

# Department of Alcoholic Beverage Control

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The Department of Alcoholic Beverage Control (ABC) is a constitutionally-authorized agency established in 1955 (section 22 of Article XX, California Constitution). A division of the Business, Transportation and Housing Agency, ABC is responsible for the enforcement of the Alcoholic Beverage Control Act (ABC Act), Business and Professions Code section 23000 *et seq.*, and its regulations, which are codified in Divisions 1 and 1.1, Title 4 of the California Code of Regulations (CCR). The Act delegates to ABC the exclusive power to regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages in California. In addition, the ABC Act vests the Department with authority, subject to certain federal laws, to regulate the importation and exportation of alcoholic beverages across state lines.

ABC is authorized to investigate violations of the Business and Professions Code and other statutes which occur on premises where alcohol is sold, and may deny, suspend, or revoke alcoholic beverage licenses. Approximately 71,200 retail licenses operate under this authority. ABC's disciplinary decisions are appealable to the Alcoholic Beverage Control Appeals Board. Many disciplinary actions taken by ABC, as well as other information concerning the Department, are printed in liquor industry trade publications such as *California Beverage News* and *Beverage Industry News*.

The Director of ABC is appointed by, and serves at the pleasure of, the Governor. ABC divides the state into two divisions (northern and southern), with assistant directors in charge of each division. The Department is further divided into 24 field offices, which are headed by district administrators or supervisors and staffed by investigators, licensing representatives, and support personnel. ABC's investigators—who have full peace officer powers to enforce the ABC Act, the California Penal Code, and the Department's regulations—are responsible for investigating applicants for licenses and complaints filed against licensees and, when necessary, making arrests for statutory violations. In addition to the district offices' investigations, the Department operates a Special Operations Unit consisting of 22 special investigators who primarily assist district offices and other law enforcement agencies in undercover operations involving vice and criminal activities, as well as high-profile operations at large events.

ABC dispenses various types of licenses to qualified persons and legitimate businesses to sell, manufacture, or other-

wise deal in alcoholic beverages. "On-sale" refers to a license to sell alcoholic beverages which will be bought and consumed on the same premises. "Off-sale" refers to a license to sell alcoholic beverages which will not be consumed on the premises. Population-based quotas determine the number of general liquor licenses issued each year per county; in 1997, the legislature applied similar quotas to beer and wine licenses.

Former ABC Director Jay Stroh retired effective July 15, 2000. Stroh served as ABC Director for 17 years under three Governors; his tenure is believed to be the longest continuous directorship in state government. Chief Deputy Director Manuel Espinoza has been appointed interim director pending a permanent appointment by Governor Davis.

## MAJOR PROJECTS

### Restrictions on Promotional Items, Sweepstakes Remain

Business and Professions Code section 25600(a) prohibits ABC licensees from "directly or indirectly" giving any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage, except as provided in regulations adopted by ABC. Section 25600(b) states that "no rule of the department may permit a licensee to give any premium, gift, or free goods of greater than inconsequential value in connection with the sale or distribution of beer. With respect to beer, premiums, gifts, or free goods, including advertising specialties that have no significant utilitarian value other than advertising, shall be deemed to have greater than inconsequential value if they cost more than twenty-five cents (\$0.25) per unit, or cost more than fifteen dollars (\$15) in the aggregate for all those items given by a single supplier to a single retail premises per calendar year."

In an attempt to supersede the 25-cent restriction on advertising specialties, the beer industry supported legislation in 2000 that would have increased by more than five times the limit on the value of gifts that may be given by beer manufacturers to retailers to help promote their product. The bill, AB 2551 (Thomson), would have increased the existing 25-cent limit to \$1.35. However, the Governor vetoed the legislation (see 2000 LEGISLATION).

The industry also failed in its recent attempt to curb ABC's restrictions on the use of sweepstakes promotions.

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Section 106, Title 4 of the CCR, contains ABC's standards and restrictions on the advertising and merchandising of alcoholic beverages. In November 1998, ABC amplified this section by adopting—on an emergency basis—new subsection 106(j), Title 4 of the CCR, which clarifies that “[n]othing in [section 106] shall be construed to authorize the giving of any premium, gift or goods of any sort, whether by way of sweepstakes, drawings, prizes, cross-merchandising promotions with a non-alcoholic beverage product or products or any other method” if the value of the premium, gift, or goods given to an individual exceeds 25 cents with respect to beer; the Office of Administrative Law (OAL) approved ABC's permanent adoption of section 106(j) in January 1999. The promulgation of section 106(j) caused confusion in the industry and disrupted several holiday and Super Bowl promotions offering prizes to beer drinkers who enter and win a sweepstakes contest. In February 1999, Coors challenged the validity of section 106(j); as a result, ABC's enforcement of the new rule was stayed pending resolution of the litigation. [17:1 CRLR 124–25; 16:2 CRLR 104–05; 16:1 CRLR 122–23]

In January 2001, the Third District Court of Appeal upheld the validity of the ABC regulation. Coors argued that the regulation exceeds the scope of the statute because sweepstakes prizes are not premiums, gifts or free goods as prohibited by the statute. However, the court disagreed, finding that rule 106(j) is consistent with Business and Professions Code section 25600 (see LITIGATION).

**ABC Seeks to Repeal Visual Display Regulation**

On March 23, 2001, ABC published notice of its intent to repeal section 143.4, Title 4 of the CCR, which prohibits certain acts or conduct on licensed premises that are deemed “contrary to the public welfare and morals.” This section prohibits the showing of certain “films, still pictures, electronic reproduction or other reproductions” of a sexual nature that are considered contrary to the public welfare.

In its notice, ABC stated that a court recently determined that section 143.4 may prohibit expression that is protected by the first amendment. The notice cited *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000), as holding that section 143.4 is unconstitutionally overbroad in that it prohibits both non-obscene as well as obscene expression, and it is not sufficiently narrow to prohibit only legally obscene visual displays (see LITIGATION).

No public hearing is scheduled on the proposed repeal of section 143.4; however, ABC asked that interested persons submit written comments by May 7, 2001.

