

STORAGE NAME: h0725s2.grr

DATE: April 4, 1997

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL RULES & REGULATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/CS/HB 725

RELATING TO: Beverage Law

SPONSOR(S): Committee on Governmental Rules & Regulations, Committee on Regulated Services, Representative Villalobos and others

STATUTE(S) AFFECTED: Chapter 561, Florida Statutes

COMPANION BILL(S): SB 1216

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) REGULATED SERVICES YEAS 11 NAYS 0
- (2) GOVERNMENTAL RULES & REGULATIONS YEAS 4 NAYS 1
- (3)
- (4)
- (5)

I. SUMMARY:

The Florida Beverage Law generally requires all alcoholic beverages to move through 3 separate regulated tiers - manufacturer, wholesaler, and retailer - before reaching consumers. Current law prohibits the delivery of any alcoholic beverage from out of state to any person or corporation in the state, except to specified licensees.

CS/CS/HB 725 addresses the unlawful direct shipment of alcoholic beverages into Florida. Among its provisions, the bill:

- ▶ Creates a felony violation for knowingly and intentionally shipping alcoholic beverages from an out-of-state location directly to a Florida consumer in violation of the Beverage Law.
- ▶ Requires all alcoholic beverages brought into the state to come to rest at the licensed premises of an alcoholic beverage wholesaler prior to the sale or delivery to a retailer, and creates a felony violation for knowingly and intentionally violating this requirement.
- ▶ Grants legal standing to a licensee aggrieved by a violation of the Beverage Law to sue for injunctive and declaratory relief. Provides for treble damages to be awarded to the state and for a successful plaintiff to recover costs and attorney fees.
- ▶ Prohibits manufacturers of wine from also being licensed as a wholesale distributor. The bill provides a grandfather clause to exempt wine manufacturers who may hold a distributor's license on April 1, 1997 from the prohibitions of the bill, and also provides an exemption for certified Florida Farm Wineries.

CS/CS/HB 725 authorizes limited vendor-to-vendor sales of alcoholic beverages and requires record keeping. The bill also excludes persons who solicit or sell cider from certain licensure requirements; this exemption allows cider to be sold from malt beverage delivery vehicles. The bill has an indeterminate fiscal impact on state revenue.

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The bill provides that the act shall take effect upon becoming law.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The Beverage Law consists of chapter 561 relating to administration, chapter 562 relating to enforcement, chapters 563, 564 and 565 relating to beer, wine and liquor; and chapters 567 and 568 relating to wet and dry county elections. The Beverage Law requires a person to be licensed prior to engaging in the business of manufacturing, bottling, distributing, selling, or in any way dealing in the commerce of alcoholic beverages.

Section 561.14, F.S., classifies the various licenses and registrations discussed in the Beverage Law. Subsection (3) provides that vendor-to-vendor purchases of alcoholic beverages are limited to purchases between members of a pool buying group, where the initial purchase was made by a pool buying agent as a single transaction.

Section 561.24, F.S., provides that no manufacturer, rectifier, or distiller of "*spirituous liquors*" can be licensed as a distributor or registered as an exporter. This prohibition is not extended to manufacturers of wine and there are presently six wine manufacturers who are also licensed as distributors in the state. Section 561.22, F.S., provides that no manufacturer, distributor or exporter may be licensed as a vendor. This statute further provides that no vendor may also be licensed as a manufacturer, distributor or exporter.

Section 561.221, F.S., contains a series of exceptions to the prohibitions of s. 561.22, nevertheless, a simple explanation of the Florida Beverage Law is that the law generally requires all alcoholic beverages to move through three separate regulated tiers (manufacturer, wholesaler, retailer) before reaching the ultimate consumer.

State excise taxes are collected on alcoholic beverages at the wholesale level based on their inventory depletions and account for over \$400 million annually in tax revenue for the state. The state sales tax is collected on the retail sale of beverages and, like the state excise tax, generates millions of dollars in tax revenue for the state annually.

