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ALCOHOLIC BEVERAGE CONTROL

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ADVISORY OPINION REQUEST 2019-001[1]

October 25, 2021

Subject:	Whether retail package licensees and licensees with retail privileges may sell ship or deliver package alcohol to a consumer's private residence in a dry or moist territory.
Requested By:	Stephen Amato, McBrayer, McGinnis, Leslie, and Kirkland PLLC Counsel for Kentucky Distiller Association
Written Comments:	Don Cole, Executive Director for Kentucky League on Alcohol and Gambling Problems ("KLAGP") Karen Lentz, President of Kentucky Association of Beverage Retailers ("KABR"), Holly Mullins, Executive Administrator for Wine and Spirits Wholesalers of Kentucky ("WSWK").
Syllabus:	Retail package licensees, distilleries, and small farm wineries cannot sell and ship/deliver alcoholic beverage packages to a consumer's residence in dry or moist territories.
Statutes construed:	KRS 242.230(4); KRS 242.260(5); KRS 243.033(11); KRS 243.120(5)
Legal authority:	*Commonwealth v. Trousdale*, 297 Ky. 724, 181 S.W.2d 254 (1944); *Lewis v. Jackson Energy Co-op Corp.*, 189 S.W.3d 87 (Ky. 2005); *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952 (Ky. 1999).

[1] This advisory opinion was originally intended for issuance in late 2019. However, due to changing administrations and the COVID pandemic, it sat approved but unpublished. The Department publishes it now, without edits, in belated compliance with 804 KAR 6:020. Please note that due to the delay, some citations to statute may be incorrect as substantial amendments were made to the law in the 2020 and 2021 legislative sessions; however, none of these changes undermine the fundamental reasoning of this advisory opinion. For instance, changes to KRS 243.240, 243.0305, and KRS 243.155 have proscribed shipping alcoholic beverages by package retailers, and now require distilleries and small farm wineries to procure a direct shipper license in order to ship alcoholic beverages, respectively, but direct shipper licensees are not permitted to ship into dry territories. KRS 243.028(6).

Opinion of the Department of Alcoholic Beverage Control

The Kentucky General Assembly recently enacted House Bill ("HB") 256 which became law on June 27, 2019. The Kentucky Distillers Association (KDA), by counsel, asks if HB 256's amendment to KRS 242.260 now permits retail package licensees, and licensees with retail privileges, to sell and ship/deliver of alcoholic beverage packages to a consumer's private residence in a dry or moist territory.

HB 256 amended KRS 242.260 by adding the following new section:

> (5) It shall not be a violation of this section for a person to bring alcoholic beverages that were lawfully purchased in wet or moist territory into dry or moist territory to a private residence, or to a private event regardless of whether the venue is a public place, for personal consumption or consumption by others so long as the possession, consumption, or provision does not occur at a public place in violation of KRS Chapter 222. For purposes of this subsection, an event is public, not private, if any member of the public is permitted to enter or attend the event upon payment of consideration.

A retail liquor package store holds a quota retail package license that authorizes package sales of distilled spirits and wine at retail for off-premise consumption. *See* KRS 243.240(1). Licensed distillers have limited rights to sell packages of distilled spirits for off-premise consumption. *See* KRS 243.0305(3). In 2018, the Kentucky General Assembly enacted House Bill ("HB") 400, which provided these licensees, and small farm wineries[2], with additional rights to deliver and ship distilled spirits and wine packages through common carriers holding transporter's licenses. *Id.*; KRS 243.200(1).

The KDA believes that KRS 242.260(5) now permits a retail liquor store package and a distillery to sell and ship/deliver packages of alcoholic beverages to a consumer's private residence in dry or moist territories. The Department received public comments which disagreed with the KDA's interpretation.

Although the KDA's interpretation is based primarily on one section of one statute, the Department must administer ALL the alcoholic beverage statutes. *See* KRS 241.020. Statutes are supposed to be read together. *Monmouth St. Merchants' Bus Ass'n v. Ryan*, 56 S.W.2d 963, 964 (Ky. 1933); *Brown v. Department of Revenue ex rel. Carpenter*, 558 S.W.2d 635, 638 (Ky. App. 1977). "(S)tatutes in *pari materia* are not to be considered as isolated fragments of law, but as a whole or as a part of a connected system, unless a different purpose is clearly shown." *Dieruf v. Louisville & Jefferson Co. Board of Health*, 304 Ky. 207, 210, 200 S.W.2d 300, 302 (1947) (citation omitted); *Com. v. Carroll County Fiscal Court*, 633 S.W.2d 720, 722 (Ky. App. 1982).

