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ALCOHOLIC BEVERAGE CONTROL

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ABC ADVISORY OPINION 2021-003

August 31, 2021

Question:	"Can wine spritzers under 7% ABV be sold at retail stores where the sales of staple groceries exceed 10% or greater of gross sales receipts?"[1]
Syllabus:	Wine spritzers under 7% ABV are "wines" as defined by KRS 241.010(74) and cannot therefore be sold at grocery stores.
Statutes construed:	KRS 241.010(38), (70), and (74); KRS 243.230(5)
Legal authority:	KRS 241.010(38), (70), and (74)

Opinion of the Department of Alcoholic Beverage Control

On January 28, 2021, the Department issued 2020-ABC-03, an advisory opinion regarding the sale of wine spritzers under 7% ABV by groceries. After that advisory opinion was issued, the Requester, Charles George, Executive Director of Wine & Spirits Wholesalers of Kentucky, asked a number of questions that arose due to "wines" being treated as "malt beverages" under the interpretation promulgated by the Department. Briefly, these questions are as follows:

- Does any wine under 7% alcohol by volume classify as a weak cider or must it be a wine spritzer (or other adulterated wine product?)
- Do wine products under 7% alcohol by volume that are registered as wines need to be re-registered as malt beverages because they are "weak ciders'?

[1] The Department is permitted to issue an advisory opinion on its own initiative in accordance with 804 KAR 6:020 Section 2(2).

- Do wine producers need a malt beverage supplier's license to sell wine products under 7% alcohol by volume?
- Are purveyors of "weak ciders" subject to Kentucky's franchise law?
- Must wholesalers that sell "weak ciders" also hold a distributor's license?

The Department's interpretation was colored by the fact that both the definition of "wine" and the definition of "weak cider" describe alcoholic beverages made from the fermentation of fruit juices:

> As the FAAA does not consider wine containing less than 7% alcohol by volume to be "wine," wine spritzers are not required by the TTB to be labeled as "wine" so long as they contain less than 7% alcohol by volume (or more than 24% alcohol by volume), even if the TTB taxes them as wine. **The KRS mirrors this distinction, defining "wine" as including fermented, fruit-based alcoholic beverages containing not more than 24% alcohol by volume, and excluding "weak ciders"—fermented, fruit-based, alcoholic beverages containing less than 7% alcohol by volume. *Compare* KRS 241.010(70) & (74).** The KRS's definition of "weak ciders" therefore encompasses wine spritzers, or "wine combined with sparkling water, [that] may include fruit juice and natural flavors," that contain less than 7% alcohol by volume, even if wine spritzers may be federally taxed as wine.

2020-ABC-03, p. 3 (emphasis added). However, from this definition, it could follow that *all* wines under 7% alcohol by volume would be "weak ciders" and therefore "malt beverages." From the questions above, clearly this definition creates myriad unintentional issues. Therefore, the Department is revisiting this opinion to clarify the distinction between "wines" containing less than 7% alcohol by volume and "weak ciders."

> The overriding consideration in interpreting statutory language … is the intent of the legislature, *to be determined from the meaning expressed or reasonably implied in the language contained in the statute*. Where the intended meaning of a statutory term is clear from the language of the statute *as a whole*, that term must be construed in accordance with the legislative intent, regardless of whether the term may have another meaning in common usage.

Department of Alcoholic Beverage Control v. Liquor Outlet, *Inc.*, 734 S.W.2d 816, 817 (Ky. App. 1987) (emphasis added) (internal citations omitted). What separates wine from cider can be

merely a colloquial distinction between alcoholic beverages made from the fermentation of grapes and apples, respectively. Merriam-Webster defines "wine" in part as "the alcoholic fermented juice of fresh grapes used as a beverage,"[2] and "cider" as "fermented apple juice often made sparkling by carbonation or fermentation in a sealed container."[3] However, the statutory definition does not distinguish wines from ciders by the type of fruit fermented to produce it. Instead, both are alcoholic beverage products made through the fermentation of fruit juices. The overlap between the definitions of "weak cider" and "wine" regarding alcohol content further complicate the matter: "wine" has an upper limit of 24% alcohol by volume, but provides no lower limit, and "weak cider" has an upper limit of (just under) 7% and a lower limit of 1%. So, an alcoholic beverage made from fermented fruit juice with alcohol content between 1% and 7% by volume could be either a "wine" or a "weak cider."

