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ALCOHOLIC BEVERAGE CONTROL

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ABC ADVISORY OPINION 2021-004

December 6, 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?"
Requested by:	Kentucky Grocers and Convenience Store Association Tod A. Griffin, Executive Director
Syllabus:	Wine spritzers under 7% ABV are "wines" as defined by KRS 241.010(74) and cannot therefore be sold at 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 or gasoline and lubricating oil.
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Statutes construed:	KRS 241.010(13), (38), (70), and (74); KRS 243.230(5)
Legal authority:	KRS 241.010(13), (38), (70), and (74)

Opinion of the Department of Alcoholic Beverage Control

As explained more fully below, the Department affirms its opinion in AO 2021-003 that a wine spritzer does not fall under the definition of a "malt beverage" in KRS 241.010. KRS Chapters 241 to 244 define alcoholic beverages first by the plain meaning of their label and, second, by the percentage of alcohol by volume they contain. Having been made from wine, a wine spritzer is a wine and falls under the definition of "wine." It is not a cider and thus is also not a "weak cider."

In AO 2020-003, issued on January 28, 2021, the Department interpreted KRS 241.010(38), (70), and (74) to treat wine spritzers—typically a mixture of wine and sparkling water, though it may include fruit juice or other natural flavors—as "weak ciders" under Kentucky alcoholic beverage control law. The Department's interpretation in AO 2020-003 relied heavily upon the alcoholic content maximums of "wine" (24%) and "weak cider" (7%) under Kentucky law paralleling the maximum (24%) and minimum (7%) alcohol contents for the labeling of wine under the Federal Alcohol Administration Act (FAAA).

In AO 2021-003, issued on August 31, 2021, the Department reversed its previous interpretation, determining wine spritzers to instead be "wine" as defined in Kentucky alcoholic beverage control statutes. AO 2021-003 came after determining the interpretation of wine spritzers as "weak ciders" did not fit within the statutory scheme of KRS Chapters 241 to 244, as the consequences of that interpretation would have meant, for instance, a winery was in violation of its license if it produced a wine, like a Moscato, containing less than 7% alcohol by volume. In addition, a wholesaler would be in violation of its license if it purchased or sold that Moscato at wholesale, and a quota retail package licensee would be in violation of its license if it purchased that Moscato at wholesale or sold that wine at retail.

Within 10 days of the issuance of AO 2021-003, the Kentucky Grocers and Convenience Stores Association ("KGCSA" or "Requester") timely requested a reconsideration under 804 KAR 6:020 section 7(3). In its request, KGCSA argues that KRS 241.010 is unambiguous and "the Department exceeds its statutory authority by attempting to modify the definitions of 'wine' and 'weak cider'" contained within it. The Requester states as follows:

> "If it were the legislature's intent or choosing to specifically exclude fermented fruit-based beverages that are derived from wine or grape based juices, it would explicitly exclude such beverages in the definition of 'weak cider.' However, the legislature has chosen not to provide this exclusion. Instead, rather, the Department in the ABC Advisory Opinion 2021-003 makes an attempt to redefine the terms that are effectively and unambiguously defined by the legislature." Request, pp.1-2.

Further, the Requester takes issue with the Department's reliance "on allegedly overlapping definitions of 'weak cider' and 'wine'," since "'weak cider' is specifically excluded from the definition of 'wine' and, thus, no ambiguity can exist." Request, p. 2.

In response to the KGCSA's Request, the Department remotely held an informal meeting of stakeholders, including representatives of the KGCSA, Wine and Spirits Wholesalers of Kentucky, Commonwealth Alliance, Kentucky Beer Wholesalers Association, and others. Randy Strause spoke on behalf of the KGCSA, continuing the Requester's argument that no ambiguity exists between the statutory definitions of "wine" and "weak cider", and if the statute is not ambiguous on its face, then the Department cannot resort to outside aids. Charles George spoke on behalf of the Wine and Spirits Wholesalers of Kentucky, arguing that as a "wine-based product" wine spritzers fit the definition of "wine" and claimed "it's unambiguous that wine is wine." These statements outline the basic contours of the debate. On one side, the statute is unambiguous that alcoholic beverages made from the fermented juice of fruits are designated "wine" or "weak cider" based wholly upon their alcohol content; on the other, such alcoholic beverages are designated based upon the common usage of the names they are called.

Despite both sides' claims to the contrary, ambiguity exists in the statute. The Department asked the Requester whether a champagne made with less than 7% alcohol by volume would be a "wine" or a "weak cider." The Requester pointed to the "weak cider" definition and stated that it was made from fermented fruit juice and contains less than 7% alcohol by volume, so it must be a "weak cider." KRS 241.010(70). However, it is a champagne, and "champagne" is explicitly included under the definition for "wine." *See* KRS 241.010(74).