Section 561.54, F.S., makes it unlawful for anyone (common carrier, privately owned cars, out-of-state manufacturers or suppliers, etc.) to make delivery of any alcoholic beverage from outside of the state to any person or corporation in the state, except to licensed manufacturers, distributors and registered exporters and to state bonded warehouses.

Section 562.45, F.S., provides a second degree misdemeanor violation for any unlawful activity in the Beverage Law for which no penalty is provided.

Section 599.004, F.S., establishes the standards for certification as a Florida Farm Winery. A certified Florida Farm Winery must maintain a minimum of 10 acres of Florida vineyards, produce or sell less than 250,000 gallons of wine annually, be open to the public at least 30 hours per week, and submit an annual application and fee to the Department of Agriculture and Consumer Services.

Rulemaking Authority

Section 561.11, F.S., grants broad rulemaking authority to the Division of Alcoholic Beverages and Tobacco (DABT) of the Department of Business and Professional Regulation (DBPR). This section currently provides that DABT "shall have full power and authority to make, adopt, amend, or repeal rules, regulations, or administrative orders to carry out the purposes of the Beverage Law" and that "all such rules, regulations, or orders adopted in accordance with chapter 120 shall have the full force and effect of the law."

Direct Shipping of Alcoholic Beverages

In recent years there has been an expansion of solicitations and advertisements for alcoholic beverage sales via magazines, specialty catalogues, direct mailings and, more recently, the Internet. Sales of this nature bypass the state's regulatory and tax collection procedures and are, therefore, violative of Florida law.

In November 1995, the DABT and Attorney General Bob Butterworth filed a multi-count lawsuit against several out-of-state direct shippers of wine alleging that the direct shippers violate state law relating to the importation, distribution and sale of alcoholic beverages and collection and payment of state excise and sales taxes when selling alcoholic beverages directly to Florida consumers. The lawsuit cited violations of the 21st Amendment to the United States Constitution, the federal Wilson Act and federal Webb-Kenyon Act and also alleged that direct shipments violated the Florida Deceptive and Unfair Trade Practices Act. The lawsuit was initiated after agency requests to cease unlawful practices were ignored.

The federal court ruled that neither the federal acts, nor the constitutional amendment created a federal right of action by which the state could receive injunctive relief and dismissed the complaint for lack of jurisdiction. The federal case is on appeal.

In the meanwhile, at the state level, the Attorney General and the DABT filed a similar suit in Circuit Court for the Second Judicial Circuit in Leon County against three additional defendants. The defendants in this case argue that as an out-of-state business, they are not subject to in-state court actions. Furthermore, the defendants argue that Florida restrictions are an undue restraint on trade and, as such, unconstitutional. A hearing on this matter has been delayed until after the 1997 Legislature recesses for the summer.

Numerous estimates of the fiscal impact of direct shipping on state tax collections have been proffered. While those estimates ranged from the low millions to figures well in excess of \$100 million, the actual impact on state tax collections is indeterminable.

Cider

Cider is similar to both wine and beer in that it is a fermented product. Unlike wine which is made from grapes and is aged, cider is made from apples and does not benefit from the aging process. Unlike beer which is made from grain products, cider may be carbonated or still, while beer is always carbonated. Cider is served and consumed in similar fashion as beer. The 1996 Legislature amended s. 564.06, F.S., to provide a definition for cider and to establish an excise tax rate of \$0.89 per gallon; prior to this amendment cider was taxed at the excise tax rate of wine, \$2.25 per gallon. Section 564.06, F.S., as amended by the 1996 Legislature, specifies that, with the exception of

the reduced excise tax rate, cider is considered wine and subject to all other provisions of Chapter 564.

Section 561.68, F.S., requires all persons involved in the sale or solicitation of liquor or wine on behalf of a Florida distributor, be licensed by the DABT. This requirement does not apply to persons who sell or solicit sales of malt beverages, however, it does apply to cider since, by definition, cider is a wine product. Since cider is sold and consumed in similar fashion as beer, some beer wholesalers perceive a potential for increased marketability of cider, however, the licensure requirement hinders the sale of cider from beer trucks.

