

 CAPITAL

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Brewers Bring Suit Against The TABC For Unconstitutional Taking



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And speaking of the subject of craft beer, a number of Texas craft breweries filed a lawsuit at the end of 2014 against the Texas Alcohol Beverage Commission and its executive director, alleging that their rights under the Texas Constitution were deprived by legislation passed in 2013. In *Live Oak Brewing Company, LLC, et al. v. Texas Alcohol Beverage Commission, et al.*, in state district court in Travis County, the brewers complained that Senate Bill 639 unconstitutionally takes away their right to sell to distributors the distribution rights to their beers. The Texas cycle of delivery of alcohol is described as a three-tier system, beginning with the manufacturer and ending with the retail establishments (liquor stores, bars, etc.) that sell alcohol to consumers. Between the manufacturer and the retailer stand the distributors, or wholesalers, who buy from the manufacturers and sell to the retailers. As explained in the brewers' lawsuit, although brewers may work with multiple distributors around the state, within a single territory (such as a city or county), a brewer must select a single distributor. As a result, say the brewers, the right to distribute their beer in a given territory has significant economic value.

The 2013 legislation eliminates the brewers' previous right to receive payment from distributors for the territorial distribution rights, but leaves distributors free to sell those same territorial rights, once acquired, to another distributor for a profit. In a similar vein, a brewer who wishes to reacquire the territorial rights (after having given them away) is required to repurchase them from a distributor, even though it received no compensation for sale of the distribution rights in the first place. Claiming that the sale restriction lacked any substantial, legitimate, or rational reason, the brewers sued under the Texas Constitution, alleging an unconstitutional taking of property without compensation and a denial of economic liberty without "due course of [] law."

The plaintiffs' petition is a mini lesson on the craft beer industry in Texas. Plaintiffs estimate that more than 20 full-time craft breweries operate in Texas, in addition to brewpubs and part-time operations. The petition describes the reason for the rise in popularity of craft beers in Texas, and the ways brewers raise awareness about their beers to the public, including regular tours of their facilities to explain the brewing process and showcase the multitude of available styles.

Distribution of beers beyond the immediate locale of the manufacturing plant, the plaintiffs allege, is integral to a brewer's desire to expand operations. Under Texas law, once a brewery produces more than 125,000 barrels of beer per year, it must use distributors to deliver its beer to retail establishments. Producers of fewer than 125,000 barrels have the option of self-distributing, although a brewer is prohibited from self-distributing more than 40,000 barrels per year. When a craft brewer elects to distribute through a distributor, it may only distribute through a single distributor in a particular territory (territories are typically individual cities or counties). Moreover, the territorial rights granted are perpetual except in limited cases. The distributor is permitted to sell territorial rights to another distributor, with only a limited right on the part of producers to object to such a sale. Producers may repurchase their territorial rights if the distributor agrees to do so.

Senate Bill 639, passed during the 83rd Texas Legislative session in 2013, included a provision that "no manufacturer shall . . . accept payment in exchange for an agreement setting forth territorial rights." The law does not prohibit distributors from receiving payment for selling those distribution rights to other distributors, or from reselling the territorial rights back to the producer. As described by the brewers in their petition, "[w]hat brewers previously sold for compensation, they are now required to give away. What brewers previously had to negotiate for on the open market, they now receive for free." Plaintiffs' Original Petition, ¶ 46. The plaintiffs argue that, in addition to depriving them of revenue for sale of territorial rights, the legislation stifles the growth of the craft beer industry and restricts their economic liberty.

In describing the harm occasioned by the legislation, the plaintiffs give as one example the refusal of one of the brewers to distribute its beer in College Station, Corpus Christi, DFW, or West Texas because the owner is unwilling to give away territorial rights.

Plaintiffs allege that the territorial rights are the property of plaintiffs and are being taken from them without compensation as a condition to their maintaining their alcohol manufacturer's licenses and various permits. Plaintiffs contend the TABC can show no public harm to justify this taking. Plaintiffs also allege that their liberty to conduct their occupation is being interfered with in violation of the prohibition under the Texas Constitution against deprivation of liberty "except by the due course of the law of the land." While plaintiffs seek only \$1.00 in nominal damages, they also seek a declaration that the law is unconstitutional and a permanent injunction barring the TABC from enforcing the law. ■