of the department may permit a licensee to give any premium, gift, or free goods of greater than inconsequential value in connection with the sale or distribution of beer. With respect to beer, premiums, gifts, or free goods, including advertising specialties that have no significant utilitarian value other than advertising, shall be deemed to have greater than inconsequential value if they cost more than twenty-five cents (\$0.25) per unit, or cost more than fifteen dollars (\$15) in the aggregate for all those items given by a single supplier to a single retail premises per calendar year."

As amended in May 1999, this bill would provide that no ABC regulation may permit a licensee to offer any premium, gift, or free goods to a consumer in such a way that would encourage the purchase or consumption of alcoholic beverages by minors and that is conditioned on the purchase of an alcoholic beverage. This bill was introduced following ABC's January 1999 amendment of section 106, Title 4 of the CCR, which specifically prohibits the giving of any premium, gift, or goods through any type of sweepstakes or other promotion if the value of the premium, gift, or goods exceeds 25 cents with respect to beer, \$1 with respect to wine, or \$5 with respect to distilled spirits and the related litigation that resulted from the Department's position (see LITIGATION). [16:2 CRLR 104-05] With respect to this issue, the author of this bill states that he seeks to affirm ABC's previous policy regarding consumer promotions, in that they should not be permitted to condition the awarding of gifts on the purchase of alcohol. [S. GO]

**AB 220 (Washington)**, as amended in April 1999, would establish the Community-Based Alcohol Education Account within the ABC Fund to finance community-based alcohol education programs for youth. ABC would make grants to

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cities and counties for alcohol education programs. The bill would require ABC to give preference in awarding grants to cities and counties with more than 700 retail liquor licenses within their boundaries and to other cities and counties with the highest demonstrated need, as indicated in their applications. [A. Appr]

**AJR 13 (Wiggins)**, as introduced in April 1999, would memorialize Congress to support the public's right to become informed regarding the health effects of wine consumption based on the latest scientific findings as approved by the U.S. Bureau of Alcohol, Tobacco and Firearms, and to oppose a tripling of the excise tax on wine as being unwarranted, harming the California wine industry, and unnecessarily eroding the industry's ability to compete with foreign producers in the global and domestic marketplace. [A. GO]

**H.R. 2031 (Scarborough)**, the "Twenty-First Amendment Enforcement Act," is federal legislation that would give federal courts jurisdiction to enforce state laws relating to the interstate transportation of alcoholic beverages from manufacturers to purchasers. Named after the constitutional amendment that repealed Prohibition and gave states the authority to regulate alcohol sales, H.R. 2031 would allow state attorneys general to seek federal court orders barring interstate sales of liquor to consumers within their state if there is reasonable cause to believe that the shipment violates state law. Proponents of the bill claim it is aimed at curbing unlawful Internet sales and shipments of alcohol products.

The bill would have little effect on California and about 20 other states which permit limited interstate shipments of alcohol, but it would chill expansion of those laws to other states. Although it appears to simply permit states to enforce their liquor laws in federal court, the bill pits the interests of small wineries (including California's wine industry) against those of liquor wholesalers and distributors, who are losing significant business because of interstate Internet sales. While wholesalers and distributors support the bill, claiming it will help stop minors from purchasing alcohol over the Internet, wineries oppose it because they are increasingly profiting from direct Internet sales to out-of-state purchasers. Disputing the proponents' argument that the bill will curb underage drinking, the wine industry notes that the bulk of Internet alcohol sales appears to be high-end wines and other hard-to-find products special-ordered by restaurants and connoisseurs. Law enforcement authorities say the bill would in no way restrict legitimate online commerce in alcohol or any product. On August 3, the House of Representatives passed H.R. 2031 by a 310-112 vote; the Senate has passed similar legislation, but it is attached to S. 254, a juvenile justice bill which is currently stalled in conference committee.

