ORIGINAL

IN THE SUPREME COURT OF OHIO

ESBER BEVERAGE COMPANY,	)	Ohio Supreme Court Case No. 12-0941
	)	
Plaintiff-Appellant,	)	On Appeal from the Stark County Court of Appeals, Fifth Appellate District
-vs-	)	
	)	Court of Appeals Case Nos. 2011CA00113 and 2011CA00116
LABATT USA OPERATING COMPANY, LLC *et al.*,	)	
	)	
Defendants-Appellees.	)	

MEMORANDUM OF DEFENDANT-APPELLEE, SUPERIOR BEVERAGE GROUP, LTD., IN OPPOSITION TO JURISDICTION

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EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

Although Appellant, Esber Beverage Company ("Esber"), argued multiple issues before the trial court and the Fifth Appellate District on appeal, Esber requests that this Court review only one issue: whether R.C. 1333.85(D) permits a successor manufacturer to terminate without just cause a written distribution agreement that the successor manufacturer ***itself*** has assumed. Esber claims that this issue is one of exceptional statewide importance, because it may impact every written distribution contract throughout Ohio.

The meaning of the Ohio Alcoholic Beverages Franchise Act, R.C. 1333.82 *et seq.* (the "Act") is so apparent from its express language, however, that Esber's alleged "issue" in reality is not even an issue at all, let alone one of great public interest and state-wide importance. On its face, R.C. 1333.85(D) permits a successor manufacturer to terminate existing distributors if the successor manufacturer "acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition…" Therefore, R.C. 1333.85(D) clearly permits a successor manufacturer to terminate distributors in all such cases, even in cases where written distribution agreements otherwise would be binding upon the successor manufacturer.

Esber's misconstruction of the Act and misapplication of well-settled rules of statutory construction through its convoluted interpretation of the Act's language and its legislative history does not change the plain meaning of R.C. 1333.85(D). Thus, the clarity of the Act's language critically undermines Esber's issue and its alleged importance.

COUNTERSTATEMENT OF THE CASE AND FACTS

Prior to March 13, 2009, InBev USA, LLC ("InBev USA") imported the Labatt Brands into the United States, and Esber was the designated distributor of the Labatt Brands in certain territories. InBev USA was formed in 2004 as part of an inter-corporate restructuring by InBev

N.V./S.A., its parent company. After the restructuring, InBev USA attempted to terminate Esber as a Labatt Brands distributor. Litigation ensued the result of which was a decision by the Fifth Appellate District finding InBev USA's termination of Esber was unlawful, because InBev N.V./S.A. owned each of the entities involved in the inter-corporate restructuring. Esber Beverage Company v. InBev USA, LLC, 5th Dist. No. 2005 CA00113, 2007 Ohio 927. As a result of the decision, InBev USA and Esber entered into a new distribution agreement in November, 2007 (the "Distribution Agreement").

Thereafter, InBev N.V./S.A. sought to acquire Anheuser-Busch Companies, Inc., a merger that would create the world's largest brewing company, and that spawned anti-trust litigation by the United States Department of Justice. For the merger to proceed, InBev N.V./S.A. was required in the anti-trust litigation to sell all assets associated with the Labatt Brands to an unrelated entity. The United States approved the sale of the Labatt Brands assets to Appellee, KPS Capital Partners, LLP ("KPS"). KPS owned Appellee, North American Breweries, Inc. ("NAB"), which was the parent company of High Falls Brewing Company, LLC ("High Falls"), in turn which was the manufacturer of the Genesee brands of beer. NAB eventually formed Appellee, Labatt USA Operating Company ("Labatt USA"), to acquire the Labatt Brands. On March 5, 2009, Labatt USA entered a purchase agreement (the "Purchase Agreement") with InBev USA to acquire the assets relating to the Labatt Brands, a transaction that closed March 13, 2009.

Within days of the closing, NAB contacted all distributors of the Labatt Brands and the Genesee Brands, including Esber, notifying them of the acquisition, and requesting them to submit proposals and make presentations regarding their ability and plans to distribute the brands. Rather than objecting to a potential termination at that point, Esber responded to the request, made a presentation, and even requested that other distributors, including Appellee, Superior Beverage Group, Ltd.'s ("Superior") franchise to distribute the Genesee brands, be terminated and Esber appointed as the distributor. On May 15, 2009, just two months after the Purchase Agreement became effective, Labatt USA and High Falls notified Esber that it was terminated as a Labatt Brands and Genesee brands distributor. Superior subsequently was appointed as the new distributor of the Labatt Brands in several territories wherein Esber previously was the distributor.

Esber filed suit in the Stark County Court of Common Pleas to enjoin the termination. The trial court found that the termination violated the Act, in relevant part, because R.C. 1333.85(D) permitted a successor manufacturer to terminate only at-will distributors, as opposed to those operating under a written agreement. In other words, the trial court held that a successor manufacturer can never terminate a distributor operating under a written franchise agreement, especially if the successor manufacturer assumed the agreement as Labatt USA assumed the Distribution Agreement between InBev USA and Esber.

