

No. 11-2456

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

MISSOURI BEVERAGE COMPANY, INC.,

Plaintiff/Appellant,

v.

SHELTON BROTHERS, INC.,

Defendant/Appellee.

Appeal from the United States District Court  
for the Western District of Missouri, Central Division  
Honorable Nanette K. Laughrey

**BRIEF OF AMICI CURIAE  
MISSOURI BEER WHOLESALERS ASSOCIATION  
AND  
MISSOURI WINE AND SPIRITS ASSOCIATION  
IN SUPPORT OF  
APPELLANT MISSOURI BEVERAGE COMPANY, INC.  
SEEKING REVERSAL**

Paul V. Herbers, MO Bar #28536  
COOLING AND HERBERS, P.C.  
1100 Main Street  
Suite 2400  
Kansas City, MO 64105  
Telephone: (816) 477-0777  
Facsimile: (816) 472-0790  
E-Mail: [pherbers@coolinglaw.com](mailto:pherbers@coolinglaw.com)

John Gianoulakis, MO Bar #18194  
David A. Castleman, MO Bar #47946  
KOHN, SHANDS, ELBERT,  
GIANOULAKIS & GILJUM, LLP  
1 N. Brentwood Blvd.  
St. Louis, MO 63105  
Telephone: (314) 241-3963  
Facsimile: (314) 898-4327  
E-Mail: [jgianoulakis@KSEGG.com](mailto:jgianoulakis@KSEGG.com)

ATTORNEYS FOR AMICI CURIAE

## **DISCLOSURE OF CORPORATE INTERESTS**

The first amicus curiae, Missouri Beer Wholesalers Association (“MBWA”), respectfully states to the Court as follows: (1) there is no parent corporation and no publicly held corporation owning ten percent or more of the stock of MBWA; and (2) there is no parent corporation, subsidiary, or affiliate of MBWA, which issues shares to the public.

The second amicus curiae, Missouri Wine and Spirits Association (“MWSA”), respectfully states to the Court as follows: (1) there is no parent corporation and no publicly held corporation owning ten percent or more of the stock of MWSA; and (2) there is no parent corporation, subsidiary, or affiliate of MWSA, which issues shares to the public.

**TABLE OF CONTENTS**

Disclosure of Corporate Interests..... 1

Table of Authorities .....3

Statement of Amici Curiae.....5

    Fed. R. App. P. 29(c)(4) .....5

    Fed. R. App. P. 29 (c)(5) .....5

Summary of Argument .....6

Argument.....8

    A. The Missouri Legislature Properly Exercised Its Broad Power to Protect Liquor Wholesale Relationships as Franchises.....8

    B. Missouri’s Fundamental Policy, Repeatedly Recognized, Is to Protect Wholesalers ..... 11

    C. Appellant’s Statutory Construction Gives Effect to the Legislative Intent and to All Provisions of the Statute..... 13

Suggestion for Relief .....17

Request for Participation in Oral Argument .....17

Certificate of Compliance .....19

Certificate of Service .....20

**TABLE OF AUTHORITIES**

Cases

*Brown-Forman Distillers Corp. v. McHenry*,  
566 S.W.2d 194, 197 (Mo. 1978) ..... 10-11, 13, 15-16

*C&J Delivery, Inc. v. Emery Air Freight Corp.*,  
647 F.Supp. 867 (E.D.Mo. 1986)..... 11

*Crowley Beverage Co., Inc. v. Miller Brewing Co.*,  
862 F.2d 688 (8<sup>th</sup> Cir. 1988)..... 8

*Electrical and Magneto Service Co., Inc. v. AMBAC Intern. Corp.*,  
941 F.2d 660, 663 (8<sup>th</sup> Cir. 1991)..... 11

*G. Heileman Brewing Co., Inc. v. Stroh Brewery Co.*,  
521 A.2d 1225, 1227-28 (Md. 1987) ..... 10

*Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885 (2005)..... 8

*High Life Sales Co. v. Brown-Forman Corp.*,  
823 S.W.2d 493 (Mo. 1992) ..... 12, 15-16

*Huch v. Charter Communications, Inc.*,  
290 S.W.3d 721, 725 (Mo. 2009) ..... 12

*Koetting v. State Board of Nursing*,  
314 S.W.3d 812 (Mo. App. 2010) ..... 14

*North Dakota v. United States*, 495 U.S. 423, 110 S.Ct. 1986, 1992 (1990) ..... 8

*State ex. rel. Ashcroft v. Wahl*, 600 S.W.3d 175, 180-181 (Mo.App. 1980)..... 11

