

Final Order No. BPR-2007-03901 Date: **5-11-07**
FILED

Department of Business and Professional Regulation
AGENCY CLERK

Sarah Wachman, Agency Clerk
By: Brandon M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2007-020622

CHARLES E. BAILES, III, d/b/a
ABC FINE WINE AND SPIRITS,

DS 2007-014

ORDER DENYING PETITION FOR DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Alcoholic Beverages and Tobacco (Division) hereby issues this Order Denying Petition for Declaratory Statement pursuant to section 120.565, Florida Statutes.

PRELIMINARY STATEMENT

On April 3, 2007, the Division received a Petition for Declaratory Statement from Charles E. Bailes, III, d/b/a ABC Fine Wine and Spirits (PETITIONER). Notice of receipt of the petition was published in Florida Administrative Weekly on April 20, 2007. The Division also received a Petition to Intervene and Request for Hearing from Florida Fine Wine & Spirits, LLC, d/b/a Total Wine and More (TOTAL WINE) on April 27, 2007. Although the Division acknowledges TOTAL WINE would be entitled to intervene and receive a hearing, the Division has determined that neither is necessary because the petition is being denied.

FINDINGS OF FACT

The following findings of fact are based on information submitted by PETITIONER and TOTAL WINE. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. PETITIONER is a retail vendor of alcoholic beverages, including distilled spirits, licensed to do business in Florida, as classified in section 561.14(3), Florida Statutes.

2. TOTAL WINE is a retail vendor of alcoholic beverages, including distilled spirits, licensed to do business in Florida, as classified in section 561.14(3), Florida Statutes.

3. PETITIONER requested an opinion from the Division as to whether distributors of distilled spirits may provide in-store servicing of distilled spirits to retail vendors under section 561.424, Florida Statutes.

4. TOTAL WINE requested to intervene in PETITIONER'S action and requested a hearing by the Division.

5. TOTAL WINE stated that the Petition for Declaratory Statement was improper under section 120.565(1), Florida Statutes, because PETITIONER asked the Division "to issue an opinion generally applicable to all retailers, wholesalers, and distributors who participate in in-store servicing of distilled spirits."

6. Furthermore, TOTAL WINE asserted PETITIONER is requesting an opinion regarding a practice PETITIONER admittedly does not engage in.

7. Finally, TOTAL WINE maintained that PETITIONER'S interest in obtaining a declaratory statement was wholly economic in nature and not within "the zone of interests" (i.e. health, safety, and welfare of Floridians) which the Division has a statutory duty to protect.

8. TOTAL WINE went on to raise two additional areas of disputed facts: whether Petitioner has standing to request the declaratory statement and whether in-store servicing of distilled spirits is permitted under Florida law.

CONCLUSIONS OF LAW

1. The Division has jurisdiction to enter this order pursuant to sections 561.02 and 120.565, Florida Statutes.

2. PETITIONER has standing to seek this declaratory statement.

3. TOTAL WINE has standing to intervene in this proceeding.

4. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(emphasis added).

5. Rule 28-105.001, Florida Administrative Code, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used only to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency. A petition for declaratory statement must describe the potential impact of statutes, rules, or orders upon the petitioner's interests.

(emphasis added).

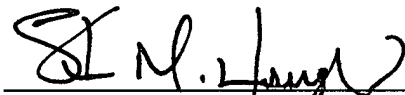
6. A declaratory statement is not proper when there is a related proceeding on the same issues. See Couch v. Dep't of Health, 377 So. 2d 32 (Fla. 1st DCA 1979)

(upholding a denial of a declaratory statement because of the existence of a related court proceeding); Fox v. Bd of Osteopathic Med. Examiners, 395 So. 2d 192 (Fla. 1st DCA 1981) (upholding a denial of a declaratory statement when related issues were pending in an administrative hearing). There are two pending cases filed by TWM with the Division of Administrative Hearings: 07-1858RU and 07-1857RX, both involving issues directly related to PETITIONER'S Petition for Declaratory Statement.

For the reasons stated above it is hereby:

ORDERED that the Petition for Declaratory Statement is DENIED.

DONE this 11 day of May, 2007, at Tallahassee, Leon
County, Florida.



Steven M. Hougland, Ph.D.
Department of Business and
Professional Regulation,
Division of Alcoholic Beverages
and Tobacco.
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399

NOTICE OF RIGHT TO APPEAL

THIS ORDER DENYING PETITION FOR DECLARATORY STATEMENT
CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO
SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF
APPELLATE PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE
REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE PROCEDURE,
BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY

APPROPRIATE FILING FEES AND WITH THE AGENCY CLERK, 1940 NORTH
MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217
WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been
furnished by U.S. mail to: Charles E. Bailes, III, ABC Fine Wine and Spirits, 8989 S.
Orange Avenue, Orlando, Florida, 32824, and to William E. Williams, Esq. and Amy W.
Schrader, Esq., Gray Robinson, P.A., 301 S. Bronough Street, Suite 600, Tallahassee,
Florida, 32301, this 11th day of May, 2007.


Lisa Livezey Comingore

Copies furnished to:

Renee Alsobrook,
Deputy General Counsel

Lisa Livezey Comingore,
Assistant General Counsel



FLORIDA'S OLDEST and LARGEST
FINE WINE & SPIRITS MERCHANT

FILED
Department of Business and Professional Regulation
DEPUTY CLERK

CLERK *Brandon M. Nichols*
DATE 4-3-2007

April 3, 2007

Renee Alsobrook
Deputy General Counsel
Division of Alcoholic Beverages and Tobacco
1940 N. Monroe Street
Tallahassee, FL. 32399

DS 2007-014

Dear Renee,

I am asking you to affirm our interpretation of "FS 561.424 Vinous Beverages; In-Store Servicing Authorized" which allows limited in-store servicing of vinous beverages but prohibits in-store servicing of distilled spirits.

Historically, in-store servicing of perishable products such as wine and beer have been allowed so as to maximize freshness and minimize the chances of consumers purchasing spoiled merchandise. Because distilled spirits are not perishable; "in-store servicing" as defined in FS 561.424 is not allowed. By permitting wholesalers or manufacturers to stock distilled spirits on retailer shelves is simply providing labor that retailers normally would provide and is therefore a clear violation of the law by "aiding a retailer"

This practice currently exists in some parts of the state and places ABC at a tremendous competitive disadvantage. I am asking for swift clarification on this point to put an end to Tide House Evil violations that currently exist. Additionally, I am asking that this be communicated directly to the wholesalers.

Thanks for your consideration.

Sincerely,

Charles E. Bailes III
Chairman and CEO

CC: Scott Dick