## LITIGATION

ABC's recent regulatory ban on most alcohol-related sweepstakes promotions has prompted litigation against the Department. Business and Professions section 25600 broadly prohibits licensees from "directly or indirectly" offering "any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage," except pursuant to ABC regulations, and prohibits ABC from adopting any regulation permitting beer manufacturers and retailers from offering prizes worth more than 25 cents to consumers. Section 106, Title 4 of the CCR, contains ABC's standards and restrictions on the advertising and merchandising of alcoholic beverages. In November 1998, ABC amplified this section by adopting—on an emergency basis—new subsection 106(j), Title 4 of the CCR, which clarifies that "[n]othing in [section 106] shall be construed to authorize the giving of any premium, gift or goods of any sort, whether by way of sweepstakes, drawings, prizes, cross-

merchandising promotions with a non-alcoholic beverage product or products or any other method" if the value of the premium, gift, or goods given to an individual exceeds 25 cents with respect to beer; ABC's permanent adoption of section 106(j) was approved by the

Office of Administrative Law in

January 1999. The promulgation of section 106(j) caused confusion in the industry and disrupted several holiday and Super Bowl promotions offering prizes to beer drinkers who enter and win a sweepstakes contest. [16:2 CRLR 104-05; 16:1 CRLR 122-23]

In February 1999, Coors challenged the validity of section 106(j); as a result, ABC's enforcement of the new rule has been stayed pending resolution of the litigation. In *Coors Brewing Company v. Stroh*, No. C0311851 (Third District Court of Appeal), Coors challenges section 106(j) as being inconsistent with Business and Professions Code section 25600 and as "grossly exceeding" the authority of the Department. Coors alleges that ABC has abandoned its longstanding interpretation of section 25600 (under which it allegedly issued a formal policy statement expressly permitting licensees to offer sweepstakes prizes). Coors further contends that the "prize" offered in its two major sweepstakes promotions—"or, more precisely, for the vast majority of contestants, the mere chance to win a prize"—is not a "premium, gift, or free goods" which ABC is authorized to ban under section 25600. Coors argues that the rewards in its sweepstakes promotions are "prizes" (defined by Coors as any item of value offered for winning in a game of chance), and distinguishes "prizes" from "premiums" (defined by Coors as something extra given for the purchase of a product), "gifts" (defined by Coors as something voluntarily transferred by one person to another without compensation), and

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“free goods” (defined by Coors as tangible movable personal property having intrinsic value, usually excluding money). Coors also emphasizes that entry in its sweepstakes promotions is not conditioned upon the purchase of alcoholic beverages, and contends that if ABC wants to prohibit sweepstakes, it must seek that authority from the legislature.

In its April 1999 response filed on behalf of ABC, the Attorney General’s Office argues that Coors is lifting phrase “premium, gift, or free goods” out of context from a statute which broadly prohibits ABC licensees from “directly or indirectly” giving “any” premium, gift, or free goods “in connection with” the sale or distribution of any alcoholic beverage. ABC notes that under the California Constitution and state law, one of its primary goals in regulating the manufacture, sale, and distribution of alcohol is “to promote temperance in the use and consumption of alcoholic beverages,” and that all provisions of the ABC Act “shall be liberally construed” for the accomplishment of this purpose (Business and Professions Code section 23001).

On May 21, Coors filed its reply, arguing that the legislature “impliedly approved the Department’s prior interpretation that sweepstakes prizes do not violate section 25600” because “the legislature has repeatedly amended section 25600 without challenging the Department’s longstanding published policy of permitting sweepstakes.” Further, Coors argued that if ABC’s current interpretation of section 25600 is correct, “then [it] has been violating its governing statute for almost two decades.” At this writing, the court has not yet heard oral argument on Coors’ petition.

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, 71 Cal. App. 4th 1518 (May 11, 1999), the Fourth District Court of Appeal reversed a decision of the ABC Appeals Board and found that the liquor industry practice commonly called “trade sampling” or “trade spending”—in which a liquor manufacturer purchases its own product at a bar or other drinking establishment and then offers customers the opportunity to exchange its product for whatever they are drinking—is illegal in California.

