STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

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Opinion No. 21-12

Authority of Retail Food Store Wine Licensee to Hold Delivery Service License

Question 1

May a retail food store that is licensed to sell wine under Tenn. Code Ann. § 57-3-803 also be licensed to deliver alcoholic beverages under Tenn. Code Ann. § 57-3-224?

Opinion 1

A retail food store licensed to sell wine under Tenn. Code Ann. § 57-3-803 does not appear to be statutorily prohibited from also holding a license to deliver alcoholic beverages under Tenn. Code Ann. § 57-3-224.

Question 2

If the answer to question #1 is yes, may such a retail food store—i.e., a single entity that holds both licenses—deliver the wine that it itself sells under its retail food store wine license?

Opinion 2

A retail food store that holds both a license to sell wine and a delivery service license may likely use its delivery service license to deliver the wine that it itself sells under its retail food store license, as long as it does so in compliance with the terms and conditions of its delivery service license.

Question 3

May an entity licensed to deliver alcoholic beverages deliver wine sold by a legally separate entity licensed as a retail food store to sell wine even though the two separate entities are under common ownership or control?

Opinion 3

A delivery service licensee may deliver wine sold by a retail food store wine licensee that is legally a separate entity from the delivery service even though the two separate entities are both owned or controlled by the same person or entity.

ANALYSIS

As the United States Supreme Court has explained,

> Tennessee, like many other States, requires alcoholic beverages distributed in the State to pass through a specified three-tiered system. Acting through the Tennessee Alcoholic Beverage Commission (TABC), the State issues different types of licenses to producers, wholesalers, and retailers of alcoholic beverages. *See* Tenn. Code Ann. § 57–3–201 (2018). Producers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers or other wholesalers; and only licensed retailers may sell to consumers. § 57–3–404. No person may lawfully participate in the sale of alcohol without the appropriate license. *See, e.g.*, § 57–3–406.

Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2457, 204 L. Ed. 2d 801 (2019) (footnote omitted).

Retail liquor stores (i.e., liquor stores and package stores licensed under Tenn. Code Ann. § 57-3-204) have been the traditional sellers of wine for off-premises consumption in Tennessee. Until recently, retail food stores (i.e., grocery stores and convenience stores) were not eligible to be licensed to sell wine. But in 2014 the General Assembly created "an additional class of licenses allowing the sale of wine at retail food stores." 2014 Tenn. Pub. Acts, ch. 554, § 1. This new "retail food store wine license" allows a "retail food store" that meets certain statutory requirements[1] to "receive, store, possess and sell wine at retail for consumption off the premises at the licensed retail food store . . . ." Tenn. Code Ann. § 57-3-803(a).

A retail food store wine licensee is subject to the following "prohibited-interest" limitation:

> No holder of a retail food store wine license, nor any person or entity having any interest in such license greater than ten percent (10%) shall have any interest as partner or otherwise, either direct or indirect, in a business licensed to engage in the sale or distribution of alcoholic beverages, including wine and beer licensed under § 57-3-202 [i.e., producers], § 57-3-203 [i.e., wholesalers], § 57-3-204 i.e., retailers], § 57-3-207 [i.e. wineries], § 57-3-217 [i.e., direct shippers that manufacture, sell, and ship wine by common carrier] or [title 57, chapter 3] part 6 . . . [i.e., non-resident sellers permitted to operate in Tennessee].

Id. § 57-3-803(b)(2)(A).

[1] "'Retail food store' means an establishment that is open to the public that derives at least twenty percent (20%) of its sales [sic] taxable sales from the retail sale of food and food ingredients for human consumption taxed at the rate provided in § 67-6-228(a) and has retail floor space of at least one thousand two hundred square feet (1,200 sq. ft.)." Tenn. Code Ann. § 57-3-802(1). The basic statutory requirements for obtaining a retail food store wine license are specified in Tenn. Code Ann. § 57-3-803.

When the General Assembly created this "additional" wine license for retail food stores in 2014, it granted liquor stores and package stores a new privilege of licensure: simply by virtue of being licensed to sell alcoholic beverages under § 57-3-204, liquor stores and package stores are now authorized to "deliver" the products they sell to locations outside their licensed premises and to charge a fee for this delivery service. *See* 2014 Tenn. Pub. Acts, ch. 554, § 12 (codified at Tenn. Code Ann. § 57-3-406(j)(1)). But that delivery privilege was not included in the new class of license that allows retail food stores to sell wine. Unlike liquor store licensees, retail food store wine licensees are not authorized to deliver wine simply by virtue of being licensed to sell wine.

