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Friday, January 9th, 2004

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“The Sky Is Not Yet Falling”

Filed on November 24, 2003



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Dear Client:

Gauging from the tremendous response to yesterday's issue, the three-tier system is heavy on everybody's mind. During this short week of slow beer news, we asked legal eagle Drew Jaglom at Tannenbaum Helpem Syracuse & Hirschrift LLP, a New York law firm specializing in antitrust and distribution cases, to comment on Costco's letter to Washington from a legal standpoint.

Drew writes: "I quibble with your comment that Costco's letter mounts 'a strong legal case for direct brewery-to-retailer shipments of beer and wine.' In point of fact, Costco carefully avoided taking that ultimate step, even though it is clear they want to, because the legal case is much weaker than the one they actually make in their lengthy epistle. That case, to invalidate under the antitrust laws various price-related Washington regulations -- prohibiting quantity discounts and sales on credit, and requiring a minimum mark-up, delivered pricing and advance price posting -- is indeed a strong one under current case law, and the Costco letter makes that case effectively.

"As to the three-tier system, Costco explicitly says that it 'questions whether the three-tier mandate also violates the Sherman Act, but because it might be subject to the Rule of Reason, rather than per se analysis, we do not ask your office to support that claim at this time.' except to attack that now time-honored bugaboo of both direct-shipping and three-tier laws, the in-state exemption.

A direct attack on the three-tier system is not only a tougher row to hoe under the antitrust laws, but it also confronts a much stronger 21st Amendment defense.

The Sixth Circuit wrote in the Michigan direct shipping case of ' . . . the core concerns of the Twenty-first Amendment, i.e., to exercise control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' The Fourth Circuit agreed, in its opinion in the North Carolina case: 'The plaintiffs do not challenge North Carolina's three-tiered system standing alone, perhaps due to their recognition that it is a long-standing regulatory scheme authorized by the Twenty-First Amendment.'

"The Fourth Circuit cited U.S. Supreme Court Justice Scalia's opinion in North Dakota v. U.S.: 'The State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate. . . . The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler. Nothing in our Twenty-first Amendment case law forecloses that conclusion.'

"Striking down a three-tier system in the absence of an in-state exemption thus would require a substantial change from the current case law, unlike the price-related challenges Costco does mount now. The sky is not yet falling on the three-tier system. But while the current state of the law permits a state to establish a three-tier system, it certainly does not require it. If the Costcos of the world can find a sympathetic state legislature somewhere, that is receptive to the asserted interests of consumers in lower prices, or of Sam Kursh's larger number of big box employees, then the walls may indeed be breached."

GARFIELD PANS MILLER ADS (AGAIN). Not too surprising that Ad Age critic Bob Garfield panned the new Miller dominoes ad. He admits that it is "a fabulous piece of filmmaking" and

“extremely cool” but that it is “a terrible way to advertise Miller Lite” because it the them of the ad (don't be a conformist) is akin to telling consumers: “Drink us, because nobody else does.” Ouch.

MEANWHILE, BrandWeek reports that Miller will be transferring resources from outdoor and radio advertising to local markets, to “free up money for distributors” in top markets. The magazine also reports that sales reps are undergoing training to become “brand ambassadors” and consultants for distributors.

GLAZER'S MAKES PURCHASE,. Big wine, spirits, and beer distributor Glazer's signed a letter of intent to purchase Reliance Wine & Spirits Co., Inc., an Oklahoma-based wine brokerage company. Reliance, founded in 1968, has grown from a one-man operation to the largest brokerage company in Oklahoma. Following the purchase, Oklahoma will become Glazer's 11th state. Glazer's has been active in the beer industry, buying several beer distributors in Texas over the past few years.

BEER BRIEFS. Labatt Breweries of Canada is the latest major brewer announcing the launch of a low carb beer. Labatt is launching Labatt Sterling this week in Canada.....

FEMSA said that the controlling family shareholders have increased their stake in the company. The shareholders raised their voting stake to 73.1% from 53.8%. This move helps to dispel rumors that the family would spin off its beer division. “The material investment just made by majority shareholders paints a picture of generalized optimism and confidence by the insiders regarding the value inherent in their beer company,” DeutscheXE said in a research note on Friday.

Until tomorrow, Harry

MTD Sell Day: 18 Sell Days This Month: 19 Sell Days This Month Last Year: 20
YTD Over/Under Sell Days: 0 .. This Month Ends on a: Fri .. Last Year This Month Ended on a: Fri.



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