

Texas Court Affirms Constitutionality of Statute Prohibiting Brewers from Selling Distribution Rights to Their Products

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Texas craft beer distributors received an early Christmas present in 2017. On December 15, 2017, the Texas Court of Appeals for the Third District, at Austin issued an opinion in *Texas Alcoholic Beverage Commission v. Live Oak Brewing Co., et al.* (NO. 03-16-00786-CV) in which the court overturned a lower court's determination that a statute prohibiting self-distributing brewers from selling the distribution rights to their products was unconstitutional under the Texas Constitution.

In 2014, Live Oak Brewing Co., Revolver Brewing and Peticolas Brewing Co. (all Texas-based craft breweries that self-distribute) joined together in a suit against the Texas Alcoholic Beverage Commission (Commission) challenging the constitutionality of a provision in Texas' alcohol beverage control law that prohibits brewers from selling the distribution rights to their products. The provision at issue, Tex. Alco. Bev. Code § 102.75(a)(7), provides that it is unlawful for a brewer to "accept payment in exchange for an agreement setting forth territorial rights." The [lower court rendered judgment in favor of the brewers](#), declaring the prohibition on a brewer's sale of its distribution rights unconstitutional under the "due course of law" guarantees of the Texas Constitution.

On appeal by the Commission, the Texas Court of Appeals reversed the lower court's decision and upheld the constitutionality of the challenged provision under the Texas Constitution. The brewers argued that the statute denied them the fundamental economic liberty interest recognized by the Supreme Court of Texas in *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015). The Court of Appeals disagreed, noting that "unlike the entry barrier faced by the Threaders in *Patel*, [the brewers] have not demonstrated that section 102.75(a)(7) has deprived them of their occupational freedom, i.e., that it has prevented them from operating within their chose trade – brewing and selling beer – within the confines of the unchallenged three-tier system."

The brewers also argued that the provision was a "naked transfer of wealth" to beer distributors at the expense of brewers. The court remained unconvinced by this argument, pointing out that the same legislative package that included section 102.75(a)(7) also included the provisions giving Texas brewers the right to self-distribute to retailers and sell directly to consumers for on-site consumption. This trade-off, the court noted, was "the result of the type of commonplace compromise among various stakeholders that takes place as part of the legislative process."

Ultimately, the Court of Appeals rejected both the brewers' facial and as-applied challenges to the

statute, overturning in full the lower court's ruling on the constitutional issue.

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Although the impact of the Texas Court of Appeals' decision in the *Live Oak* case is of limited precedential value outside of Texas (because it turns on application of the Texas Constitution), it does deprive Texas brewers of the ability to raise capital by selling the distribution rights to their products. For now, Texas brewers will have to look to other fundraising avenues for expansion.

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National Law Review, Volume VIII, Number 2

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