



TABC

TEXAS ALCOHOLIC BEVERAGE COMMISSION

service ★ courtesy ★ integrity ★ accountability

José Cuevas, Jr.
Presiding Officer-Midland

Steven M. Weinberg, MD, JD
Member-Colleyville

Melinda S. Fredricks
Member-Conroe

Alan Steen
Administrator

July 15, 2011

MARKETING PRACTICES BULLETIN – MPB046 ***Post Delivery Product Damage, a.k.a. “Chips and Flats”***

To: Alcoholic Beverage Industry

This bulletin is intended to clarify industry common practice and agency interpretation of state law as it relates to the replacement of damaged products by upper-tier members after retailers have taken possession of the products. This does not include shipments containing concealed damage upon delivery and/or products unfit for consumption upon delivery. It has come to the agency’s attention that on occasion, retailers put pressure on upper-tier members to replace products that have been damaged by the retailer or consumer after the retailer has taken possession. This practice is prohibited and is a violation of state consignment sales laws.

Section 104.05 of the Texas Alcoholic Beverage Code (Code) addresses ale, malt liquor, and beer. It allows retailers to make a claim for the replacement of malt beverages that are delivered in damaged condition by a wholesaler or distributor. It states that a wholesaler or distributor may not give a refund for or replace malt beverages that were damaged while in the possession of the retailer. There is not an equivalent statute that allows for this same practice for distilled spirits and wine; however, the agency by policy has allowed for wholesalers, local distributors, wineries, authorized to sale directly to retailers, to replace damaged wine and distilled spirits only in accordance with these same restrictions.

The agency will not take action against parties that provide credit or exchange for product shipments that contain concealed damage upon delivery or that are determined to be unfit for consumption upon delivery. Product that has been damaged by the retailer or consumer while in the possession of the retailer may not be replaced by exchange or credit. Product determined to be unfit for consumption and thus returned to the retailer by the consumer, may be exchanged or credited by the wholesaler at the wholesaler’s discretion. Should a pattern arise where a retailer continuously makes claims for damages, the Commission will conduct an investigation. If the Commission detects a violation as a result of the investigation, TABC will seek administrative action against all involved parties for violations of State consignment statutes. See MPB027 Refunds, Credits or Exchanges for proper replacement procedures: http://www.tabc.state.tx.us/marketing_practices/bulletins/MPB027.pdf.

The Texas Alcoholic Beverage Commission will be compelled to take regulatory action against all involved parties in cases where the agency finds that a member of the distributor/wholesaler tier has replaced product damaged while in the possession of the retailer under Sections 102.07 (a)(4), 104.05 and 101.68 of the Code.

This opinion is of the staff of the Commission, and it should be noted that any permittee/licensee may pursue a different opinion through administrative proceedings with the State Office of Administrative Hearings. The commission will continue to monitor this issue and make necessary regulatory changes as statutorily applicable. We hope this opinion will assist you in your business endeavors. If you would like additional information or have questions regarding this bulletin, you may contact me in writing at P.O. Box 13127, Austin, TX 78711, by email at marketing.practices@tabc.state.tx.us, by phone at 512-206-3411 or by fax at 512-206-3349.

Sincerely,



Thomas Graham
Supervisor of Marketing Practices

cc: Alan Steen, Administrator
Sherry Cook, Assistant Administrator
Joel Moreno, Chief of Field Operations
Rod Venner, Assistant Chief of Field Operations, Enforcement
Dexter K. Jones, Assistant Chief of Field Operations, Compliance
Executive Management
Regional Personnel

Section 1.04. Definitions. In this code:

- (2) "Consignment sale" means:
- (A) the delivery of alcoholic beverages under an agreement, arrangement, condition, or system by which the person receiving the beverages has the right at any time to relinquish possession to them or to return them to the shipper and in which title to the beverages remains in the shipper;
 - (B) the delivery of alcoholic beverages under an agreement, arrangement, condition, or system by which the person designated as the receiver merely acts as an intermediary for the shipper or seller and the actual receiver;
 - (C) the delivery of alcoholic beverages to a factor or broker;
 - (D) any method employed by a shipper or seller by which a person designated as the purchaser of alcoholic beverages does not in fact purchase the beverages;
 - (E) any method employed by a shipper or seller by which a person is placed in actual or constructive possession of an alcoholic beverage without acquiring title to the beverage; or

(F) any other type of transaction which may legally be construed as a consignment sale.

Section 101.68. Consignment Sale Prohibited.

A person commits an offense if he is a party to, or directly or indirectly interested in or connected with, a consignment sale of an alcoholic beverage.

Section 102.07. Prohibited Dealings With Retailer Or Consumer.

(a) no person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person, may:

(4) make or offer to enter an agreement, condition, or system which will in effect amount to the shipment and delivery of alcoholic beverages on consignment.

Sec. 104.05. Sale In Original Packaging.

(a) This section applies to a permittee or licensee who is authorized to sell beer, malt liquor, or ale to an ultimate consumer for consumption off the permitted or licensed premises.

(b) The holder of a permit or license described in Subsection (a) of this section may resell beer, malt liquor, or ale only in the packaging in which the holder received the beer, malt liquor, or ale or may resell the contents of the packages as individual containers.

(c) Except for purposes of resale as individual containers, a licensee or permittee may not:

(1) mutilate, tear apart, or cut apart original packaging in which beer, malt liquor, or ale was received; or

(2) repackaging beer, malt liquor, or ale in a manner misleading to the consumer or that results in required labeling being omitted or obscured.

(d) Nothing in this code prevents a retailer from making a claim for the replacement of alcoholic beverages delivered to the retailer by a wholesaler or distributor in a damaged condition. A wholesaler or distributor may not give a refund for or replace alcoholic beverages that were damaged while in the possession of the retailer.

(e) To assure and control product quality, the holder of a distributor's license, wholesaler's permit, or class B wholesaler's permit, at the time of a regular delivery, may withdraw, with the permission of the retailer, a quantity of beer, ale, or malt liquor in its undamaged original packaging from the retailer's stock, if:

(1) the distributor, wholesaler, or class B wholesaler replaces the stock with beer, ale, or malt liquor of identical brands, quantities, and packages as the beer, ale, or malt liquor withdrawn;

(2) the stock is withdrawn before the date considered by the manufacturer of the product to be the date the product becomes inappropriate for sale to a consumer; and

(3) the quantity of stock withdrawn does not exceed the equivalent of 25 cases of 24 12-ounce containers.

(f) A consignment sale of an alcoholic beverage is not authorized under Subsection (e) of this section.