In 2015, the General Assembly created yet another type of license—the "delivery service license." 2015 Tenn. Pub. Acts, ch. 285, § 2. Initially, a delivery service license only authorized a delivery service to deliver alcoholic beverages sold by a liquor store or package store—not wine sold by a retail food store. But the General Assembly then amended the law to reflect its legislative intent to allow delivery service licensees to also deliver wine sold by licensed retail food stores. *See* 2018 Tenn. Pub. Acts, ch. 765, § 1.

Thus, under current law, a delivery service license is "to be issued by [the TABC] to any delivery service that delivers or facilitates delivery of prepared food from restaurants or items from a retail store to customers as part of [its] business and seeks to deliver sealed packages of alcoholic beverages or beer . . . sold by any retailers licensed under [title 57, chapter 3] . . ." Tenn. Code Ann. § 57-3-224(a)(1). Because retailers licensed under title 57, chapter 3 include—in addition to liquor stores and package stores — grocery stores and convenience stores, delivery services may now deliver wine sold by retail food stores.[2]

However, the next section of the delivery service license statute, 224(b)(1), which describes who may *apply* for a delivery service license, was not amended to reflect the legislative intent expressed in 224(a)(1) to allow delivery services to deliver wine sold by retail food stores. Because it was not amended, 224(b)(1) incongruously limits—as relevant here—those who may *apply* for a delivery service license to persons and entities "desiring to deliver" alcoholic beverages sold by a "retailer licensed under § 57-3-204," which includes only liquor stores and package stores, but does not include retail food stores, which are licensed to sell wine under Tenn. Code Ann. § 57-3-803, not § 57-3-204.

This incongruity between §§ 57-3-224(a)(1) and (b)(1) is of significance in the analysis of the questions posed. While the amendment of Tenn. Code Ann. § 57-3-224(a)(1) bespeaks a legislative intent to change the prior law to now allow delivery service licensees to deliver wine sold by retail food store wine licensees, the failure similarly to amend 224(b)(1) to include those delivery services within the scope of permitted *applicants* for a delivery service license creates a potential conflict and concomitant uncertainty as to the scope of the delivery service license.[3]

[2] There are no "prohibited-interest" limitations on a delivery service license.

[3] That same incongruity exists between Tenn. Code Ann. §§ 57-3-224(a)(1) and 57-3-406(k)(1), which was likewise not amended to parallel the amendment to Tenn. Code Ann. §§ 57-3-224(a)(1). (Section 406(k)(1) regulates how delivery services may deliver alcoholic beverages sold by retail liquor stores and package stores and is, therefore, not relevant to the questions posed here, which concern only retail food stores.)

1. A retail food store licensed to sell wine under Tenn. Code Ann. § 57-3-803 does not appear to be statutorily prohibited from also holding a license to deliver alcoholic beverages under Tenn. Code Ann. § 57-3-224.

There is nothing on the face of Tenn. Code Ann. § 57-3-224 that would appear to prohibit a retail food store licensed to sell wine from concurrently holding a delivery service license, assuming it meets all the statutory requirements for obtaining a delivery service license.

Tennessee Code Annotated § 57-3-204 allows liquor stores and package stores to deliver their own products without obtaining a delivery service license; that delivery privilege is included in their retailer license privileges. By contrast, no delivery service privilege is included in the retail food store wine license granted under § 57-3-803; retail food store wine licensees may not deliver wine under that license alone.

But retail food stores are not precluded from holding a separate delivery service license under Tenn. Code § 57-3-224(a)(1). Had the General Assembly intended to prohibit retail food stores from holding a delivery service license, it could easily have done so. Instead, it provided that "a delivery service license" can be "issued to any delivery service" that delivers food to customers as part of its business and that wants to also deliver sealed packages of alcoholic beverages that are sold by any retailer licensed to sell those beverages under title 57, chapter 3, *id.*, which would include retail food stores licensed to sell wine under § 57-3-803.

Although a retail food store licensed to sell wine that desires to deliver wine would—assuming it satisfies the basic requirements—fit within the statutory definition of a delivery service that may *be issued,* and that may therefore *hold,* a delivery service license, the incongruity between §§ 57-3-224(a)(1) and (b)(1) raises some question as to whether that entity or person would come within the statutory definition of who may *apply for* a delivery service license.

