Advisory Opinion Request Form
November 2019

ALCOHOLIC BEVERAGE CONTROL
COMMONWEALTH OF KENTUCKY
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
500 Mero Street 2NE33
Frankfort, KY 40601
502-564-4850 phone
502-564-1442 fax
http://abc.ky.gov

Date received

AOR NO.: _____
FOR ABC USE ONLY

RCVD KY ABC SEP 14 2021

ADVISORY OPINION REQUEST FORM

Attach additional pages as necessary and any documentation, research, or other evidence that you request the Department to consider.

Name of Requestor (individual or business entity): Kentucky Grocers and Convenience Store Association

Address: 340 Democrat Drive

City: Frankfort State: Kentucky County: Franklin

Zip Code: 40601 Phone Number: 502-696-9153

Email: tgriffin@kyretail.com

The above individual or business entity requests an: ☐ Advisory opinion ☑ Reconsideration request

If this is a reconsideration request or comment, the application Advisory opinion number: 2021-003

Question or issue to be addressed: Wine seltzers with alcohol by volume of 1-7% are within the unambiguous statutory definition of "weak cider" as a fermented fruit-based beverage.

Applicable statutes, regulations, ordinances, or other authority: KRS 241.010(,70), KRS 241.010(74), KRS 241.060

Proposed response, comment, or basis for reconsideration request: Because the statutory language is entirely unambiguous, the Department of Alcoholic Beverage Control is in violation of KRS 241.060 in redefining the statutory definitions enacted through the legislative process. Please see Memorandum in support of request.

To your knowledge, is the question for which you request an advisory opinion or reconsideration pending before, under investigation by, or recently decided by a court or government entity? ☐ Yes ☑ No

If yes, please identify the court or government agency, any case or proceeding number, and filing dates of the proceeding or investigation _____.

Signature of Requestor or Requestor's Agent Tod A. Griffin Date 9-8-2021

Signer's Name and title if requestor is a business entity TOD A. GRIFFIN, EXEC. DIR. Date 9-8-2021

September 9, 2021

Ms. Allyson Taylor
Commissioner
Department of Alcoholic Beverage Control
Commonwealth of Kentucky
Mayo-Underwood Building
500 Mero St., 2NE33
Frankfort, KY 40601

Sent by fax: 502-564-1442

Memorandum in Support of Request for Reconsideration of Advisory Opinion 2021-003

On behalf of the membership of the Kentucky Grocers & Convenience Store Association we request that the Department of Alcoholic Beverage Control reconsider its Advisory Opinion 2021-003. On August 31, 2021, the Department of Alcoholic Beverage Control (the "Department") issued ABC Advisory Opinion 2021-003 ("Advisory Opinion") providing an opinion to the question "[c]an wine spritzers under 7% ABV be sold at retail stores where the sales of staple groceries exceed 10% or greater of gross sales receipts?" In addressing this question, the Department focuses its opinion on the statutory definitions of "wine", "malt beverage", and "weak cider" as provided unambiguously by the legislature through KRS 241.010 pursuant to their amendment in 2014. Specifically, in 2014, the legislature added the definition "weak cider". Additionally, the legislature explicitly excluded "weak cider" from the definition of "wine" and included "weak cider" in the definition of "malt beverage". In the Advisory Opinion the Department exceeds its statutory authority by attempting to modify the statutory definitions of "wine" and "weak cider" when the terms are entirely unambiguous and fail to conflict with any other statute in KRS Chapters 241-244.

The legislature is provided the ability to define terms in a manner that best reflects the laws which it seeks to put in place or amend. In so defining, it completely affects the interpretation of the legislation it produces. Considering KRS 241.010, the legislature has chosen to unambiguously define "weak cider" as "any fermented fruit-based beverage containing more than one percent (1%) but less than seven percent (7%) alcohol by volume" and the legislature has chosen to explicitly exclude "weak cider" from the statutory definition of "wine" with absolutely no ambiguity. As such, fermented fruit-based beverages, preparations, or mixtures containing alcohol by volume above 7% and below 24% may meet the definition of "wine". But fermented fruit-based beverage, preparation, or mixture containing 7% or below alcohol by volume are defined by KRS as "weak cider". It is beyond peradventure "an unambiguous statute is to be applied without resort to any outside aids." *Commonwealth v. Plowman*, 86 S.W.3d 47, 48 (Ky. 2002).