Also, since cider is a wine product, the alcoholic beverage surcharge assessed for on-premise sales of cider is the same as that for wine -- \$0.10 per four ounce serving. Since cider is typically sold in 12 ounce servings, the applicable surcharge rate is, therefore, \$0.30 per glass.

B. EFFECT OF PROPOSED CHANGES:

This bill, CS/CS/HB 725, is comprehensive legislation addressing the unlawful direct shipment of alcoholic beverages from an out-of-state location into Florida through measures designed to grant increased authority for the Division of Alcoholic Beverages and Tobacco and to individual licensees. The bill also addresses the marketability of alcoholic cider.

Rulemaking Authority

CS/CS/HB 725 does not contain any language specifically directing the division to promulgate rules. According to DABT staff, additional rules are not necessary for the division to implement the new provisions contained in this bill.

Direct Shipping

The bill creates s. 561.545, F.S., and states the legislative determination that unlawful direct shipping of alcoholic beverages from an out-of-state location is injurious to the health, safety and welfare of the citizens of the state and poses a serious threat to state revenue collections and the economy of the state. This intent language affirms the authority of the state to enact stringent regulation to ensure compliance with the Florida Beverage Law.

The bill provides that any person found to be *knowingly and intentionally* shipping alcoholic beverages from an out-of-state location into the state to anyone other than a licensed manufacturer or distributor, registered exporter, or state bonded warehouse, shall be issued a cease and desist order by certified mail. A second or subsequent violation of this law, following receipt of the cease and desist order, during a two-year period of the first violation constitutes a third-degree felony. The same restrictions apply to common or permit carriers and private vehicles.

The bill provides an exemption for the direct shipment of sacramental wines to bona fide religious organizations.

The bill creates s. 561.5101, F.S., to require that all alcoholic beverages, with the exception of private labels, physically "come to rest" at the licensed wholesaler's business location prior to being sold to a retailer. This requirement does not require the merchandise to be off-loaded but does allow time for inspection. This measure will preclude paper-only arrangements which allow alcoholic beverages to be shipped directly to a retailer while the wholesaler acts merely as the clearing house for the transaction. Further, this newly created statute provides for a felony violation for any person in the business of selling alcoholic beverages who knowingly and intentionally ships in a manner inconsistent with this prohibition.

Section 561.54, F.S., prohibits any alcoholic beverage supplier, common carrier or privately owned vehicle from delivering alcoholic beverages to anyone in the state other than a manufacturer, distributor, exporter or bonded warehouse. CS/CS/HB 725 amends s. 561.54, F.S., to grant legal standing for an alcoholic beverage licensee to seek injunctive and declaratory relief to enjoin any person violating this prohibition. This language allows the court to order the confiscation and destruction of any beverage delivered in violation of this section. Further, the amendment provides for treble damages which are to be paid to the state. If successful, a plaintiff is entitled to reimbursement for costs and attorney's fees.

CS/CS/HB 725 amends s. 561.24, F.S., to prohibit a manufacturer of wine from being dually licensed as a distributor or registered as an exporter. The bill contains a grandfather clause which exempts any manufacturer of wine who holds a distributor's license on April 1, 1997 from the new prohibition. Additionally, the bill provides an exemption for certified Florida Farm Wineries as defined in s. 599.004, F.S., allowing such wineries to hold a manufacturer's license and a distributor's license.

Present law provides an exception for liquor manufacturers also licensed as distributors on June 3, 1947, if not more than 40% of the alcoholic beverages sold by the distributor were manufactured by any corporation with which the licensee is directly or indirectly affiliated. CS/CS/HB 725 exempts wine manufacturers who are also licensed as distributors from this 40% limitation.

Lastly, CS/CS/HB 725 amends s. 561.14, F.S., allowing a vendor to purchase wine or spirits from a vendor licensed to sell alcoholic beverages for off-premises consumption. Such vendor-to-vendor sales are limited to \$1,000 per year and records of such sales must be maintained by both parties for 3 years. Failure to do so will result in administrative sanctions.