*Tuft v. City of St. Louis*, 936 S.W.2d 113, 117 (Mo. App. 1996) ..... 14

Statutes

815 Ill. Comp. Stat. Ann. 720/2 (West 2009).....9

Md. Code, Art. 2B, §17-101(a).....10

Mich. Comp. Laws §436.1305(1)(a) and (b) (2011) .....9

Mo.Rev.Stat. §§407.400 through 407.420,  
in Chapter 407 on Merchandising Practices ..... 10-11, 13. 15-16

R.I. Gen. Laws §3-13-2(b)(2) and (3)(1998) .....9

Va. Code §4.1-400 (1993) .....9

Wis. Stat. §135.066(1) (2011).....9

## **STATEMENT OF AMICI CURIAE**

### **Fed. R. App. P. 29(c)(4).**

Missouri Beer Wholesalers Association (MBWA) and Missouri Wine and Spirits Association (MWSA) are both not-for-profit corporations formed and existing in Missouri. MBWA is an association of Missouri companies involved in the wholesale distribution of malt beverage products as licensed by the State of Missouri Division of Alcohol and Tobacco Control (“Division”). MWSA is an association of Missouri companies involved in the wholesale distribution of wine and spirituous liquor as licensed by the Division. MBWA and MWSA are each organized to promote the business interests of their respective members.

Amici Curiae MBWA and MWSA have an interest in the outcome of the case, in that this case involves substantial legal rights affecting the business interests of their members.

The source of authority for Amici Curiae to file this brief is Fed. R. App. P. 29(a), in that Amici Curiae seek leave of Court. Amici represent that, after consulting with counsel for the parties, not all parties have consented to the filing of this brief.

### **Fed. R. App. P. 29(c)(5).**

(A) No party’s counsel authored this brief in whole or in part.

- (B) No party and no party's counsel contributed money that was intended to fund preparing or submitting this brief.
- (C) No persons other than Amici Curiae and their respective members or counsel contributed money that was intended to fund preparing or submitting the brief.

## **SUMMARY OF ARGUMENT**

The Missouri wholesale liquor franchise law was enacted by amendment in 1975 to further the interests of Missouri in the stability of the alcoholic beverage industry by protecting wholesale distributors. These interests arise both from historical considerations and from the regulated three-tier structure of the industry in Missouri. The U.S. Supreme Court has recently confirmed the importance of this three-tier structure and the virtual complete control of the industry by the several states since the repeal of Prohibition. The Missouri Supreme Court has repeatedly recognized both the purposes and intent of Missouri's liquor franchise legislation. Also, the Eighth Circuit has acknowledged and accepted Missouri's fundamental policy as expressed in the statute.

In 1975 the Missouri legislature created a statutory cause of action for the benefit of wholesalers distributing wine and spirituous liquor, and in 1998 the legislature extended this protection to include beer wholesalers, such as Appellant herein. The statute unambiguously protects these wholesalers irrespective of any interest in the supplier's trademark or trade name, and irrespective of any community of interest between supplier and wholesaler. This construction furthers the intent of the statute and gives effect to all its provisions. The contrary construction of the statute applied by the District Court is erroneous.

## ARGUMENT

A. The Missouri Legislature Properly Exercised Its Broad Power to Protect Liquor Wholesale Relationships as Franchises.

Judge Laughrey's Order includes the following comment:

"...[T]he Court is not persuaded that the legislature intended to create a franchise whenever there was a commercial relationship between a liquor supplier and distributor. Indeed, MoBev has provided no common sense explanation for why a legislature might believe that such a special protection was necessary from the liquor industry." Addendum to Appellant's Brief at page 10.

The explanation Judge Laughrey sought lies in the evolution of the liquor industry (which encompasses all beverage alcohol) since the repeal of Prohibition, and the rationale for the three-tier liquor distribution system. The United States Supreme Court has repeatedly reaffirmed the broad power of the several states to regulate liquor distribution. *North Dakota v. United States*, 495 U.S. 423, 110 S.Ct. 1986, 1992 (1990) (The states have virtually complete control over the importation and sale of liquor and the structure of the liquor distribution systems within their borders). More recently in *Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885 (2005), the U.S. Supreme Court again recognized that "the three-tier system itself is unquestionably legitimate." 125 S.Ct. at 1905.<sup>1</sup>

---

<sup>1</sup> See also this Court's decision in *Crowley Beverage Co., Inc. v. Miller Brewing Co.*, 862 F.2d 688 (8<sup>th</sup> Cir. 1988) (finding constitutional Minnesota's Beer Brewers and Wholesalers Act as a legitimate expression of state interest in the distribution of liquor).

