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REAL ESTATE AND TITE INSURANCE

Beer in PA Supermarkets? When Did the Law Change?

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Special to the Legal

If you are like many Pennsylvanians, the Pennsylvania budget impasse, the Phillies' drive toward a second World Series, and the swine flu have dominated your headlines this fall. If you are involved in the real estate industry, the threat of foreclosures, the massive amount of securitized mortgage debt coming due in the next few years, and the lack of financing available for real estate projects have dominated your headlines.

But one story you may have missed in all the excitement is the fact that you can currently purchase beer for take out in some Pennsylvania supermarkets. In a time when many in the real estate industry are seeing projects put on hold, some supermarket operators are actually planning to expand their operations.

"Beer in supermarkets," you ask? When did that law change? Are you telling me that I can now go into a supermarket and buy milk, bread, and beer? The law did not change and technically speaking supermarkets are still not allowed to sell beer. What has happened is that some supermarket owners have acquired Restaurant Liquor Licenses (R Licenses) or Eating Place Retail Dispenser Licenses (E Licenses), and they are operating or looking to operate sit-down restaurants or cafes within the friendly confines of their supermarkets. From these locations inside supermarkets, customers can buy beer for take-out or for consumption in the licensed restaurant area.

Additionally, depending on the type of license obtained by the owner, customers can enjoy a glass of wine or a vodka tonic while having a meal and reviewing the store's weekly circulars.

The supermarket that has received the most publicity over this seemingly new business model is Wegmans Food Markets. Wegmans applied for and was issued R Licenses for the operation of cafes located within a number of its stores in the state. After proceeding through the approval process, the Pennsylvania Liquor Control Board (PLCB) approved the issuance of each license for use within cafes that Wegmans established or plans to establish in certain locations in the state.

As you might imagine, there is a fair amount of opposition in the malt beverage industry to this type of operation. The issuance of some of these licenses has been challenged by the Malt Beverages Distributors Association (MBDA), among others. The MBDA and others appealed the issuance of some licenses to Wegmans to the Commonwealth Court and subsequently challenged the issuance to the Pennsylvania Supreme Court.

As was recently reported in *The Legal Intelligencer* ("Pa. Supreme Court Picks Up Another Case of Beer," October 1), "The Supreme Court on Tuesday granted an allocatur petition filed by the Malt Beverages Distributors Association and a number of beer distributors to consider whether the LCB improperly applied rules allowing takeout beer sales at restaurants that share an interior connection with a related business."

The ultimate decision in the Wegmans case could have a significant impact on the future of beer sales from restaurants inside supermarkets in Pennsylvania. The case could ultimately change the way the PLCB views these types of applications and could require a change in the regulations.

However, while many wait for a decision in the Wegmans matter, numerous other supermarket owners have either filed transfer applications that are pending or have purchased liquor licenses. A review of the PLCB's licensing search section on the PLCB's Web site reveals that a number of supermarket store operators, including Wegmans, Weis Markets, Giant Eagle and Whole Foods, have either applied for transfer applications or have already obtained an R or an E License for particular locations.

So, if the law did not change, what is the law and what are the regulations to be considered if someone is interested in selling beer at a restaurant located within a supermarket?

The following is a brief overview of certain relevant sections of the Pennsylvania Liquor Code and the regulations promulgated thereunder. The code and the regulations have many interesting nooks and crannies, so as each situation is different, your client's individual matter must be considered before proceeding. There are other code sections that may apply, and these also need to be considered. Additionally, one must keep an eye on the outcome of the Wegmans case.

FRAMEWORK

Initially, it is helpful to understand the legal framework regarding the sale of beer in Pennsylvania. Generally speaking, beer for off-premises consumption is sold by beer distributors and restaurants (brewery pubs, public venues, golf courses, clubs, performing arts facilities, hotels and certain others are all different types of licenses that permit the holder to allow for the sale of beer but are not covered in this article).