However, there is no indication that the legislature intended for all wines under 7% alcohol by volume to be considered weak ciders. First, the statutory definition of "wine" states it is not only "the product of the normal alcoholic fermentation of the juices of fruits," but also is made using "the usual processes of manufacture and normal additions, and includes champagne and sparkling and fortified wine of an alcoholic content not to exceed twenty-four percent (24%) by volume." KRS 241.010(74). "Usual processes" and "normal additions" imply some standard alcoholic beverage product, which, in context, must be *wine*. The inclusion of "sake, cider, hard cider, and perry cider" into the definition of "wine" follow in a new sentence after that initial definition, distinct from alcoholic beverages commonly known as wines.

[2] "Wine", *Merriam-Webster.com Dictionary*, Merriam-Webster, http://www.merriam-webster.com/dictionary/wine (accessed Aug. 25, 2021).
[3] "Cider", *Merriam-Webster.com Dictionary*, Merriam-Webster, http://www.merriam-webster.com/dictionary/cider (accessed Aug. 25, 2021).

Importantly, the inclusion of cider, hard cider, and perry cider in the definition of "wine" and the exclusion of "weak ciders" from it were *explicit*. Had the legislature intended to exclude wines under 7% alcohol by volume from the definition of "wine" it is unlikely that they would have done so in such a roundabout way. Creating a second statutory term with a definition that *could* be interpreted to include wines under 7% alcohol by volume, and excluding that new statutory term from the definition of "wine" is esoteric and indirect even for alcoholic beverage law and guileful in a way that runs counter to a presumption of good faith in lawmakers. Instead, we can assume that the legislature intended that alcoholic beverage products that call themselves wines are "wines."

This finds support in review of the whole statute. The definition of "alcoholic beverage" under KRS 241.010(2) includes even "spurious or imitation liquor sold as, or under any name commonly used for, alcoholic beverages, whether containing any alcohol or not." That is, if a non-alcoholic beverage is called "beer" it is considered an alcoholic beverage under Kentucky law. Similarly, we can assume that if a particular *alcoholic* beverage made from the fermented juice of fruit is called "wine," then the legislature intended for it to be treated as a "wine" under the law, so long as it contains 24% alcohol by volume or less.

> Reasonable statutory interpretation by an agency must account for both the specific context in which language is used and the broader context of the statute as a whole. A statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

Utility Air Regulatory Group v. E.P.A., 573 U.S. 302, 321 (2014), quoting *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988). Understanding the difference between "wines" with an alcoholic content between 1% and 7% and "weak ciders" to

inhere in the names their producers give them resolves much of the uncertainty and unintended consequences of the Department's previously issued advisory opinion on this matter.

The statutory scheme in KRS Chapters 241 to 244 is dependent upon clear division between "wine" and "malt beverages," as evidenced by the myriad questions raised by the interpretation of wine spritzers as "weak ciders" rather than "wines." Beyond the questions raised *supra*, a licensed winery would not be able to produce wines under 7% alcohol by volume if they were considered "weak ciders" unless the winery also had a brewer's license. *See* KRS 243.120. Neither would the winery be able to sell the sub-7% wines at wholesale. *See* KRS 243.130. Simply put, if the producer calls it a wine, and it otherwise meets the statutory definition of "wine" under KRS 241.070(74), then Kentucky law treats it as wine. Therefore, so must the Department.

This advisory opinion therefore constitutes a reversal of 2020-ABC-003. The definition of "wine" also "includes preparations or mixtures vended in retail containers if these preparations or mixtures contain not more than fifteen percent (15%) of alcohol by volume." KRS 241.010(74). A "wine spritzer" is typically a mixture of wine and sparkling water, though it may include fruit juice or other natural flavors. As a mixture or preparation of wine, it is also "wine" according to statute and *cannot* be sold by Kentucky businesses only holding licenses to sell malt beverages, including those for whom a substantial part of their business involves the sale of staple groceries.

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