Various state legislatures have declared their purposes for legislation protective of wholesalers, including such things as balancing economic power between local distributors and suppliers with stronger bargaining power, preventing vertically integrated “tied houses,” preventing the infiltration of organized crime, ensuring orderly markets, and facilitating state collection of tax revenues.<sup>2</sup> In other words, and in the response to the District Court’s query, the liquor industry is unique, and therefore legislation relating to it is likewise unique.

---

<sup>2</sup> Various examples of these legislative purposes can be found expressed in other beer and liquor franchise statutes, as follow:

- (i) Protecting the wholesalers’ ability to recover investment costs in promoting products, and assuring the public and suppliers that wholesalers will price competitively, devote reasonable efforts and resources to sales of all supplier’s products marketed in the state and maintain satisfactory sales levels. R.I. Gen. Laws §3-13-2(b)(2) and (3)(1998);
- (ii) Promoting a wholesale tier of numerous healthy competitors is necessary for a balanced and healthy 3-tier system, and the efficient and effective means for tax collection. Wis. Stat. §135.066(1) (2011);
- (iii) Maintaining healthy competition and promoting a sound, stable and reliable three-tier distribution system, Mich. Comp. Laws §436.1305(1)(a) and (b) (2001);
- (iv) Assuring the beer wholesaler is free to manage its business enterprise, including the wholesaler’s right to independently establish its selling prices and maintain satisfactory sales levels. 815 Ill. Comp. Stat. Ann. 720/2 (West 2009);
- (v) Promoting the interests of the parties and the public in fair business relations between wine wholesalers and wineries and in the continuation of wine wholesalerships on a fair basis and to preserve and protect the existing three-tier system. Va. Code §4.1-400 (1993); and
- (vi) Fostering and promoting temperance in the consumption of beer, and to eliminate the undue stimulation of sales of beer by manufacturers

The Missouri Legislature's purpose in enacting the 1975 amendment to Mo.Rev.Stat. §§407.400 – 407.420, to include liquor wholesale franchises,<sup>3</sup> appears in *Brown-Forman Distillers Corp. v. McHenry*, 566 S.W.2d 194, 197 (Mo. 1978). The amendment "... had for its general purpose the security of business franchises: the prohibition of cancellation or termination of such franchise agreements without cause and notice." *Id* at 197.

In summary, the several states have broad power under the Twenty-First Amendment to enact laws furthering their interest in a stable beverage alcohol industry and, to that end, laws designed for the protection of wholesalers in the beer and liquor distribution system. A wide variety of legislative purposes has been enunciated by state statutes and courts regarding such protective legislation. The Missouri Legislature had for its purpose the security of these wholesale arrangements in prohibiting their termination without cause or notice. *McHenry*, 566 S.W.2d at 197. The Missouri Legislature therefore properly exercised its

---

coercing distributors by actual or threatened termination of distributor relationships, thereby encouraging them to make investments in their facilities to serve retail licensees. Md. Code, Art. 2B, §17-101(a). See also *G. Heileman Brewing Co., Inc. v. Stroh Brewery Co.*, 521 A.2d 1225, 1227-28 (Md. 1987) (law provides distributors commercial stability).

<sup>3</sup> In 1998 the legislature further amended the statute to include beer wholesalers. §407.400 Mo.Rev.Stat. Historical and Statutory Notes (V.A.M.S. 2011).

broad power with legislation protective of beer and liquor wholesalers, as affirmed in *McHenry*.

B. Missouri's Fundamental Policy, Repeatedly Recognized, Is to Protect Wholesalers.

The Missouri wholesale liquor franchise law appears at Mo.Rev.Stat. §§407.400 through 407.420, in Chapter 407 on Merchandising Practices, and within the subdivision entitled Pyramid Sales Schemes. With respect to this law generally, the courts of Missouri and the Eighth Circuit, in the opinions below, have recognized that the statute is remedial in nature, and that the words of the statute must be given a liberal interpretation in ascertaining the intent of the legislature.

In *State ex. rel. Ashcroft v. Wahl*, 600 S.W.2d 175, 180-181 (Mo.App. 1980), the court acknowledged the legislature's intent by this statute to buttress a strong public policy against pyramid sales schemes, citing "the multiplicity of remedies provided." The U.S. District Court in Missouri followed *Wahl* six years later in a franchise case, in *C&J Delivery, Inc. v. Emery Air Freight Corp.*, 647 F.Supp. 867 (E.D.Mo. 1986).

