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Agency Spotlight: Texas Alcoholic Beverage Commission

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RECENT TABC CASELAW

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I. RESTRICTIONS ON PACKAGE STORES: *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, No. 1:15-CV-134-RP, 2018 WL 1404409 (W.D. Tex. March 20, 2018)

Wal-Mart Stores, Inc. and three of its subsidiaries (collectively, "Wal-Mart"), sued the Texas Alcoholic Beverage Commission ("TABC") and three of its commissioners, challenging the constitutionality of four Texas statutes governing the issuance of package store permits. Texas Alco. Bev. Code ("Code") §§ 22.04, 22.05, 22.06, and 22.16 were the statutes challenged. Generally, these statutes prohibit public corporations like Wal-Mart from obtaining package store permits (*i.e.*, liquor stores) and limit other package store permittees from having more than five package store permits, with an exception for relatives of the existing permit holders (the "consanguinity" exception). The Code defines a public corporation as a corporation whose shares are listed on a public stock exchange or in which more than 35 persons have an ownership interest.

Wal-Mart sued under 42 U.S.C. § 1983 for violations of the dormant Commerce Clause and the Equal Protection Clause.

Fact Findings. The district court found that the public corporation ban was enacted by the Legislature for the purpose of discriminating against out-of-state retailers. The court further found efforts to repeal the five-permit limit and the consanguinity exception failed several times in the Legislature because of efforts on the part of TPSA -- the trade association of Texas package stores -- to discriminate against out-of-state companies. The court also found that the public corporation ban disproportionately affects out-of-state companies. The court found that, while the ban might have the effect of reducing the availability of alcohol by increasing its price and limiting it availability, these objectives could be achieved through other means such as an excise tax or regulatory measures limiting where and how liquor can be sold. Finally, the court found that the "credible evidence" showed that public corporations are not less accountable than other firms, rejecting the argument that the ban promoted accountability.

Conclusions Of Law. The court held that neither the five-permit limit nor the consanguinity exception violated the dormant Commerce Clause, a constitutional provision that restricts state regulation of interstate commerce. After concluding that the evidence failed to show the public corporation ban did not have a discriminatory effect, the court held the ban violated the dormant Commerce Clause because of the Legislature's discriminatory intent in passage of the ban. The court also held that the ban violated the dormant Commerce Clause because it imposed a severe burden on interstate commerce and the benefits of the legislation (reducing consumption) could be achieved by other means.

The Equal Protection Clause was analyzed under the rational basis test. The court held that the public corporation ban and the five-permit limit survived rational basis review but that the consanguinity exception did not. Finally, the court held that the prohibition in Code § 22.06(a)(2), which prohibits the holder of a wine and beer retailer's off-premises permit from also holding a

package store permit, survived rational basis review. This prohibition prevents grocery stores with a wine and beer permit from owning package stores.

Wal-Mart, the TPSA, and the TABC have all appealed the case to the Fifth Circuit.

II. CHALLENGES TO THE THREE-TIER SYSTEM

A. *Cadena Comercial USA Corp. v. TABC*, 518 S.W.3d 318 (Tex. 2017).

In this case, the Supreme Court rejected a challenge to the TABC's enforcement of its three-tier system that prohibits a "tied house" -- *i.e.*, overlapping ownership of companies engaged in the manufacture, distribution, and retail tiers of the alcoholic beverage industry. Cadena is a Mexico-based retailer that wanted to open convenience stores in Texas and sought a permit to sell alcohol. Cadena is a wholly owned subsidiary of Fomento Económico Mexicano, S.A.B. de C.V. ("FEMSA") (through other subsidiaries owned by FEMSA), and FEMSA has a 20% interest in Heineken, a beer manufacturer. The TABC rejected the permit request on the ground that issuance of the permit would have resulted in overlapping ownership in the retail and manufacturing tiers. Cadena challenged the TABC's decision and participated in an administrative hearing before a county judge, which ruled in favor of the TABC. Cadena appealed to the district court and Austin court of appeals, both of which affirmed the decision. The Supreme Court granted Cadena's petition for review, but ultimately upheld the TABC's ruling in a 7-2 decision.

The key statute at issue in the Supreme Court was Code § 102.07(a), which prohibits anyone with an interest in a brewer from having a direct or indirect ownership interest in a retailer. Cadena argued that "ownership interest" should be construed to mean the ownership of sufficient interest to control a company and, because its parent FEMSA had only a 20% interest in Heineken, FEMSA should not be considered to have a prohibited ownership interest in Heineken. The Court rejected this argument as inconsistent with the language and context of the statute. *Id.* at 327-28. Cadena also argued that ownership interest had to be in the "business" of a brewer and asserted that such an interest should extend only to those actually engaged in the business of brewing beer, not a brewer's stockholders. The Court rejected this argument as well, reasoning that it would "open the door for companies across the alcohol industry to circumvent the tied house provisions." *Id.* at 329. The Court rejected other arguments as well, including the claim that the statute as construed by the Court lacked "guiding principles." *Id.* at 331. The Court reasoned: "section 102.07 is only violated when a person with a direct or indirect interest in the business of a retailer also has a 'commercial or economic interest that provides a stake in the financial performance' of an entity engaged in the manufacturing or distributing of alcoholic beverages." *Id.*

The Court declined to address Cadena's argument that, as interpreted by the TABC and the courts, the statute would allow the TABC to reject a permit application simply because the applicant owned a single share of stock in two of the three tiers. *Id.* at 336. The Court noted that Cadena's facts did not fall into this category: FEMSA owned 100% of Cadena and "over 100 million shares of stock in the Heineken Group." *Id.*

The dissent would have held that FEMSA did not have an interest in the business of a brewer within the meaning of § 102.07(a)(1). *Id.* at 340. The dissent reasoned that "'interest'

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