But the problem presented by the incongruity between who may hold a delivery service license according to § 57-3-224(a)(1) and who may apply for a delivery service license according to 224(b)(1) can be resolved by application of principles of statutory construction—principles that are judicially designed to help courts deal with conflicts and incongruities in statutory drafting. When construing facially conflicting statutes, a court will give effect to the legislative intent without unduly restricting or expanding a statute's intended coverage. *State v. Davis,* 173 S.W.3d 411, 413–14 (Tenn. 2005) (citing *State v. Jennings,* 130 S.W.3d 43, 46 (Tenn. 2004)). Component parts of a statute are to be construed, if possible, consistently, and reasonably. *See, e.g., State v. Alford,* 970 S.W.2d 944, 946 (Tenn. 1998). Statutes involving the same subject must be construed harmoniously, so that they do not conflict. *State v. Turner,* 193 S.W.3d 522 (Tenn. 2006); *In re Akins,* 87 S.W.3d 488, 493 (Tenn. 2002) (citing *Parkridge Hosp., Inc. v. Woods,* 561 S.W.2d 754, 755 (Tenn. 1978)).

And, as most pertinent here, the rules of statutory construction direct courts *not* to "apply a particular interpretation to a statute if that interpretation would yield an absurd result." *State v. Sims,* 45 S.W.3d 1, 11 (Tenn. 2001). Put another way, courts must "presume that the General Assembly did not intend to enact meaningless or useless legislation." *Lind v. Beaman Dodge, Inc.,*

356 S.W.3d 889, 900 (Tenn. 2011) (citing *Texas Gas Transmission Corp. v. Atkins*, 205 Tenn. 495, 327 S.W.2d 305, 307 (1959)).

The legislature amended § 57-3-224 to allow delivery services to deliver alcoholic beverages sold by all retailers licensed under chapter 3, which includes retail food stores that sell wine. Before that amendment, delivery services could only deliver alcoholic beverages sold by retail liquor stores and package stores. While it amended § 57-3-224(a)(1) to accomplish that change with reference to the *issuance* of a delivery service license, the legislature neglected to similarly amend 224(b)(1) with reference to the submission of *an application* for a delivery service license. Section 224(b)(1) still says that a delivery service may submit an application only for a license to deliver beverages sold by retail liquor/package stores—not for a license to deliver wine sold by retail food stores.

In light of the applicable principles of statutory construction set out above, it is highly likely that a court would harmonize the two statutory provisions by construing them together to mean that any person or entity that may be *issued* a delivery service license may *ipso facto* be permitted to apply for such a license. Such a construction would comport with the legislative intent behind the amendment to (a)(1)—to allow delivery services to deliver wine sold by retail food stores, not just wine sold by retail liquor stores. Any other reading would render the amendment to (a)(1) essentially useless or meaningless; it would yield the absurd result that one may not apply for a license which one is qualified to hold. Because the problematic incongruity—most likely the result of a drafting oversight—may be thus resolved, it should not operate to prevent a retail food store licensed to sell wine from also applying for and being issued a delivery service license.

Nor does the prohibited-interest limitation in Tenn. Code Ann. § 57-3-803(b)(2)(a) prevent a retail food store from holding a delivery service license under Tenn. Code Ann. § 57-3-224. That limitation precludes a retail food store wine licensee from having "any interest," whether direct or indirect, in "*a business licensed to engage in the sale or distribution of alcoholic beverages*, including wine and beer licensed under § 57-3-202, § 57-3-203, § 57-3-204, § 57-3-207, § 57-3-217 or part 6 of this chapter." Tenn. Code Ann. § 57-3-803(b)(2)(A) (emphasis added).

That "prohibited-interest" limitation does not prohibit a retail food store wine licensee from having an interest in a delivery service. The prohibition applies only to interests in producers (§ 57-3-202), wholesalers (§ 57-3-203), retailers (§ 57-3-204), wineries (§ 57-3-207), direct shippers that manufacture, sell, and ship wine by common carrier (§ 57-3-217), and non-resident sellers permitted to operate in Tennessee under title 57, chapter 6.

To begin with, a delivery service is licensed under Tenn. Code Ann. § 57-3-224, which is *not* one of the specified businesses in which a retail food store may not have an interest. Moreover, a delivery service is not a business "engage[d] in the sale or distribution" of alcoholic beverages.

A licensed delivery service is not engaged in the sale of the alcoholic beverages it delivers. A delivery service licensee is simply permitted to "*deliver* sealed packages of alcoholic beverages or beer" that are sold by licensed retailers. Tenn. Ann. Code § 57-3-224(a)(1) (emphasis added). In fact, the statute makes clear that the charging of a fee for the delivery service "must not be construed as the delivery service reselling alcoholic beverages or having a direct or indirect interest

in the retailer." *Id*. § 57-3-224(a)(3). Thus, a delivery service licensee is not a business engaged in "the sale . . . of alcoholic beverages."