A complete analysis of KRS 241.010 reveals further redundancy and ambiguity regarding the statutory classification of alcoholic beverages. Consider whether an alcoholic beverage is defined by statute or is not and is therefore by defined by common usage. *See* KRS 446.080(4). The definition of "wine" is as follows:

> "Wine" means the product of the normal alcoholic fermentation of the juices of fruits, with 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. It includes sake, cider, hard cider, and perry cider and 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. It does not include weak cider[.]

KRS 241.010(74). That definition contains six kinds of alcoholic beverages that are not defined by statute—"fortified wine," "sparkling wine," "champagne," "sake," "hard cider," and "perry cider," and two that are so defined—"cider" and "weak cider." "Cider" is defined as "any fermented fruit-based beverage containing seven percent (7%) or more alcohol by volume and includes hard cider and perry cider." KRS 241.010(13). This definition overlaps almost wholly with the basic definition of "wine" as "the product of the normal alcoholic fermentation of the juices of fruits." KRS 241.010(74).

The definition of "wine" explicitly includes "cider," thus mooting any inquiry into whether a fermented fruit-based alcoholic beverage containing more than 7% alcohol by volume is a "wine" or a "cider." But the definition of "wine" and the definition of "cider" both explicitly include "hard cider and perry cider." *See* KRS 241.010(74). Because both "wine" and "cider" are described as alcoholic beverages made from fermented fruit juice with no further distinction, there is arguably no reason to maintain both definitions. Whether it is a "wine" or a "cider," it is a "wine." Yet the statutory definition of "cider" remains.

Expanding the search for alcoholic beverages that are defined or not defined in statute to the rest of KRS 241.010, "distilled spirits" and "malt beverages" are defined by statute, while "whiskey," "brandy," "gin," "rum," "spirits," "cordials," and "bitters" are included in definitions, but not defined themselves. *See* KRS 241.010(49). The definition of "distilled spirits" states that it does not include "wine, *hard* cider, and malt beverages." KRS 241.010(25)(emphasis added). Using the statutorily undefined "hard cider" instead of the defined "cider" limits "distilled spirits" exclusions only to hard cider, therefore implicitly including all other "ciders," like perry

cider. *See id*. However, perry cider is a "wine," and "distilled spirits" excludes "wine," mooting that otherwise thorny issue.

These provisions of KRS 241.010 are inarguably ambiguous. In a previous advisory opinion, the Department stated, "The historical difficulty of enacting alcoholic beverage laws in Kentucky caused them to become a patchwork of sometimes conflicting provisions, enacted at different times for unique piecemeal purposes, inconsistent with a cogent statutory scheme."[1] AO 2019-001. Despite the patchwork nature of Kentucky alcoholic beverage law, "statutes 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 Cty. Bd. of Health*, 304 Ky. 207, 210, 200 S.W.2d 300, 302 (1947) (citation omitted); *Com. v. Carroll Cty. Fiscal Court*, 633 S.W.2d 720, 722 (Ky. App. 1982). At the same time, it is important to consider a statute or statutory provision from the perspective of the entire act from which it was enacted "with the judicial eye upon the historical setting, the public policy, the objects to be accomplished, the mischief intended to be remedied, and all other attendant facts and circumstances which throw intelligent light upon the intention of the law–making body." *Dougherty v. Kentucky Alcoholic Beverage Control Bd.*, 130 S.W.2d 756, 760 (Ky. App. 1979) (citing *Sewell v. Bennett*, 220 S.W. 517 (Ky. 1920)).

Enacted in 2014, Senate Bill 83 amended KRS 241.010 to define "weak ciders" as "any fermented fruit-based beverage containing more than one percent (1%) but less than seven percent (7%) alcohol by volume." The bill also amended the definition of "malt beverage" to state that it "includes weak cider," amended the definition of "wine" to state that it "does not include weak cider," and amended the definition of "cider" to increase the minimum alcohol content from 0.1% to 7% to make room for the new definition of "weak cider." The bill made no

[1] The Kentucky Supreme Court has been less generous in describing alcoholic beverage laws in Kentucky, referring to them as "confusing at best" and "perhaps intentionally so" as well as "a maze of obscure statutory language." *Howard v. Salyer*, 695 S.W.2d 420, 427 (Ky. 1985) (J. Liebson concurring).

other changes relevant to this new classification of fermented-fruit-based alcoholic beverages but did make a raft of typographical and other changes.

Accordingly, on March 14, 2014, Senator John Schickel, who sponsored the bill, described it on the floor of the Senate as a "clean-up bill," meant to fix errors in the overhaul of Kentucky alcoholic beverage laws that passed in 2013. He stated, however, that it contained two additional provisions beyond the "clean up": a craft (Class B) distiller's license, and

> "[t]he other item that was added was the way that we market ciders in Kentucky. Those of you who are not familiar with this, cider has always been marketed as a wine, but those in the industry tell me it's more appropriately marketed as a beer. So, ciders that have alcohol content less than 7% will now be under the malt beverage regulations."