Thereafter, this Court, in *Electrical and Magneto Service Co., Inc. v. AMBAC Intern., Corp.*, 941 F.2d 660, 663 (8<sup>th</sup> Cir. 1991), followed *Wahl* and held that the protections of Chapter 407 are a fundamental policy of Missouri:

“In short, Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection. Furthermore, the very fact that this legislation is paternalistic in nature indicates that it is fundamental policy...”

941 F.2d at 663.

Two years after *AMBAC*, the Missouri Supreme Court issued *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. 1992). In its decision and opinion which are central to the resolution of this case, the *High Life Sales* court cited *AMBAC* with approval and adopted this Court’s expression of Chapter 407, affirming Missouri’s fundamental policy (quoted above) to protect a wine wholesaler in a franchise termination case. *High Life Sales*, 823 S.W.2d at 498.

Recently, the Missouri Supreme Court again repeated this Court’s pronouncement in *AMBAC*, in the opinion of *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 725 (Mo. 2009) (reaffirming both *High Life Sales* and *AMBAC, supra*). The court stated:

“The [*High Life Sales*] Court found that the statutes protecting a holder of a liquor distribution franchise, in chapter 407, ‘carry heightened public policy considerations that outweigh any public policy considerations involved in the enforcement of a forum selection clause.’(citations omitted). In so ruling the Court cited with approval the reasoning of *Electrical and Magneto Service Co. v. AMBAC International Corp.*, an Eighth Circuit case holding that ‘the public policy involved in Chapter 407 is so strong that parties will not be allowed to waive its benefits.’ (citations omitted).”

290 S.W.3d at 725.

Repeated judicial review by Missouri's Supreme Court and this Court consistently confirm that the Missouri legislature intended Chapter 407's liquor franchise law to express fundamental policy of the State. Further, because the law is remedial in nature, it is to be liberally construed.

C. Appellant's Statutory Construction Gives Effect to the Legislative Intent and to All Provisions of the Statute.

The 1975 amendment to Mo.Rev.Stat. §§407.400 - 407.420 is set forth in *Brown-Forman Distillers Corp. v. McHenry*, 566 S.W.2d 194 (Mo. 1978), as an appendix, at pages 198 – 200, in the form passed as House Bill 810. The amendment contains six sections, including a number of provisions specific to the liquor industry. Most notable for this case is the amendment to the definition of the word “franchise” in Section 1.(6) of the amendment. It is worthwhile to consider this amendment separately from its later incorporation into the Revised Statutes.

The District Court's analysis turns on whether liquor wholesalers are covered by the pre-amendment definition, such that the 1975 amendatory language in the Section 1.(6) definition would have no effect other than to “clarify” that wholesalers were covered all along, as the District Court found. Alternatively, the new language can be viewed as expanding the scope of “franchise” to include a class of persons not previously covered, as Appellant contends.

In view of Section 4 to the 1975 amendment, and all its subparts, creating a statutory cause of action in favor of wholesalers who suffer termination of their distributorship without cause, the “mere clarification” construction seems mistaken. Rather, the addition of a new cause of action for liquor wholesalers, whose commercial relationship is newly specified in the definition, strongly indicates the addition of a new group of persons into the definition.

Moreover, the “mere clarification” construction of the liquor-specific franchise definition renders elements of that definition redundant and unnecessary, which is contrary to well-established rules of statutory construction. *Koetting v. State Board of Nursing*, 314 S.W.3d 812 (Mo. App. 2010); *Tuft v. City of St. Louis*, 936 S.W.2d 113, 117 (Mo. App. 1996). If, as the District Court held, both the specific and general definitions apply to establish a liquor supplier-wholesaler franchise, then the requirement of the general definition for an “arrangement for a definite or indefinite period” renders superfluous the requirement of the liquor-specific definition for “a commercial relationship of a definite duration or continuing indefinite duration,” and vice versa. Rather, Appellant’s construction gives meaning to the duration requirement in the liquor-specific definition independent of the general franchise definition.

The *McHenry* case has been discussed at length in Appellant’s brief, and that discussion need not be repeated. Several additional points deserve mention,

however. That court considered a series of contracts between the six identified suppliers, 566 S.W.2d at 194 fn.2, and a group of wholesalers. The court was silent on whether those contracts conferred on the wholesalers any interest in a trademark or community of interest in the brand, which suggests those elements either were not present, or otherwise were not necessary to the analysis.

Unfortunately, the record of those agreements in the *McHenry* case is not available to this Court. There is another clue from the opinion, however, that these agreements did not convey a community of interest in the brand. The court noted:

“They have contracts or agreements with liquor wholesalers that are terminable at will. These agreements provide for their termination by either party without cause or notice, or without cause but with notice of termination, or without right of renewal and early termination for cause.”