**ABC Combats Teen Drinking**

ABC continues to attack the problems posed by underage drinking through the following programs:

◆ **Study of Every 15 Minutes Program Shows Significant Impact.** For the past three years, ABC has provided grants to local agencies and organizations to present the *Every 15 Minutes* program to more than 230 California high schools. The Chico Police Department developed the program in 1996 as part of an ABC grant to local law enforcement. The program gets its name from statistics showing that, during the early 1990s, a death from an alcohol-related traffic collision occurred every fifteen minutes. The program is a two-day event, targeting high school juniors and seniors, designed to challenge teens to think about drinking, driving, personal safety, the responsibility of making mature decisions, and the impact those decisions have on family, friends, and others. [16:2 CRLR 105; 16:1 CRLR 125]

In March 2001, ABC released the preliminary results of a survey of 1,200 *Every 15 Minutes* participants being conducted by Professor Judy Bordin of Chico State University. The survey data indicate that the program has a significant impact on how teenagers feel about drinking and driving. Pre- and post-program surveys found decreased drinking and a decreased likelihood of drinking and driving. The surveys also showed that students were less likely to ride with someone who had been drinking and were also more likely to prevent friends who had been drinking from driving. The program is being transferred from ABC to the California Highway Patrol (CHP) over the next four years; CHP will provide grants to schools and school districts to conduct the program.

◆ **Teen “Spring Break” Parties.** During March 2001, ABC's San Marcos and San Diego District Offices worked with nine other law enforcement agencies to reduce the number of teen drinking parties and driving under the influence incidents associated with spring break. The Teenage Party Prevention, Enforcement and Dispersal (TAPPED) program is designed to help local law enforcement respond to and disperse teen drinking parties, increase community awareness of the problems associated with teen drinking, and deter future drinking violations by minors. TAPPED was part of Operation Safeguard, a two-month operation

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designed to crack down on teenage drinking parties, adults who furnish alcohol to minors, and underage drinking overall. Operation Safeguard included sobriety checkpoints, decoy shoulder tap and minor decoy compliance checks, keg registration enforcement, and teenage party dispersal.

◆ **Decoy Shoulder Tap Grants.** On August 1, 2000, ABC began awarding grants of \$5,000–\$20,000 to local law enforcement agencies to utilize the Decoy Shoulder Tap Program, which targets adults who furnish alcohol to minors. “Shoulder tapping” refers to the practice used by minors to obtain alcohol from strangers near off-sale liquor retailers. Minors wait outside the premises, approach adults who are about to enter, and request that the adult buy alcohol for them.

## BUSINESS REGULATORY AGENCIES

According to Business, Transportation and Housing Secretary Maria Contreras-Sweet, this practice has become increasingly common because liquor retailers are now doing a better job of checking identification. According to ABC Interim Director Manuel Espinoza, recent surveys show that as many as 46% of minors who attempt to buy alcohol use the shoulder tap method. Under Business and Professions Code section 25658(a), any adult caught purchasing alcohol for a minor faces a minimum fine of \$1,000 and 24 hours of community service. Under the Decoy Shoulder Tap Program, minor decoys working under the supervision of law enforcement officers solicit adults outside liquor stores to buy alcohol. The decoys tell the adult that they are under 21 and that the store will not sell them alcohol. If the adult then buys alcohol for the minor, he/she is knowingly and deliberately violating the law. The funding for ABC's Minor Decoy Shoulder Tap Program comes from the federal government's Office of Juvenile Justice and Delinquency Prevention.

◆ **ABC Web Site Adds "Teen Corner" Link.** ABC recently added a "Teen Corner" feature to its Web site, which is designed to help young people understand the dangers of drinking and driving; the laws that prohibit minors from purchasing, possessing, or consuming alcoholic beverages; and the consequences of violating those laws.

### ABC's GALE Program Awards \$1.5 Million to Fight Alcohol-Related Crime

On September 7, 2000, Governor Davis announced the award of 19 grants totaling \$1.5 million to local law enforcement agencies in California to fight alcohol-related crime. The awards come from the Grant Assistance to Local Law Enforcement (GALE) program, an ABC program which provides assistance to law enforcement agencies that target liquor license locations that are high in alcohol-related crime. [17:1 CRLR 122] Local law enforcement agencies apply for grants by submitting to ABC an action plan that identifies alcohol-related crime and provides a strategy for preventing and reducing those problems. An "alcohol-related crime" is any crime related to an ABC licensed business including illegal drug sales, sales of alcohol to minors, sales to obviously intoxicated patrons, illegal gambling, prostitution, and violence.

The grants also fund educational seminars for liquor license holders and their employees. The seminars teach ABC laws and regulations, how to spot false identification, preventing sales to minors, and how to tell when a patron has become intoxicated. In addition, the sessions teach preventive measures for halting illegal drug sales and other criminal activities that reduce quality of life in neighborhoods and business districts.

### Study Shows Less Alcohol Consumption in California

In December 1999, the State Board of Equalization released a study concluding that Californians are drinking 36% less wine, 34% less hard liquor, and 21% less beer. The find-

ings were based on excise tax collections paid by beverage manufacturers over a 10-year period from 1988. Changing cultural attitudes toward alcohol and stricter driving under the influence laws are a few of the speculated reasons for the shift. For instance, in 1990 California dropped its blood-alcohol content level required for a drunken driving conviction from .10 to .08. Moreover, stiffer penalties, including immediate license suspension, and increased use of sobriety check points have acted as further deterrents to driving under the influence. While the current statistics are comforting to those who advocate responsible alcohol use, some experts believe that an alcohol use explosion is just around the corner. Manny Espinoza, then Chief Deputy Director of the Department, commented in a December 1999 Associated Press article that in the long run there will be one-third more people of drinking age due to a projected increase in the number of people of legal drinking age in the general population.

## 2000 LEGISLATION

**AB 2551 (Thomson)**, as introduced in early 2000 by Assembly Speaker Hertzberg, was unrelated to alcohol regulation. On August 28, 2000, the bill was gutted and amended. As enrolled to the Governor on August 31, 2000, the bill would have amended Business and Professions Code section 25600(b) to substantially increase the monetary amount of advertising specialties that ABC licensees may give to the public and retailers (see MAJOR PROJECTS). The new provisions would also have required ABC to report to the legislature regarding industry compliance with restrictions on advertising and promotional giveaways. On September 30, Governor Davis vetoed AB 2551. According to the Governor's veto message, "this bill was drastically changed during the last week of the legislative session and there was no opportunity for public comment in both houses. I have repeatedly expressed my disinclination to sign bills, barring an emergency, that deny the public an opportunity to participate."

**SB 1293 (Chesbro)**, as amended August 25, 2000, adds section 25241 to the Business and Professions Code. Sponsored by the Napa Valley Vintners Association, the new law provides that no wine that is produced, bottled, labeled, offered for sale, or sold in California may use, in a brand name or otherwise, on any label, packaging material or advertising, the name "Napa," any viticultural area appellation entirely within Napa County, or any similar name, unless the wine meets certain federal regulatory standards for appellation of origin in Napa County. The bill also authorizes ABC to suspend or revoke the license of a winemaker who violates the provisions of this bill, and permits ABC to seize and dispose of any wine labeled in violation of the bill. On September 28, 2000, Governor Davis signed SB 1293 (Chapter 831, Statutes of 2000), the constitutionality of which is currently being challenged in the Third District Court of Appeal (see LITIGATION).