In this matter, approximately 20 employees of Anheuser-Busch entered a bar in Riverside, bought Anheuser products, and exchanged them for other brands being drunk by patrons—including two ABC undercover investigators. ABC challenged the practice, but the ABC Appeals Board found no violation of statute or regulation. ABC sought review pursuant to Business and Professions Code section 23090, and the Fourth District reversed the Appeals Board.

The court outlined the rather complex statutory scheme. As noted above, Business and Professions Code section 25600, part of the state’s “tied-house” law, prohibits licensees from giving “any premium, gift, or free goods in connec-

tion with the sale or distribution of any alcoholic beverage,” except as provided in regulations adopted by ABC. The court identified two relevant regulations: (1) section 106, Title 4 of the CCR, which authorizes licensees to give certain gifts to consumers, but not gifts of alcoholic beverages; and (2) section 52(b), Title 4 of the CCR, which prohibits gifts of alcoholic beverages “in connection with the sale of any alcoholic beverage” (but may permit them if not “in connection with the sale of any alcoholic beverage”). Further, Business and Professions Code section 23386 authorizes a manufacturer to give away “samples” of alcoholic beverages in accordance with rules adopted by ABC. ABC has adopted section 52(a), Title 4 of the CCR, but section 52(a) permits a manufacturer to give “samples” only to other licensees, not consumers. Thus, the Fourth District framed the issue as follows: “When Busch provides its beer products to consumers in a retail establishment, is it giving a ‘gift’ of alcoholic beverages as apparently permitted by rule 52(b), or a gift forbidden by rule 106? Or is it providing a ‘sample,’ forbidden by rule 52(a)?”

After consulting the dictionary, the court ultimately decided that Anheuser-Busch was providing a “sample” of alcoholic beverages to consumers, which is unlawful under section 52(a). The court refused to equate “consumer samples” with “licensee samples,” reiterating that legislative goal behind the ABC Act is “the promotion of temperance.” It also refused to analogize “trade sampling” with legal “on-premises tasting” at wineries and breweries. “We do not think this pleasant practice—which has as much to do with tourism as with drinking—can be equated with the mass distribution of free alcoholic beverages at other, unregulated locations.” Thus, the Fourth District granted ABC’s petition for writ, annulled the Appeals Board’s order dismissing the case, and remanded the matter for further proceedings. On August 11, the California Supreme Court denied the Appeals Board’s petition for review.

In *Korean-American Grocers Association, et al. v. City of Los Angeles*, No. 99-08560 (filed August 23 in U.S. District Court in Los Angeles), a coalition of business groups—Korean American Grocers Association, Mexican-American

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Grocers Association, California State Package Store and Tavern Owners Association, California Beverage Merchants, Southern California Business Association, California Beer and Beverage Distributors, Outdoor Advertising Association of America, Inc., Beer Institute, and Wine Institute—challenged Los Angeles Ordinance 172213, which added Article 5.2.6 to Chapter IV of the Los Angeles Municipal Code. The ordinance, then scheduled to become effective on October 23, prohibits the placement or maintenance of signs, posters, graphic displays, and any other form of advertising of alcoholic beverages in “publicly visible locations” within 1,000 feet of any residential zone, residential use, school, religious institution,

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entertainment park, youth center, or public park or playground, subject to a number of exemptions. A "publicly visible location" includes offsite and onsite signs, billboards, roof signs, wall signs, pole signs, and marquee signs. Plaintiffs challenge the ordinance on two major grounds: (1) it violates their commercial speech rights under the first amendment, and (2) ABC's sweeping authority over alcohol regulation preempts the City of Los Angeles from enforcing its ordinance. Plaintiffs seek injunctive relief banning the City from enforcing the ordinance.

