

# ADMINISTRATIVE CASE LAW UPDATE

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THE UNIVERSITY OF TEXAS AT AUSTIN  
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## I. INTRODUCTION

This case law update includes many of the administrative law cases decided in Texas between November 2016 and July 2017. This is not an exhaustive review of all administrative law cases, nor do these synopses exhaustively cover all issues raised by these cases. We have attempted to choose cases representative of issues raised in Texas courts and to highlight the most salient points of each. Our views are not to be taken as the views of Texas Tech University School of Law and should not be interpreted as predictive of the result of future cases.

## II. AGENCY AUTHORITY

*Cadena Comm. USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318 (Tex. 2017). ¶

This case is the first time the Texas Supreme Court weighed in on the application of Texas' tied house law. Texas tied house statutes, located in Texas Alcoholic Beverage Code, currently serve to separate the industry into "three independent tiers: manufacturing (brewing), distribution, and retail." TEX. ALCO. BEV. CODE § 102.01-82. Fomento Economico Mexicano, S.A.B. de C.V. (FEMSA) holds a 20 percent interest in the stock of two Heineken entities and has a 100 percent interest in Cadena Comercial USA Corp. (Cadena) through intermediate holding companies. Cadena formed to operate convenience stores in Texas; however, when the company sought a retailer's permit from the Texas Alcoholic Beverage Commission (TABC) to sell alcohol, TABC refused on grounds that FEMSA's ownership interests in Cadena and Hineken would violate the tied house laws if it granted a permit.

On appeal, the district court and the court of appeals both affirmed the TABC's denial of the permit. The supreme court looked at three main issues: (1) the scope of 102.07(a) and the meaning of "an interest in the business of a brewer"; (2) if the TABC properly looked at the separate corporate statutes of the entities when determining Cadena's permit application; and (3) whether Cadena's equal protection rights

were violated by TABC's refusal of Cadena's permits and subsequent holdings of the lower courts. *Cadena* at 323. In regards to the first issue, the court interpreted "interest" to include almost any interest, as well as "corporate stock, affiliate-subsidary relationships, and a level of control" interests that have a stake in the financial performance of a brewer. *Id.* at 329. The court relied on the goal of the three-tier strict separation of the legislature to determine that the phrase applies to both entities engaged in brewing and their stockholders.

In considering the second issue, whether the TABC's veil-piercing for FEMSA and Cadena companies was proper, the court determined that statutes in a regulatory context were intended for that very purpose. The legislature "intended that the TABC and courts look beyond corporate separateness status in enforcing the tied house provisions." *Id.* at 336. The court assessed the Texas alcohol beverage laws and said that the laws specifically granted TABC the authority to deny Cadena's retail permit on the rationale that the permit would have led to a tied house violation based on the parent company's ownership interest.

Finally, the court took up the third issue of whether or not there was a violation of Cadena's equal protection rights in the denial of the retail permit. Cadena did point the court towards examples of existing cross-tier holdings in Texas; however, the court said Cadena did not show that the entities were "similarly situated." For example, FEMSA's multi-million dollar shared interest in Heineken was considered large scale. Additionally, the court did not comment on TABC's speculative application of the "One Share Rule." Section 102.07 triggered when FEMSA's indirect ownership interest in Heineken Group and its breweries combined with the indirect ownership in Cadena.

In a 6-2 decision, the court upheld the TABC's denial of a retail permit to a foreign corporation whose parent company held a 20% ownership interest in a foreign brewer.

*Tex. Alcoholic Beverage Comm'n. v. D. Houston, Inc.*, No. 03-13-00327-CV, 2017 WL 2333272, 2017 Tex. App. LEXIS 4725 (Tex. App.—Austin May 25, 2017, no pet.). Ω

This is an appeal from the district court's judgment dismissing D. Houston, Inc. d/b/a Treasures' (Treasures) claims involving issues of jurisdiction and declaratory and injunctive relief. Treasures operates what it terms a "gentleman's club" in Houston, TX. The Texas Alcoholic Beverage Commission (TABC) initiated a proceeding to impose civil penalties in response to alleged violations of the Alcoholic Beverage Code through the sexual misconduct of the club's dancers.

Under section 2001.038 of the Administrative Procedures Act (APA), Treasures first asserted a claim against TABC for declaration regarding the applicability of TABC Rule 35.31(B), which states the offenses that give rise to a violation of the Alcoholic Beverage Code. Treasures claimed that the dancers operated as independent contractors, and therefore, the Rule was not applicable. The district court dismissed the claim for want of jurisdiction and for failure to exhaust administrative remedies. On appeal, Treasures emphasized that section 2001.038 allows pre-enforcement adjudication of rule applicability issues. Further, its claim brought under section 2001.038 was a question of law, and did not require resolution of factual issues. The court previously limited a rule applicability challenge under section 2001.038 to determining whether a rule is relevant to the current situation. The Court of Appeals determined that Treasures sought a declaration to the rule's *application*, rather than the "applicability" of the rule to the particular facts. Clearly, the rule was relevant to the factual situation at hand. For those reasons, this court affirmed the district court's judgment dismissing the claim for want of jurisdiction.

Treasures' second claim sought declaratory and injunctive relief under section 11.641(c) of the Alcoholic Beverage Code. This section states that a civil penalty may not be imposed where a court finds a defendant not guilty in a criminal prosecution, criminal charges were dismissed, or if no final adjudication occurred. Treasures alleged that TABC pursued penalties in the underlying enforcement proceeding based on accusations against Treasures' dancers that the court had not adjudicated. Treasures' brought claims for

declaratory and injunctive relief under the Uniform Declaratory Judgments Act to restrain TABC's suspension of Treasures' permit pursuant to section 11.641(c). The district court ruled it had jurisdiction under section 2001.038 and granted summary judgment for Treasures. The district court dismissed the remaining claims relating to section 11.641(c), as they were redundant to Treasures' section 2001.038 challenge.

The Court of Appeals determined that the plain meaning of section 11.641(c) unambiguously prohibits a criminal prosecution from serving as the basis of a civil penalty. It did not prohibit TABC from imposing penalties on the basis of common facts that underlie criminal prosecution. The Court reversed the district court's judgment awarding Treasures relief on the merits of its claim brought under APA section 2001.038 and dismissed the claim for want of subject-matter jurisdiction. The Court affirmed the dismissal of Treasures' remaining claims concerning section 11.641(c).

***City of Dall. v. Sabine River Authority of Tex.***, No. 03-15-00371-CV, 2017 WL 2536882, 2017 Tex. App. LEXIS 5166 (Tex. App.—Austin June 7, 2017, no pet.). ☪

The Sabine River Authority (Respondent) began charging Dallas (Petitioner) more for water. The Petitioner filed a claim for review with the Public Utility Commission (Commission), and the State Office of Administrative Hearings appointed an administrative law judge to hear the case. Because the dispute revolved around contracts between the two parties, Tex. Admin. Code sec. 24.131(a) required the judge to abate review proceedings. The Petitioner filed suit under the Texas Uniform Declaratory Judgments Act (UDJA) in district court, alleging that the Respondent's rate increase was an unlawful legislative act. However, the court ruled in favor of the Respondent by granting its plea to the jurisdiction, as the Respondent claimed governmental immunity. The Petitioner appealed.

The appellate court reviewed the case *de novo*. It reasoned that a breach of contract claim, barred by sovereign immunity, differs from a UDJA claim where a petitioner might raise a



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