**AB 2187 (Aanestad)**, as amended August 10, 2000, allows local governments to prohibit both the possession of alcoholic beverage containers and the consumption of alco-

## BUSINESS REGULATORY AGENCIES

holic beverages in city- or county-owned parks or public places. This bill was signed by the Governor on September 8, 2000 (Chapter 381, Statutes of 2000).

**SB 1423 (Chesbro)**, as amended June 8, 2000, adds section 25500.1 to the Business and Professions Code, which authorizes wineries and brandy manufacturers ("nonretail industry members")—notwithstanding the state's "tied-house restrictions"—to list restaurants (on-sale retailers) which carry their products on their Web sites. The "tied-house" laws generally prohibit any cross-ownership among the three independent tiers of the alcohol industry—manufacturers, retailers, and distributors/wholesalers—and discourage manufacturers from providing anything of value to distributors or retailers, be it free goods, services, or advertising. New section 25500.1 provides that the listing of the names, addresses, telephone numbers or e-mail addresses (or both), or Web site addresses of two or more unaffiliated on-sale retailers selling wine or brandy (or both) and operating and licensed as bona fide public eating places selling the wine or brandy produced, distributed or imported by a nonretail industry member in response to a direct inquiry from a consumer received by telephone, by mail, by electronic Internet inquiry or in person does not constitute a thing of value or prohibited inducement to the listed on-sale retailer, if specified conditions are met. The bill was signed by the Governor on July 24, 2000 (Chapter 205, Statutes of 2000); similar provisions applicable to other liquor manufacturers were enacted in AB 2759 (Committee on Governmental Organization) and AB 2777 (Granlund) (see below).

**AB 2759 (Committee on Governmental Organization)**, as amended August 29, 2000, makes a number of "code maintenance" amendments and technical changes to the ABC Act, including the following:

- The bill deletes an obsolete provision of Business and Professions Code section 23050 that requires the ABC Director to be a member of the Governor's Council and to execute an official bond to the state for \$25,000.

- AB 2759 substantially amends Business and Professions Code section 23100, which previously allowed any person in possession of lawfully acquired alcoholic products to sell them to ABC licensees following the revocation or failure to renew an ABC license, to clarify that a wholesaler or manufacturer may accept the return of beer purchased from that wholesaler or manufacturer by the holder of a retail license following the revocation of, suspension of, voluntary surrender of, or failure to renew the retail license; the amendments also permit the wholesaler or manufacturer to credit the account of the retailer for the returned beer.

- Business and Professions Code section 23800 authorizes ABC to place reasonable restrictions upon retail licensees or any licensee in the exercise of retail privileges in various situations, and additionally permits ABC to place reasonable restrictions on these licensees if the Department adopts conditions requested by a local governing body. AB 2759 permits the Department, at the time of a transfer of a

license and upon written notice to the licensee of its adoption of conditions requested by a local governing body, to place reasonable restrictions on the license at the time of transfer.

- Business and Professions Code section 23817.5 formerly permitted replacement off-sale and beer licenses for use at abandoned premises that were licensed within the past 12 months. AB 2759 instead permits replacement off-sale and beer licenses for use at abandoned premises that were licensed and operated within the past 90 days.

- Business and Professions Code section 23824 provides that limitations on the number of licensed premises do not apply to premises located on land owned by the State of California; AB 2759 provides additionally that these limitations do not apply to premises located on land owned by and leased from the State of California.

- Business and Professions Code section 23986 requires any applicant for an on-sale or off-sale license in a census tract having an "undue concentration of licenses," as defined in ABC regulation, to publish a notice of the application in a local newspaper. AB 2759 instead requires such a notice to be published by applicants in census tracts having an "undue concentration of licenses" as defined in Business and Professions Code section 23958.4(a)(2) or (3).

- Business and Professions Code section 25512 contains an exception to the "tied-house" provisions under which a holder of no more than eight on-sale licenses may also hold not more than 16.67% of the stock of a corporation that holds beer manufacturer licenses that are located in Sacramento, Placer, El Dorado, Marin, or Napa County. This bill removes El Dorado and Marin counties, and adds Contra Costa and San Joaquin counties to the authorized locations. The modification to this exception, which was originally enacted in 1993, accommodates the changing business plans of the owners of the Old Spaghetti Factory restaurants.

- Similar to SB 1423 (Chesbro) (see above), AB 2759 amends Business and Professions Code section 25502.1 to permit certain "nonretail industry members" (generally, manufacturers, winegrowers, distillers, and wholesalers, with the exception of beer wholesalers)—notwithstanding the state's "tied-house restrictions"—to list contact information of unaffiliated off-sale premises where their products may be purchased on their Web sites, provided certain conditions are met.

- AB 2759 amends Business and Professions Code sections 25503.6, 25503.8, 25503.26, 25503.85—several existing exceptions to the state's "tied-house" restrictions"—which permit a beer manufacturer or the holder of a winegrower's license to purchase advertising space and time from or on behalf of an on-sale retail licensee under certain conditions, if the on-sale licensee owns a specified facility. This bill extends that authorization to distilled spirits manufacturers and distilled spirits manufacturer's agents. AB 2759 further permits specified manufacturers to purchase advertising space and time from a retail licensee who is the owner, manager, agent, assignee, or major tenant of a certain-sized arena in Los Angeles County. The bill includes a theme or amusement

## BUSINESS REGULATORY AGENCIES

park and the adjacent retail, dining, and entertainment area located in the City of Los Angeles or Los Angeles County within the enumerated facilities permitted to be owned by an on-sale licensee for purposes of the purchase of advertising time and space. AB 2759 also amends the same sections to refer to a "beer manufacturer" instead of a "holder" of a beer manufacturer's license.

AB 2759 was signed by the Governor on September 29, 2000 (Chapter 979, Statutes of 2000).

**AB 2777 (Granlund)**, as amended August 25, 2000, makes several changes to the ABC Act. First, AB 2777 amends section 25502.1 and adds new section 25500.2 to the Business and Professions Code. Similar to provisions in SB 1423 (Chesbro) and AB 2759 (Committee on Governmental Organization) (see above), AB 2777 authorizes a beer manufacturer, winegrower, or distiller of alcoholic beverages ("nonretail industry member")—notwithstanding the state's "tied-house" restrictions—to list restaurants (on-sale retailers) which carry their products on their Web sites. AB 2777 provides that the listing of the names, addresses, telephone numbers or e-mail addresses (or both), or Web site addresses of two or more unaffiliated on-sale retailers selling beer, wine, or distilled spirits and operating and licensed as bona fide public eating places selling the beer, wine, or distilled spirits produced, distributed or imported by the nonretail industry member in response to a direct inquiry from a consumer received by telephone, by mail, by electronic Internet inquiry or in person does not constitute a thing of value or prohibited inducement to the listed on-sale retailer, if specified conditions are met.