On September 10, the City of Los Angeles moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(6), arguing that none of the plaintiffs have demonstrated that they have suffered or will suffer any injury as a result of the City's enactment of the ordinance, such that they have no standing to pursue the action. The City called the complaint "all conclusion and no fact," and alleged that only three of the nine plaintiffs even reside in the City. Los Angeles also argued that plaintiffs' preemption claim is subject to a special 90-day statute of limitations in Government Code section 65009(c)(2). Finally, the City argued that the federal court should abstain from deciding this case because resolution of the state

law claims—that is, whether ABC's authority preempts Los Angeles from regulating alcohol advertising (and whether that claim was timely filed)—would eliminate the need for the federal court to address the constitutional claim. In its motion, the City stated: "We feel obligated...to bring to the court's attention that identical preemption claims were raised and rejected in an action challenging a similar ordinance enacted by the City of Oakland" in *Eller Media Company v. City of Oakland*, No. C98-2237 (Nov. 25, 1998). There, a private billboard company alleged that a similar Oakland ordinance was preempted by the ABC Act; the court disagreed and held in an unpublished decision that the ordinance "does not directly regulate the purchase or sale of alcoholic beverages....Instead, it is designed to influence the behavior of minors by regulating a separate arena of entitlements: the right to place billboard advertisements in specified locations throughout the City."

Although oral argument in the matter was scheduled for October 18, U.S. District Court Judge Spencer Letts canceled the hearing and said he would issue a ruling based on the filed pleadings. On October 19, Judge Letts issued an order in which he denied the City's motion to dismiss the case, failed to enjoin the City from enforcing the ordinance, and scheduled another hearing for December 17. On October 25, the City announced that it would enforce the ordinance; adver-

tisers, however, say they will not remove their signs and will hold the City liable for damages if the City forces them to remove the signs and the court ultimately rules in their favor.

In *Lucky Stores, Inc. v. Department of Alcoholic Beverage Control*, No. AB-7303, Lucky appealed a 15-day suspension of its off-sale general license for accepting free services from a licensed wine, beer, and spirits wholesaler in violation of Business and Professions Code section 25504; specifically, ABC found that Lucky—in permitting holders of wholesaler and importer licenses to remove bottles of wine and distilled spirits sold by them to Lucky and place them on Lucky's shelves—had "solicited, accepted, or permitted to be accepted on its behalf, stocking and shelving of alcoholic beverages in violation of section 25503.2 of the Business and Professions Code." Section 25503.2 prohibits "the removal of any brand or brands of alcoholic beverages, except beer, which are owned or sold by the licensee performing the service,

from the storeroom or other place belonging to an off-sale retailer for the purpose of replacing alcoholic beverages on or restocking shelves or refrigerated boxes." In response, Lucky challenged the constitutionality of section 25503.2, contending that it violates the equal protection

**Plaintiffs challenge the ordinance on two major grounds: (1) it violates their commercial speech rights under the first amendment, and (2) ABC's sweeping authority over alcohol regulation preempts the City of Los Angeles from enforcing its ordinance.**

provisions of the state and federal constitutions because it permits licensed suppliers to remove beer or malt-based alcoholic beverage products from a retailer's storeroom in order to stock permanent shelves and refrigerated boxes, but prohibits licensed suppliers from performing those same services with respect to wine and/or spirits products. Lucky argued there is no rational basis for the different treatment of beer on the one hand and wine/spirits on the other, with respect to the performance of stocking and shelving services.

In March 1999, the ABC Appeals Board noted that it is constitutionally precluded from declaring section 25503.2 or any other statute unconstitutional or unenforceable, and declined to review Lucky's contention. The Fourth District Court of Appeal summarily denied Lucky's petition for writ of mandamus and, on June 3, 1999, the California Supreme Court denied Lucky's petition for review. However, in response to this case, the legislature passed AB 1407 (Wesson) (Chapter 669, Statutes of 1999), which has amended section 25503.2 to specify that winegrowers, wine blenders, beer manufacturers, brandy manufacturers, distilled spirits manufacturers, distilled spirits manufacturer's agents, rectifiers, distilled spirits wholesalers, and beer and wine wholesalers, or their authorized agents, may perform stocking and shelving services for off-sale retail licensees at or on the premises of the off-sale retail licensee with the licensee's permission (see LEGISLATION).