The Appellees, including Superior, appealed to the Fifth Appellate District, which reversed the trial court. On the relevant issue, the Fifth Appellate District concluded that R.C. 1333.85(D) permitted Labatt USA to terminate Esber as a distributor, despite Labatt USA assuming the Distribution Agreement.

ARGUMENT IN OPPOSITION TO THE PROPOSITION OF LAW

Esber's Memorandum in Support of Jurisdiction is premised upon two intertwined arguments: (1) R.C. 1333.85(D) does not apply if a written agreement exists between a distributor and the prior manufacturer; and (2) a successor manufacturer cannot terminate existing distributors if the successor manufacturer itself has assumed a written distribution agreement. Esber's arguments are based upon its interpretation of the Act's legislative history and its claim that reading R.C. 1333.85(D) and 1333.83 *in pari materia* shows R.C. 1333.85(D) applies in only one situation: "in the absence of a written agreement." *See* Esber's Memorandum in Support of Jurisdiction at p.10. As both arguments are incorrect, Esber cannot establish a great public interest or state-wide importance to support this Court's exercise of jurisdiction.

1. **R.C. 1333.85(D) permits a successor manufacturer to terminate written franchise agreements.**

While Esber claims the Fifth Appellate District ignored principles of statutory interpretation, it is really Esber that seeks to ignore such principles. Esber's analysis skips the express, clear and unambiguous language of R.C. 1333.85(D) and proceeds directly to the Act's legislative history. This is entirely inappropriate as this Court has held that a court's "first duty" in statutory interpretation is "to determine whether the statute is clear and unambiguous." Estate of Heintzelman v. Air Experts, Inc. (2010), 126 Ohio St.3d 138, 142. If the statute is clear and unambiguous, "there is no occasion to resort to other means of interpretation," such as a statute's legislative history or *in pari materia*, the rules of construction that Esber seeks to employ. State v. Chappell (2010), 127 Ohio St.3d 376, 379. In fact, this Court has expressly held that there is no need to resort to *in pari materia* when the language of a statute is clear. State v. Robinson (2009), 124 Ohio St.3d 76, 81-82.

Contrary to Esber's arguments, R.C. 1333.85(D) unambiguously permits a successor manufacturer to terminate existing distributors under a written, oral, or statutorily imposed franchise agreement. In making its strained claims, Esber ignores the first rule of statutory construction by reading one sentence of R.C. 1333.85(D) in complete isolation, out of context, and without reference to the Act's own definitions. The complete language of R.C. 1333.85(D) does not support Esber's illogical leap. R.C. 1333.85(D) provides:

> (D) If a successor manufacturer acquires all or substantially all of the stock or assets of another manufacturer through merger or acquisition or acquires or is the assignee of a particular product or brand of alcoholic beverage from another manufacturer, the successor manufacturer, within ninety days of the date of the merger, acquisition, purchase, or assignment, may give written notice of termination, nonrenewal, or renewal of the ***franchise*** to a distributor of the acquired product or brand. Any notice of termination or nonrenewal of the ***franchise*** to a distributor of the acquired product or brand shall be received at the distributor's principal place of business within the ninety-day period. If notice is not received within this ninety-day period, a ***franchise relationship*** is established between the parties. If the successor manufacturer complies with the provisions of this division, just cause or consent of the distributor shall not be required for the termination or nonrenewal. Upon termination or nonrenewal of a ***franchise*** pursuant to this division, the distributor shall sell and the successor manufacturer shall repurchase the distributor's inventory of the terminated or nonrenewed product or brand as set forth in division (C) of this section, and the successor manufacturer also shall compensate the distributor for the diminished value of the distributor's business that is directly related to the sale of the product or brand terminated or not renewed by the successor manufacturer. The value of the distributor's business that is directly related to the sale of the terminated or nonrenewed product or brand shall include, but shall not be limited to, the appraised market value of those assets of the distributor principally devoted to the sale of the terminated or nonrenewed product or brand and the goodwill associated with that product or brand.

(emphasis added). R.C. 1333.85(D) makes three references to the word "franchise" in addition to the reference to "franchise relationship." Esber has conveniently ignored the definition of "franchise" in its Memorandum in Support of Jurisdiction, a submission which fails to contain even a single reference to the statutory definition. The Act itself defines the word "franchise" as "a ***contract*** or any other legal device used to establish a contractual relationship between a manufacturer and a distributor." R.C. 1333.82(D), emphasis added.

Moreover, it is Esber's interpretation of R.C. 1333.85(D), not the Fifth Appellate District's, which would render R.C. 1333.85(D)'s references to "franchise" and the statutory definition of the same of no meaning or effect. Contrary to Esber's convoluted interpretation, the word "franchise" as used in R.C. 1333.85(D), according to R.C. 1333.82(D)'s express definition, refers to any contractual agreement between a manufacturer and a distributor, whether written, oral or statutorily created. Plainly, R.C. 1333.85(D)'s successor manufacturer termination provision, by the statute's express terms and definitions, applies even if a distributor had a written contract with the prior manufacturer.