Like AB 2759 (see above), AB 2777 also amends section 25503.6 to broaden an existing "tied-house" exception and to allow a distilled spirits manufacturer to purchase advertising from, or on behalf of, an on-sale licensee who is an owner or major tenant of a certain-sized arena in Los Angeles County. This bill was signed by the Governor on September 29, 2000 (Chapter 980, Statutes of 2000).

**SB 607 (Chesbro)**, as amended August 25, 1999, would have amended the "tied-house" provisions to allow a new "winegrower-café" license [17:1 CRLR 123]; those provisions were deleted in August 2000. As amended August 28, 2000, SB 607 provides an exemption to the excise tax levied on certain types of alcoholic beverages sold to the military. Under existing law, an excise tax is imposed on all beer, wine, and distilled spirits sold in this state, and on beer, wine, and distilled spirits sold by manufacturers, rectifiers, or wholesalers, or sellers of those alcoholic beverages with respect to which no tax has been paid within areas over which the federal government exercises jurisdiction at rates based upon various formulas calculated according to volume and weight. SB 607 exempts distilled spirits sold by brandy manufacturers, distilled spirits manufacturers, rectifiers, importers, and distilled spirits wholesalers from the excise tax where the al-

coholic beverages are sold to specified instrumentalities of the armed forces of the United States located within the geographical boundaries of the state. The bill was signed by the Governor on September 23, 2000 (Chapter 609, Statutes of 2000).

**SB 671 (Chesbro)**, as amended April 25, 2000, is urgency legislation that provides funding to fight the glassy-winged sharpshooter and the spread of Pierce's disease, both of which pose a significant threat to California's winegrape industry. This bill creates the Pierce's Disease Management Program within the California Department of Food and Agriculture (CDFA); appropriates \$6.9 million from the general fund to a new Pierce's Disease Management Fund within CDFA (and expresses the legislature's intent that an additional

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\$6.9 million be appropriated through the Budget Act of 2000) for the purpose of research and other efforts to combat Pierce's disease and its vectors; and provides that funds from federal, industry, and other sources will be

available for these purposes without regard to fiscal year. The funds must be used for the purpose of combating Pierce's disease and its vectors, and to cover costs incurred by the state or by local entities. This bill authorizes the CDFA Secretary to establish, maintain, and enforce regulations consistent with the legislature's intent, and provides that this authority is to be liberally construed. SB 671 was signed by the Governor on May 19, 2000 (Chapter 21, Statutes of 2000) and took effect on that date.

**SB 1957 (Burton)**, as amended August 28, 2000, adds section 25000.7 to the Business and Professions Code, which provides that no sale or distribution agreement between a beer manufacturer and beer wholesaler shall be terminated solely for a beer wholesaler's failure to meet a sales goal or quota that is not commercially reasonable under the prevailing market conditions. This bill also adds new section 25000.9 to the Business and Professions Code, which provides that a beer manufacturer who unreasonably withholds consent or unreasonably denies approval of a sale, transfer, or assignment of any ownership interest in a beer wholesaler's business with respect to that manufacturer's brand or brands shall be liable in damages to the beer wholesaler, as specified. The bill was signed by the Governor on September 30, 2000 (Chapter 1083, Statutes of 2000).

**AB 2520 (Thomson)**, as amended August 14, 2000, adds section 23399.4 to the Business and Professions Code, which permits ABC to issue a certified farmers' market sales permit to allow a licensee under a winegrower's license to sell wine produced and bottled by the winegrower at certified farmers' market locations under certain conditions. The Governor signed AB 2520 on September 8, 2000 (Chapter 384, Statutes of 2000).

**AB 1525 (Thomson), AB 1604 (Wesson), SB 1232 (Chesbro), and SB 1511 (Chesbro)** create or expand an exception to the state's "tied-house" laws:

## BUSINESS REGULATORY AGENCIES

◆ **AB 1525 (Thomson)**, as amended February 28, 2000, grants a tied-house exception to the River City Cats, a minor league professional baseball organization located in West Sacramento in Yolo County. An exception to the state's tied-house laws is necessary so that alcohol manufacturers may purchase advertising from, or on behalf of, the baseball team, which will be licensed to sell alcoholic beverages at the stadium. The bill was signed by the Governor on March 28, 2000 and took effect immediately as an urgency statute (Chapter 7, Statutes of 2000).

◆ **AB 1604 (Wesson)**, as amended May 30, 2000, broadens an existing tied-house exception to allow a distilled spirits manufacturer to purchase advertising from, or on behalf of, an on-sale retail licensee that falls under the existing motion picture studio/entertainment facility tied-house exemption. The practical effect of this bill will be to allow Joseph E. Seagram & Sons, Inc., a distiller and the parent company of Universal Studios located in Los Angeles County, to purchase advertising in connection with daily activities and events held at the CityWalk portion of the facility. The current exemption applies only to beer and wine manufacturers, and only Disneyland located in Orange County may purchase advertising in connection with daily activities or events held at the park. The Governor signed AB 1604 on September 12, 2000, and the bill took effect immediately as an urgency statute (Chapter 424, Statutes of 2000).

◆ **SB 1232 (Chesbro)**. Business and Professions Code section 25503.30 creates a tied-house exception that permits a winegrower who manufactures or sells wine to hold an ownership interest in any on-sale license provided that (1) the on-sale licensee purchases all alcoholic beverages sold and served from California wholesale licensees, (2) the number of wine items by brand offered for sale by the on-sale licensee that are produced by the winegrower does not exceed 15% of the total wine items by brand listed and offered for sale by the on-sale licensee selling and serving that wine, and (3) a winegrower may not own more than two on-sale licenses relative to this authorization. As amended February 3, 2000, SB 1232 modifies this exception to allow an on-sale licensee that also has an ownership interest in a winery to purchase a specified portion of the wine products sold at the on-sale establishment directly from the same licensed winegrower, rather than from a wholesaler. The bill was sponsored by Family Winemakers of California. The Governor signed SB 1232 on July 21, 2000 (Chapter 162, Statutes of 2000).