566 S.W.2d at 195.

These provisions in a wholesaler agreement do not suggest a community of interest in the brands of liquor or wine involved, or a shared investment in the brands, when either party may terminate the other at any time for any reason. In addition, nothing in the *McHenry* opinion suggests otherwise.

Next, the later Missouri Supreme Court opinion in the *High Life Sales* case showed painstaking analysis of the franchise definition, which that court then applied to the facts at hand. Once again, that opinion is silent on the presence or absence of a trademark license or community of interest, even though the court’s examination of Mo.Rev.Stat. §407.400 is exhaustive. 823 S.W.2d at 501. Most

specifically, given the discussion of “liquor franchise defined,” with absolutely no reference to the provisions of the general statutory definition, one must infer that the elements of trademark and community of interest were either absent or irrelevant. The unspoken but clear construction of the statute by the Missouri Supreme Court is to treat “liquor franchise defined” as a stand-alone definition of a franchise.

In summary, the proper interpretation of the franchise statute is that the reference to a liquor specific franchise is a stand-alone addition, and not a mere clarification. This is supported by a consideration of the statutory language on its face, and particularly when the 1975 amendment is viewed in the form passed as House Bill 810. Further support for this interpretation can be found in the two extensive reviews of the law by the Missouri Supreme Court in *McHenry* and in *High Life Sales*.

Moreover, this statutory construction gives effect to the strong purpose and fundamental policy of Missouri as acknowledged by the U.S. Supreme Court and expressed throughout Chapter 407 and confirmed by this Court’s *AMBAC* decision to create a unique regulatory scheme governing the beverage alcohol industry and consequently to protect those persons identified in the statute. It is unreasonable to conclude that the legislature meant anything other than a new definition to include all liquor wholesale commercial relationships as defined in the 1975 amendment.

**SUGGESTION FOR RELIEF**

For the reasons stated above, Amici Curiae Missouri Beer Wholesalers Association and Missouri Wine and Spirits Association support the position of Appellant herein and urge the Court to reverse the order of the District Court.

**REQUEST FOR PARTICIPATION IN ORAL ARGUMENT**

Pursuant to Fed. R. App. P. 29(g), Amici Curiae request this Court's permission to participate in oral argument.

Respectfully submitted,

COOLING AND HERBERS, P.C.

By: /s/ Paul V. Herbers  
Paul V. Herbers, MO Bar #28536  
1100 Main Street  
2400 City Center Square  
Kansas City, Missouri 64105  
Telephone: (816) 474-0777  
Facsimile: (816) 472-0790  
E-mail: [pherbers@coolinglaw.com](mailto:pherbers@coolinglaw.com)

And

KOHN, SHANDS, ELBERT,  
GIANOULAKIS & GILJUM, LLP

By: /s/ John Gianoulakis  
John Gianoulakis, MO Bar #18194  
David A. Castleman, MO Bar #47946  
1 N. Brentwood Blvd.  
St. Louis, MO 63105  
Telephone: (314) 241-3963  
Facsimile: (314) 898-4327  
E-Mail: [jgianoulakis@KSEGG.com](mailto:jgianoulakis@KSEGG.com)

ATTORNEYS FOR AMICI CURIAE

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation in Fed. R. App. P. 29(c)(7) and 32(a)(7)(B), because it contains 2,445 words from Statement of Amici Curiae through the signatures of counsel, as calculated by Microsoft Word, the software used to prepare this brief and that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in Times New Roman, 14-point font. The undersigned further certifies that the electronic version of this brief and its addendum have been scanned for viruses and are virus-free.

*/s/ Paul V. Herbers*  
\_\_\_\_\_  
Paul V. Herbers MO. Bar #28536

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 23<sup>rd</sup> day of August, 2011, this Brief is being filed electronically in the CM/ECF system. A copy of this brief is also being sent by electronic transmission on this date to counsel of record as follows:

Plaintiff/Appellant	Diana C. Carter: <a href="mailto:dcarter@brydonlaw.com">dcarter@brydonlaw.com</a>
	Johnny K. Richardson: <a href="mailto:johnnyr@brydonlaw.com">johnnyr@brydonlaw.com</a>
	Charles E. Smarr: <a href="mailto:chassmarr@brydonlaw.com">chassmarr@brydonlaw.com</a>
Defendant/Appellee	Mr. Edward C. King: <a href="mailto:ed@eastervillage.org">ed@eastervillage.org</a>

*/s/ Paul V. Herbers*  
\_\_\_\_\_  
Paul V. Herbers, MO Bar #28536