Beer distributors are those that have obtained a distributor's license. Beer distributors are permitted to sell beer for off-premises consumption (consumption on the premises is not permitted) in amounts not less than a case or original containers containing 128 ounces or more, which may be sold separately (Pa. Code §4-441). Beer distributors may not sell six-packs or singles. Also, no person may own more than one distributor's license, according to Pa. Code §4-438(b).

Restaurants (retail dispensers) may also sell beer for take-out. In the Pennsylvania liquor license world, there is no such thing as a "bar," as all bars are really places where food must be served. The following summarizes certain applicable regulations that are found in Pa. Code §1-102.

Technically speaking, restaurants are places that are habitually and principally used for the purpose of providing food to the public, and an "eating place" is a premise where food is regularly and customarily prepared and sold. To operate a restaurant that can serve beer, wine or liquor, generally speaking (see comment above about other types of licenses), one would acquire either an R License or an E License. The holder of an R License may serve beer, wine and liquor.

(In this article, I use the term "beer," but in the Pennsylvania Code, in most instances, the term used is "malt and brewed beverages," which is a slightly more inclusive category than "beer.")

The holder of an E License may only serve beer. In addition, for an E License, the premises must contain at least 300

square feet and have enough tables and chairs to accommodate at least 30 people for food. For an R License, the space requirement is 400 feet and tables and chairs for at least 30 people.

An E License is usually owned by an operator of a deli or a small restaurant that also sells take-out beer. Both the holders of E and R licenses may sell small quantities of beer to their patrons for off-premises consumption. Holders of R and E licenses may sell beer to go in quantities of not more than 192 fluid ounces (two six-packs of 16 ounce bottles). Generally speaking, an E License is less expensive than an R License.

SUPERMARKETS

In order to place a restaurant in a supermarket, there are additional regulations that must be considered.

Under the Pennsylvania regulations, a licensee may not conduct another business on the licensed premises, unless approval is obtained from the PLCB, pursuant to Pa. Code §3.52. The regulations also provide that the licensed premises may not have an inside passage or communication with any business conducted by the licensee or other persons, except as approved by the PLCB.

As a side note, the provision regarding the inside passage is one of the main issues at the center of the Wegmans dispute. If the PLCB approves the interior passage or connection, all liquors must be stored and sold entirely within the licensed premises, pursuant to Pa. Regs §3.53.

Finally, the licensed portion of the facility must be set off behind a permanent partition at least four feet in height.

Depending on the location of the supermarket, there may be other local regulations that need to be considered. These vary according to municipality, so you need to be mindful of whether or not the local municipality has imposed any additional requirements. For example, in Philadelphia, a separate permit (one from the PLCB and one from the city) is required to allow for off-premises sales.

In addition to the local regulations and those specific to the operation of a licensed facility within another premises, there are also other requirements set forth in the Pennsylvania code and regulations, which apply to almost all licensed operations.

Oftentimes referred to as the "300, 200, 500 rules," these regulations are set forth in Pa. Code §4-404 and they provide, among other things, that the PLCB may refuse to approve a transfer of a license to a premises that is: within 300 feet of a church, hospital, playground, charitable institution or school; or within 200 feet of another licensed location. The PLCB shall refuse to approve a transfer if, generally speaking in its opinion, the licensed premises is or would be detrimental to the welfare, health, peace and morals of the neighborhood within a 500-foot radius of the licensed premises. Lastly, no license may be issued to a location where the sale of liquid fuels or oil is conducted.

The addition of beer sales at restaurants and cafes located in supermarkets has sparked a debate among those in the beverage industry and the general public, and a final resolution has yet to be reached. In a time when few in the real estate business are seeing developments move forward, the addition of restaurants in supermarkets could encourage growth in the supermarket sector.

Like the Phillies, however, we will all need to keep watching the developments that occur.

Joseph Stapleton, a partner with the firm, assisted in writing this article. •

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