◆ **SB 1511 (Chesbro)**, as amended May 26, 2000, adds section 23396.2 to the Business and Professions Code. This bill creates a new license category in the ABC Act—the on-sale general license for “wine, food and art cultural museum and educational center”—for the American Center for Wine, Food and the Arts in Napa County, and authorizes the Center to sell, furnish, or give alcoholic beverages for consumption on the licensed premises. The bill authorizes the Center to have off-sale privileges as well, so long as no more than 6,000

cases per calendar year are sold of wine labeled with and otherwise bearing only the name, logo, trademark and/or other proprietary art owned by the Center licensee; in no event may the wine sold off-sale bear a name, logo, trademark and/or other proprietary art or statement identifying any other licensee. SB 1511 also creates an exception to the “tied-house” restrictions by permitting a winegrower, distiller, or wholesaler to have an ownership interest in, or serve as an officer, director or employee of the Center, and by permitting these persons to sponsor educational and promotional events for the Center. SB 1511 was signed by the Governor on August 22, 2000 (Chapter 231, Statutes of 2000).

**H.R. 2031**, the Twenty-First Amendment Enforcement Act, was federal legislation that would authorize state attorneys general to use the federal courts as a forum for enforcing a state's direct shipping laws. [17:1 CRLR 124] On August 3, 1999, H.R. 2031 passed the House of Representatives by a vote of 325–99. On March 3, 2000, the Senate passed S. 577, a similar version of the Twenty-First Amendment Enforcement Act. Neither of these bills were enacted. However, at the insistence of Senator Orrin Hatch, the language of S. 577 was included in the conference report for H.R. 3244, The Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, Div. C, section 2004(a), which was signed by President Clinton on October 28, 2000. H.R. 3244 is an unrelated bill intended to reduce the sexual exploitation of immigrant women and children.

Under the bill, state attorneys general can now seek federal court injunctions against out-of-state businesses that ship alcoholic beverage products into their state, potentially violating that particular state's direct shipping laws. The proffered justification for the legislation was that it addresses the problem of underage access to alcohol over the Internet. Proponents of the Enforcement Act claimed that under current law, minors may be able to order alcohol over the Internet or by telephone and, with the aid of a credit card, have the contraband shipped directly to their homes. They argued that the Enforcement Act would help alleviate this problem by providing states with a powerful tool for enforcing direct shipment laws. Opponents of the Enforcement Act claimed that the articulated problem of underage access to alcohol over the Internet is unsubstantiated and overstated; even if such a problem does exist, it could be better addressed under current law, or—if necessary—by means less restrictive than the proposed legislation. Opponents argued that the proffered justification is nothing more than a pretext for the passage of legislation intended to protect liquor wholesalers. Opponents of the legislation contended that direct shipment laws (and by association, the Enforcement Act) are unconstitutional because they discriminate against interstate commerce in a way that violates the dormant Commerce Clause of the United States Constitution.

The following bills reported in Volume 17, No. 1 (Winter 2000) of the *California Regulatory Law Reporter* died in committee or otherwise failed to be enacted: **AB 377**

## BUSINESS REGULATORY AGENCIES

(Wesson), which—as amended in May 1999—would have provided that no ABC regulation may permit a licensee to offer any premium, gift, or free goods to a consumer in such a way that would encourage the purchase or consumption of alcoholic beverages by minors and that is conditioned on the purchase of an alcoholic beverage; **AB 220 (Washington)**, which would have established the Community-Based Alcohol Education Account within the ABC Fund to finance community-based alcohol education grants for youth; and **AJR 13 (Wiggins)**, which would have memorialized Congress to support the public's right to become informed regarding the health effects of wine consumption and to oppose a tripling of the excise tax on wine as being unwarranted.

### 2001 LEGISLATION

**SB 589 (Perata)**, as introduced February 22, 2001, is a spot bill that the author hopes to use to address a long-term solution to ABC's budget issues. According to a Senate committee analysis, the author has met with ABC and industry representatives to discuss legislation to allow ABC to increase annual license fees in order to sustain current enforcement and licensing levels and to avoid any budget shortfalls. According to the Legislative Analyst's Office (LAO), at its existing funding level, ABC will end the 2001–02 budget year with an inadequate special fund reserve, and will further deplete that reserve by the 2002–03 budget year. By 2003–04, ABC will have insufficient funds to sustain its current level of enforcement. The LAO analysis notes that ABC fees have not been adjusted for inflation since 1978. In its *2001–02 Budget Analysis*, LAO recommended that the legislature amend the ABC Act to permit an increase of fees of up to 20% over several years as needed to meet the expenditure level approved by the legislature and to maintain a prudent operating reserve. [S. GO]

**AB 624 (Oropeza)**, as amended April 26, 2001, would extend from 30 to 45 days the amount of time local governments have to review applications for alcoholic beverage licenses. The bill would authorize ABC to consider adjacent crime reporting districts when considering an application for off-sale beer and wine licenses proposed in an area that exceeds the existing population-to-license limitations. It would also require the applicant to mail notification of the application to every owner of property within a 500-foot radius of the premises; current law requires notification to every resident within 500 feet. A provision appropriating \$5 million from the general fund to ABC for enhanced enforcement activities was deleted on April 26. [A. Appr]

**AB 395 (Briggs)**, as amended on April 17, 2001, would amend Business and Professions Code section 25611.1 to provide that interior signs advertising beer that are provided to on-sale or off-sale retail establishments remain the property of the beer wholesaler who authorized or furnished the

signs unless sold to the licensee. The bill is supported by California Beer and Beverage Distributors. [A. Appr]

**AB 1298 (Wesson)**, as introduced February 23, 2001, would provide that the presence of drug paraphernalia on a licensed premises is grounds for suspension or revocation of an ABC license. [A. GO]

**AB 1394 (Wiggins)**, as amended April 16, 2001, addresses Pierce's disease and the glassy-winged sharpshooter, which have seriously impacted the California wine industry (see 2000 LEGISLATION for a description of SB 671 (Chesbro)). AB 1394 would create the Pierce's Disease and the Glassy-winged Sharpshooter Board within CDFA. The board is to consist of at least 14 and no more than 15 members—eight of whom must be California grape growers, six of whom must be grape processors, and one may be a public member appointed by the CDFA Secretary. The bill sets forth the powers of the Board and provides for a specified annual assessment to be paid by processors for research of integrated pest management and other sustainable industry practices. As an urgency measure, the bill would take effect immediately. [A. Appr]

**SB 594 (Chesbro)**. Food and Agricultural Code section 6200 *et seq.*, the Winegrape Pest and Disease Control District Law, authorizes the formation of winegrape pest and

disease control districts to respond to the effects of winegrape plant pests and diseases, and to collect and disseminate to winegrape producers in the district all relevant information and scientific studies concerning the pests and

diseases, as well as to chart and determine the extent and location of any infestations. This statutory scheme sets forth a procedure for the formation, consolidation, reauthorization, and dissolution of the districts, and provides for their powers and duties, including the power to make assessments for the purposes of the district.