Cider

CS/CS/HB 725 addresses the sale and delivery of alcoholic cider. The bill amends s. 561.68, F.S., to specify that the licensure requirements contained therein do not apply to the solicitation or sale of cider. This exception will allow cider to be sold from malt beverage delivery vehicles and is expected to increase the market for the product.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No. According to DABT staff, the new provisions of this bill do not require the adoption of additional rules.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

Yes. The bill provides for limited vendor-to-vendor sales of alcoholic beverages for off-premises consumption and requires both parties to maintain records of such transactions for 3 years.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes, the bill prohibits the dual licensure of a winery as both manufacturer and distributor, with certain exceptions.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

N/A

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

N/A

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. SECTION-BY-SECTION RESEARCH:

Please see the Effect of Proposed Changes section above.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

Minimal. The DABT will incur the initial cost of informing alcoholic beverage licensees of the relevant changes regarding licensure and enhanced penalties. Additionally, the DABT will incur the cost of reprinting necessary documents to facilitate these changes.

2. Recurring Effects:

Direct Shipping

Indeterminate. If the provisions contained in this bill result in a significant reduction in the number of unlawful direct shipments of alcoholic beverages from an out-of-state location into the state, the long-term result will be an increase in collections of excise and sales tax revenue.

Licensing

The bill would have a negative, but indeterminate, impact on license fee revenue due to the prohibitions to licensure and exemption from licensure provisions contained therein.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

4. Total Revenues and Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

The bill potentially benefits businesses presently licensed as distributors by prohibiting a certain class of licensees (wineries) from holding dual licensure.

The bill potentially benefits the industry through a reduction in the incidents of unlawful direct shipping. A significant reduction in direct shipping would result in increased sales revenue to Florida wholesalers and retailers, as well as, receipt of increased tax revenue to the state.

3. Effects on Competition, Private Enterprise and Employment Markets:

Indeterminate.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES

This bill does not reduce the percentage of state tax shared with counties or municipalities.

V. COMMENTS:

Congressional legislation which creates a federal right of action under the Webb-Kenyon or Wilson Acts would appear to remedy the question of jurisdiction and enable the federal court to grant injunctive relief to the state. Absent federal legislation, however, efforts to enforce state regulations, such as those presently in Florida and those contained in this legislation, will continue to present difficulties.

Rulemaking Authority

The Joint Administrative Procedures Committee staff has recommended inserting consistent rulemaking language in the statutes based on the 1996 rewrite of chapter 120, F.S., and suggests the following revision to s. 561.11, F.S.: "The division has authority to adopt rules pursuant to the Administrative Procedures Act."

Technical

The CS/CS/HB 725 contains two newly created felony provisions. Since the act is scheduled to take effect upon becoming law, the Legislature may wish to consider a delayed effective date for the entire bill, or for those two sections, in order for the public to be made aware of the penalties. The House Bill Drafting office suggests an effective date of October 1, 1997.

On page 2, lines 9, 13 & 25 and on page 3, lines 9 & 14, the bill reads "A manufacturer, rectifier, or distiller that manufactures, rectifies, or distills spirituous liquors or wine..." According to DABT staff, this terminology may give the appearance of an extension of a manufacturer, rectifier, or distiller of spirits that also manufactures wine. Insertion of the words "manufacturer of" between "or" and "wine" would appear to clarify this ambiguity.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute for committee substitute for HB 725 includes the following amendments:

Amendment #1 by Representative Albright provides for vendor-to-vendor sales for off-premises consumption, not to exceed \$1,000 annually. Such vendor-to-vendor sales are subject to the current alcoholic beverage surcharge. Both parties are required to maintain records of vendor-to-vendor sales for three years, or are subject to administrative sanctions.

Substitute Amendment #2 by Representative Albright provides that a certified Florida Farm Winery may hold both a manufacturer's license and a distributor's license.

Amendment # 3 by Representative Albright restores the current surcharge rate for cider.

Amendment # 4 by Representative Albright clarifies that any person who knowingly and intentionally ships any alcoholic beverage from an out-of-state location into Florida is subject to the penalties contained in Section 5 of the bill.

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VII. SIGNATURES:

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