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

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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. The Department turns to definitions and sources not provided by statute in order to generate a new definition under the guise of clarification. In so doing, the agency does not clarify, but rather, uproot and change the definition of "wine" and "weak cider" entirely and in a manner that is outside the plain reading of the statute.

In the ABC Advisory Opinion 2021-003 the Department presents an argument to "clarify" a distinction between "wines" and "weak ciders". In so doing the Department supplants the language of the statute and replaces it with a definition that is not only against the statute also exceeding their statutory authority in so doing. The Department agrees that the statutory definition of wine excludes "weak cider", and that "weak cider" was specifically added to the statute in 2014. So, in order to determine the meaning of the regulation the Department but must first turn to the statute itself and determine if there is any actual ambiguity. While KRS 241.010 does define "wine" and "weak cider", it does not define "fruit". For this term, the Department may turn to outside definitions to identify such terms if they believe the term is ambiguous. However, it may not do so for the terms specifically defined by the legislature.

"Fruit" is defined by Merriam-Webster as the usually edible reproductive body of a seed plant especially one having sweet pulp associated with the seed. There is little discussion on whether a grape is a "fruit", in fact many children know this to be fact by the time they enter kindergarten. It is unlikely, nor do we believe, that the Department or the legislature would claim that it is confused about whether a grape is a "fruit". Never-the-less, based upon the statutory definition of "weak cider", it is any fermented beverage utilizing the edible reproductive body of a seed plant containing more than one percent (1%) but less than seven percent (7%) alcohol by volume and, thus, any beverage meeting that distinction is explicitly and unambiguously excluded from the statutory definition of "wine".

In the Advisory Opinion the Department relies on allegedly overlapping definitions of "weak cider" and "wine" and base its argument on the level of alcohol. However, this does not generate any ambiguity amongst the statutory definitions when "weak cider" is specifically excluded from the definition of "wine" and, thus, no ambiguity can exist. The Department states that "there is no indication that the legislature intended for all wines under 7% alcohol by volume to be considered "weak ciders"." This is false. In fact, the opposite affirmation is true; the legislature intends for all fermented fruit-based beverages between 1% and 7% alcohol by volume to be treated as "weak ciders", as that is how they have chosen to unambiguously define the term. The legislature has provided a specific definition for weak cider that includes such language, has provided a definition for "wine" that explicitly excludes "weak ciders", and specifically defined a threshold between these definitions.

Further, the Department conflates the term "wine" and "wine spritzer" in its Advisory Opinion in invoking its determination regarding the definition of "alcoholic beverage". Specifically, a "wine spritzer" is a commonly used term of art which unfortunately the statute does not go to lengths to define. Merriam-Webster defines "spritzer" as a beverage of usually white wine and soda water. Spritzers were first invented in Hungary in roughly 1842, and while wine spritzers are debatably the most popular, there are other varieties of spritzer including varieties containing no alcohol.

Thus, "wine" is a modifier of "spritzer" used to identify the addition of wine to the soda water. It is not imitating wine or spuriously using the name. The beverage is a "wine spritzer". Under the logic used in the Advisory Opinion "root beer" too should be considered an alcoholic beverage. However, unlike root beer, it is not claimed here that a typical wine spritzer is not an alcoholic beverage, as many do contain greater than 1% alcohol by volume.

The Department in its issuance of the Advisory Opinion is in violation of KRS 241.060 by modifying unambiguous definitions within the bounds of KRS Chapters 241-244. The Department has specifically delineated functions, powers, and duties as defined by KRS 241.060. For example, the Department may promulgate reasonable administrative regulations governing procedures relative to applications for and revocations of licenses, limit the number of licenses of each kind or class to be issued, or hold hearings in accordance with KRS Chapter 13B. The Department does not have the authority to enact legislation, modify statutes, or to change the definitions contained therein. The Department's redefining of the terms "wine" and "weak cider" violates its duties in excess of the powers provided to it by the KRS 241.060. If the legislature so chooses, it may change the statute and the specific definitions set forth therein. However, the Department is without authority to circumvent the legislative process.

As such we Request that the Department reconsider its Advisory Opinion 2021-003 as it directly conflicts with KRS 241.010 and attempts to modify the statute in a manner that is outside the Department's authority.

Sincerely,

Tod A. Griffin
Executive Director

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