As amended April 18, 2001, SB 594 would add section 6292.1 *et seq.* to the Food and Agricultural Code, enacting the Napa County Winegrape Pest and Disease Control District Law and authorizing the creation of the Napa County Winegrape Pest and Disease Control District. The purposes of the District are to implement the Napa County glassy-winged sharpshooter workplan (as authorized in SB 671 (Chesbro); see 2000 LEGISLATION) and to address other pests and diseases that attack winegrape plants and disseminate information on pests and pest infestations. The district may be formed through a petition which is signed by 50% or more of the owners of 65% or more of the affected land, or signed by 65% or more of the owners of 50% or more of the affected land.

If the District is formed, this measure would direct the Napa County Board of Supervisors to appoint a five-member board of directors to administer the affairs of the District. Directors must be winegrape growers living within the bound-

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## BUSINESS REGULATORY AGENCIES

aries of the district. If formed, the District will be valid for a period of five years, and may be reauthorized by a resolution of the District's board of directors with the approval of the Napa County Board of Supervisors. The district may also be dissolved through a specified petition procedure. The Board of Supervisors, subject to the notice, protest, vote, and hearing procedures of Government Code 53753 (Proposition 218), may determine and levy an assessment for winegrape pest and disease control activities. The annual assessment, which may not exceed \$20 per planted acre, may be levied for the following purposes: (1) response to and management and control of Pierce's disease, the glassy-winged sharpshooter, and any other pests that attack winegrape plants; (2) collection and dissemination of information to winegrape growers concerning pests and winegrape diseases; and (3) charting and determination of the extent and location of infestations. The bill is sponsored by the Napa Valley Vintners Association. [S. Agr & WatRes]

**AB 1429 (Committee on Governmental Organization)**, as amended April 16, 2001, makes various nonsubstantive changes to the ABC Act, including the following:

- The bill would amend Business and Professions Code section 24045.7 to delete a requirement that a nonprofit theater company must be in existence for at least ten years in order for ABC to issue it a special on-sale general license, and require that any such license issued pursuant to this authorization be issued only for a single location.

- AB 1429 would amend section 25500.2 to broaden the existing "tied-house" exception that allows nonretail industry members to respond to consumer inquiries and provide information about the availability of their products to include all wholesalers, and remove the specific exclusion for beer retailers and wholesalers.

- The bill would also make a technical and nonsubstantive change to section 25503.6, an existing tied-house exemption, relating to the purchase of advertising by an alcoholic beverage manufacturer at, or on behalf of, specified on-sale licensees. [A. GO]

**AB 1437 (Leslie)** as introduced February 23, 2001, would authorize ABC to issue a special on-sale general license to any person operating a bed and breakfast inn to serve any alcoholic beverage. Existing law limits this type of license to wine only. [A. GO]

**SB 647 (Costa)** as amended April 25, 2001, would create an exception to the "tied-house" restrictions by allowing beer manufacturers, winegrowers, distilled spirits manufacturers, and distilled spirits manufacturer's agents to purchase advertising time and space at an outdoor stadium or a fully enclosed stadium, with a fixed seating capacity in excess of 10,000 seats located in Fresno County. The author is carrying this bill on behalf of the Fresno Grizzlies, the Triple-A affiliate of the San Francisco Giants, which is building a new baseball stadium in Fresno. [S. Appr]

**SB 1035 (Perata)**. Existing law allows a wholesaler or manufacturer to accept the return of beer following the revo-

lution or voluntary surrender of, or failure to renew, an alcoholic beverage license to sell beer and to credit the licensee. As introduced February 23, 2001, SB 1035 would allow the return and credit of any alcoholic beverage under these circumstances. According to the bill's analysis, SB 1035 is necessary to correct an inadvertent drafting error contained in AB 2759 (Committee on Governmental Organization) (see 2000 LEGISLATION), which mistakenly deleted the provision relating to the return of alcoholic beverages other than beer. The legislation is sponsored by California Beer and Beverage Distributors. [S. Appr]

**SB 1189 (Committee on Governmental Organization)**, as introduced March 12, 2001, would extend certain advertising provisions under which beer wholesalers may install and service window displays, promotional materials, and temporary floor displays to include on-sale retail licensees in addition to off-sale retail licensees. [S. Appr]

## LITIGATION

On January 30, 2001 in *Coors Brewing Company v. Stroh*, 86 Cal. App. 4th 768 (2001), the Third District Court of Appeal upheld the validity of an ABC regulation prohibiting alcoholic beverage licensees from conducting promotional contests or sweepstakes in which cash prizes are given to consumers. [17:1 CRLR 124-25; 16:2 CRLR 104-05; 16:1 CRLR 122-23]

Coors Brewing Company (Coors) argued that section 106, Title 4 of the CCR, as amended January 8, 1999, is invalid because it exceeds the scope of Business and Professions Code section 25600. The statute provides that "no licensee shall, directly or indirectly, give any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage...." Subsection 25600(b) further provides that no ABC rule may permit a licensee to give any premium, gift, or free goods of greater than inconsequential value in connection with the sale or distribution of beer. Inconsequential value is defined as having a value of twenty-five cents or less per unit.

On January 8, 1999, ABC promulgated and the Office of Administrative Law approved an amended version of section 106. The new regulation adds subdivision (j), which provides: "Nothing in this rule shall be construed to authorize the giving of any premium, gift or goods of any sort, whether by way of sweepstakes, drawings, prizes, cross-merchandising promotions with a non-alcoholic beverage product or products or any other method if the value of the premium, gift or goods given to an individual exceeds \$0.25 with respect to beer, \$1.00 with respect to wine or \$5.00 with respect to distilled spirits."

Coors argued that the regulation exceeds the scope of the statute because sweepstakes prizes are not premiums, gifts or free goods prohibited by the statute. According to Coors, such prizes are not "free goods" because the sweepstakes prizes are always cash awards. The prizes are not "gifts," said Coors, because the act of entering the sweepstakes and be-



## BUSINESS REGULATORY AGENCIES

coming a random winner is sufficient consideration to preclude defining the prize as a gift. As for "premiums," Coors relied on *Gonzales & Co. v. Department of Alcoholic Beverage Control*, 151 Cal. App. 3d 172 (1984), in which the Third District held that a rebate is not a "premium" within the meaning of section 25600. In that opinion, the court said that a premium may be something given without charge or at less than the usual price with the purchase of a product or service. Because its sweepstakes prizes are not conditioned on the purchase of a product, Coors argued that its prizes are not "premiums."