2. **<u>R.C. 1333.85(D) permits a successor manufacturer to terminate a prior manufacturer's written franchise notwithstanding the successor manufacturer's assumption of the agreements.</u>**

In addition to arguing that R.C. 1333.85(D) applies only if there is no written agreement, Esber claims R.C. 1333.85(D) does not apply if the successor manufacturer assumes the prior manufacturer's distributor agreements. The lynchpin of Esber's argument is the third sentence of R.C. 1333.85(D), which states: "If notice is not received within this ninety-day period, a franchise relationship is established between the parties." According to Esber, this sentence "clearly provides that a minimally protective 'franchise relationship' is established, by operation of statute, after 90 days, and it necessarily presupposes that a franchise *** relationship does <u>not</u> already exist between the successor manufacturer and the distributor." *See* Esber Memorandum in Support of Jurisdiction at pp.9-10. Esber uses the "franchise relationship" language to make the illogical leap that this language would be superfluous if there was already a written agreement between a successor manufacturer and a distributor, because "[t]he <u>only</u> circumstance under which a franchise relationship 'is established' after 90 days under the Act is in the absence of a written agreement" – an apparent reference to R.C. 1333.83 implied statutory franchise provision. <u>Id</u>. at p.10.

Esber's logical flaw is apparent from the fact that R.C. 1333.83 and R.C. 1333.85(D) address entirely different circumstances. R.C. 1333.83 applies where a manufacturer refuses to enter a written franchise agreement with a distributor, but continues to do business with the distributor. In such cases, if the distributor distributes for a manufacturer for 90 days, a statutory franchise is imposed as a matter of law. R.C. 1333.85(D), on the other hand, addresses a successor manufacturer's termination of existing distributors following the acquisition of the prior manufacturer or a brand. In such cases, if the successor manufacturer does not terminate the existing distributors within 90 days of acquiring the prior manufacturer or a brand, the distributor's prior franchise relationship with the former manufacturer, whether written, oral or statutorily created, is imposed upon the successor manufacturer.

With the actual statutory definition of "franchise" in mind, R.C. 1333.85(D) indubitably permits a successor manufacturer to terminate existing distributors with written franchise agreements, even where the successor manufacturer can be said to have assumed the agreement. This is obvious from the fact that the successor manufacturer termination provision applies where the successor manufacturer acquires "all of the stock…of another manufacturer through merger or acquisition." R.C. 1333.85(D). In that case, it is elementary that the identity of the manufacturer has not changed; rather, the change occurs only to the ownership of the manufacturer. Upon a merger or a stock acquisition, the successor manufacturer (the new ownership group) necessarily assumes the prior manufacturer's franchise agreements, whether written, oral or statutorily imposed, and they are binding upon the successor manufacturer from the beginning of the 90-day period.

Esber argues for an interpretation of the Act that contradicts the intent of R.C. 1333.85(D). A stock acquisition effectively amounts to the transfer of assets and the assumption of liabilities of the acquired entity, and the surviving entity in a merger takes all assets and assumes all liabilities of the merged companies. *See e.g.* R.C. 1701.82(A)(3), (4) (surviving entity in merger retains all obligations of constituent entities). Nonetheless, the legislature clearly provides in R.C. 1333.85 (D) that in the event of the acquisition of the "***stock*** or assets of another manufacturer" (emphasis added) through sale or merger, the successor manufacturer has a ninety-day period within which it may terminate existing franchises without just cause or consent of the distributor, notwithstanding the fact that the predecessor manufacturer could not have done so prior to the acquisition.

Despite the fact that all contracts of the manufacturer remain binding upon the new ownership group in the event of a merger or stock acquisition, R.C. 1333.85(D) still permits a successor manufacturer to terminate a "franchise" in those contexts. It makes little sense to say, as Esber contends, that the statute permits a successor manufacturer to terminate franchise agreements that are binding upon the successor manufacturer as a result of a merger or stock acquisition, but prohibits the same successor manufacturer from terminating franchise agreements if they were assumed as part of an asset acquisition just because the acquisition was in a different form.

To conclude, as Esber does, that R.C. 1333.85(D) does not permit a successor manufacturer to terminate distributors when a successor manufacturer assumes a contract with a distributor (*see* Esber Memorandum in Support of Jurisdiction at pp.9-10) would render this entire subsection superfluous and of no meaning or effect. Under Esber's interpretation, a successor manufacturer in a merger or stock acquisition could not terminate oral agreements or statutorily imposed franchises, let alone written franchise agreements, because oral or statutorily imposed contracts would be binding on the manufacturer, the identity of which does not change in a merger or stock acquisition. Thus, it is Esber's interpretation, not the Fifth Appellate District's interpretation, which ignores principles of statutory interpretation and does injustice to the clear and unambiguous language of R.C. 1333.85(D).

CONCLUSION

Esber posits that whether a successor manufacturer may terminate a written franchise agreement when it is assumed by the successor manufacturer is an issue of great public importance and state-wide interest. Since there is no ambiguity in the meaning of R.C. 1333.85(D), even if a written franchise is assumed by the successor manufacturer, the clarity of the statutory language belies any argument of great public interest or issue of state-wide importance.

Jurisdiction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served via regular U.S. Mail, postage prepaid, and email where indicated this 27 day of June, 2011, upon the following:

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