Sen. Schickel further stated that this provision had been thoroughly vetted in committee during the interim session. Summaries of two meetings during the 2013 interim legislative session addressed the provision. The first, from the October 11, 2013, meeting of the Interim Joint Committee on Licensing and Occupations, included statements consistent with what Sen. Schickel said on the floor of the Senate five months later, with an important clarification:

> The bill also addresses a growing part of the alcohol market, "cider." **There is a need to change current language to define "hard" cider as 7 percent or more alcohol, while "weak cider" would be defined as cider with more than 1 percent but less than 7 percent alcohol.** Weak cider would then be defined as a malt beverage and could be sold by beer distributors.

2013 INTERIM LEGISLATIVE RECORD at p. 18, Vol. 26, No. 7 (Oct. 2013) (emphasis added). The second summary, from the November 8, 2013, meeting, was more in-depth, with comments by representatives of industry stakeholders the Charles Seligman Distributing Company, and Country Boy Brewing.

The first of these two stakeholders, Jennifer Doering, General Manager of Charles Seligman Dist. Co., compared hard ciders to beer in how they are marketed and sold nationally: "Sales of cider track nationally with beer. It is packaged and sold with the same appearance as beer—in six pack bottles. Cider is also sold in bars on tap like Sam Adams or Bud Light." 2013

INTERIM LEGISLATIVE RECORD, Vol. 26, No. 8 (Nov. 2013), at p. 31. Additionally, she stated that brewers nationally had begun producing ciders because it "shares the same attributes as beer." *Id.* Importantly, she only spoke of wine to highlight the alcohol content at which the FAAA considered *ciders* to be *wine*—when they contain over 7% alcohol by volume—not the other way around. *Id.*

Considering the context in which the change was made, breweries nationally had begun producing ciders, and ciders were sold like beer in six-bottle packages. Wine containing under 7% alcohol by volume existed at the time but was not mentioned as being affected by this bill. In fact, during the October 11, 2021, meeting, the Department asked the Requester when groceries in Kentucky first started selling wines containing under 7% alcohol by volume. Shannon Stiglitz answered on behalf of the Requester that such sales did not begin until approximately June 1, 2021, which is after she had clarified with the Department that the reasoning in AO 2020-003 extended to all wines. That puts nearly seven (7) years between the effective date of 2014 Kentucky Laws Ch. 22 (SB 83) and the first usage of its language to authorize sales of low-alcohol wines in grocery stores. Had the intent of the legislature been to permit sales of low-alcohol wines in grocery stores, it would have explicitly allowed it. Further, had the language of the law unambiguously permitted such sales, groceries and convenience stores would not have required the Department's interpretation seven years later to begin marketing and selling low-alcohol wines.

Nevertheless, the definition of "weak ciders" being so general has admittedly generated considerable confusion. To that end, even general language may be qualified in its interpretation:

> [T]he general rule is that where [a statute] is expressed in general language it is to be applied to all cases coming within its terms and the court may not restrict or qualify it. However, **the precise words of a statute may be restricted or words may be transposed or supplied where that is necessary to obviate inconsistency and give effect to the manifest intention of the Legislature and to carry out the general scope and purpose of the act**.

Commonwealth v. Trousdale, 181 S.W.2d 254, 255 (Ky. 1944) (emphasis added).

According to the legislative history, the manifest intention of the legislature was to create a distinction between "hard" cider and "weak cider," not to define all fermented-fruit-juice-based alcoholic beverages, including wines, as "weak cider." 2013 INTERIM LEGISLATIVE RECORD, Vol. 26, No. 7 (Oct. 2013) at p. 18. This intention is apparent in the enactment of 2014 Ky. Laws Ch. 22 (SB 83), wherein the definition of "weak cider" was directly carved out of the definition of "cider" in KRS 241.010, with the alcohol content of "cider" thereafter increasing from 7%, where "weak cider's" alcohol content stopped. As "cider" was included in the definition of "wine," "weak cider" was excised from the definition of "wine."

Still, the statutory definition of "cider" remains. Given the existence of the definition of "cider" despite its historical redundancy to the definition of "wine" as describing an alcoholic beverage made from fermented fruit juice, as well as the number of alcoholic beverages included in statutory definitions without themselves being defined, it is apparent that what an alcoholic beverage is called remains relevant to, if not determinative of, how Kentucky alcoholic beverage law treats it. Therefore, a wine is a "wine" under KRS Chapters 241 to 244. A cider is a "cider" (and therefore a "wine") or a "*weak* cider" (and therefore a "malt beverage") depending upon its alcohol content.

As stated *supra*, 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 "wine" according to statute. Wines containing under 7% alcohol by volume are also "wines." Neither can therefore 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 or gasoline and lubricating oil.

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