The court rejected this argument, saying that the language in *Gonzales* was not intended as a comprehensive definition of the word "premium" but merely as a demonstration that the word is ambiguous with respect to whether it includes rebates. The court then consulted several dictionary definitions and concluded that the word "premium" can mean a reward or prize. The court also relied on *Hankins v. Ottinger*, 115 Cal. 454 (1896), dealing with the winnings from horse races, in which the California Supreme Court said that a premium is a "reward or recompense for some act done." The court noted several later cases which followed this decision in equating "premium" with "prize" or "prize." Therefore, the court concluded that rule 106, as amended, is consistent with Business and Professions Code section 25600.

In September 2000, Governor Davis signed SB 1293 (Chesbro) (Chapter 831, Statutes of 2000 (see 2000 LEGISLATION)). Sponsored by the Napa Valley Vintners Association (NVVA), SB 1293 provides that no wine that is produced, bottled, labeled, offered for sale, or sold in California may use, in a brand name or otherwise, on any label, packaging material or advertising, the name "Napa," any viticultural area appellation entirely within Napa County, or any similar name, unless the wine meets certain federal regulatory standards for appellation of origin in Napa County. The new law essentially requires that any wine with the word "Napa" on the label must be made from grapes of which at least 75% were grown in Napa County.

SB 1293 was scheduled to go into effect on January 1, 2001. On December 22, 2000, however, Bronco Wine Company filed *Bronco Wine Co., et al. v. Espinoza*, No. C037254, in the Third District Court of Appeal to block enforcement of the legislation. Bronco is the Stanislaus County producer of the Napa Ridge, Napa Creek Winery, and Rutherford Vineyards brands composed of grapes from the Central Valley. Bronco argues that the new law is unconstitutional because it is preempted by a comprehensive federal regulatory scheme governing the contents of wine labels—including brand names, the name and address of the bottling winery, and indications of the wine's origin, as well as the use of such information in advertising. Bronco also contends that SB 1293 infringes upon its first amendment commercial speech rights.

**Bronco argues that the new law is unconstitutional because it is preempted by a comprehensive federal regulatory scheme governing the contents of wine labels—including brand names, the name and address of the bottling winery, and indications of the wine's origin, as well as the use of such information in advertising.**

On December 29, 2000, the Third District granted a temporary stay of the new law after ABC decided not to oppose the enforcement delay. On February 14, 2001, the court granted NVVA's motion to intervene. On February 28, 2001, the Attorney General's Office (on behalf of ABC) and NVVA filed their opposition to the petition for writ of mandate. On the preemption issue, the AG argued that there is no conflict between the federal regulations and the state law, while NVVA argued that the federal scheme contemplates concurrent state-federal regulation. At this writing, the case has not been set for oral argument.

In *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (Mar. 6, 2000), the U.S. Ninth Circuit Court of Appeals ruled that Lifestyles Organization, Ltd. (LSO), a California corporation seeking to display erotic but not legally obscene materials, has standing to challenge threatened action by ABC under a state regulation prohibiting such displays on premises that have liquor licenses. In addition to finding that LSO has standing to pursue its claim, the court ruled that ABC is not entitled to assert qualified immunity in a suit seeking damages for its actions.

This controversy arose in 1997 when LSO contracted for exclusive use of the Palm Springs Convention Center (which holds a liquor license) to hold LSO's Sensual and Erotic Art Exhibition and Trade Show (as it had in other locations throughout the state since 1991). A few months prior to the convention, ABC notified both LSO and the Convention Center that Title 4, section 143.4 of the CCR, prohibits any premises that holds a liquor license from showing film, still pictures, electronic reproductions, or other visual reproductions depicting specified sexually explicit acts. Prior to the exhibit, LSO attempted to negotiate with ABC by offering to declare

the Convention Center an alcohol-free zone during the event, but ABC officials responded that it is not possible to "de-license" an area within the physical limits of a larger licensed area for the purpose of engaging in conduct otherwise prohibited by the liquor laws. ABC separately contacted the Convention Center on numer-

ous occasions, and told the Center's general manager that the Center faced ABC disciplinary action against its liquor license if displays in violation of section 143.4 were permitted. On July 23, 1997, the Convention Center notified LSO by letter that it had decided to bar the display from the Center because it feared sanctions by ABC. On July 28, 1997, LSO filed suit in federal district court seeking injunctive relief prohibiting ABC officials from interfering with the convention. The district court granted LSO's request for a temporary restraining order (TRO). The exhibit and trade show took place as scheduled at the Convention Center in July-August 1997.

Subsequently, LSO filed an amended complaint seeking declaratory relief, damages, and injunctive relief under 42 U.S.C. section 1983. LSO sought damages and declaratory

## BUSINESS REGULATORY AGENCIES

relief as to ABC's alleged interference with the 1997 convention, as well as prospective injunctive and declaratory relief to prevent ABC interference in future exhibitions and trade shows. The district court issued several orders, and LSO appealed only three: (1) the district court's finding that LSO lacks standing to seek prospective injunctive relief; (2) on plaintiff's damages claim arising out of the 1997 art show, the district court's order granting summary judgment to ABC on the ground of qualified immunity; and (3) the district court's award of costs to ABC. ABC cross-appealed, objecting to the district court's award of fees to LSO with respect to the TRO.

A party seeking to invoke federal jurisdiction bears the burden of establishing its standing. To do so, it must demonstrate three elements: (1) plaintiff must show that it has suffered an injury-in-fact to a legally protected interest that is both "concrete and particularized" and "actual and imminent," as opposed to conjectural or hypothetical; (2) it must show a causal connection between the injury and the conduct complained of; and (3) it must be likely—not merely speculative—that its injury will be redressed by a favorable decision.

According to the Ninth Circuit, the controversy turned on whether plaintiff LSO alleged an injury-in-fact. ABC contended that because its regulatory threats were aimed at liquor licensees and not LSO, the plaintiff alleged a generalized grievance and not a particularized injury (such that plaintiff LSO lacks standing to challenge ABC's actions). The Ninth Circuit disagreed, citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). Here, LSO alleged that ABC censored its exhibition by applying pressure and threats to "a necessary conduit"—the facilities that LSO must rent in order to hold its shows. "Thus, LSO alleges injury to its own constitutional rights." Further, the court reasoned that LSO faced a reasonable threat of future interference with its exhibits and trade shows based on ABC's past enforcement posture and its current refusal to disavow enforcement of the regulation against LSO. Finally, the court noted that "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." The court went on to say that the tendency to find standing absent actual, impending enforcement against the plaintiff is stronger in first amendment cases, "for free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." Accordingly, the Ninth Circuit reversed the district court's orders dismissing LSO's claims seeking prospective relief and remanded the case for further proceedings.