This is particularly true of alcoholic beverage laws. The historical difficulty of enacting alcoholic beverage laws in Kentucky caused them to become a patchwork of sometimes conflicting

[2] *See* KRS 243.155(2).

provisions, enacted at different times for unique piecemeal purposes, inconsistent with a cogent statutory scheme. For this reason, one cannot simply look at only sentence or section of an alcoholic beverage statute but must look at the alcoholic beverage law statutory scheme as a whole. *See Commonwealth v. Trousdale*, 297 Ky. 724, 726, 181 S.W.2d 254, 255 (1944).

The General Assembly's intent is the guiding light and touchstone when interpreting laws. *See MPM Financial Group, Inc. v. Morton*, 289 S.W.3d 193, 197 (Ky. 2009) ("[T]he cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect."). The Department is further reminded that statutory interpretation that is heedless of context invites an absurd or unreasonable result. *George v. Alcoholic Beverage Control Bd*., 421 S.W.2d 569, 571 (Ky. 1967); *Commonwealth ex rel. Martin v. Tom Moore Distillery Co*., 287 Ky. 125, 152 S.W.2d 962, 967 (1939).

HB 256's bill sponsor, Representative Michael Meredith, stated the purpose and intent of the bill at a hearing held by the Senate Committee on Licensing, Occupation, and Administrative Regulation on Monday, March 11, 2019. The stated purpose of HB 256 was to allow persons and licensed caterers to serve alcoholic beverages to guests at private residences or private events in dry or moist territories. (March 11, 2019 Hearing at 02:20). Representative Meredith did NOT state that the intent of the bill was to permit holders of quota retail package licenses, distiller's licenses, and small farm winery licenses to ship or deliver package alcoholic beverages to consumers' private residences in a dry or moist territories.

Brian Alvey from the KDA also testified at the hearing on March 11, 2019. Although the KDA expressed concerns about HB 256[3], no comment was made that the bill would allow retail liquor package stores or distilleries to ship or deliver package alcoholic beverages to consumers' private residences in a dry or moist territories. (March 11, 2019 Hearing at 14:21).

The legislative record makes clear that the General Assembly's intent by HB 256 was NOT to allow retail liquor package stores and distilleries (and small farm wineries) to sell and ship/deliver package alcoholic beverages to consumers' private residences in dry or moist territories.

HB 256 amended KRS 242.230, KRS 242.260, KRS 243.020, and KRS 243.033. A reading of the new language of KRS 242.260(5) in the context of HB 256's other amendments makes clear that KRS 242.260 was amended for the sole purpose of effectuating changes to KRS 242.240(4) and KRS 243.033(11)[4].

KRS 242.260(5) was intended to permit a person to visit a retail liquor package store in a wet territory, purchase alcoholic beverages there, and bring the alcoholic beverages to a private

[3] Alvey stated that KDA maintained three concerns with HB 256: (1) responsibility in the form of proper training for people serving in dry/moist counties; (2) competitiveness, that HB 256 will push communities that are in dry counties toward moist/wet counties if alcohol is served at private events and venues; and (3) taxes, especially those associated with alcohol in dry territories. (March 11, 2019 Hearing at 14:17).

[4] HB 256's amendments to KRS 242.230(4), KRS 242.260(5), and KRS 243.033(11) contained identical or similar language demonstrating their intended inter-relation to each other.

residence or private event in dry or moist territory.[5] Alternatively, a person could contract with a caterer in wet territory and the caterer could bring and serve alcoholic beverages to a private catered event in dry or moist territory.[6]
It should also be noted that, "our rules of statutory construction presume that the legislature is aware of the state of the law at the time it enacts a statute ... including judicial construction of prior enactments." *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky. 2004)). When enacting HB 256, the General Assembly was presumed to have been aware of the holdings in *Settles v Commonwealth*, 294 Ky. 403, 171 S.W.2d 999, 1000 (1943) and *Trousdale*, 181 S.W.2d at 255-56, which held that a consumer is permitted to possess and transport alcoholic beverages in an automobile in dry territory for personal use.

The new KRS 243.260(5) appears to merely codify the *Settles* and *Trousdale* holdings and give effect to the KRS 243.033 amendment that allows caterers to transport and serve alcoholic beverages at a private catered event in dry territory.