A delivery service is likewise not a business engaged in the "distribution of alcoholic beverages" as that phrase must be understood here. In the context in which it is used here, "distribution" can only refer to the alcoholic-beverage-distribution system allowed under Tennessee law—the three-tier distribution system that includes only producers, wholesalers, and retailers of alcoholic beverages. A delivery service is none of those. It is neither a producer, a wholesaler, nor a retailer of alcoholic beverages, which indeed explains why it is not among the "prohibited-interest" businesses listed in Tenn. Code Ann. § 57-3-803(b)(2)(A), all of which are part of the three-tier "distribution" system.[4]

While "distribution" might mean "delivery" in some contexts, it does not have that meaning in the present context. The terms "distribution," "distributor," and "distribute" are repeatedly used throughout title 57 in connection with producers, wholesalers, and retailers—the traditional members of Tennessee's three-tiered system. A delivery service does not perform the functions of any of these participants in that system; it operates outside the system when it simply delivers alcoholic beverages that have already been distributed—from producer to wholesaler to retailer—through the three-tiered system.

Further, those engaged in the business of selling and distributing alcoholic beverages are subject to certain taxes[5] that delivery service licensees are not obligated to pay.[6] That strongly reinforces that the General Assembly does not view delivery service businesses as sellers or distributors of alcoholic beverages.

In sum, the "prohibited-interest" limitation in Tenn. Code Ann. § 57-3-803(b)(2)(A) does not appear to preclude a retail food store from having an interest in a delivery service because a delivery service is not a business licensed to engage in the sale or distribution of alcoholic beverages.

Therefore, a retail food store that is licensed to sell wine under Tenn. Code Ann. § 57-3-803 is likely not statutorily precluded from also holding a license to deliver alcoholic beverages.

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[4]The first four businesses—§ 57-3-202 (producers); § 57-3-203 (wholesalers); § 57-3-204 (retailers); and § 57-3-207 (wineries)— have been included in Tennessee's three-tiered system for the sale and distribution of wine and other alcoholic beverages within this State since the system's inception in 1939. All "sell" and/or "distribute" alcoholic beverages under the express language of their respective licensure statutes. Similarly, the other two businesses—direct shippers that manufacture, sell, and ship wine by common carrier under § 57-3-217 and non-resident sellers that are permitted to operate in this State—also "sell" and/or "distribute" alcoholic beverages under their respective licensure statutes.

[5] "It is lawful to manufacture, store, sell, distribute and purchase alcoholic beverages or wine subject to proper licensing, [and] payment of taxes, ..." Tenn. Code Ann. § 57-3-102(a); *see* Tenn. Code Ann. §§ 57-3-301 to -304.

[6] "The delivery service licensee is not responsible for remitting applicable taxes on alcoholic beverages or beer delivered by the licensee." Tenn. Code Ann. § 57-3-224(a)(3).

2. & 3. A retail food store that holds both a license to sell wine and a delivery service license may likely use its delivery service license to deliver the wine that it itself sells under its retail food store license, and a delivery service licensee may deliver wine sold by a retail food store wine licensee that is legally a separate entity from the delivery service even though the two entities are commonly owned or controlled.

Clearly, under the statutory licensing scheme, a delivery service licensee that is an entity or person legally separate and distinct from a retail food store wine licensee may deliver wine sold by the retail food store wine licensee, assuming it does so in compliance with the terms and conditions of its delivery license. That the two legally separate entities may share common ownership or control does not appear to be contrary to the statutory licensing scheme. That is, there does not appear to be any applicable statutory provision that would prevent two separate business entities that are under common ownership or control and that obtain, respectively, a retail food store wine license and a delivery service license, from engaging in the same business activities that legally separate entities not under common ownership or control may engage in with one another. Thus, there does not appear to be any statutory provision that would prevent the delivery service licensee from delivering the wine sold by the retail food store wine licensee with which it shares ownership or control.

Nor does there appear to be any applicable statutory provision that would prohibit a retail food store that holds both a license to sell wine and a delivery service license from delivering the wine that the retail food store is licensed to sell, assuming that it does so in compliance with the terms and conditions of its delivery service license.

HERBERT H. SLATERY III
Attorney General and Reporter

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

LAURA T. KIDWELL
Assistant Solicitor General

Requested by:

The Honorable Jeremy Faison
State Representative
425 Rep. John Lewis Way N.
Suite 604 Cordell Hull Building
Nashville, Tennessee 37243