With respect to the ABC officials' claims of qualified immunity on LSO's claim for damages arising out of the 1997 art show, the Ninth Circuit noted that state officials are entitled to qualified immunity in performing discretionary functions if their conduct does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ABC officials argued that the ques-

tion whether liquor authorities may constitutionally regulate the content of expression was unsettled. The Ninth Circuit noted that the U.S. Supreme Court held in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), that the twenty-first amendment does not authorize states to enact liquor regulations that would otherwise be prevented by the first amendment. Because *44 Liquormart* was decided a year before LSO filed its action, "no reasonable official" could have believed that section 143.4 could be used to impede LSO's right to display non-obscene art on the premises of an ABC licensee. ABC argued that Article III, section 3.5(a) of the California Constitution required the agency to enforce the regulation regardless of constitutional inadequacies because an appellate court had not yet held the statute unconstitutional. The Ninth Circuit rejected this argument, citing the supremacy clause of the U.S. Constitution. Relying on *Martinez v. California*, 444 U.S. 277 (1980), the court said that "conduct by persons acting under color of state law which is wrongful under 42 U.S.C. section 1983...cannot be immunized by state law....The supremacy clause of the Constitution insures that the proper construction may be enforced."

Thus, the Ninth Circuit reversed the district court's grant of summary judgment to the ABC officials on the ground of qualified immunity. Because it reversed the district court's orders on standing and immunity, the Ninth Circuit remanded the matter back to the lower court for a new determination of the "prevailing party" for purposes of attorneys' fees and costs. At this writing, ABC is also seeking to repeal section 143.4, Title 4 of the CCR, based on its interpretation of the court's ruling (see MAJOR PROJECTS).

On December 7, 2000 in *Eller Media v. City of Oakland*, No. C-98-02237, the U.S. District Court for the Northern District of California upheld an Oakland city ordinance prohibiting billboards from advertising alcohol near schools, saying the law does not violate the billboard companies' commercial speech rights under the first amendment. [17:1 CRLR 126] The order ruled that the ordinance meets the test for permissible regulation of commercial speech set forth by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). This test has four parts: (1) whether the speech being regulated concerns a lawful activity and is not misleading; (2) whether the asserted government interest underlying the regulation is substantial; (3) whether the regulation directly advances the government interest; and (4) whether the regulation is not more extensive than necessary to serve that interest.

The plaintiffs argued that *Central Hudson* should not apply and contended that the court should instead apply strict scrutiny in examining the Oakland ordinance. Plaintiffs cited *Butler v. Michigan*, 352 U.S. 380 (1957), which held that government may not restrict free speech for adults in order to protect children, and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), which endorsed strict scrutiny for content-based bans on speech. The court distinguished these cases because they did not deal with commercial speech. In reaching this result,

## BUSINESS REGULATORY AGENCIES

the court relied on *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30 (2000), a recent First Circuit opinion addressing a similar ordinance banning tobacco advertising. There, the First Circuit declined to apply the strict scrutiny of *R.A.V.*, noting that "the Supreme Court has made clear that even regulations which single out the promotional speech of a particular industry are analyzed under the *Central Hudson* test." Thus, the court concluded that the regulation must meet the *Central Hudson* test.

The parties agreed that the ordinance met the first two prongs of the test: the speech is lawful, and the government interest in stemming minors' consumption of alcoholic beverages is substantial. Therefore, the decision turned on whether the regulation advances the city's interest in reducing underage consumption and whether the restriction is narrowly tailored to advance that interest. Plaintiffs argued that restricting billboard advertising would not necessarily reduce consumption by minors, and that numerous exceptions in the law allowing other types of liquor advertising render the law ineffective. However, the court noted that Oakland produced evidence that billboard advertising is particularly effective in targeting minors and that billboard advertising is effective even when other methods of advertising are used. Thus, the court concluded that eliminating alcohol advertising on billboards in areas frequented by minors would materially advance Oakland's goal of reducing consumption by minors.

The billboard companies argued that the regulation fails the fourth prong of *Central Hudson* because the city could adopt less burdensome regulations such as increasing alcohol fees, increasing enforcement activities, or setting curfews. The court said that the city is not required to pursue every possible avenue to fight underage drinking and that the ban on billboards may be designed to act in concert with other methods. The court concluded that the ordinance is "a reasonable fit to the goal of decreasing youth demand for alcoholic beverages."

At this writing, a challenge to a similar Los Angeles ordinance restricting advertising of alcoholic beverages in certain areas, *Korean-American Grocers Association, v. City of Los Angeles*, No. 99-08560, is still pending before the U. S. District Court in Los Angeles. [17:1 CRLR 125-26]

On January 8, 2001, the U.S. Supreme Court granted *certiorari* in the First Circuit's decision in *Consolidated Cigar Corp.* and in *Lorillard Tobacco Co., et al. v. Reilly*, Nos.

00-0596 and 00-0597, a similar challenge to a Massachusetts ban on tobacco advertising. The outcome of these cases is expected to ultimately determine the validity of many local ordinances banning alcohol and tobacco advertising on billboards. Oral argument in these cases was heard on April 25, 2001, and a ruling is expected by summer 2001.

In *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board*, 76 Cal. App. 4th 570 (Nov. 29, 1999), the Fourth District Court of Appeal ruled that ABC overstepped its authority by suspending a liquor license for a single illegal act unrelated to the sale of alcohol and committed by an employee without the store's knowledge. ABC issued a 10-day license suspension to the market after a market employee purchased food stamps at half their face value from an undercover U.S. Department of Agriculture (USDA) employee. After the sale, the employee was immediately arrested and fired. Although USDA declined to pursue action against the market, ABC took disciplinary action against the market's liquor license. The market appealed ABC's decision and it was affirmed by the ABC Appeals Board.

Pursuant to the state constitution, ABC is authorized to suspend a license if there is good cause to believe that continuance of the license would be "contrary to public welfare or morals." The Fourth District cited other cases in which a single act (even an act that is not a violation of the ABC Act) was found sufficient to justify ABC disciplinary action; moreover, wrongful acts by employees giving rise to a suspension need not be within the scope of employment. Nonetheless, the court noted that ABC's powers are not limitless and the concept of good cause prohibits the Department from acting arbitrarily. According to the Fourth District, "for a suspension to be rational, the acts giving rise to it must have some minimal nexus to the licensee's sale of alcoholic beverages....[W]e see no *per se* nexus between a food market's sale of alcoholic beverages and unlawful food stamp purchases." Stating that "we do not intend to change the basic rules for suspension of licenses or unduly restrict the ABC from exercising its discretion," the court concluded that ABC abused its discretion because the licensee's employee committed a single criminal act unrelated to the sale of alcohol, the licensee took strong steps to prevent and deter such a crime, and the licensee was not aware of it before the fact. The Fourth District annulled the suspension and awarded the market its costs on appeal.