HB 256 must also be considered with ALL *pari materia* statutes that address delivery in dry territory and the context in which those statutes came into existence. "The rule is that statutes in *pari materia* should be construed together and, if possible, should be construed so as to harmonize and give effect to provisions of each." *Economy Optical Co. v. Kentucky Board of Optometric Examiners*, 310 S.W.2d 783, 784 (Ky. 1953). "Statutes should be construed in such a way that they do not become ineffectual or meaningless." *Lewis v. Jackson Energy Co-op Corp.*, 189 S.W.3d 87, 91 (Ky. 2005) (citation omitted). Any apparent conflict among sections of the same statute should be harmonized in order that all of them may be given meaningful effect. *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952, 957 (Ky. 1999).

As previously stated, the General Assembly enacted HB 400 in 2018, only one year prior to HB 256. HB 400, supported by the KDA, amended several statutes to specifically permit holders of a retail quota package license, distiller's license, and small farm winery license to deliver or ship alcoholic beverages to a consumer's home. However, the General Assembly made quite clear that these licensees were NOT permitted to ship/deliver alcoholic beverages into a dry or moist territory.

KRS 243.120(5)(b) was specifically added to make clear that the new shipping privilege of distillers, rectifiers, and wineries did NOT "[a]llow delivery or shipment of alcohol into dry or moist territory." HB 400 added several requirements that "[a]ll deliveries or shipments made pursuant to this section shall be made through a licensed transporter or licensed common carrier…" KRS 243.240(3); *See also* KRS 243.0305(3)(a)(distillery must ship or deliver through a licensed common carrier); KRS 243.155(2)(h)(winery must ship or deliver through a licensed common carrier). HB 400 specifically amended KRS 243.200(1) to provide that a common carrier with a

[5] As amended by HB 256, KRS 242.230(4) permits a person to provide alcoholic beverages to others at a private residence or private event in dry or moist territory.

[6] As amended by HB 256, KRS 243.033(11) permits a licensed caterer serve alcoholic beverages at a private catered event in dry or moist territory.

transporter's license could ONLY deliver or ship alcoholic beverages "into areas of the state in which alcoholic beverages may be lawfully sold [wet territories]". *See* KRS 243.200.[7]

The effect of these amendments was to directly prohibit liquor package stores, distilleries, and small farm wineries from shipping or delivering alcoholic beverages to a consumer's residence in dry or moist territories.

In the context of HB 400's exhaustive efforts to prevent liquor package stores, distilleries, and small farm wineries from delivering or shipping alcoholic beverage packages into dry or moist territories, it would be an absurd or unreasonable result to believe that HB 256 permitted same. *George,* 421 S.W.2d at 571, *Tom Moore Distillery Co.*, 152 S.W.2d at 967.

If the legislature had intended for HB 256 to permit liquor package stores, distilleries, or small farm wineries to ship/deliver alcoholic beverage packages into dry or moist territories, HB 256 would have removed KRS 243.200(1)'s and KRS 243.120(5)(b)'s prohibitions against same. At the very least, the legislature would have added HB 400's "shipping and delivering," language to KRS 242.260(5) to permit it. Since the legislature omitted these amendments in HB 256, it must be presumed that the legislature intentionally did do so in order to maintain the prohibition against shipping/delivery into dry or moist territories. *Commonwealth v. McBride*, 281 S.W.3d 799, 806 (Ky. 2009); *Palmer v. Commonwealth*, 3 S.W.3d 763,764-65 (Ky. App. 1999).

If the KDA's interpretation was accepted, KRS 243.200(1) and KRS 243.120(5)(b) would be rendered meaningless or ineffectual. This is impermissible. *See Stevenson ex rel. Stevenson v. Anthem Cas. Ins. Group***,** 15 S.W.3d 720, 724 (Ky. 1999); *General Motors Corp. v. Book Chevrolet, Inc*., 979 S.W.2d 918, 919 (Ky. 1998).

KRS 242.260(5) allows a consumer to bring—not deliver—alcoholic beverages purchased in wet territory to a personal residence or event in a dry territory and allows licensed caterers to bring alcoholic beverages from their licensed premises to serve at a private catered event in dry or moist territory. It does not allow a liquor package store, distillery or small farm winery to sell and ship/deliver package alcoholic beverages to a consumer's private residence in a dry or moist territory. This is the only interpretation that harmonizes all the statutes together and "gives effect to the provisions of each." *Economy Optical Co.*, 310 S.W.2d at 784.

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[7] To encourage common carriers to ship alcoholic beverages, HB 400 also amended KRS 243.260 to create subsection (3) so that the liquor package stores, distilleries, or small farm wineries, not the common carrier, were solely liable for illegal deliveries into dry or moist territory. *See also* KRS 242.270(4)(same).